JOSH GREEN, M.D.
GOVERNOR

SYLVIA LUKE
LT. GOVERNOR

WENDY GADY
EXECUTIVE DIRECTOR

STATE OF HAWAI'I
AGRIBUSINESS DEVELOPMENT CORPORATION
HUI HO'OULU AINA MAHIAI

Regular Meeting of the Board of Directors

Held via Teleconference with In-Person Viewing Location

October 24, 2024
9:00 a.m.

Pursuant to section 92-3.7, *Hawaii Revised Statutes*, this meeting will be held using interactive conference technology (ICT). Board members, staff, persons with business before the Board, and the public may participate remotely online using ICT, or may participate via the in-person meeting site which provides ICT.

Interested persons may submit written testimony in advance of the meeting, which will be distributed to Board members prior to the meeting. If possible, we request that testimony be received by our office not less than seventy-two hours prior to the meeting to ensure that staff has time to disseminate it and that Board members have time to review it. Written testimony may be submitted electronically to dbedt.adc@hawaii.gov or sent via U.S. Postal Service, or delivered to:

Agribusiness Development Corporation
235 S. Beretania Street, Suite 205
Honolulu, Hawaii 96813

When testifying via ICT, via telephone, or in-person, you will be asked to identify yourself and the organization you represent, if any. Each testifier will be limited to two minutes of testimony per agenda item.

The public may participate in the meeting via:

ICT:	CLICK HERE TO JOIN
Telephone:	(669) 900-6833, Webinar ID: 827 2973 2588
In-Person:	at the meeting location indicated below

ICT ACCESS
To view the meeting and provide live oral testimony, please use the link above. You will be asked to enter your name in order to access the meeting as an attendee. The Board requests that you enter your full name, but you may use a pseudonym or other identifier if you wish to remain anonymous. You will also be asked for an email address. You may fill in this field with any entry in an email format, e.g., ****@****.com.

As an attendee, your microphone will be automatically muted. When the Chairperson asks for public testimony, you may click the Raise Hand button found on your Zoom screen to indicate that you wish to testify about that agenda item. The Chairperson or staff will individually enable each testifier to unmute their microphone. When recognized by the Chairperson, please unmute your microphone before speaking and mute your microphone after you have finished speaking.

For ICT, telephone, and in-person access, when testifying, you will be asked to identify yourself and the organization, if any, that you represent. Each testifier will be limited to two minutes of testimony per agenda item.

TELEPHONE ACCESS
If you do not have ICT access, you may get audio-only access by calling the Telephone Number listed above.

Upon dialing the number, you will be prompted to enter the Meeting ID that is listed next to the Telephone Number above. After entering the Meeting ID, you will be asked to either enter your panelist number or wait to be admitted into the meeting. You will not have a panelist number. Please wait until you are admitted into the meeting.

When the Chairperson asks for public testimony, you may indicate you want to testify by entering "#" and then "9" on your telephone's keypad. After entering "#" and then "9", a voice prompt will let you know that the host of the meeting has been notified. When recognized by the

Chairperson, you may unmute yourself by pressing "#" and then "6" on your telephone. A voice prompt will let you know that you are unmuted. Once you are finished speaking, please enter "#" and then "6" again to mute yourself.

For ICT, telephone, and in-person access, when testifying, you will be asked to identify yourself and the organization, if any, that you represent. Each testifier will be limited to two minutes of testimony per agenda item.

Instructions to attend State of Hawaii virtual board meetings may be found online at https://cca.hawaii.gov/pvl/files/2020/08/State-of-Hawaii-Virtual-Board-Attendee-Instructions.pdf.

IN-PERSON ACCESS
There will also be one meeting location, open to the public, which will have an audio-visual connection. That meeting will be held at:

State of Hawaii, Leiopapa A Kamehameha
State Office Tower Building
235 S. Beretania St., Suite 205
Honolulu, HI 96813

For ICT, telephone, and in-person access, when testifying, you will be asked to identify yourself and the organization, if any, that you represent. Each testifier will be limited to two minutes of testimony per agenda item.

LOSS OF CONNECTIVITY
In the event of a loss of ICT connectivity, the meeting will be recessed for a period not to exceed thirty minutes to restore connectivity with all board members and the public in-person access location noted above. In the event that audio connectivity is re-established within thirty minutes without video connectivity, interested participants can access the meeting via the telephone number and Meeting ID number noted above. In the further event that connectivity is unable to be restored within thirty minutes, the meeting will be automatically continued to a date and time to be posted on the ADC website at https://dbedt.hawaii.gov/adc/ no later than close of business the next business day. New ICT, telephone, and in-person access information will be posted on the website no less than twenty-four hours prior to the continued meeting date. Alternatively, if a decision is made to terminate the meeting, the termination will be posted on the ADC website.

SPECIAL ASSISTANCE
If you require special assistance, accommodations, modifications, auxiliary aids, or services to participate in the public meeting process, including translation or interpretation services, please contact staff at (808) 586-0186 or by email at dbedt.adc@hawaii.gov.

Please allow sufficient time for ADC staff to meet requests for special assistance, accommodation, modifications, auxiliary aids, translation, or interpretation services.

NOTE: MATERIALS FOR THIS AGENDA WILL BE AVAILABLE FOR REVIEW IN THE ADC OFFICE, 235 S. BERETANIA STREET, SUITE 205, HONOLULU, HAWAII 96813 ON AND AFTER OCTOBER 18, 2024.

Agribusiness Development Corporation Non-Discrimination Statement

The Agribusiness Development Corporation does not discriminate on the basis of race, color, sex, national origin, age, or disability, or any other class as protected under applicable federal or state law, in administration of its programs, or activities, and the Agribusiness Development Corporation does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in actions protected by, or oppose action prohibited by, 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.

If you have any questions about this notice or any of the Agribusiness Development Corporation's non-discrimination programs, policies, or procedures, you may contact:

Mark Takemoto
Acting Title VI Non-Discrimination Coordinator
235 S. Beretania St., Ste 205 Honolulu, HI 96813
(808) 586-0186
dbedt.adc.titlevi@hawaii.gov

If you believe that you have been discriminated against with respect to an Agribusiness Development Corporation program or activity, you may contact the Acting Non-Discrimination Coordinator identified above.

AGENDA

A. Call to Order

B. Approval of Minutes

1. Regular Session Minutes, July 18, 2024

2. Executive Session Minutes, July 18, 2024

3. Regular Session Minutes, September 19, 2024

4. Executive Session Minutes, September 19, 2024

C. Chairperson's Report

1. None

D. Committee Reports

1. Administration Committee

E. Action Items

1. Request for approval to issue a construction right-of-entry to Kiewit Infrastructure West Co. for the construction of the Whitmore Village-Wahiawa Pedestrian Bridge, Tax Map Key No. (1) 7-1-002:009

2. Request for approval for Ohana Hui Ventures, Inc. to host their Keiki Construction Zone event on ADC property under License Agreement No. LI-W194-23-01 in Whitmore Village, City & County of Honolulu, State of Hawaii, Tax Map Key Nos. (1) 7-1-001:012, (1) 7-1-002:041, :046, :047, (1) 7-1-002:034, :006

3. Request to accept and approve the report and findings of the executive director evaluation permitted interaction group

4. Request to establish a permitted interaction group to establish goals and objectives for the executive director for FY 2025; appointment of members thereto

5. Request for approval to issue a grant of easement to City & County of Honolulu, Board of Water Supply for its existing waterlines in Wahiawa, City & County of Honolulu, State of Hawaii, Tax Map Key (1) 7-1-002:004.

6. Request for after-the-fact approval to authorize the executive director to execute and enter into the Stipulation and Agreement Between the Parties to the April 18, 2017 Waimea Watershed Agreement, the Agreement to Transfer of Duties, Obligations and Responsibilities for the Modification of the Diversions and Placement of Monitoring Stations as Required Under Phase One of the April 18, 2017 Waimea Watershed Agreement from the Kauai Island Utility Cooperative to the State of Hawaii Agribusiness Development Corporation, and the Agreement Between the State of Hawaii Agribusiness Development Corporation and the Kekaha Agriculture Association

7. Request for approval to issue a Notice of Intent, and enter into a Memorandum of Understanding between ADC and the Hawaii Department of Agriculture for ADC to acquire the Wahiawa Irrigation System spillway per Act218 SLH2022.

F. Informational Items

1. Update and discussion regarding recent activities held on ADC property in Whitmore Village, City & County of Honolulu, State of Hawaii, by Ohana Hui Ventures, Inc. under License Agreement No. LI-W194-23-01

2. Presentation of report and findings of the land application permitted interaction group

3. Update and discussion regarding draft Authorization to Discharge Under the National Pollutant Discharge Elimination System (NPDES), Permit No. HI0021940/HI0021945

4. Executive Director's Report

G. Adjourn

The Board may go into executive session on any agenda item pursuant to the exceptions provided under section §92-5, Hawaii Revised Statutes.

AGRIBUSINESS DEVELOPMENT CORPORATION
Minutes of the Regular Meeting of the Board of Directors held on July 18, 2024 at the Wahiawa Value-Added Product Development Center, located at 1001 California Ave., Wahiawa, HI 96786

Pursuant to section 92-3, Hawaii Revised Statutes (HRS), this meeting was held at an in-person meeting location available for public participation at the Wahiawa Value-Added Product Development Center, 1001 California Ave., Wahiawa, HI 96786.

Members in attendance for In-Person Regular Session:

Lyle Tabata, Kauai County member (Chair)
Jesse Cooke, Honolulu City and County member (Member Cooke)
Glenn Hong, member-at-large (Member Hong)
Earl Yamamoto, designee for HBOA ex officio member Sharon Hurd (Member Yamamoto)
Ryan Kanakaʻole, designee for DLNR ex-officio member Dawn Chang (Member Kanakaʻole)
Dean Okimoto, member-at-large (Member Okimoto)
Jason Okuhama, member-at-large (Member Okuhama)
Nathan Trump, Hawaii County member (Member Trump)
Jayson Watts, Maui County member (Member Watts)
Dane Wicker, designee for DBEDT ex officio member James Tokioka (Member Wicker)

Member excused from In-Person Regular Session:

Karen Seddon, member-at-large (Member Seddon)

Counsel Present for In-Person Regular Session:

Jennifer Waihee-Polk, Deputy Attorney General (Ms. Waihee-Polk)
Delanie Prescott-Tate, Deputy Attorney General (Ms. Prescott-Tate)

Staff Present for In-Person Regular Session:

Wendy Gady, Executive Director (Ms. Gady)
Mark Takemoto, Sr. Executive Assistant (Mr. Takemoto)
Ken Nakamoto, Project Manager (K. Nakamoto)
Ingrid Hisatake, Executive Secretary

Guests Present for In-Person Regular Session:

Alec Sou
Chris Bailey, LCC
Craig Inouye
Craig Nakamoto, HCDA (C. Nakamoto)
Garet Sasaki, HCDA (Mr. Sasaki)
Grant Kunishima, Sunrise Capital (Mr. Kunishima)
Heath Williams
Mac Blanchard, Esq., Sunrise Capital (Mr. Blanchard)
Ryan Kagimoto
Senator Donovan Dela Cruz (Senator Dela Cruz)
Stephanie Whalen
Stewart Yerton, Civil Beat

AGRIBUSINESS DEVELOPMENT CORPORATION
Minutes of the Regular Meeting of the Board of Directors held on July 18, 2024 at the Wahiawa Value-Added Product Development Center, located at 1001 California Ave., Wahiawa, HI 96786

A. Call to Order:

Chair called the regular meeting to order at 9:02 A.M.

Chair introduced himself and welcomed members of the public to the meeting of the board of directors of the Agribusiness Development Corporation (ADC). The public was advised that when testifying, they would be asked to identify themselves and the organization, if any, they represent. And there was a two-minute limit of testimony per agenda item.

Chair conducted a roll call of the board members present. Chair called the name of board members and asked them to verbally acknowledge their presence. This also served as a roll call vote. For each subsequent vote, Chair would ask if there were any objections or abstentions. If there were none, then the motion would be approved on the same basis as the initial roll call.

Chair, Member Cooke, Member Hong, Member Kanakaʻole, Member Okimoto, Member Okuhama, Member Trump, Member Watts, Member Yamamoto, and Member Wicker acknowledged their presence.

Chair noted that Member Seddon was excused from the meeting.

B. Approval of Minutes

Chair announced that approval of the May 16, 2024 Regular Session Minutes, and the June 20, 2024 Regular and Executive Minutes would be deferred until the next meeting.

C. Chairperson's Report

Chair welcomed new members to the ADC board, Member Cooke, and Interim Members Trump and Okimoto. Chair was looking forward to remarkable things from the board moving forward as it supports our Executive Director Wendy Gady (Ms. Gady or ED), and her staff with fervor and purpose. There's work to be done to move us forward in collaboration with the Legislature. We will rise to meet expectations and produce results for Hawaii's agricultural community. Chair forewarned his fellow board members that he's a grassroots working guy. Everyone will be put to work. We're a hard working board that supports our ED and the staff that supports her. There are many things that need to be prioritized and help guide the board in the new direction we're headed. Chair appreciates and thanks the board in advance for their cooperation.

D. Committee Reports

Chair noted there were no committee reports.

E. Action Items

1. Request for approval to issue a right of entry agreement to Diamond Head Seafood, Inc. for the purpose of access through the Kalaeloa property to access a project site; Kalaeloa, City and County of Honolulu, State of Hawaii, Tax Map Key No. (1) 9-1-031:037

Chair called for a motion to approve.

Motion by Member Watts; Second by Member Wicker.

Chair called on K. Nakamoto for the staff presentation.

K. Nakamoto said there was no presentation, just wanted to say this was just a request for permission to use ADC's Kalaeloa property, specifically a driveway that parallels Diamondhead Seafoods driveway that needs some improvements. So for the time being, ADC will allow them to access their area through our driveway.

Chair asked if there was anyone from the public who wished to give testimony. There was none.

Chair asked if there was any board discussion.

Member Okuhama asked if there were insurance requirements.

K. Nakamoto replied that the Right of Entry did have insurance requirements.

Chair asked if there were any other questions. Hearing none, Chair called for the vote. Hearing no objections or abstentions the motion was unanimously approved: 10-0.

Chair stated that action items 2 and 3, the request for consent to assign nine license and lease agreements from Sunrise Capital Incorporated to Aloun Farms Incorporated, may be discussed in an executive meeting closed to the public pursuant to section 92-4 , HRS to allow the board to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities as provided in section 92-5(a)(4), HRS. To allow sufficient time for this discussion, action items two and three will be moved to the end of the agenda.

4. Request for approval to issue a letter of intent, conduct due diligence, and negotiate the fee simple interest in real property located in Wahiawa, City and County of Honolulu, State of Hawaii, Tax Map Key Nos. (1) 7-1-001:013; :017; 7-1-012:003; :004; :007; 7-3-005:005; 7-3-013:003

Chair called for a motion to approve.

Motion by Member Watts; Second by Member Wicker.

Chair called on Mr. Takemoto for the presentation.

Mr. Takemoto stated there was no formal presentation. The request was to approve the ED to move forward and submit an NOI [Notice of Intent] to the landowners of the parcels to begin discussion for the acquisition of the property related to the Wahiawa Dam and Reservoir Project and he was available for questions.

Mr. Okimoto asked how big of an area is the property?

Mr. Takemoto responded a little over 150 acres. This is the area ADC is responsible for. There are other parcels that DLNR and HDOA are responsible for. DNLR is looking at the freshwater recreational facility and HDOA is going for the dam/spillway portion.

Chair clarified that the intent of this purchase was to incorporate into the Wahiawa irrigation system. Is there anyone from the public who wishes to provide testimony? There was none. Chair asked if there was any board discussion.

Member Hong asked who was actually responsible for negotiating with the landowner; ADC or the Governor's office?

Mr. Takemoto responded that the Governor directed DLNR to lead the negotiation. ADC was working with the landowner. ADC we will return with the terms to DLNR for final approval.

Chair asked if HDOA was still waiting for the environmental report on the dam?

Mr. Takemoto responded yes we're still waiting on the draft report.

Hearing no more discussion, Chair called for the vote. Hearing no objections or abstentions the motion was unanimously approved: 10-0.

Ms. Gady added that for ADC's portion of the Wahiawa Irrigation System, the Phase One environmental assessment had been completed and the Phase Two should be done by the end of September. No red flags so far.

5. **Presentation of the draft annual performance review of the Executive Director by the permitted interaction group established on March 21, 2024 for the purpose of conducting the annual performance review of the executive director, continued from May 16, 2024**

This agenda item was deferred to the next meeting because two of the three members of the permitted interaction group were not available to attend this meeting.

6. **The appointment of members to the standing Administration Committee, the standing Marketing & Communications Committee, and the standing Technical Assistance Committee**

Chair stated that Article four, section one of the ADC bylaws establishes three standing committees to facilitate consideration of policies and other significant matters that require approval of the board of directors. The standing committees are the administration committee, marketing and communications committee, and the technical assistance committee. Pursuant to Article 4, Section 2 of the ADC By-law, the members of each standing committee shall be appointed by the chair and shall serve for one year or until the appointment of their successors and the chair may serve as an ex-official voting member on any standing committee.

The only standing committee that currently exists is the Administration Committee that was appointed by former Chair Fred Lau on February 16, 2023. According to subsection 1 C of Article 4, Section 1 of the ADC By-law, the Administration Committee was assigned to make recommendations regarding any matter referred to them by the chair. Former Chair Lau asked the Administration Committee to design an application form for vacant lands; post the application form requesting applicants for vacant land; review the received applications; review the applicants; and make referrals to the board.

As the new chair, I would like to appoint new members to all the standing committees. I'm proposing the Administration Committee review and make recommendations regarding all financial matters requiring approval of the board of directors, including but not limited to contractual matters and the annual ADC budget; review and make recommendations regarding all

personnel matters requiring approval of the board of directors; and review and make recommendations regarding any other matters referred by the Chair of the board of directors.

The Technical Assistance Committee shall review and make recommendations regarding all proposed projects with the exception of marketing-related projects requiring the approval of the board of directors, and review and make recommendations regarding any other matter referred to the Chair of the board of directors.

The Marketing Communications Committee shall review and make recommendations regarding all marketing-related projects requiring approval of the board of directors, and review and make recommendations regarding any other matter referred to the Chair of the board of directors.

The authority to act on all matters is reserved to the board of directors, and the functions of each committee shall be to consider and make recommendations to the board.

The following members are appointed to the Administration Committee:

1. Chair
2. Member Okuhama
3. Member Hong
4. Member Trump
5. Member Cooke

The following members are appointed to the Technical Assistance Committee:

1. Member Okuhama
2. Member Okimoto
3. Member Hurd
4. Member Kanaka‘ole
5. Member Wicker

The following members are appointed to the Marketing/Communications Committee:

1. Chair
2. Member Watts
3. Member Cooke
4. Member Wicker
5. Member Seddon

At the first meeting, each committee shall select a Chair and Vice-Chair from among its members, decide how often the committee will meet, and inform ADC staff who will schedule the meetings accordingly.

Chair continued that there’s no vote, so if there are any objections to how the committees were assigned, please speak up now or forever hold your peace.

Member Watts said he preferred to serve on the Administration committee.

Member Hong said he preferred to serve on the Marketing Committee.

Chair said he would take the requests under advisement and will notify the members after clarifying some issues.

Member Wicker asked if the committees were going to get descriptions of the items the committee members were to produce.

Chair replied that the committee descriptions were actually in the ADC By-Laws and in your handouts.

7. Request for approval to establish a permitted interaction group to evaluate land applications and make recommendations to the board

Chair stated he was now asking for approval to establish a permitted interaction group to evaluate land applications and make recommendations to the board.

Chair asked for a motion to approve.

Motion by Member Wicker; Second by Member Watts.

Chair asked for presentation by staff.

Ms. Gady said ADC released our entire vacant land portfolio on October 5, 2023. The original deadline was mid-April but the deadline was extended until May 1st. Staff was getting calls daily in regard to the status of their land applications. We have urgent requests to get approval by the board so licenses can be granted and get people onto the land.

Chair asked if there was anyone from the public who wishes to provide testimony. There was none.

Chair asked if there was any board discussion. There was none.

Chair called for the vote. Hearing no objections or abstentions the motion was unanimously approved: 10-0.

Chair continued, pursuant to Article 4, Section 3 of the ADC bylaws and section 92-2.5, HRS, Chair appointed himself, Member Trump, and Member Cooke to the permitted interaction group to evaluate the applications for vacant land, rate and rank the applications, and make recommendations to the full board. In forming the recommendations, the permitted interaction group may interview the applicants, visit applicant farming operations, and review any written materials from the former Administration Committee. Unless there are major objections, the slate of three will get to work immediately because we have a very short fuse.

8. Request for approval to establish a permitted interaction group to review capital improvement project priorities, rank them, and make recommendations to the board

Chair asked for a motion to approve.

Motion by Member Okimoto; Second by Member Watts.

Chair called on Ms. Gady for staff presentation.

Ms. Gady said staff has been working really hard for the last six weeks crafting a budget for capital improvements projects (CIP) that not only looks to the year ahead, but looks three, five, ten years into the future so we can help the Ways and Means and Finance Committees at the legislature to understand the long-term vision for ADC. Once the CIP list gets put in front of the permitted interaction group there will be a lot of discussion and information, but this will be the first time we've taken a long term view at our CIP.

Chair asked if there was anyone from the public who wished to provide a testimony. There was none.

Chair asked if there was any board discussion. Chair stated that he recommended creating this group to help the ED prioritize future projects. The ED has been good at providing the board with weekly updates and it feels like she's being pulled in multiple directions by external forces. The ED needs to focus on the board's priorities. That way the work gets accomplished.

Ms. Gady said ADC's needs are so great and the priorities should come from the board.

Chair asked if there was any other discussion. Hearing none, Chair called for the vote. Hearing no objections or abstentions, the motion was unanimously approved: 10-0.

Chair continued, pursuant to Article 4, Section 3 of the ADC By-law, section 92-2.5, HRS, Chair appointed himself, Member Hong, and Member Seddon to the permitted interaction group to review ADC's capital improvement project priorities, rank of projects, and make the recommendations to the full board.

Member Trump asked to serve on the CIP group; and Member Wicker also asked to serve on the CIP group.

Member Okuhama volunteered to help on the land application review group.

Member Okimoto also volunteered to help with the land application review group.

Chair said he would take their requests under advisement.

F. Informational Items

Chair said at this point they were moving onto informational items. The following are for informational purposes only, so there will be no motion or vote needed.

1. **Presentation by Agribusiness Development Corporation and Hawaii Community Development staff on the status of two separate, but related proposal procurements, described as follows: (i) A standalone facility to house one or more hyperbaric HPP machines through a design-build method, and, (ii) an operator to maintain, market, and manage the facility and HPP machines in Whitmore Village, Wahiawa, County of Honolulu, State of Hawaii, tax map key number 7-1-002:009.**

Chair called on Craig Nakamoto, Executive Director of the Hawaii Community Development Authority (HCDA) and Garrett Sasaki, HCDA's Chief Financial Officer to give a presentation on procurement and the management of the HPP machines.

C. Nakamoto introduced himself and Mr. Sasaki and thanked the board for the opportunity to make this presentation. C. Nakamoto explained that he was asked by ADC to provide help on this procurement. This is the procurement for a stand-alone facility in the Central Oahu Food Hub Project to house a hyperbaric HPP machine to process food. The location of the HPP machine is within the larger food hub. HCDA is also an agency attached to the Department of Business, Economic Development and Tourism (DBEDT). Our background has been in redevelopment. HCDA has always been willing to help affiliated agencies. The scope of HCDA's effort will be to provide resources and technical help to ADC. Funds are currently available for the equipment acquisition but lapse on June 30, 2025. We have a year to encumber the funds.

Member Watts asked how much money was required to see this project through completion.

C. Nakamoto said we estimate the cost to acquire and install would be about $2,500,000.00. As far as building the warehouse, I don't know the estimate for that.

Mr. Okimoto asked if the building was just going to house the HPP machine or other things like chill facilities.

C. Nakamoto responded it's a stand-alone facility that's going to be part of larger food company. That's one of the reasons why this project needs to move quickly. The building we are in now is the research and development, education, and data testing sub-product. If it works, then the synergy is good. There's a need to move this project along as quickly as possible.

Member Hong asked if HCDA had been involved in the establishment of the test HPP here at the Value Added Center?

C. Nakamoto said no. HCDA did visit the facility and understands the purpose of the HPP machine. We bring knowledge of procurement to the equation. As far as the technical expertise, it's presumed the HPP machine was selected because it's the same model as here.

Member Hong asked if HCDA had concerned itself with the market demand for a production machine in a way that would be feasible? I'm assuming that HCDA has not been involved with the marketing projection for the production machine.

C. Nakamoto said no but HCDA had reviewed some revenue projections and some of those projected benefits. Those revenue projections shaped our procurement approach.

Mr. Okimoto asked if there is one year to encumber the money, does that mean put up the building and install the machine or just set up the contracts.

C. Nakamoto said that doesn't mean the building must be completed in a year. Just enter into a contract with the design/builder and contract to acquire the machine. The way HCDA looks at it, the design-build contractor is going to be responsible for designing the facility, building the facility, and equipping the facility.

Mr. Okuhama stated we have one year for equipment but several years for the build out. Is there some kind of feasibility study or business plan for this facility? We have a machine and building but no plan? Operational, profitability, feasibility, marketing, users, who's going to use the facility. We don't have all the other parts.

Ms. Gady responded that the concept of the business development rests with ADC. The board hasn't necessarily seen all of the data and research that's happened prior to this point. We'll look at where the market is right now and help to develop and build. But given the amount of time that we have before the money expires, and HCDA has some experience in this RFP process.

Mr. Nakamoto explained that HCDA asked ADC to provide research for this procurement. It was suggested that we do this design-build-operate-and-maintain kind of procurement as a public-private partnership. We looked at the projected revenues and numbers that were provided by the ADC staff. In the early years revenue projections were showing a net operating loss; but some kind of revenue stream that will offset developer costs. HCDA proposes, subject to feedback from the board, this two-step procurement process. First a design, build, contract for the facility and the equipment, the HPP machine, with all the county permitting, and utilities hook it up. Second procurement we get the operator maintainer. Operator maintainer could operate and maintain the facility and equipment in the best interest of the state. We may have to pay the operator maintainer to maintain the facility in the first couple of years, when revenues are less. Once this process gains more acceptance by farmers, management can change into a different type of operation where the business can pay management fees and maintain the facilities and equipment.

Member Watts asked if ADC was responsible for staffing or just construction.

Ms. Gady replied that's the vision moving forward, but we have a lot more factfinding to do.

Chair stated that getting input from the operator was important. How to lay out the facility; how much space is needed; what's the end product. Could Leeward Community College (LCC) come forward and tell us how much this facility gets used right now?

Member Wicker said this technology was actually brought to the state by request of the private sector. The front end, LCC's creating users. It's not the commercial side; it's the education side. There is a lot of demand now. The way I see it, in the long-term, with DBEDT, we see if we're a business development support division, to increase exports; developing markets.

C. Nakamoto concluded by saying this project has the potential to create jobs, create agriculture-related jobs that will help agriculture a lot. HCDA supports it. While revenue projections in the early years maybe negative, I think for the government, return on investment is different. You look at other social impacts that can happen with this kind of development.

Chair asked if there was anyone from the public who wished to give testimony. There was none.

Chair asked if there was any more board discussion. There was none.

2. Executive Director's Report regarding prior weekly reports to the board, and ADC interest in establishing subsidiaries

Chair called on Ms. Gady to give her ED report.

Ms. Gady referred the board and members of the public to her weekly ED reports on the ADC website. And as we kind of bridge from the HPP machine and look around at the LCC facility, it really comes back to the mission and the vision of ADC. The three major points in our statute, which is many pages long. One is to grow more local food, second is to develop an ag export economy, and the third is to provide aggressive and dynamic leadership. This is the beginning of something great. I asked Senator Dela Cruz to join us today and give some background on some of the bigger vision of things to come in Wahiawa. I thought it would be appropriate for him to come and share some of the components of his vision.

Chair called for a recess at 9:55 a.m.

Chair called the meeting back to order at 10:00 A.M.

Ms. Gady introduced Senator Dela Cruz.

Senator Dela Cruz spoke in support of the procurement for a stand-alone facility in the Central Oahu Food Hub Project to house a hyperbaric HPP machine to process food. ADC's mission is to assist agriculture enterprises to facilitate the transition from sugar and pineapple to diversified agriculture. Things like the HPP machine will move the agency in the right direction by increasing local production of agricultural products to local consumption and reduce the state's reliance on imported agricultural products. He hoped the board could be a lot more proactive in ensuring that you complete your statutory mandates. Agriculture must be an actor in the state economy. ADC is the landowner and the project coordinator. We want to scale up, because if you're not scaling up, you're just a farmer's market or selling out of your house. This past year, the legislature funded additional monies for this LCC facility. We put in money for Kauai Community College for a program with more value-added production focus. Same thing for Molokai, who has access to deer so you can do leather toys, beef jerky, dog treats with the hooves, you can do all kinds of things. The LCC facility provides for innovation and business development, new product development, commercial production, process optimization, support for exports, support for entrepreneurs, and business advancement. LCC is partnering with the Hawaii Department of Education (HDOE) developing entrepreneurship programs at the middle school and high school. We need the HPP machine, so people can scale up shared facilities, so students can really see they have global potential. That's where the Foreign Trade Zone comes in. Value-added producers are going to need more ag products. As we conceptualize regional kitchens, we're going to have to have existing farmers do some training, especially with food safety. It can't be business as usual. ADC's mission is to get farmers trained so that they can scale up. Use this facility that the state purchased. This is going to be a temporary facility for HDOE storefront and HDOE will start to construct their centralized kitchen in Whitmore, in partnership with ADC, 40 acres within Whitmore. HDOE can scale up, prepare meals and use the HPP machine to preserve meals. If we have warehouse space, we can store those prepared meals. I can go on and on about this stuff. Anybody have questions?

Chair asked if there were private partners out there that were willing to invest. You mentioned the priority right now is warehousing. Instead of state funding everything, is there any private money available?

Senator Dela Cruz responded I don't think that's a necessary question. Look at what the state is capable of. We have revenue bond potential. If we come up with a business plan where the revenue from the facility will pay the bond, the state will own the property. You don't want a land investor or foreign investment. You want to make sure it's a state asset that will stay in

agriculture in perpetuity. That's why it's critical for the state to own the facility. We get a private operator, but it's still state property. That's why it's critical ADC owns this facility or at least the land. If LCC says we don't want to do ag anymore, ADC can take back the property and continue to do ag. That's why I implore you to read your statute again, and again, and make sure that you are really trying to meet what the statute requires.

Member Hong asked about incorporating equipment for small, medium farmers who otherwise couldn't afford some of that equipment and maybe create a pool of equipment. If they don't have access to that, farmers may not be able to reach economies of scale in production.

Senator Dela Cruz responded that if you read some of the reports your questions would be answered. The legislature funded a proof of concept for a dehydration machine for farmers that want to grow feed for cattle. A couple of farmers came to see me and said, we want to grow feed, but the shelf life doesn't last past two weeks. So the legislature put in some money. Now ADC is working with UHCDC trying to figure out a way we can do dehydration of alfalfa. Initially the farmers wanted grants. I'm not in favor of grants. Grants only help one farmer. If the state does a shared facility other farmers can grow alfalfa, dehydrate for feed, and store before shipment to other islands, even China; a Hawaii brand of cattle feed. That's why the legislature funded the project for UHCDC to investigate if the potential is there. We need a shared facility. This helps an area of agriculture. Bring it up, and then we can try to fund it.

Member Wicker thanked Senator Dela Cruz and said he had been working with HCDA and the ED trying to hit scale because of a lack of access to equipment, facilities, and storage. Look at what government can do; infrastructure, facilities, leveraging DBEDT's ecosystem, and putting that pipeline together. It is a challenge getting this information to the board, and even on Kauai, we're speaking with ADC tenants who need a processing aggregate facility. That's the challenge. DBEDT wants to grow the economy and create more revenue. How do we leverage our sixteen attached agencies to make that happen? Do we subsidize activities with no return on investment. At the end of the day, the farmers are the ones who stand to gain. Member Okimoto used to say, if a farmer makes money, he'll stay in business. Forty percent of the farmers off-grade don't go to market. So, with an FPIN facility, the HDOE facility, and the LCC facility, you are creating an area for non-farmers to purchase from the farmers to prepare those offerings. Now 40% doesn't go to market. This is a solution to providing farmers additional revenue for the produce they're growing but can't sell. That's where the state, through DBEDT and ADC, can help, and with alignment with the legislature to actually provide the funds and the resources, that'll make it a lot better for the farmers.

Ms. Gady said she had done research in terms of what people are using the HPP machine for. On the eastern seaboard HPP co-packers are doing seafood. You can process mollusks and it pops it open, lobsters it pops it open. We eat so much seafood that's a wonderful opportunity. I see tomatoes lying in the field and I see the HPP facility creating tomato sauce that goes into every HDOE chili, spaghetti, pizza. What a difference that would make to the profitability of these farmers. You have to work intimately with the farmers; some weeks you'll get 3,000 pounds of mango. You can't eat 3,000 pounds of mango in one week. You have to find ways to make juice and make other products to extend the shelf life and make profits feasible for our farmers.

Senator Dela Cruz continued that he has visited other value-added facilities thinking they were going to be primarily for farmers. But they are really for value-add purposes. It's for entrepreneurs. Farmers are too busy farming. The HPP machine will definitely increase shelf life for export purposes. The graduates from LCC go on to a program on entrepreneurship. There're a lot of different programs. We just have to take a step back and realize the scale and the potential.

Member Hong commented that the word "subsidy" has been used here. These are really investments in the economy.

Senator Dela Cruz said go back to your statute. That's your job. You should be pushing it.

Member Watts added that there is a Food Innovation Center at the University of Hawaii at Maui College. They've quadrupled the number of students that went into that program; students looking for second careers because they lost their careers during COVID. People are out there producing but can't hit scale. If government can help it'll be beneficial to all of us. It's hard to show the data, but if you build it they will come. That's agribusiness development.

Senator Dela Cruz continued that people are going to fail, but when they fail, they learn, and it's early enough in the process before they spend all their money. You know, you have to buy everything and now you fail. That's difficult. The whole system is a continuum to help you figure it out. When you fail, how you get back up, or is this even for you. Learn from the two cohorts. The LCC facility was so demanding to open. Now they're ready to start the program and we even have students who are ready to start scaling up. And from my observation, the teachers are getting better so the products are getting more sophisticated; the labeling is getting more sophisticated, because the staff is becoming more sophisticated.

Chair asked if there were any more questions or comments. Hearing none Chair thanked Senator Dela Cruz.

Ms. Gady added that LCC's Chris Bailey was available to give a tour of the facility to members of the public after the meeting then commenced with her monthly report, saying the reports try and give an indication of where she's headed. She attended a federal grants summit. ADC submitted its first grant in June and thanked the ADC staff that went above and beyond getting the grant application across the finish line. And you've heard about the Yardi system, something the board chose to invest in about two years ago. Staff continues to input information into this system. This system will provide the information the board will need to make strategic decisions moving forward. ADC has been paying its ceded land fee. I've had conversations with folks in the Ag community about their struggles and putting that together with major goals and objectives. I'm looking for feedback from the board on how to prioritize those objectives because I can't make every goal number one. I've prepared a matrix for use in ranking objectives for one, two, five, ten years. Rank the objectives one to ten; where do you want ADC to focus. I'll use the information to rebuild the matrix, which will be posted with my weekly reports. The land application permitted interaction group has about 600 pages of license applications to go through. And the capital improvement project permitted interaction group will have a stack of information to start going through tomorrow. Thank you for going above and beyond. That concludes the report. Any questions?

Chair asked if there was any more board discussion. There was none.

Chair asked if there was anyone from the public who wished to provide testimony. There was none.

Chair recalled Action Item 2:

2. **Request to consent to the assignment of License Agreement No. LI-K1001, issued to Sunrise Capital, Inc., to Aloun Farm, Inc. for 393.58 gross acres, more or less, of agricultural land in Kekaha, County of Kauai, State of Hawaii, Tax Map Key No. (4) 1-2-002:001 (por.)**

Chair asked for a motion to approve.

Motion by Member Wicker; Second by Member Watts.

Chair called on Ms. Gady for the staff presentation.

Ms. Gady said she did not have a formal presentation other than to say the staff supports the opportunity for Kauai shrimp to continue production.

Chair asked if there was anyone from the public who wished to provide testimony.

Mr. Blanchard rose to speak as counsel for Sunrise Capital saying there are essentially two different properties. One is this license, LI-K1001. We're asking for the substantial majority of the Sunrise leases/license to be assigned to Aloun farms, with the exception of field 408, which is regarded as the Sunrise Capital catchment. The eight leases used to be with HDOA and were transferred to ADC by executive order. I've provided a map so you can see how these properties relate to each other. The orange right there is the entire agreement, except for field 408, which can be excluded. I'll summarize that Sunrise Capital has been operating here since 2005. They are a Hawaii-based company and have one of the largest agricultural operations in the state. They've had significant positive impact on the local economy and community; they've been involved in charitable efforts; and they employ 52 Hawaii residents. That's 52 families and that's very important. This is an asset purchase agreement, and our top priority is to ensure the employees continue with the same benefits, the same jobs they've had, so the transition is seamless. Right now Sunrise Capital as essentially two businesses. Kauai Shrimp, which is everything from the farming and raising of shrimp for retail and the processing and packaging of that shrimp for retail. The other half is Kona Bay, and that is more science. We're trying to pick the best shrimp, the highest yield, and the most disease resistant, for shrimp brood stock. But today, the discussion is about Kauai shrimp and the asset purchase agreement. The backbone of this ADC land we're going to be building today is shrimp. It's about 250 acres that is Kauai Shrimp. It's where all the farming and growing happens; where all the shrimp that is raised goes down the road to our processing plant where about 1 million pounds a year of shrimp is processed; that summarizes the annual growth through the Kauai Shrimp operations. The processing plant is under DLNR; 12 miles down the road. For logistic purposes, that's about the farthest it can be for a successful operation to transport live shrimp to the processing plant in about three hours where the live shrimp are packaged, frozen, and ready for distribution. Logistically, the location of the shrimp farm and processing plant are very important. This is not just a Hawaii success story; this is an American success story. The Sou family, an immigrant family that started with five acres in the 70s, to today, we find the son running the company, with hundreds of acres, now supplying some of the largest retailers in the state. This shrimp company utilizes former sugar plantation fields to help employ over 50 employees directly contributing to Hawaii's economy and reduces Hawaii's dependence on imports. On July 11th, Sunrise signed an asset purchase agreement. Sunrise will sell their Kauai shrimp operation to Aloun farms. This includes the farming equipment, facilities, inventory, and the transfer of every employee from Kauai Shrimp to Aloun Farms, as well as ongoing agreements for supplying Kauai Shrimp. Aloun Farms will be able to hit the ground running. Sunrise isn't going anywhere we're keeping the Kona Bay operation. Kauai Shrimp has been a successful operation. How Sunrise Capital fits into the equation is Hendrix genetics will be using Kauai shrimp as a buyer. Aloun Farms is the right fit. They are good stewards of the land here on Oahu, and Kauai. With Mr. Sou's leadership, we are confident this is the best team to take over Kauai shrimp. We're aiming for an October 1st transition so the employees' jobs will continue. And, as part of this asset purchase agreement is a

long-term partnership between Sunrise and its Kona Bay operation the hatchery that's field 408, as well as Lease No. S-5367, where we are going to have a supply agreement where Kona Bay would exclusively provide brood stock to Kauai Shrimp for at least the next ten years. We want to see Kauai Shrimp be successful as well as Kona Bay. We hope that with your approval Kauai shrimp can continue to be grand as it is today.

Chair asked if the board had any questions.

Ms. Gady added that this is a bio-secure facility and where a local student who went to UH and studied aquaculture, who didn't think there was a chance of ever getting back to Kauai, is now proudly a Sunrise employee. They regularly get involved with the local community, the high schools, fundraisers, and also host students in the community to give them an idea of what is actually possible. This is the largest shrimp farm in Hawaii, and it's on ADC land. And they're doing shrimp breeding; that's the Silicon Valley of aquaculture and aquaculture is distinctly called out in ADC's statue.

Member Watts asked why the processing facility was so far from the facility.

Mr. Blanchard said historically it's the largest facility available.

Member Trump asked if Mr. Blanchard could share a little bit about the Kona Bay side of the business. How does the future look?

Mr. Blanchard said he'd like to focus on the Sunrise part of the business.

Mr. Kunishima as the general manager for Sunshine Capital offered a comment on Hendrix, saying they were really focused on staying in Kauai. We actually have built different companies around the world. We have a facility in Indonesia, in India, and we ship them the baby shrimp from Hawaii. These businesses depend on Kauai shrimp operating. Hendricks is here to stay.

Chair asked is anyone from the public wished to provide comment. There was none.

Chair asked if there was any board discussion. Chair stated that he journeyed to Kekaha yesterday because he heard about the Sunrise/Aloun announcement and the community was elated and in support of the project. People were saying this is a wonderful thing to happen. This was Dennis Ignacio's dream. He was the originator of shrimp production in Kekaha; graduated from Waimea. When we both finished college, Dennis had this vision towards the end of our sugar operation, and with the help of a grant from Senator Inouye, he helped us significantly on the west side. He started the diversified Ag program and it was Dennis who brought us shrimp. It has deep roots. The Kekaha community really thanks Aloun Farms for this opportunity.

Member Hong asked why the operation was situated in Kauai versus anywhere else in the world.

Mr. Kunishima replied that Kauai is very unique. I've been in aquaculture in Hawaii for over twenty years, working on different shrimp companies and fish companies. Kauai is unique because we're so far away from other shrimp farming operations. There's disease, viruses all around the world, and especially concentrated in that part of the world where shrimp farming industries are. India, Nicaragua, all those areas. Kauai is so far away there are no biosecurity problems. Kauai is uniquely situated in the middle of the ocean. There are no other viruses or diseases. That makes such a difference. And there's actually a designated work force here.

Member Okuhama asked, looking at the map, how is the Ag land here tied into this operation. Is there a connection between the two? The Ag land on the mauka side and aquaculture?

Mr. Kunishima said, actually the original plan was shrimp raising farms off of the highway. There were supposed to be other farms developing aquaculture facilities. That was the original plan that never materialized. Ceatech closed and sold the company. The big expansion never happened.

Chair asked if there was any more discussion or questions. Hearing none, Chair called for the vote. Hearing no objections or abstentions the motion was unanimously approved: 10-0.

Recalling Action Item 3.

Request to consent to the assignment of Lease Agreement Nos. S-8001, S-8002, S-8005, S-8008, S-8012, S-8013, S-8017, and S-8020, currently assigned to Sunrise Capital, Inc., to Aloun Farm, Inc. for 145.65 gross acres, more or less, at Kekaha Agricultural Park, Kekaha, County of Kauai, State of Hawaii, Tax Map Key Nos. (4) 1-2-016:001; :002; :004; :005; :006; :007; :008; :009; :010; :011; :012; :013; :014; :015; :016; :017; :018; :019

Chair asked for a motion to approve.

Motion by Member Cooke; Second by Member Okuhama.

Chair asked if there was any presentation from staff. There was none.

Chair asked if there was anyone from the public who wished to provide testimony. There was none.

Chair asked if there was any board discussion.

Member Okuhama asked if Aloun would have to assume the leases as-is.

Chair said to discuss the details of a business transaction that is still under negotiations, the matter should be discussed in executive session. Pursuant to section 92-4, HRS, the board will be discussing action item 3 in executive session to allow the board to come to a decision with advice from the board's attorney pursuant to section 92.5(a)(4) and (8), HRS. Chair asked if there was any public testimony on action item three. There was none.

Chair asked for a motion to go into executive session.

Motion by Member Wicker; Second by Member Okuhama.

Chair asked if there was any board discussion before going into executive session. There was none.

Chair asked if there was any public testimony on the decision to go into executive session? There was none.

Chair called for the vote and conducted a roll call vote so each member's vote could be recorded and entered into the meeting minutes:

1.	Chair Tabata	Yes
2.	Member Cooke	Yes
3.	Member Hong	Yes
4.	Member Kanakaʻole	Yes
5.	Member Okimoto	Yes
6.	Member Okuhama	Yes
7.	Member Trump	Yes
8.	Member Watts	Yes
9.	Member Yamamoto	Yes
10.	Member Wicker	Yes

Motion unanimously approved: 10-0.

The public session was recessed, subject to reconvening at the conclusion of the executive session.

Exited the public meeting at 11:03 A.M.

Public meeting reconvened at 12:00 P.M.

Chair stated that pursuant to HRS section 92-4(b) (2023), the board took the following action in executive session: After discussion with our attorney regarding questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities relating to agenda action item 3 and the HDOA leases transferred to ADC, the board determined that we need more information to make a decision. The matter is referred back to staff to perform its due diligence and reconvene at a later date for a special meeting.

Chair asked if there was anyone from the public that wished to provide testimony. There was none.

Ms. Gady asked Mr. Blanchard what the latest date was the board could give Sunrise its decision.

Mr. Blanchard replied August 1, 2024.

Chair stated that the board will try and schedule a special meeting by August 1, 2024. It really depends on how fast staff can gather the information needed to make the decision. And some of that information may need to be provided by Sunrise.

Ms. Prescott-Tate said she would write a letter to Sunrise and they could write back.

Chair said these HDOA leases are not like ADC licenses. The language is difference and this created questions that need to be answered. Our attorneys will send a letter requesting the information that needs to be clarified.

Chair asked if there was any further board discussion. There was none.

Chair asked for a motion to defer this matter pending collection of further information.

Motion by Member Kanakaʻole; Second Member Trump.

Chair asked if there were any objections or abstentions?

Member Okuhama abstained from voting.

Chair conducted a roll call vote:

1.	Chair Tabata	Yes
2.	Member Cooke	Yes
3.	Member Hong	Yes
4.	Member Kanakaʻole	Yes
5.	Member Okimoto	Yes
6.	Member Okuhama	Abstain
7.	Member Trump	Yes
8.	Member Watts	Yes
9.	Member Yamamoto	Yes
10.	Member Wicker	Yes

Motion approved: 9-0; Member Okuhama abstained.

Chair thanked the board and said that concludes the board's business for today.

G. Adjourn

Having no further business before the board Chair adjourned the meeting at 12:06 p.m.

Host; Bz Services LLC

Keiki Construction Zone

FREE EVENT OPEN TO PUBLIC

Attractions:

- Excavators/Skidsteer
- Semi/Superdump
- Photo Opts
- Vendors
- Entertainment
- Kids Activities

General Information

DATE: November 10, 2024
Time: 9:00am-2:00pm
Location: Saipan Drive (Whitmore)
Ke Alaula Farms

CONTACT US:
808-630-3536

Hi Vis & Shoes
Waiver forms at entry

STATE OF HAWAI'I

AGRIBUSINESS DEVELOPMENT CORPORATION

E-5

STAFF SUBMITTAL TO THE BOARD OF DIRECTORS
October 24, 2024

Subject:	Request for approval to issue a grant of easement to the City & County of Honolulu, Board of Water Supply for its existing waterlines in Wahiawa, City & County of Honolulu, State of Hawaii, TMK (1) 7-1-002:004.
Applicant:	City & County of Honolulu, Board of Water Supply (Applicant)
Authority:	Section 163D-4(a)(5), Hawaii Revised Statutes
Area:	N/A
Field No(s):	Whitmore, 257 acres
Tax Map Key:	(1) 7-1-002:004 (Property)
Land Status:	Acquired in fee by the Agribusiness Development Corporation in 2013
Trust Land Status:	Section ___ lands of the Hawaii Admission Act Yes ☐ No ☒ DHHL 30% entitlement lands pursuant to the Hawaii State Constitution? Yes ☐ No ☒
Zoning:	SLUD: Agricultural CZO: AG-1
Chapter 343:	In accordance with the Comprehensive Exemption List for the Agribusiness Development Corporation dated May 1, 2018, this request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 10.
Character of Use:	Municipal water resources and distribution system
Land Doc. Type:	Grant of Easement
Term:	Perpetual
Rental Rate	$0.00 **Annual Rent: $0.00/year**

BACKGROUND:
On June 7, 2022, ADC issued a Right-of-Entry to the City & County of Honolulu's Board of Water Supply (BWS) to repair and construct modifications to its existing waterlines, which runs along the southern edge of the Property. The existing waterlines are located in a natural forested area between Kellog Street in Wahiawa town and the Property.

REQUEST:
During the planning phase, it became apparent that BWS did not have an easement for these waterlines. Staff requests that the Board authorize the issuance of a perpetual grant of easement to BWS for its existing 12-inch and 16-inch diameter waterlines that cross through the Property. (Request).

OPERATIONAL PLAN:
The grant of easement will provide BWS legal access to operate, maintain, repair, replace, and/or remove the waterlines.

CONSERVATION PLAN:
N/A

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT COMPLIANCE:
Under Hawaii Revised Statutes (HRS) §343-5(a), an environmental assessment shall be required for actions, as summarized in part below, that propose: (1) use of state land or county lands, or the use of state or county funds; (2) use within any land classified as a conservation district; (3) use within a shoreline area; (4) use within any historic site as designated in the National Register or Hawaii Register; (5) use within the Waikiki area of O'ahu; (6) any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation; (7) any reclassification of any land classified as a conservation district; (8) construction of new or the expansion or modification of existing helicopter facilities within the State, that may affect: (A) any land classified as a conservation district; (B) a shoreline area; or (C) any historic site as designated in the National Register or Hawaii Register; (9) any (A) wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent; (B) Waste-to-energy facility; (C) Landfill; (D) Oil refinery; or (E) Power-generating facility.

The project triggers an environmental assessment because it proposes (1) the use of state or county lands or the use of state or county funds.

In accordance with the Comprehensive Exemption List for the Agribusiness Development Corporation dated May 1, 2018, the subject Request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 5, item 1, which includes "Surveys, research, investigations into all aspects of water use, quantity, and quality;" The Request is a de minimis action that will probably have minimal or no significant effect on the environmental and should be declared exempt from the preparation of an environmental assessment.

REMARKS & DISCUSSION:
Under this perpetual easement, BWS plans to operate, maintain, repair, replace and remove a water pipeline or pipelines together with water meters, fire hydrants, control cable and other

appurtenance related to municipal water resources and distribution system. Other than staff time, it is not expected that the grant of easement will cause any significant fiscal impact.

RECOMMENDATION:
Based on the foregoing, it is recommended that the Board:

1. Approve the Request, subject to the following conditions:
   a. Term shall be forever, provided, however, that this indenture shall be subject to cancellation and termination by Grantor if any of the rights hereby granted are assigned to any person or entity, other than to a duly created legal successor of Grantee and BWS, without the written consent of the Grantor, which shall not be unreasonably withheld.
   b. Sum of $1 to be paid by BWS for the grant of easement.
2. Declare that, pursuant to ADC's Comprehensive Exemption List dated May 1, 2018, the proposed disposition will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment, pursuant to Chapter 343, Hawaii Revised Statutes

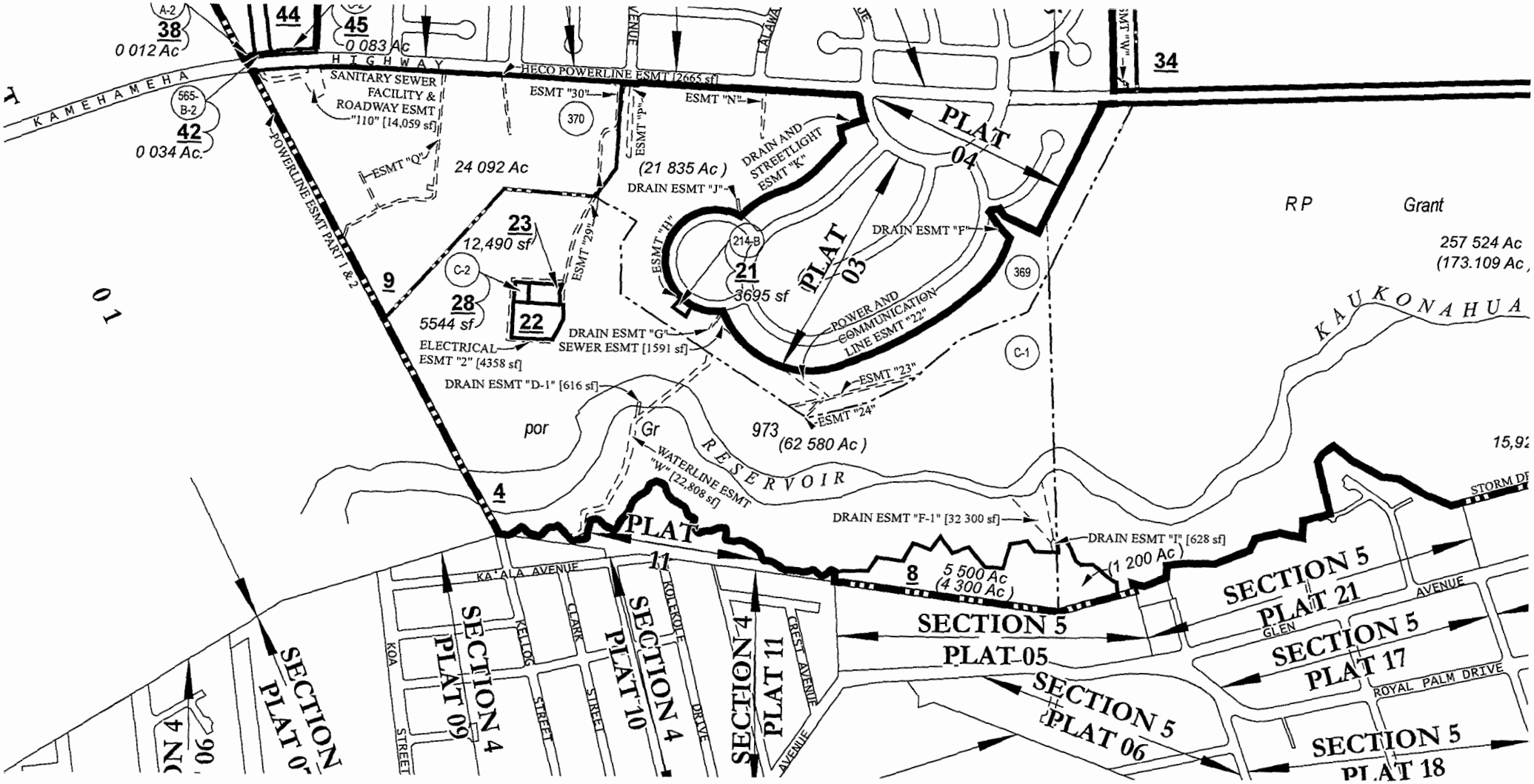
Respectfully Submitted,

KEN NAKAMOTO
Project Manager

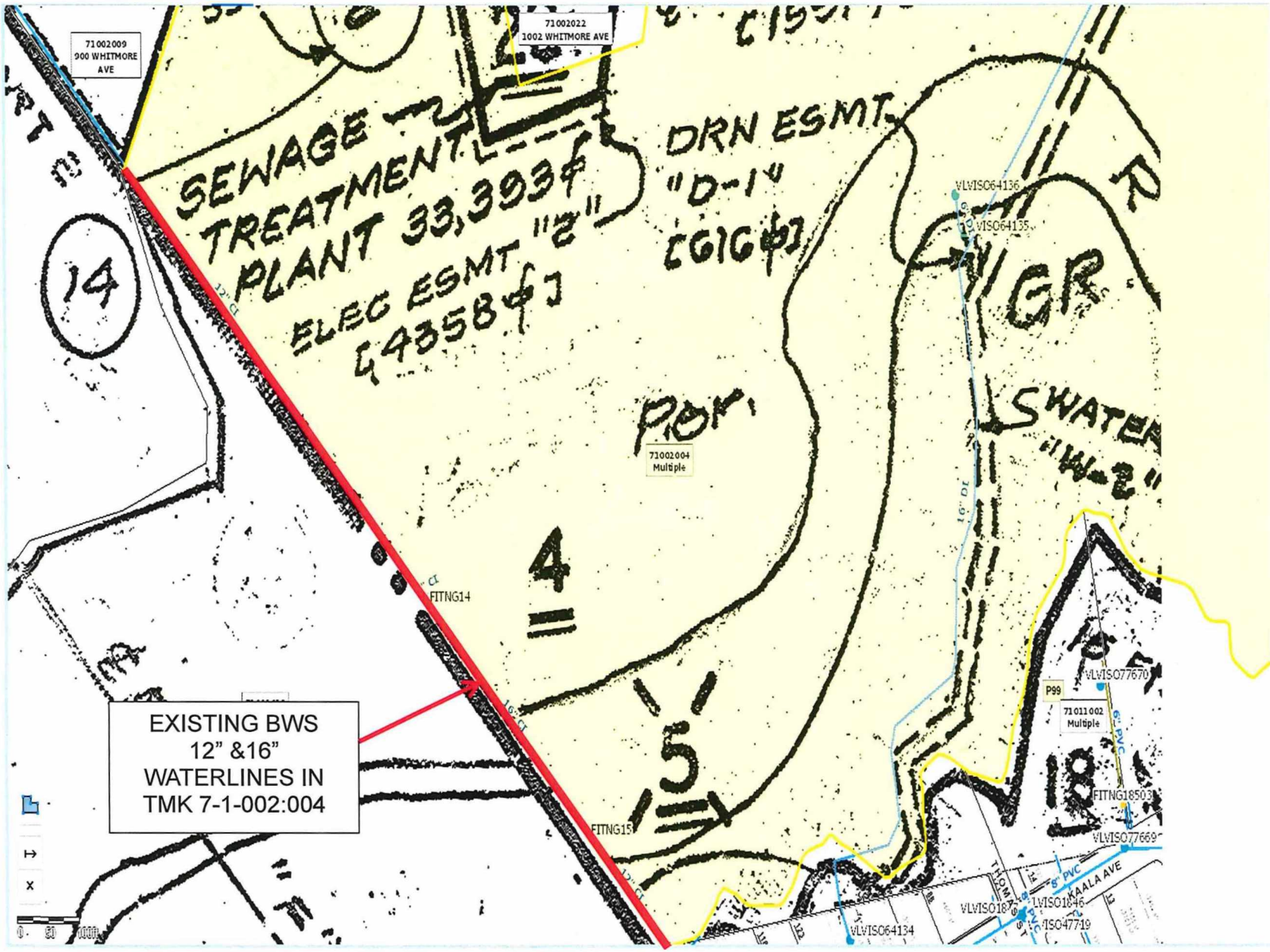
Approved for Submittal:

Mark Takemoto, Senior Executive Assistant
For Wendy Gady Executive Director

E-5b



Tax Map 7-1-002


71002009
900 WHITMORE AVE
71002022
1002 WHITMORE AVE
SEWAGE TREATMENT PLANT 33,393±
ELEC ESMT "2" [4358±]
DRN ESMT "D-1" [616±]
14
4
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71002004
Multiple
FITNG14
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VLVISO64136
VLVISO64135
VLVISO64134
VLVISO77670
VLVISO77669
VLVISO1870
VLVISO1846
ISO47719
FITNG18503
P99
71011002
Multiple
KAALA AVE
EXISTING BWS
12" &16"
WATERLINES IN
TMK 7-1-002:004

After recordation return by mail ( ) or pickup (X) to:

Board of Water Supply
Attention: Land Division
630 South Beretania Street
Honolulu, Hawai'i 96843
Phone: (808) 748-5910

THIS DOCUMENT CONTAINS _____ PAGES

Title or type of Document: GRANT OF WATER PIPELINE EASEMENT

Grantor: **AGRIBUSINESS DEVELOPMENT CORPORATION**, a public corporate body and politic and an instrumentality and agency of the State of Hawai'i

Grantee: **CITY AND COUNTY OF HONOLULU**, a municipal corporation of the State of Hawai'i

BWS: **BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU**
630 South Beretania Street
Honolulu, Hawai'i 96843

Tax Map Key: (1) 7-1-002:004

GRANT OF WATER PIPELINE EASEMENT

THIS INDENTURE is made by and between **AGRIBUSINESS DEVELOPMENT CORPORATION**, a public corporate body and politic and an instrumentality and agency of the State of Hawai'i, whose address is 235 South Beretania Street, Room 205, Honolulu, Hawai'i 96813, hereinafter referred to as "**Grantor**," and the **CITY AND COUNTY OF HONOLULU**, a municipal corporation of the State of Hawai'i, whose address is Honolulu Hale, City and County of Honolulu, State of Hawai'i, hereinafter referred to as "**Grantee**" and the **BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU**, whose principal place of business and post office address is 630 South Beretania Street, Honolulu, Hawai'i 96843, hereinafter referred to as "**BWS**."

W I T N E S S E T H:

That Grantor, in consideration of the sum of _____ AND ___/100 DOLLARS ($_____.____) to it paid by BWS, the receipt whereof is hereby acknowledged, and of the terms, conditions and covenants of Grantor, Grantee asn BWS as hereinafter contained, does hereby grant, bargain, sell and convey unto Grantee, forever, the right, in the nature of a perpetual easement, to be exercised and enjoyed by BWS, to operate, maintain, repair, replace and remove a water pipeline or pipelines together with such meters, fire hydrants, control cable and other appurtenances, hereinafter referred to as the "**Facilities**", as BWS shall deem necessary to properly measure and control water conveyed to consumers through that certain premises situate at Wahiawā, O'ahu, Hawai'i, and described in Exhibit "A" attached hereto and by this reference incorporated herein, hereinafter referred to as the "**Easement Area**."

TOGETHER with the right of ingress to and egress from the Easement Area for all purposes in connection with the rights hereby granted.

TO HAVE AND TO HOLD the same unto Grantee for the use and benefit of BWS forever, PROVIDED, HOWEVER, that this indenture shall be subject to cancellation and termination by Grantor if any of the rights hereby granted are assigned to any person or entity, other than to a duly created and legal successor of Grantee and BWS, without the written

consent of Grantor, which shall not be unreasonably withheld.

AND in consideration of the rights hereby granted and the acceptance thereof and the obligations hereby assumed, Grantor, Grantee and BWS hereby covenant and agree as follows:

1. BWS shall operate, maintain, replace, repair and/or remove the Facilities in such a manner that shall not unreasonably interfere with the use of the Easement Area by Grantor, as herein provided, except during the period of construction, installation, operation, maintenance, replacement, repair and/or removal.

2. The Facilities are, and shall remain, the property of BWS.

3. After the original installation of the Facilities has been completed, BWS shall not be obligated in any manner to relocate or adjust the grade of the pipeline or pipelines.

4. BWS may, at its discretion, abandon in place or remove any Facilities or any portion thereof from the Easement Area. The easement, however, shall terminate only if BWS prepares and records a cancellation of easement document. Upon cancellation of the easement, BWS shall remove any existing water meters, fire hydrants, or any other structures and appurtenances that were installed by BWS and are located above ground within the Easement Area; provided however, nothing herein contained shall require BWS to remove any pipeline, structure or equipment and/or appurtenance located underground within the Easement Area.

5. After entry onto the Easement Area and/or operation, maintenance, repair, replacement or removal of the Facilities or any portion thereof, BWS shall restore the surface of the land, and any road paving, curb and sidewalk above the Facilities, to the extent reasonably possible, to a grade and condition existing immediately prior thereto, considering the nature of the Facilities involved.

6. Grantor shall not at any time during the term of this indenture erect or place any building foundation of any kind below the surface of the Easement Area or at any

time erect or place any building or structure of any kind, other than roads, walks, curbs or appurtenances thereof, or stockpile any material above or on the surface of the Easement Area, unless the plans shall be first approved by BWS and unless the same shall be so constructed to not interfere with BWS's construction, installation, maintenance, replacement, repair and removal of the Facilities, or access to the Easement Area, provided however, that this provision shall not prohibit the Grantor from constructing and maintaining roads, walks, curbs, or appurtenances thereof within the Easement Area or from laying, constructing, operating, maintaining, repairing or removing its own water pipelines, conduits or drains below the surface of the Easement Area, provided that such actions do not interfere with BWS exercising the rights herein granted; provided, further, that if it becomes necessary to excavate, grade or change the existing ground conditions within the Easement Area, the plans shall first be submitted to BWS for review and approval.

7. Except as otherwise herein provided, Grantor hereby agrees that Grantee or BWS shall not be liable or responsible for any damage to, or loss of, any real and personal property, including but not limited to any building foundation, fence, gate and structure of any kind placed or erected or used within the Easement Area contrary to the terms hereof caused by, or resulting, from Grantee and BWS exercising the rights herein granted.

8. If at any time the Easement Area, or any part thereof, shall be condemned or taken by any authority exercising the power of eminent domain, Grantee shall have the right to claim and recover from the condemning authority, but not from Grantor, such compensation as is payable for the easement and right-of-way and for the Facilities, which shall be payable to the Grantee.

9. Grantor does hereby covenant and agree with Grantee and BWS, that they are seised in fee simple of the real property described in Exhibit "A," and that same is free and clear of and from all encumbrances, except as provided herein.

10. Grantor covenants with Grantee and BWS that it/he/she/they has/have good right and title to grant the foregoing easement and that it/they/he/she shall WARRANT and DEFEND the same unto Grantee and BWS, forever, against the claims and demands of all persons.

11. When more than one person is involved in the Grant of this indenture and the covenants herein contained, the terms "Grantor" and "Grantee" and related verbs and pronouns in the singular shall include the plural. Where appropriate, the masculine gender shall be deemed to include the feminine or neuter genders.

12. The term "Grantor" wherever used herein shall be held to mean and include Grantor, its successors, and assigns. The terms "Grantee" and "BWS" wherever used herein shall be held to mean the City and County of Honolulu and Board of Water Supply, City and County of Honolulu, respectively, its successors or permitted assigns.

13. This instrument shall be binding upon and shall inure to the benefit of the parties hereto and their said respective successors and assigns.

14. This Grant of Water Pipeline Easement may be executed in counterparts, each of which shall, for all purposes, be deemed to be an original and all of which shall constitute but one and the same Grant of Water Pipeline Easement.

[Remainder of this page intentionally left blank; signatures appear on next page.]

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and executed this Grant of Water Pipeline Easement on this _____ day of _____, 20___.

AGRIBUSINESS DEVELOPMENT CORPORATION,
a public corporate body and politic and an instrumentality and agency of the State of Hawai'i

_____
WENDY GADY
Executive Director

Grantor

CITY AND COUNTY OF HONOLULU,
a Hawai'i municipal corporation
By Board of Water Supply

APPROVED AS TO CONTENTS:

_____
MICHAEL I. MATSUO, P.E.
Land Administrator

_____
ERNEST Y. W. LAU, P.E.
Manager and Chief Engineer

APPROVED AS TO FORM AND LEGALITY:

_____
Deputy Corporation Counsel

Grantee

STATE OF HAWAI'I)
) SS
CITY AND COUNTY OF HONOLULU)

On this _____ day of_____, 20_____, before me personally appeared _____, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument identified or described as Grant of Water Meter Easement and dated _____, as the free act and deed of such person(s), and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity

The foregoing instrument dated _____, contained _____ page(s) at the time of this acknowledgment/certification

_____
Notary Public Signature
Print Name _____
Notary Public, State of Hawai'i
My commission expires. _____

STATE OF HAWAI'I)
) SS
CITY AND COUNTY OF HONOLULU)

On this _____ day of _____, 20____, before me appeared **ERNEST Y. W. LAU**, to me personally known, who, being by me duly sworn, did say that he is the Manager and Chief Engineer of the **BOARD OF WATER SUPPLY**, City and County of Honolulu, that said _____ page instrument entitled Grant of Water Pipeline Easement and dated _____ was signed and sealed on behalf of said **BOARD OF WATER SUPPLY** by authority of its BOARD, and that the seal affixed to said instrument is the seal of said **BOARD OF WATER SUPPLY**, and said **ERNEST Y. W. LAU** acknowledged said instrument to be the free act and deed of said **BOARD OF WATER SUPPLY**, City and County of Honolulu.

_____
Print Name:
Notary Public, First Circuit
State of Hawai'i
My commission expires: _____

EXHIBIT "A"

(Insert surveyor's description/metes and bounds of the easement, current derivation and encumbrances affecting the easement)

RIGHT-OF-ENTRY AGREEMENT

THIS RIGHT-OF-ENTRY AGREEMENT ("Agreement") is made and entered into by and between the BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, ("GRANTEE") whose mailing address is 630 South Beretania Street, Honolulu, Hawaii 96843 , and STATE OF HAWAII, AGRIBUSINESS DEVELOPMENT CORPORATION, ("GRANTOR") whose mailing address is 235 South Beretania Street, Room 205, Honolulu, Hawaii, 96813, (collectively "Parties").

W I T N E S S E T H:

WHEREAS, GRANTEE desires a right-of-entry in and to that certain property located at Kuaokala, Waialua, Oahu, Hawaii, described as Tax Map Key: (1) 7-1-002-004, ("Property"), and as more specifically identified on the map attached hereto as Exhibit "A", to perform repair work on a leaking water main ("Fieldwork"); and

WHEREAS, GRANTOR is the fee-owner of the Property; and

WHEREAS, GRANTOR wishes to cooperate with GRANTEE to allow the entry of GRANTEE and its officers, employees, contractors and consultants (collectively "Grantee's Agents") on the Property for purposes of conducting the Fieldwork.

NOW, THEREFORE, in consideration of the premises and covenants contained herein, and other good and valuable consideration given, the Parties hereto mutually agree as follows:

1. GRANTOR hereby grants to GRANTEE and Grantee's Agents permission to enter upon the Property for the purpose of conducting the Fieldwork.

2. This Agreement shall be effective as of the execution date so noted below and shall expire on December 31, 2025, unless sooner terminated pursuant to Paragraph 10 below.

3. GRANTEE and Grantee's Agents shall maintain and exercise due care in conducting the Fieldwork, and shall practice preventive measures to minimize any disturbance on or to the Property.

4. GRANTEE shall provide GRANTOR with no less than twenty-four hours written notice prior to the commencement of any Fieldwork and related activities and shall coordinate access to the Property with GRANTOR. Written notices shall be provided pursuant to Paragraph 17 below and may be provided via electronic mail.

5. Reserved.

6. GRANTEE and Grantee's Agents shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law.

GRANTEE and Grantee's Agents shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the right-of-entry area or Property any such materials except to use in the ordinary course of GRANTEE and Grantee's Agents' business, and then only after written notice is given to GRANTOR of the identity of such materials and upon the GRANTOR'S consent which consent may be withheld at the GRANTOR'S sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by GRANTEE and Grantee's Agents, GRANTEE and Grantee's Agents shall be responsible for the cost thereof. In addition, GRANTEE and Grantee's Agents shall execute affidavits, representations and the like from time to time at the GRANTOR'S request concerning GRANTEE and Grantee's Agents' best knowledge and belief regarding the presence of hazardous materials on the right-of-entry area or Property placed or released by GRANTEE and Grantee's Agents.

7 GRANTEE and Grantee's Agents agree to indemnify and hold GRANTOR harmless, from any damages and claims resulting from the release of hazardous materials on the right-of-entry area or premises occurring while GRANTEE and Grantee's Agents is/are in possession, or elsewhere if caused by GRANTEE and Grantee's Agents. These covenants shall survive the expiration or earlier termination of this Agreement.

For purposes of this right-of-entry, "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted, provided however, that obligation to indemnify and hold harmless hereunder shall not apply to contractors who are only contracted to perform professional architectural, engineering, or surveying services on behalf of GRANTEE.

8. GRANTEE and Grantee's Agents agrees to indemnify, release and hold harmless GRANTOR from and against any and all costs, claims, suits, fines, damages, or causes of action of any kind for injury of any kind to any person, or damage to any property of any kind occasioned, in whole or in part, by GRANTEE'S actions or omissions arising out of the exercise of this Agreement. Further, GRANTEE agrees that GRANTOR shall not be liable, should GRANTEE suffer injury to its personnel or damage to its property as a result of work conducted upon the Property pursuant to this Agreement.

GRANTEE shall not be liable or responsible for any property damage or conditions that existed prior to the GRANTEE'S exercise of the Agreement.

9. In the event of any unanticipated sites or remains such as bone or charcoal deposits, human burials, rock or coral alignments, paving's or walls are encountered during the Fieldwork, GRANTEE and Grantee's Agents, in the exercise of this Agreement, shall stop work immediately and contact the State of Hawaii, Department of Land and Natural Resources, Historic Preservation Division in Kapolei at (808) 692-8015. GRANTEE shall also notify GRANTOR immediately of any unanticipated finds during the Fieldwork.

10. Any failure or breach by GRANTEE or GRANTOR to abide by the terms and conditions set forth herein shall constitute a breach of this Agreement. Upon written request, any breaching party shall be afforded a reasonable period of time within which to cure any said breach, such cure to be determined by the non-breaching party as acceptable to avoid breach. In the event additional costs are incurred by any party as a result of a breach of this Agreement, both parties shall bear their own costs, including any legal costs and fees incurred except as otherwise provided below.

11. Notwithstanding any other provision contained herein, this Agreement is revocable at the will of GRANTOR, and can be canceled or terminated at any time and for any reason, including any breach or default hereunder, upon two weeks written notice, sent via U.S. Postal Service, first class mailing, or electronic mail to GRANTEE at the address listed in Paragraph 17.

12. In the event this Agreement is terminated as provided herein, GRANTEE shall immediately remove any and all property of GRANTEE and Grantee's Agents physically located in the Property. Any property not timely removed shall be deemed abandoned by GRANTEE and Grantee's Agents, and GRANTOR shall have the right to dispose of the property in any commercially reasonable manner.

13. Paragraphs 6, and 7 shall survive the termination of this Agreement and shall be binding on the Parties, and their successors and assigns.

14. GRANTEE and Grantee's Agents shall carry and maintain at its sole cost and expense the following insurance policies and coverages noted below:

    a. Comprehensive general liability insurance, including contingent liability, contractual liability, and products and completed operations liability, covering all activities conducted on the Property. The limits of liability shall not be less than $2,000,000 aggregate and $1,000,000 per occurrence. If the policy is written on a "claims made" form, it shall provide for an extended reporting period of not less than three years.

b. Comprehensive automobile liability insurance covering all owned, hired, or non-owned vehicles, including the loading or unloading thereof on the Property.

c. Workers' Compensation insurance affording statutory limits, and employers' liability coverage with limits of no less than $1,000,000 covering all persons admitted to the Property under the terms of this Agreement.

All Policies and coverage under this Agreement shall list the "Agribusiness Development Corporation" as additional insured and a certificate of insurance evidencing all policies and coverage as required under this paragraph shall be provided to GRANTOR prior to the commencement of the Fieldwork.

15. This Agreement shall be governed by the laws of the State of Hawaii in effect on the execution date noted below without reference to the principles governing conflict of laws or choice of laws applicable in any other jurisdiction.

16. GRANTEE agrees that this Agreement does not in any way convey a real property interest to the Property.

17. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give the other party shall be in writing, sent to the address noted below (or such other address as a party may designate in writing to the other party), and given by delivering such notice in person or by commercial courier; by sending it by first-class mail, certified mail, return receipt requested; or by electronic mail as may be permitted elsewhere in this Agreement.

GRANTOR. Agribusiness Development Corporation
Attention: James Nakatani
235 S. Beretania St., Rm 205
Honolulu, Hawaii 96813

Email: hdoa.adc@hawaii.gov
Phone: (808) 586-0186

GRANTEE: Board of Water Supply
City and County of Honolulu
Attention: Land Division
630 S. Beretania Street
Honolulu, Hawaii 96843

Email: lthomas@hbws.org

Phone: (808) 748-5916

(the remainder of this page is left intentionally blank)

IN WITNESS WHEREOF, the parties hereto have executed this Right-of-Entry Agreement this 7th day of June, 2022.

GRANTOR:

By: _____
James J. Nakatani
Its: Executive Director

APPROVED AS TO FORM:

Delanie Prescott-Tate
Delanie Prescott-Tate
Deputy Attorney General

Date: 6/6/2022

GRANTEE:

By: _____
Ernest Y. W Lau, P.E.
Its: Manage and Chief Engineer

APPROVED AS TO CONTENT:

Michael Mac

Board of Water Supply

Date: _____

APPROVED AS TO FORM AND LEGALITY:

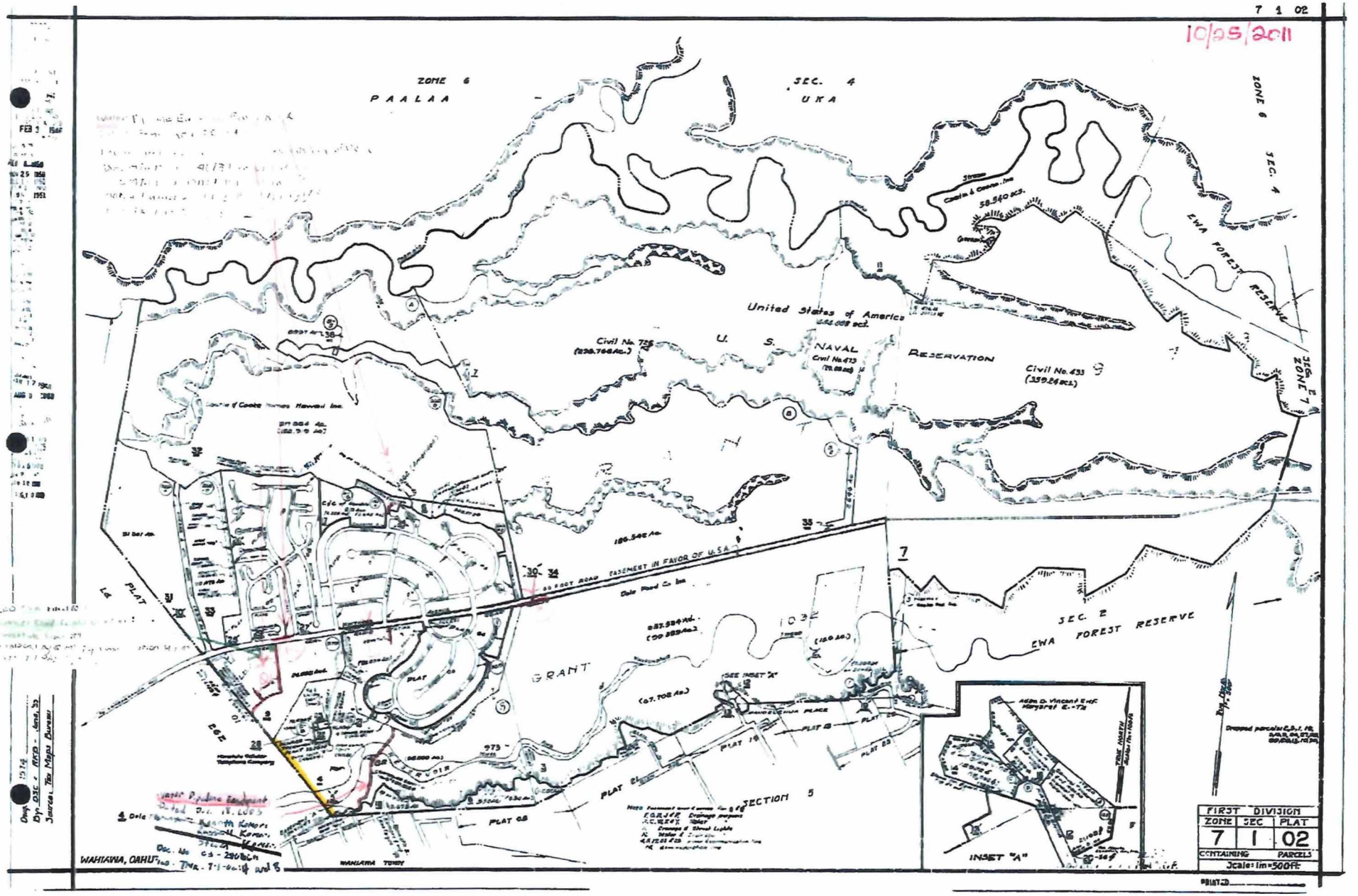
_____
JEFF A. LAU
Deputy Corporation Counsel

Date: 5/26/22

EXHIBIT A

Plat Map of TMK (1) 7-1-002-004 with Fieldwork Location Highlighted

[see yellow highlight on following page]


7 1 02
10/25/2011
ZONE 6
PAALAA
SEC. 4
UKA
ZONE 6
SEC. 4
EWA FOREST RESERVE
United States of America
U. S. NAVAL RESERVATION
Civil No. 726
(238.766Ac.)
Civil No. 473
Civil No. 433
(339.24 ac.)
ZONE 7
SEC. 2
180.540 Ac.
50 FOOT ROAD EASEMENT IN FAVOR OF U.S.A.
Dole Food Co Inc
GRANT
1032
(180 Ac)
(67.708 Ac)
SEE INSET "A"
SEC. 2
EWA FOREST RESERVE
PLAT 18
PLAT 19
PLAT 20
PLAT 21
PLAT 22
PLAT 23
PLAT 24
PLAT 25
PLAT 26
SECTION 5
WAHIAWA, OAHU
INSET "A"
FIRST DIVISION
ZONE 7 | SEC 1 | PLAT 02
CONTAINING PARCELS
Scale: 1in=500ft.

044

E-7

ACT 218

S.B. NO. 833

A Bill for an Act Relating to the Wahiawa Irrigation System.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. In accordance with section 9 of article VII of the Hawaii State Constitution and sections 37-91 and 37-93, Hawaii Revised Statutes, the legislature has determined that the appropriations contained in H.B. No. 300,

H.D. 1, S.D. 1, C.D. 1,[1] and this Act will cause the state general fund expenditure ceiling for fiscal year 2023-2024 to be exceeded by $1,089,767,367 or 11.0 per cent. This current declaration takes into account general fund appropriations authorized for fiscal year 2023-2024 in H.B. No. 300, H.D. 1, S.D. 1, C.D. 1,[1] and this Act only. The reasons for exceeding the general fund expenditure ceiling are that:

(1) The appropriations made in this Act are necessary to serve the public interest; and

(2) The appropriations made in this Act meet the needs addressed by this Act.

PART II

SECTION 2. The legislature finds that the Wahiawa irrigation system is a critical irrigation system providing water to farmers in Wahiawa, Waialua, and Haleiwa on the island of Oahu. Built by the Waialua Sugar Company, the Wahiawa irrigation system was created with a dam and freshwater reservoir fed by the north fork and south fork of the Kaukonahua stream. The dam is essential to agriculture as the water in the reservoir provides irrigation to farmers in Wahiawa, Waialua, and Haleiwa. The reservoir also provides a venue for recreational activities for the surrounding community and the State.

The legislature further finds that Dole Food Company, Inc., has listed the irrigation system for sale for $20,000,000. The Dole portion of the system includes the Wahiawa reservoir, Wahiawa dam, and ditch system. The spillway, owned by Sustainable Hawaii, LLC, is also an integral component of the irrigation system. Dole has offered to donate its interests to the State of Hawaii in exchange for the State's agreement to repair the spillway to meet and maintain dam safety standards. It is in the interest of the public for the State to acquire the Wahiawa irrigation system and preserve the system for public access and the agriculture industry.

The purpose of this Act is to authorize the department of agriculture, department of land and natural resources, and agribusiness development corporation to acquire the Wahiawa irrigation system, on terms negotiated and agreed upon by the office of the governor, or by eminent domain, and to purchase, repair, and maintain the associated spillway.

PART III

SECTION 3. (a) The office of the governor shall negotiate with Wahiawa Water Company, Inc.; Dole Food Company, Inc.; Sustainable Hawaii, LLC; or any other appropriate owner for the State's fee simple acquisition of the Wahiawa irrigation system.

(b) The department of land and natural resources may acquire from Wahiawa Water Company, Inc., or Dole Food Company, Inc., on terms agreed upon by the office of the governor, the fee simple interest in the Wahiawa irrigation system, including the following parcels:

(1) TMK (1) 7-3-001-003;
(2) TMK (1) 7-3-001-019;
(3) TMK (1) 7-3-006-023;
(4) TMK (1) 7-3-007-001;
(5) TMK (1) 7-3-008-001;
(6) TMK (1) 7-3-010-003;
(7) TMK (1) 7-3-011-003;
(8) TMK (1) 7-3-011-006;

(9) TMK (1) 7-3-011-007;
(10) TMK (1) 7-3-012-002;
(11) TMK (1) 7-3-012-006;
(12) TMK (1) 7-4-001-003; and
(13) TMK (1) 7-4-012-001.

(c) The department of agriculture may acquire:

(1) From Dole Food Company, Inc., or the appropriate owner, a fee simple interest in the Wahiawa dam, on terms agreed upon by the office of the governor; and

(2) From Sustainable Hawaii, LLC, a fee simple interest in the spillway associated with the Wahiawa irrigation system, located at parcel TMK (1) 7-1-012-014; provided that the sale terms shall be conditioned on an appraisal of the property pursuant to section 171-30, Hawaii Revised Statutes.

(d) The agribusiness development corporation may acquire from Dole Food Company, Inc., or the appropriate owner, on terms agreed upon by the office of the governor, the ditch system associated with the Wahiawa irrigation system.

(e) The agribusiness development corporation may acquire from Wahiawa Water Company, Inc.; Dole Food Company, Inc.; or Sustainable Hawaii, LLC; on terms agreed upon by the office of the governor, the fee simple interest in the Wahiawa irrigation system, including the following parcels:

(1) TMK (1) 7-1-001-013;
(2) TMK (1) 7-1-001-017;
(3) TMK (1) 7-1-012-003;
(4) TMK (1) 7-1-012-004;
(5) TMK (1) 7-1-012-007;
(6) TMK (1) 7-3-005-005; and
(7) TMK (1) 7-3-013-003.

(f) The department of land and natural resources shall not impose administrative fines on the department of agriculture for safety deficiencies at Wahiawa dam or the associated spillway; provided that the department of agriculture shall repair and maintain the Wahiawa dam and spillway and shall ensure the structures meet dam safety standards.

(g) No fines owed by Wahiawa Water Company, Inc.; Dole Food Company, Inc.; or Sustainable Hawaii, LLC; for violations of dam safety standards at Wahiawa dam or the associated spillway shall transfer to the State upon the sale of the property to the State.

SECTION 4. Notwithstanding any law to the contrary, all users of water associated with the Wahiawa irrigation system shall pay such rates sufficient to operate and maintain the irrigation system as prescribed by the agribusiness development corporation.

SECTION 5. The State may by exercise of eminent domain acquire the Wahiawa dam, the spillway associated with the Wahiawa irrigation system, and the ditch system associated with the Wahiawa irrigation system, including all parcels in this Act.

PART IV

SECTION 6. There is appropriated out of the general revenues of the State of Hawaii the sum of $5,000,000 or so much thereof as may be necessary for fiscal year 2023-2024 for the department of agriculture to acquire a fee simple

interest in the spillway associated with the Wahiawa irrigation system, located at parcel TMK (1) 7-1-012-014; provided that the sale terms shall be conditioned on an appraisal of the property pursuant to section 171-30, Hawaii Revised Statutes; provided further that if negotiations for the acquisition of the property are unsuccessful, the appropriation shall be used for an eminent domain action to acquire the property; provided further that moneys from the appropriation may be expended for an eminent domain action and its associated costs.

The sum appropriated shall be expended by the department of agriculture for the purposes of this Act.

SECTION 7. There is appropriated out of the general revenues of the State of Hawaii the sum of $21,000,000 or so much thereof as may be necessary for fiscal year 2023-2024 for the department of agriculture to repair and expand the spillway associated with the Wahiawa irrigation system and to bring the spillway into compliance with all relevant dam safety requirements; provided that the expenditure of the appropriation is contingent upon the State's acquisition of the property.

The sum appropriated shall be expended by the department of agriculture for the purposes of this Act.

PART V

SECTION 8. If the transfer of all properties authorized to be acquired by this Act are not filed or recorded with the bureau of conveyances by June 30, 2026, the governor shall notify the legislature and the revisor of statutes by June 30, 2026, that the conveyance was not filed or recorded with the bureau of conveyances, and this Act shall be repealed in its entirety on July 1, 2026.

SECTION 9. If the transfer of all properties authorized to be acquired by this Act are filed or recorded with the bureau of conveyances by June 30, 2026, the governor shall notify the legislature and the revisor of statutes by June 30, 2026, that the transfer of all properties authorized to be acquired by this Act were filed or recorded with the bureau of conveyances, and this Act shall not be repealed and the appropriations authorized pursuant to this Act shall not lapse at the end of the fiscal year for which the moneys were appropriated; provided that all moneys that remain unexpended or unencumbered on June 30, 2026, shall lapse.

SECTION 10. This Act shall take effect on July 1, 2023.

(Approved July 5, 2023.)

Note

1. Act 164.

JOSH GREEN, M.D.
GOVERNOR

SYLVIA LUKE
LT. GOVERNOR

WENDY GADY
EXECUTIVE DIRECTOR

STATE OF HAWAI'I
AGRIBUSINESS DEVELOPMENT CORPORATION
HUI HO'OULU AINA MAHIAI
PROPERTY & ASSET MANAGEMENT OFFICE

October 22, 2024

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
CM# 9589 0710 5270 0879 5577 14
VIA EMAIL, SCOTTYWONG@GMAIL.COM

Mr. Scott Wong
Ohana Hui Ventures, Inc.
41-207 Kauholokahiki Street
Waimanalo, HI 96795

RE: Violation of License Agreement No. LI-W194-23-01 between the State of Hawaii Agribusiness Development Corporation and Ohana Hui Ventures, Inc.

NOTICE OF VIOLATION

Dear Mr. Wong:

Please be advised that Ohana Hui Ventures, Inc. (Licensee) is in violation of License Agreement No. LI-W194-23-01. Pursuant to Section 6.1 B of the Agribusiness Development Corporation's (Licensor) Land and Management Policy & Procedure Manual, you have thirty-days from the date of this letter to rectify the following violations:

Violation 1: Paragraph 8 of License Agreement No. LI-W194-23-01 states: "LICENSEE shall not do or commit, or permit or suffer to be done, any willful or voluntary waste or destruction in and upon the Premises, any nuisance in and upon the Premises, or any unlawful or improper use of the Premises. Licensee shall use the Premises solely for diversified agriculture purposes[.]"

On Saturday, October 12, 2024, Licensor became aware of and documented unauthorized, non-agricultural use of the licensed premises for purposes of conducting a mud racing event, with hundreds of individuals in attendance, with their vehicles driving across and parked on the licensed premises.

Violation 2: Paragraph 8 of License Agreement No. LI-W194-23-01 states: "LICENSEE shall not do or commit, or permit or suffer to be done, any willful or voluntary waste or destruction in and upon the Premises, any nuisance in and upon the

Premises, or any unlawful or improper use of the Premises. Licensee shall use the Premises solely for diversified agriculture purposes[.]"

On Sunday, October 13, 2024, Licensor became aware of and documented unauthorized, non-agricultural use of the licensed premises for purposes of conducting a motorcross event with numerous individuals operating motorcycles on the premises.

Violation 3: Paragraph 46 of License Agreement No. LI-W194-23-01 states: "LICENSEE shall not engage in any activity that may result in soil erosion from water or wind. LICENSEE shall control soil erosion as completely as practicable by strip cropping and contouring, by filling in or otherwise controlling small washes or ditches that may form, and by adopting practices recommended by the Natural Resource Conservation Service (NRCS)." Licensee's adopted Conservation Plan, dated August 11, 2022, is attached to the License Agreement as Exhibit C.

On Saturday, October 12, 2024, and Sunday, October 13, 2024, Licensor became aware of and documented activities by people, vehicles, and equipment, which caused the release of excessive air-borne dust that went unmitigated as required by your Conservation Plan and resulted in excessive soil erosion.

Violation 4: Paragraph 2 of the Special Conditions of License Agreement No. LI-W194-23-01 states: "LICENSEE, its employees, customers, guests, agents, and/or invitees shall not display or offer for sale or sell any article(s) or merchandise whatsoever within the Premises without the prior written approval of LICENSOR and upon such terms and conditions established by LICENSOR. No commercial activities whatsoever, including activities such as feedlots (excepting a private feedlot designed to feed LICENSEE's own cattle), dairy milking parlors, or boarding of horses, are permitted without the prior written approval of LICENSOR."

On Saturday, October 12, 2024, Licensor became aware of and documented commercial activities being conducted on the premises without LICENSOR's prior written approval.

Violation 5: Paragraph 10 of License Agreement No. LI-W194-23-01 states: "LICENSEE shall not sublicense or rent the whole or any portion of the Premises without the prior consent of LICENSOR, which consent may be withheld in LICENSOR's sole discretion. Any sublicensing request shall be submitted in writing to LICENSOR, together with a copy of the sub-licensee's land utilization plan and rental payment schedule for LICENSOR's consideration. Profit on any sublicense charges is neither allowed, nor shall be sought by LICENSEE."

Licensor became aware of and documented individuals working on the premises who are not employees of Licensee and for whom Licensee has not sought approval for these individuals to occupy the premises, and which Licensor has not approved.

Pursuant to Licensor's policies and procedures, you have thirty-days from the date of this notice to fully cure the above-noticed violations. If Licensee does not fully cure the violations within

the time specified, Licensor will refer the matter to its Board of Directors for referral to the Attorney General's office for legal action, which may include termination of License Agreement No. LI-W194-23-01.

Please contact me at (808) 372-8743 if you have any questions. I am available to discuss your specific plans and options to remedy the above. I urge your immediate attention to this matter.

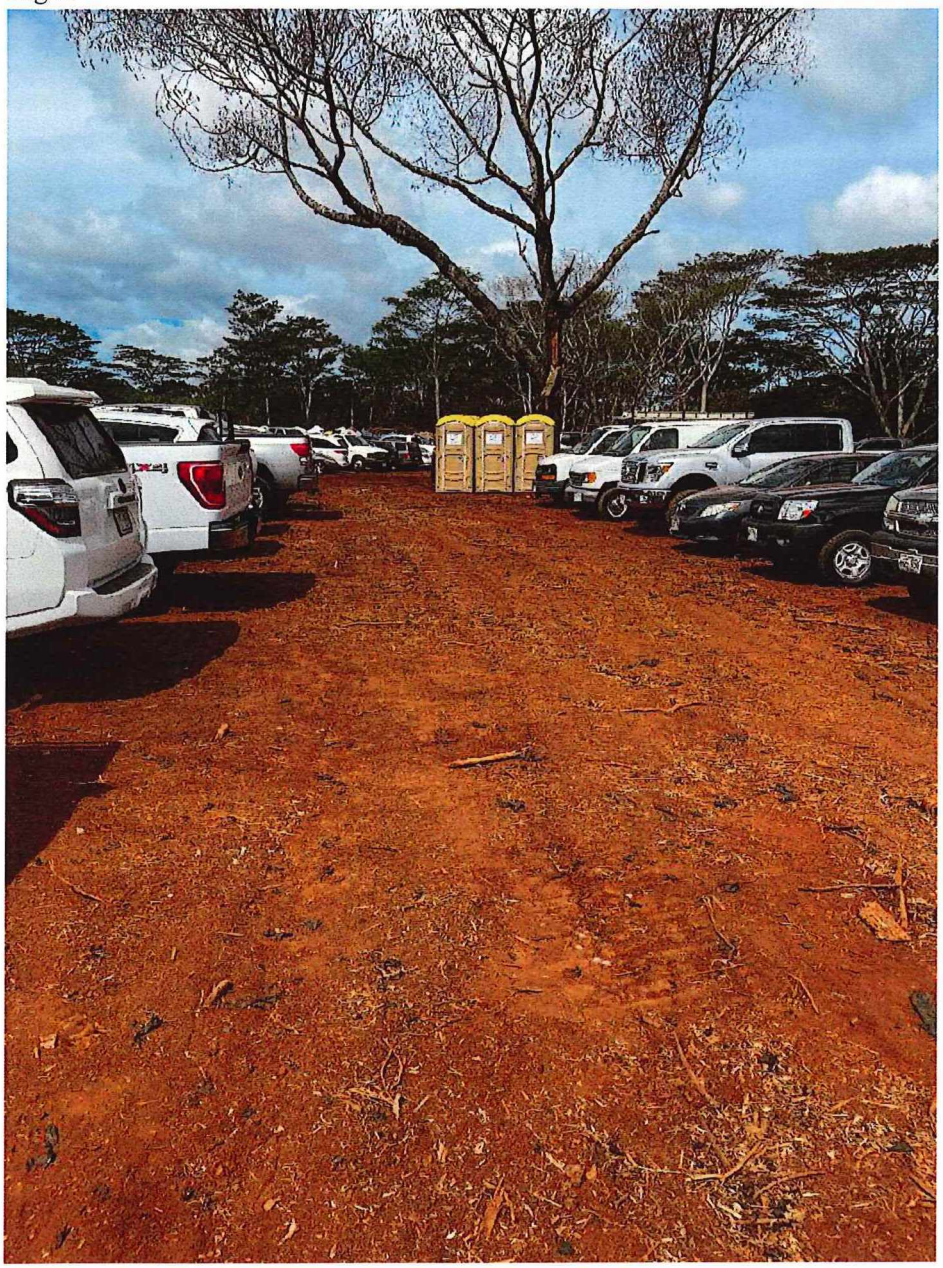
Sincerely,

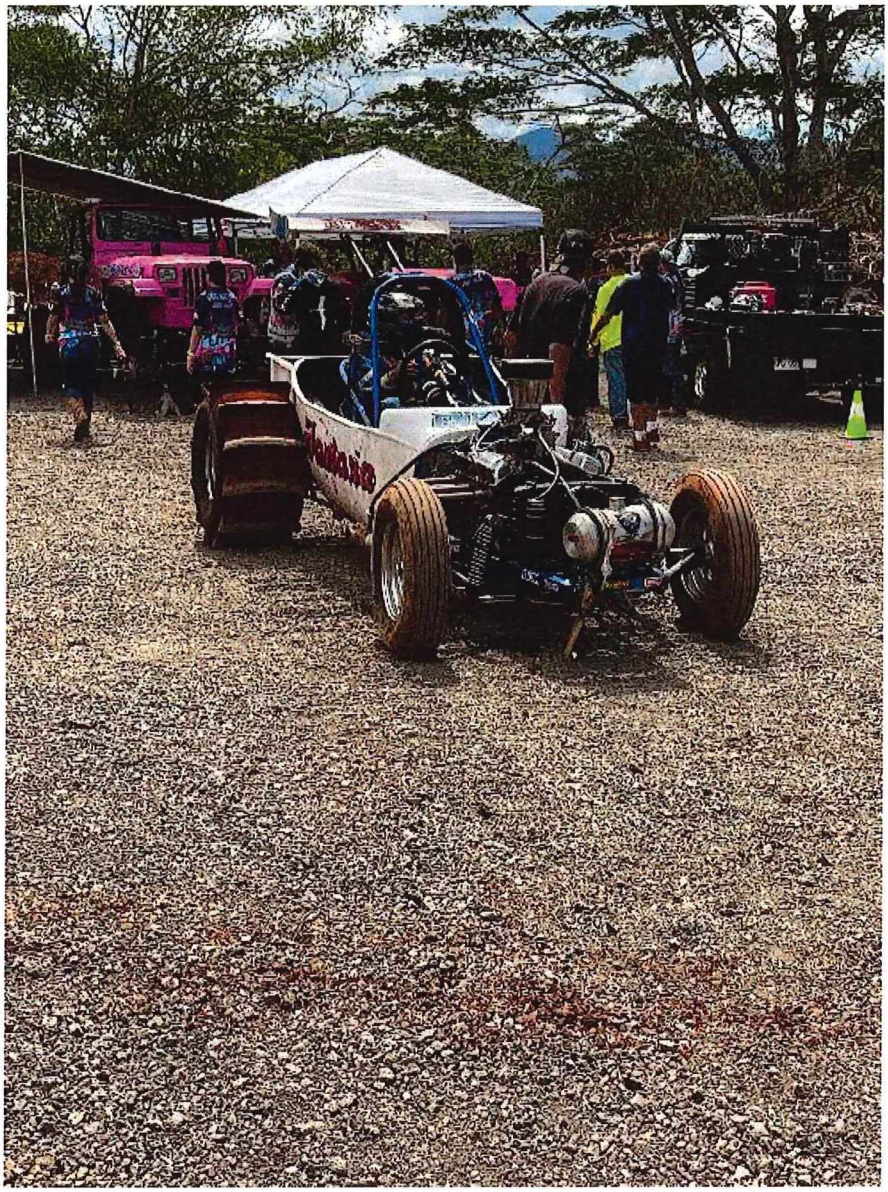
ROGER CLEMENTE
Property Manager

cc: File

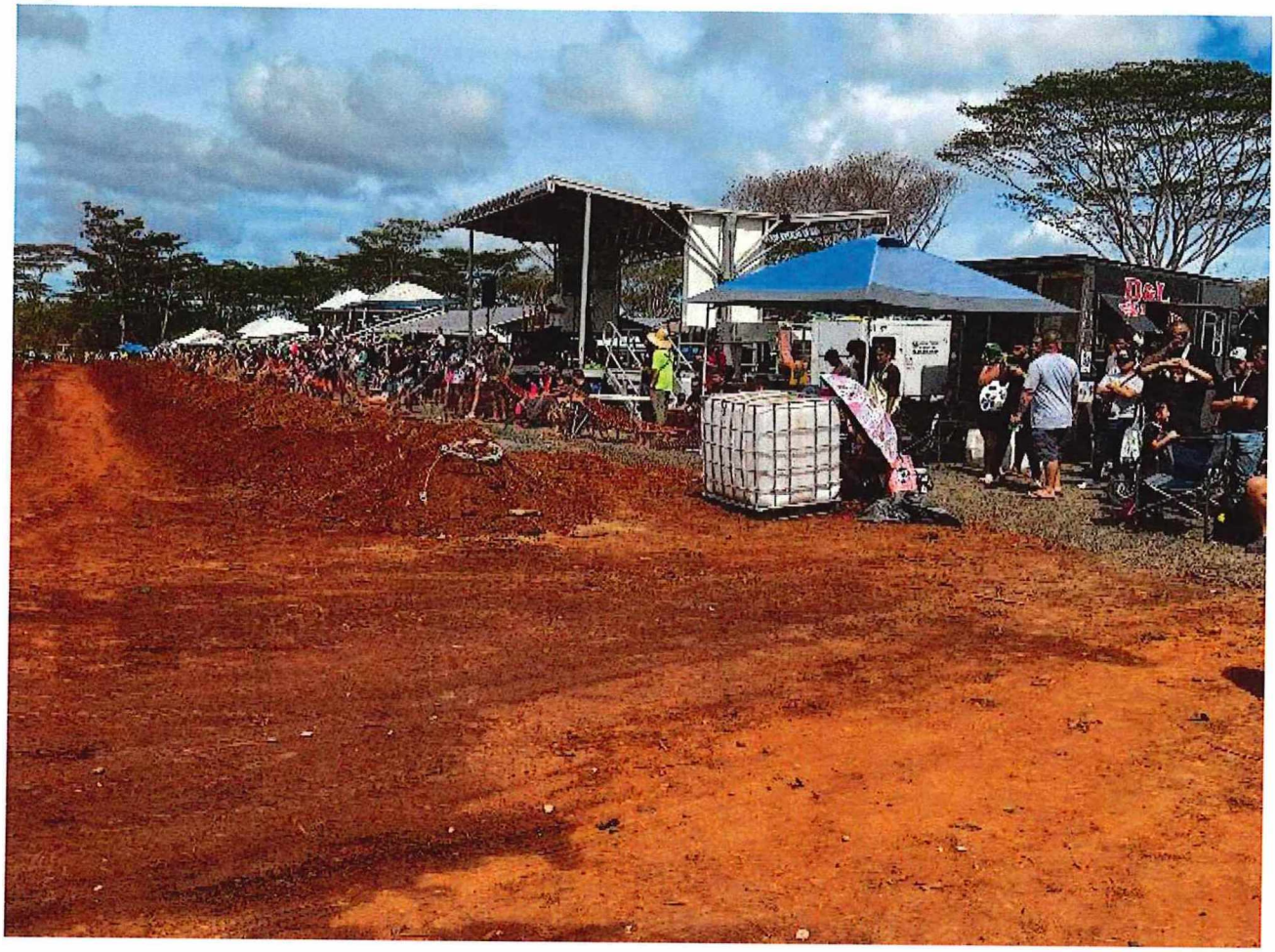
EXHIBIT A

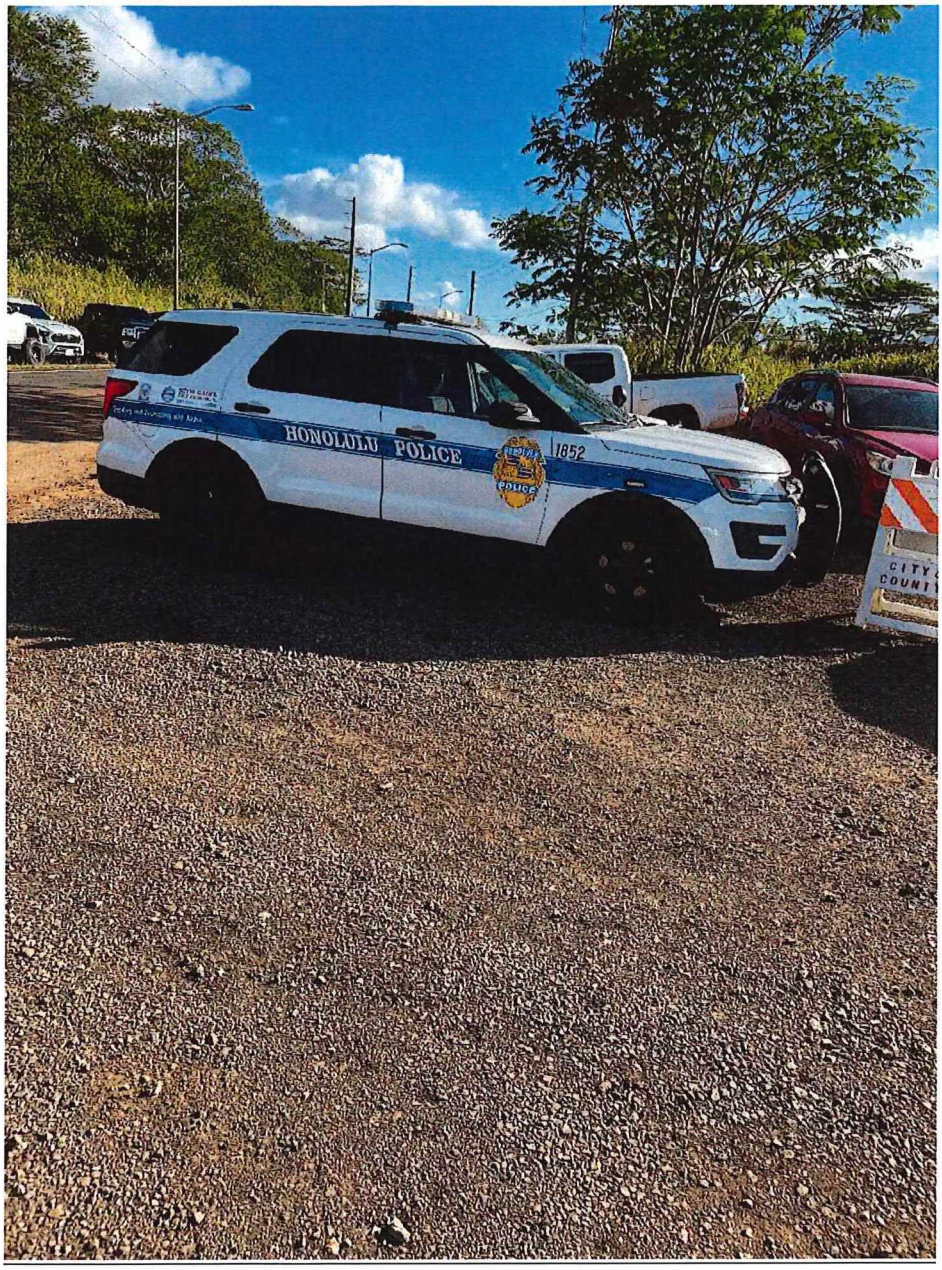

EC






AMBULANCE

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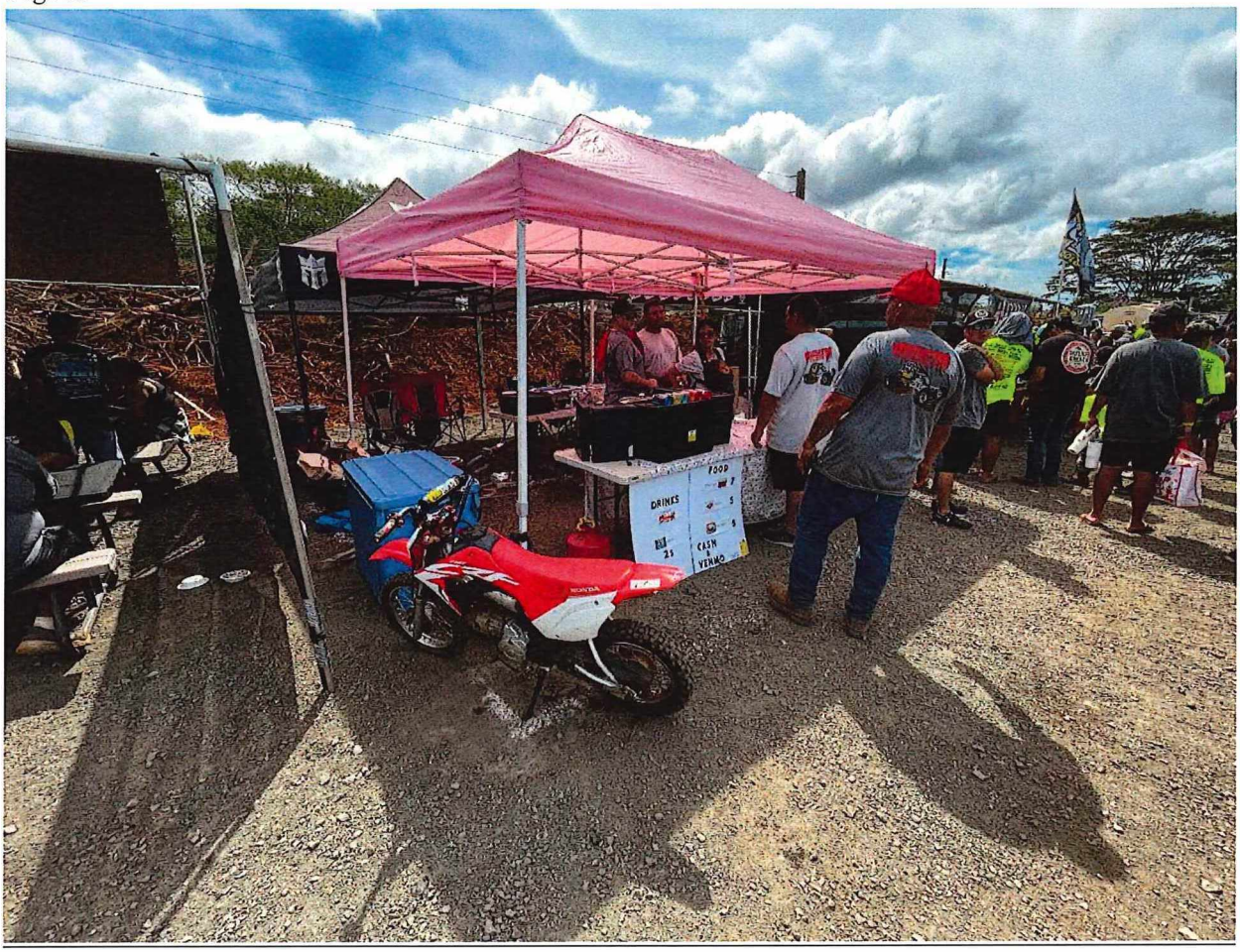
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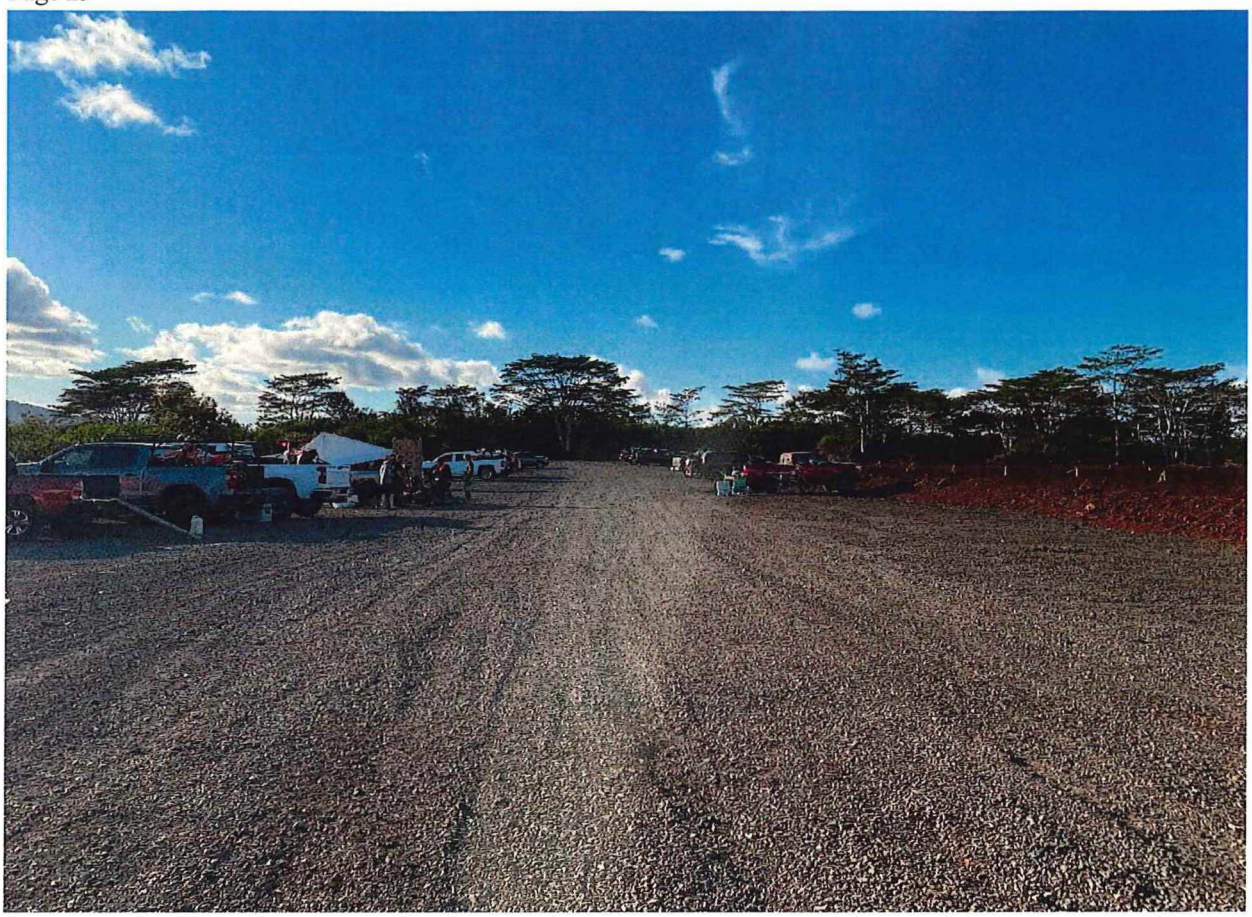

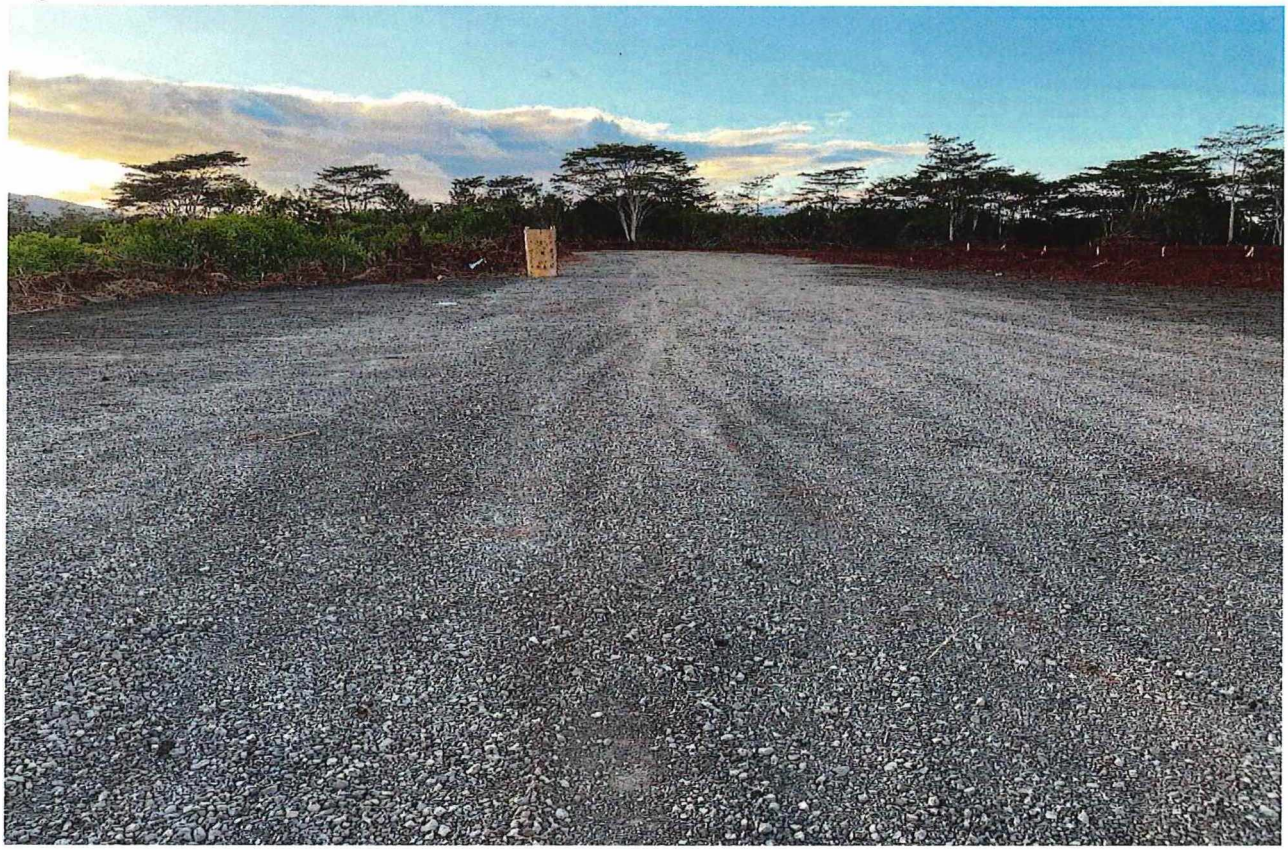


EXIT

F-3

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

NA KIA'I KAI, an unincorporated association, SURFRIDER FOUNDATION, a non-profit corporation, and PESTICIDE ACTION NETWORK NORTH AMERICA, a non-profit corporation, Plaintiffs, v. JAMES NAKATANI in his official capacity as Executive Director of the STATE OF HAWAI'I AGRIBUSINESS DEVELOPMENT CORPORATION, Defendant.	CIVIL NO. 18-00005 DKW-RLP **ORDER RE: SUMMARY JUDGMENT AND DISMISSAL**

INTRODUCTION

Plaintiffs Na Kia'i Kai, Surfrider Foundation, and Pesticide Action Network North America (Plaintiffs) seek injunctive and declaratory relief for alleged violations of the Clean Water Act (CWA), 33 U.S.C. §§1251-1311(a), and breach of public trust under Haw. Const. art. XI §§1, 6, as a result of discharges from the Mānā Plain near Kekaha, Kauai, Hawaii into the Pacific Ocean. Plaintiffs seek summary judgment on both claims, while Defendant Nakatani, as Director of the

State of Hawai'i Agribusiness Development Corporation (ADC or the State), seeks summary judgment on the CWA claim and dismissal of the public trust claim. Plaintiffs also seek to strike an expert report filed by the State as part of its summary judgment briefing.

For the reasons set forth below, Plaintiffs' Motion for Summary Judgment is GRANTED IN PART as to the CWA claim but DENIED as to the public trust claim. The State's Motion for Partial Summary Judgment as to the CWA claim is DENIED, but the Motion to Dismiss the public trust claim is GRANTED. Plaintiffs' Motion to Strike is DENIED as moot.

FACTUAL BACKGROUND

The Area

The Mānā Plain on Kaua'i's western coast contains naturally-occurring wetland areas that have been drained for agricultural production. Defendant's Concise Statement of Facts in Support of Motion for Partial Summary Judgment (Defendant SOF), Dkt. No. 56, ¶1-2; Plaintiffs' Concise Statement in Opposition to Motion for Partial Summary Judgment (Plf. Opp. SOF), Dkt. No. 66, ¶2. To drain the area, a system of unlined drainage canals was built below the natural water table to draw water out of the wetlands. To avoid water standing in the

drainage canals, pumps were installed to draw water through the canals, lift the water up and over coastal dunes, and pump it into the ocean. *Id.* This drainage system consists of forty miles of earthen, unlined canals and ditches, two pumping stations at Kawai'ele and Nohili, and six outfalls where water discharges from the canal system into the Pacific Ocean. Plaintiffs' Concise Statement of Facts in Support of Motion (Plaintiff SOF), Dkt. No. 52, ¶2. In addition, in order to discharge water from some of the outfalls, excavators are used to open sand berms and allow water from the canals to drain into the ocean. *Id.* ¶¶3, 5.

This century-old drainage system, originally built for a sugar mill operated by the Kekaha Sugar Company (KSC), has been controlled and managed by ADC since 2001. Defendant SOF ¶5. The 7000-acres of Mānā Plain land controlled and managed by ADC now contains several operations, including the Pacific Missile Range and various commercial facilities. Defendant SOF 3; Plaintiffs' Motion for Summary Judgment, Dkt No. 51, (Plf. MSJ), at 14. In addition, the town of Kekaha is located in the Mānā Plain. *Id.*

The Mānā Plain borders the Pacific Ocean for approximately nine miles. Plf. MSJ at 8. The adjacent ocean waters are used extensively for recreation, including for fishing and swimming. *Id.*, 14. In 2014 and 2018, the Hawai'i

Department of Health reported to the EPA that the waters in popular beaches in the area were not meeting state water quality standards, threatening the designated uses of the water. *Id.,* Hawai'i Water Quality Monitoring Report (2014 and 2018), Ex. 37-38.

The CWA and NPDES permits

Except where authorized by a National Pollutant Discharge Elimination System (NPDES) permit, the CWA bans the discharge of pollutants into waters of the United States ("WOTUS"). The NPDES permit system requires regulating, monitoring, and public reporting of pollutants discharged into such waters. 40 C.F.R. §122. The EPA administers the NPDES permit system but authorizes states that meet minimum requirements to stand in its shoes. FAC ¶6 (citing 33 U.S.C. §1342; 40 C.F.R. §23.24). DOH administers the NPDES permitting system in Hawai'i. Answer, Dkt. No. 18, ¶18.

In 2008, the EPA promulgated the Water Transfer Rule (WTR), which created a new exemption from NPDES permitting requirements where a water transfer activity (WTA) "conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" and does not add pollutants to the water. 40 C.F.R. §122.3(i).

As the operator of the Mānā Plain drainage ditch system (the System), KSC obtained an NPDES permit, which regulated the discharge of pollutants from the System into the Pacific Ocean. Defendant's Concise Statement in Opposition (Def. Opp. SOF), Dkt No. 68, ¶9. ADC assumed ownership of the System and its NPDES permit in 2001, administratively extending the permit until 2011 when it submitted an NPDES renewal application. Defendant SOF ¶6; FAC ¶60.

In 2015, ADC withdrew its application to renew the System NPDES permit in reliance on the WTR exemption. *Id.* ¶61. As of August 3, 2015, ADC has been without an NPDES permit for the drainage ditch system, which continues to discharge waters into the Pacific Ocean. FAC ¶16; Answer ¶2.

The Pollution

The System collects groundwater and surface waters, including stormwater from ADC's agricultural tenants and stormwater and groundwater containing pollutants from ADC's non-agricultural tenants, and discharges those waters to the nearshore waters of the Pacific Ocean. Plaintiff SOF ¶14. Several of ADC's tenants who sublicense land adjacent to the drainage ditches pollute water that enters the drainage ditch system. *Id.* 17-20. For example, Shredco permits runoff containing pesticides from its green waste material processing operations to

enter the drainage ditch system. Plaintiff SOF ¶18. Another ADC sublicensee, Pohaku, runs a mining and rock crushing operation that emits stormwater runoff, which flows into the System. Plaintiff SOF ¶19.

The Kawai'ele Outfall is the most active of the System's six. Alone, it discharges millions of gallons of water every day from the System into the Pacific Ocean. Plaintiff SOF ¶4. Other System outfalls similarly discharge into the nearshore marine waters within three miles of the coast, occasionally requiring the movement of sand berms by excavator before doing so. *Id.* at ¶¶4, 13. These discharged waters contain sediment and sand from the drainage ditch system, as well as chemicals that seep into the drainage ditch system, including amniomethylphosphonic acid (AMPA), a degradate of glyphosate; dichlorodiphenyldichloroethylene (DDE), a degradate of dichlorodiphenyltrichloroethane (DDT); glyphosate, ametryn, atrazine, bentazon, chlorpyrifos, cispropiconazole, diuron, fipronil, hexazinone, MCPA, metolachlor, prometryn, propoxur, simazine, and trans-propiconazole. *Id.* ¶¶8-9. These waters also contain phosphorus, metals (arsenic, barium, cadmium, chromium, copper, lead, mercury, nickel, silver, zinc), sulfide, phenols, antimony, beryllium, selenium, thallium, and bis-phthalate. *Id.* ¶11.

PROCEDURAL BACKGROUND

On January 16, 2018, Plaintiffs filed a First Amended Complaint (FAC) alleging violations of the CWA and of the public trust by ADC.[1] Dkt. No. 9. On April 3, 2019, Plaintiffs filed a Motion for Summary Judgment (Plf. MSJ). Dkt. Nos. 51-54. On the same day, Defendant filed a Motion for Partial Summary Judgment and Motion to Dismiss (Defendant MSJ). Dkt. Nos. 55-58. These Motions have been fully briefed. Dkt. Nos. 65, 67, 71, 72. On May 5, 2019, Plaintiffs filed a Motion to Strike, for which briefing is also complete. Dkt. Nos. 63, 74, 75. On May 22, 2019, the Court held a hearing on the cross-motions for summary judgment, Defendant's Motion to Dismiss, and Plaintiffs' Motion to Strike. Dkt. No. 77. This disposition follows.

LEGAL STANDARDS

Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any

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[1]The FAC also named as a Defendant Hawai'i Department of Health Director, Virginia Pressler. Ms. Pressler has since been dismissed from this action pursuant to this Court's July 2018 Order (Dkt. No. 37) granting Defendant's Motion to Dismiss (Dkt. No. 14).

material fact and the movant is entitled to judgment as a matter of law." The moving party is entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of a claim in the case on which the non-moving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In assessing a motion for summary judgment, all facts are construed in the light most favorable to the non-moving party. *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005).

Motion to Dismiss

Federal Rule of Civil Procedure 12 allows a defendant to move for dismissal of a claim on the grounds of, *inter alia*, lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(1), (6). "Although sovereign immunity is only quasi-jurisdictional in nature, Rule 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit." *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).[2] A defendant may,

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[2]*Cf. Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 927 (9th Cir.), *cert. denied*, 138 S. Ct. 459 (2017) ("A sovereign immunity defense is 'quasi-jurisdictional' in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6) motion.") (citing *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015), and *Eason v. Clark Cty. Sch. Dist.*, 303 F.3d 1137, 1140 (9th Cir. 2002)).

however, be found to have waived sovereign immunity if it does not invoke its immunity in a timely fashion and takes actions indicating consent to the litigation. *See id.*; *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir.), *amended on denial of reh'g*, 201 F.3d 1186 (9th Cir. 1999).

DISCUSSION

I. Motion for Summary Judgment

Plaintiffs' first count alleges ADC has violated the CWA by discharging pollutants via its drainage ditch system into the waters of the United States without an NPDES permit since August 2015. FAC at 1. Plaintiffs further assert that Nakatani, as director of ADC, ordered ADC to do so. *Id.* Both sides have filed cross-motions for summary judgment on this claim. Dkt. Nos. 51, 55.

ADC asserts that despite the System operating pursuant to an NPDES permit for decades, no NPDES permit is needed now because of the Water Transfer Rule. According to the State, the drainage ditches that comprise the System -- like the Pacific Ocean -- are Waters of the United States (WOTUS), the System pumps at Nohili and Kawai'ele are water transfer activities (WTA), and the WTR exempts WTAs between two WOTUS from NPDES permit requirements. Defendant's Opposition to Plaintiffs' Motion for Summary Judgment (Def. Opp), Dkt. No. 68,

at 19. Plaintiffs do not agree. They respond that (1) the System is not a WOTUS, and the WTR therefore does not apply; (2) the WTR does not apply even if the System transfers water between two WOTUS because pollutants are added to the water during the WTA; and (3) the WTR is invalid. Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Dkt. No. 65 (Plf. Opp.) at 1-2.

The Court need not reach Plaintiffs' third argument because the first and second are dispositive: the System does not involve transfers between WOTUS and, regardless, the addition of pollutants during the would-be WTA excepts it from applicability of the WTR exemption. Plaintiffs' Motion for Summary Judgment is therefore GRANTED with respect to Count I, and Defendant's Motion for Partial Summary Judgement is DENIED.

A. The CWA Violation

Plaintiffs assert that ADC's discharge of water from the System into the Pacific Ocean meets all five elements of a CWA violation. Plf. MSJ at 23. These five elements include: (1) a discharge (2) of pollutants (3) into navigable waters (4) from a point source (5) without an NPDES permit. *Id.* ADC disputes that element four has been satisfied, arguing that under the applicable definitions, the System is not a point source of pollution but rather a navigable waterway that is

therefore a WOTUS. Def. Opp. at 9-14. As a WOTUS, the System is considered a "donor water," and the pollutants that ADC discharges into the "receiving waters," the Pacific Ocean, are exempt from NPDES permit requirements by the WTR. *Id.*, at 19.

Plaintiffs have established, and ADC admits, that ADC discharges water from the System via the Kawai'ele Outfall into the Pacific Ocean. *Id.*, at 2. Indeed, ADC discharges millions of gallons of water daily from Kawai'ele. Plf. MSJ at 23 (citing Ex. 31, Kurano Deposition). Several other System outfalls discharge intermittently. Defendant's Motion for Partial Summary Judgment (Def. MSJ), Dkt. No. 55, at 12. Four outfalls "drain into the nearshore marine waters along West Kaua'i by opening sand berms in the outfalls with an excavator." Plf. MSJ at 24 (citing Ex. 34, ADC Standard Operating Procedure). Plaintiffs have easily shown the first element of a CWA violation.

Plaintiffs have also met element two, that the discharged waters contain pollutants. The CWA defines pollutants as, among other things, "chemical waste, biological material… rock, sand…industrial, municipal, and agricultural waste…" 33 U.S.C. §1362(6). Sediment is also a pollutant. 33 U.S.C. §1314(a)(4); *Natural Res. Def. Counc. v. U.S. EPA*, 863 F.2d 1420, 1424 n.4 (9th Cir. 1988).

The System carries groundwater and stormwater runoff through unlined canals and ditches where it gathers sediment and dirt. Plf. MSJ at 25-26 (citing Ex. 21, Bond Decl.) Plaintiffs have also shown that the water in the System contains pesticide residue, heavy metals and toxins.[3] Plf. MSJ at 26-28. ADC's own sampling shows the presence of chlorophyll, nitrogen, ammonia nitrogen, and nitrate-nitrite, which are all pollutants. *Id.*, Ex. 33, ADC Daily Monitoring Results. And ADC's own NPDES Renewal Application indicates that the drainage water contains "suspended solids" which are understood to be sediment. *Id.*, NKK004442. Even the groundwater itself that flows into and through the System is considered a pollutant under the CWA because its pH differs from that of the Pacific Ocean into which it discharges. *See Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 863 F.2d 1420, 1424 (9th Cir. 1988) (citing 33 U.S.C. § 1314(a)(4)

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[3]ADC quibbles with Plaintiffs' characterization of the water quality survey results (Dkt. No. 53, Ex. 40). Def. Opp. SOF ¶1. ADC argues that water quality tests were conducted on water in the drainage ditch near the Kawai'ele Pump Station, rather than in the Pacific Ocean, and therefore do not reflect the resulting level of pollutants in the ocean. *Id.*; Dkt. No. 53, Ex. 19 at 18. However, ADC does not dispute that the water in the drainage ditch is polluted at the levels the State's water quality report indicates nor does ADC dispute that the water, polluted as it is, is discharged into the Pacific. As such, the distinction appears to be of little consequence. Of note, the absence of information regarding levels of pollution at the outfalls is exactly the information vacuum that would be remedied if ADC was required to obtain an NPDES permit.

(1982)). Further, Plaintiffs' expert hydrologist concludes that, because of the structure of System, groundwater flowing to the drainage ditch is likely contaminated with seepage from a nearby landfill and domestic cesspools outside the Mānā Plain. Plf. MSJ at 19. Although ADC challenges the characterization of the extent of the pollution, it does not dispute that the second element of a CWA violation is met.

Third, Plaintiffs assert that the nearshore area of the Pacific Ocean surrounding Kaua'i is a navigable waterway and is protected under the CWA. *See* 33 U.S.C. §§1362(7-8). Notably, the polluted water discharges from the drainage ditch into the Pacific Ocean in an area containing popular beaches used for water recreation, including Barking Sands Beach and Kekaha Beach Park. Plf. MSJ at 14. The third element is therefore also met.

It is undisputed that, since 2015, ADC has been without an NPDES permit for its discharge of waters from the System into the Pacific Ocean. Def. MSJ at 4; Answer ¶¶2, 7. Element five has therefore also been met.

B. The System Is Not a WOTUS

The parties disagree on the fourth element of a CWA violation, which requires a point source of pollutants. Under Plaintiffs' theory, the System is a

point source of pollution. Plaintiffs assert that "the System and its outfalls fall under the express definition of 'point source' because they are 'discernible, confined and discrete conveyance[s],' and are 'ditch[es] [or] channel[s],' which the Clean Water Act expressly defines as point sources." Plf. MSJ at 31 (quoting 33 U.S.C. §1362(14)). Forty years of NPDES permitting support Plaintiffs' assertion that the System is a point source of pollution.

Under ADC's theory, the System is not a point source of pollution. ADC asserts that, notwithstanding the decades of classifying the System as a point source, the proper classification of the System is as a WOTUS or jurisdictional water under 40 C.F.R. §122.2. Specifically, ADC asserts that, based on an EPA consultant's determination, the water in the drainage ditch system should be considered a protected WOTUS, rather than a point source of pollutants into the ocean. Def. Opp. at 14 (citing Hayes Decl. ¶24-25).[4] ADC explains that, because there is no longer a single point source of industrial pollution (the KSC sugar mill) entering the drainage ditch system, the drainage ditch is now properly treated as its own protected waterway under the CWA. Thus, in ADC's view,

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[4]Plaintiffs have moved to strike the Hayes Declaration.

some of ADC's sublicensees' activities may be point sources of pollution requiring NPDES permits,[5] but the System itself is not a point source of pollution to the ocean. According to ADC, Hawai'i DOH agreed and, following ADC's consultant's direction, reclassified the System as a "receiving water" that should be considered a "state jurisdictional water" such that industrial point-source pollution should be regulated as it enters the System.[6] Def. Opp. SOF ¶9; Def. Opp. at 5.

This reclassification of the System from a point source to a WOTUS is suspect for several reasons. First, treating the drainage ditch system as a WOTUS or jurisdictional water does not comport with the history of the System's use and regulation. Second, the change in how the System is classified is not justified by any intervening change in law or relevant change in circumstances. Third, the reclassification of the System as a WOTUS undermines the purpose of the CWA.

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[5]Under the CWA, agricultural irrigation return flows do not qualify as a point-source of pollution. CWA §402(1)(1-2); CWA §502(14). Thus, many of ADC's tenants do not require NPDES permits for the pesticide-laden runoff that enters the ditch system. Plaintiffs argue that mixed with this agricultural runoff is industrial stormwater runoff that does require a permit. Plaintiff SOF ¶18. Plaintiffs, for instance, allege that Pohaku is an industrial point source and the HDOH has required them to obtain an NPDES permit, which they have failed to do. *Id.* ¶19. That dispute need not be resolved here.

[6]Plaintiffs dispute whether Hawaii DOH has in fact made that determination and, if it has, whether the determination is even proper for consideration here. Plf. Reply at 6.

The history and use of the System indicate an origin, role and purpose entirely different from those waterways protected under the CWA. The drainage ditches were built to create agricultural land from a previously existing wetland. Defendant SOF ¶¶2-4. This System was created, in other words, so that KSC could use the land to produce sugar. The canals and water pumps were used to carry the drained water to the Pacific Ocean so that the polluted water would not stand in or overflow the ditches. *Id.*

For decades, the System was regulated as such. During the many decades of the existence of the drainage ditches and water pumps draining polluted water from the Mānā Plain into the Pacific Ocean, KSC obtained NPDES permits for the System. Plf. MSJ at 20. Those NPDES permits regulated the discharge of the System's waters *into the ocean*.[7] Def. Opp SOF. ¶9. KSC, as operator of the System, was not required to regulate its discharge of pollutants at the point at which they entered the drainage ditch system. *Id.* The history of permitting indicates that the System was viewed as a means of transporting polluted discharge

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[7]Defendant's Statement of Facts here relies on the Hayes Declaration which Plaintiffs moved to strike. However, the basis of the Motion to Strike is not this fact and in any case the Motion to Strike is moot.

into the Pacific Ocean and was viewed in its totality as the point source of pollution, not as a protected, navigable waterway. Recognizing the System for what it is—a series of drainage ditches carrying polluted waters—the State regulated the point at which the System discharged into the waterway the State *did* seek to protect: the Pacific Ocean.

Nothing about the subsequent change in ownership in 2001 from KSC to ADC indicates that the System, which has remained structurally unchanged, should now suddenly be treated as a WOTUS, navigable waterway, or jurisdictional water. Nothing about the structure of the drainage ditches, canals and water pumps has changed since ADC took over from KSC as the operator of the System.

What has changed is the use of the surrounding land, with the proliferation of sources of pollution from one company (KSC) to many companies as sublicensees of KSC's successor (ADC).[8] But this change in land use and owner does nothing to change the structure of the System itself. Just as was the case during KSC's operational years, some of the surrounding businesses (now ADC's

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[8]Notably, even during the time of KSC's operation of the System, various commercial uses of the land surrounding the System already existed. Defendant SOF ¶3.

sublicensees) may not add pollutants to the System, some may add pollutants to the System via exempt means (such as agricultural irrigation return flow), and some may add pollutants through non-exempt means (such as industrial runoff from Pohaku and, previously, KSC). But the nature of ADC's use of the land (through its sublicensees) has not changed the nature of the System and therefore provides no logical support for reclassifying the System from a point source of pollution to a WOTUS.

ADC argues that its classification of the System as a WOTUS is supported by state and federal law. Citing to the CWA and various cases, ADC varyingly argues that the drainage ditches are "canals," "navigable waters," and "tributaries," and that they have a "significant nexus" to jurisdictional waters, such that they are themselves WOTUS. Def. Opp. 12-17. ADC also asserts that the State has classified the System as a State Water and argues that such classification in the State translates into a classification of the System as a WOTUS under the CWA. Def. MSJ at 8-9. Plaintiffs dispute whether the System satisfies any of the definitions of WOTUS offered by ADC. Plaintiffs' Reply in Support of Motion for Summary Judgment (Plf. Reply), Dkt. No. 71, at 3-5. Citing extensive case law, Plaintiffs argue that the groundwater drawn into the System precludes

classification as a WOTUS and that the State's capacious definition of a State Water is inconsequential to the federal definition of a WOTUS. *Id.*

The Court need not resolve the ultimate question of whether the drainage ditch system operated here could ever be classified as a WOTUS because, while the law, as cited by ADC, may allow certain drainage ditch systems to be considered WOTUS, it does not require the Court to disregard how this System has historically been classified and regulated, and what it, in fact, is: a means to convey and discharge polluted water into the Pacific. In more than forty years of NPDES regulation, the System has never been treated as a WOTUS. In the several decades of NPDES regulation, no effort was ever made to regulate the level of pollution entering the System, as would be required if it were a WOTUS under the CWA; no effort was made to keep the System's waters in a usable condition either. The cases and statutory definitions cited to by ADC that indicate a system of drainage ditches *could be* a WOTUS predate ADC's first application to renew the System NPDES permit, such that those definitions could have been relied upon to argue for the System to be treated as a WOTUS. *See* Def. Opp. at 9-17 (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *North Carolina Shellfish Growers Assoc v. Holly Ridge Assocs.*, LLC., 278

F.Supp.2d 654, 672 (2003). Yet neither ADC nor Hawai'i DOH ever sought to do so, and indeed, ADC's withdrawn NPDES renewal application can easily be viewed as advancing the same position on the applicability of the CWA as that advanced by Plaintiffs here. *See* ADC NPDES Renewal Application, February 25, 2011, Dkt. No. 53-4.

No intervening change in the WOTUS definition warranted ADC and Hawai'i DOH's efforts to reclassify the System either. The only arguably relevant regulatory change that did occur was the promulgation of the EPA's WTR in 2008, which exempts polluted waters transferred into a receiving WOTUS from requiring an NPDES permit, *but only if the donor water is itself a WOTUS.* Plf. Reply at 8 (citing 40 C.F.R. 122.3(i) ("water transfer means activity that conveys or connects water of the United States[...]")). The State's reclassification of the System as a WOTUS seeks solely to take advantage of the WTR exemption. The reclassification, in other words, appears opportunistic, rather than factually based, especially where, as here, ADC seeks to twist a law intended to protect waterways to do exactly the opposite.

Importantly, it is Defendant's burden to show that its pollutant-laden discharge from the System falls under an exemption to the CWA. *See N. Cal.*

River Watch v. City of Healdsburg, 496 F.3d 993, 1001 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008) (burden on polluter to prove applicability of regulatory exemption from "waters of the United States"); *United States v. Akers*, 785 F.2d 814, 819 (9th Cir.), cert. denied, 479 U.S. 828 (1986) (the burden falls on the polluter to prove its activities are statutorily exempt from Clean Water Act Section 404, 33 U.S.C. § 1344). ADC's unfounded claim that the System has suddenly changed from a point source of pollution to a WOTUS without any intervening changes to the definition of a WOTUS, to the interpretation of the definition, or to the physical structure or function of the System itself, does not satisfy this burden.

Finally, ADC offers that "HDOH's determination that the Canals are the receiving Jurisdictional Water" cannot be contradicted here without bringing suit against HDOH. Def. Opp. at 17-18. ADC's argument relies on a convoluted interpretation of Plaintiffs' claims, treating Plaintiffs' argument that no exemption to the NPDES permit requirement applies as a challenge to the State's law defining State jurisdictional waters. Plaintiffs make no such challenge to the State's laws, and the Court need not address such a hypothetical.

Moreover, the potential conflict between the instructions and demands of State permitting authorities and this Court's Order suggested by ADC are not proper for consideration here. This Court is not limited in its authority to evaluate CWA violations by the State's laws. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002). While an agency determination is ordinarily afforded deference in some circumstances, ADC has nowhere shown an EPA determination at all—rather, ADC has suggested what the EPA's views might be via ADC's reliance on a contractor's opinion. Plf. Reply at 7; Def. Opp at 4 ("the contractor's assessment was that an NPDES permit was no longer necessary, as there was no longer an industrial point source discharging."). If the State's interpretation of its own laws create a conflict with CWA jurisprudence, or the EPA later makes a determination about the need for an NPDES permit, and those determinations put ADC in an impossible position, that conflict can be resolved by ADC at a later time.

C. The WTR Does Not Apply Because of the Added Pollutant Exception

Building on the unsound premise that the System is a WOTUS, ADC argues that "any discharge from the Canals into the Pacific Ocean is a water transfer from Jurisdictional Water into another. By definition, this activity does not require a

NPDES permit." Def. Opp. at 4 (relying on the EPA's WTR). According to the State, the WTR, codified at 40 C.F.R. §122.3, allows transfers of water from one WOTUS to another without an NPDES permit, even where it might transfer "the most loathsome navigable water in the country into the most pristine one." Def. Reply at 10 (quoting *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1226 (11th Cir. 2009).

However, even assuming, *arguendo*, that the System and the Pacific Ocean into which it discharges are both WOTUS, the transfers at issue here are not exempt under the WTR because *pollutants are added during the transfer*. 40 C.F.R. §122.3(i)(the water transfer exclusion "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.").

Here, it is uncontested that the System's "forty miles of unlined, earthen drainage ditches add pesticide-laden sediment to the transferred waters…" Plf. Opp. at 2; Answer ¶16; Plaintiff SOF ¶¶7-8;[9] Dkt. No. 53 (Plf. Ex. 25: ADC

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[9]Although ADC disputes SOF ¶¶7-8, it does so only to the extent that the statements suggest that the samples taken from the drainage ditches surrounding the outfalls, which show the presence of pesticides, were actually taken from the Pacific Ocean. Def. Opp SOF ¶1. These facts are here used only to support the assertion that the drainage ditches themselves add pesticide-laden sediment to the water. ADC did not object to the statement that "the discharge waters contain sediment from the banks and bottoms of the Mānā Plain Drainage Ditch System." Plaintiff SOF

NPDES Permit Renewal Application (Feb. 25, 2011) at NKK004444-NKK00444540; Ex. 39: Alfredo Lee Letter (Nov. 28, 2011) at ADCID000143-ADCID000174, ADCID000179-ADCID000180, ADCID000190-ADCID000191; Ex 40: Statewide Pesticide Sampling Project, at NKK000215); Dkt. No. 52 (Bond Decl. ¶¶140-145; Ex. 21: Erosion Images); First Amended Complaint ¶74. ADC instead argues that the proper conception of the water transfer activity is not to look at the entire System, including those forty miles of unlined ditches through which pollutants are added, but rather to focus on the two pumps at Kawai'ele and Nohili. Def. Reply at 11-12. Based on this conception of the WTA, ADC argues that the proper inquiry is whether those pumps add pollutants to the transferred water. *Id.* ADC asserts they do not. *Id.*

ADC has the burden of proving that it is eligible for an exemption to the CWA. *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (holding that a party claiming an exception must prove that they acted within the exception). Further, the Court must narrowly construe "claims of an

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¶7. Moreover, in its Answer, ADC admits to FAC ¶74, which states that, "ADC [] self-reported testing results to DOH on or about November 28, 2011. The testing results show the presence of [numerous pollutants] at the Nohili Outfall and Second Ditch." *See* Answer ¶16.

exemption, from the . . . permitting requirements of the [CWA's] broad pollution prevention mandate . . . to achieve the Act's purpose." *N. California River Watch v. City of Healdsburg,* 496 F.3d 993, 1001 (9th Cir. 2007).

Plaintiffs argue that the ditches, the water pumps that draw water through these ditches and pump it into the Pacific Ocean, and the excavation of the sand berms that allows water to flow into the Pacific Ocean should all be viewed collectively as the water transfer activity. Plaintiffs here rely on the plain language of the statute describing a WTA as an "engineered activity" to argue that ADC has failed to establish that the entire engineered System should not be considered part of the WTA. In furtherance of that argument, Plaintiffs have shown via expert testimony, and ADC does not dispute, that the unlined ditches were purposefully built below the natural water table at Mānā Plain to draw water from the surrounding wetlands into the ditches, and the pumps at the end of these ditches then draw that water from throughout the forty-mile system into the Pacific Ocean. And because these miles of "unlined, earthen canals" are "integral parts of the [WTA]" and the "unvegetated and unstable banks are sources of detached sediment [...] contaminated with pesticides[...,]" that System is not an exempt WTA because it adds pollutants. Plf. Opp. at 14-17. Plaintiffs' construction is

surely the proper, and, indeed, the only sensical one. The pumps focused on by the State have no water to draw, move, or ultimately discharge without the ditches purposefully built to first collect that water. That logically leads to the conclusion that the entire System represents the water transfer activity, not the pumps studied in isolation.

Certainly, ADC offers citations to ambiguous regulatory language in which the EPA refers to a water transfer "facility" or "structure" to suggest that the EPA itself intended the term WTA to apply only to an *isolated* structure. Def. Reply at 12 (quoting *National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule*, 73 FR 33697-01, at 33704.). If that were true, the regulation at Section 122.3, or elsewhere, could have said so. It strains credulity, however, to interpret a water transfer activity to mean only a pump or other single structure when the "engineered activity" clearly involves much more than that.

Moreover, as ADC itself identifies, in promulgating the WTR, the EPA described a WTA, stating, "[t]ypically water transfers route water through tunnels, channels, and/or natural stream water features, *and* either pump or passively direct it for uses such as[...] flood control." Def. Opp. at 20 (quoting Federal Register, vol. 73- 115, at 33697 (June 13, 2008)) (emphasis added). The structure of the

sentence suggests that the channels through which water passes and the pumps that move and discharge it are *collectively* considered the water transfer. There is nothing in the language of the rule or EPA's explanation of the rule that suggests the forty miles of unlined ditches and canals at issue here should be excluded from consideration as part of the WTA. In fact, the rule appears to contemplate those exact structures, to include pumping stations, pipes, canals and other structures "used solely to facilitate the transfer of water," as WTAs. *Id.* at 33704

The sole case upon which ADC relies for its crabbed view of the WTA is a non-controlling Eleventh Circuit case applying the WTR. Def. Reply at 12. In *Friends*, the court was similarly faced with a system of canals and a water pump facility pumping polluted water into Lake Okeechobee. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1222 (11th Cir. 2009). ADC relies on *Friends* to argue that the pumps alone are the WTA because the canals that were part of the system in *Friends* were treated as WOTUS, such that the only activity transferring water between two WOTUS—and therefore the only WTA at issue—were the pumps. But nothing in the holding in *Friends* indicates that the court there was asked to parse the meaning of a "water transfer activity" or to determine whether the canals were WOTUS. Indeed, in *Friends,* the court stated, "it is

undisputed that . . . Lake Okeechobee *and the canals* are 'navigable waters." *Id.* at 1216 (emphasis added). In light of that undisputed fact, the court's treatment of the canals as the donor WOTUS and the pumps as the WTA is of little assistance in defining the proper limits of the WTA under the circumstances presented here. Here, unlike in *Friends,* the status of the ditches as WOTUS is heavily disputed. And nothing in the opinion suggests that the history or structure of the system of canals and pumps in *Friends* resembles the System here, such that it can readily answer the question of whether the ditches are properly considered WOTUS or part of the WTA (or both). ADC has provided no Ninth Circuit case law to support its proposed interpretation of the WTA to exclude the pollutant-adding canals and drainage ditches.

With competing definitions of WOTUS and WTA, and little authority cited to offer guidance, the Court cannot find that ADC has satisfied its burden of proving that an exemption applies under the WTR. Because the ditches are logically considered part of the WTA, and because they add pollutants during the transfer activity, the WTR does not exempt the discharge from the System into the Pacific Ocean from NPDES permit requirements.

D. Conclusion

The parade of horribles ADC sets forth is unmoving. ADC claims that "should the water transfer cease, the Mānā Plain would be inundated with water, causing extensive adverse effects to the Pacific Missile Range Facility, Kekaha town residences and commercial businesses, and agriculture and other uses on the Plain." Def. Opp. at 3. Of course, Plaintiffs do not ask the Court to enjoin ADC's discharge of water from the System; they ask only that the Court require ADC to obtain an NPDES permit to do so. Flooding of the Mānā Plain and military sites is not the proximate outcome of a requirement that ADC resume its efforts to obtain permits for the activities it previously conducted under NPDES requirements. Rather, ADC's compliance with NPDES permitting requirements will generate more data gathering and facilitate additional public scrutiny of its water discharges, as was the case prior to 2015.

There is no question that ADC discharges polluted water into the near-shore waters of the Pacific Ocean off Kauai's western coast on a daily basis via the Mānā Plain drainage ditch system, and that it does so without an NPDES permit. It is undisputed that the water discharged contains various pesticides and agricultural chemicals, byproducts of agricultural chemicals, and heavy metals, as well as

sediment from the unlined canals through which it passes. It is further undisputed that these pollutants include those from which the CWA seeks to protect waterways and that the near-shore waters of the Pacific Ocean are protected under the CWA. Thus, no material facts remain in dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The undisputed facts show that each of the five elements of a CWA violation are present. The undisputed facts also show that the WTR does not apply to exempt the State's conduct from the application of the CWA because pollutants are added to the water flow during the transfer.

The Court GRANTS Plaintiffs' Motion for Summary Judgment on Count I and DENIES Defendant's Counter-Motion on the same.

II. Motion to Dismiss

In Count II, Plaintiffs allege that the same conduct on which their CWA claim is based also amounts to the State's violation of its public trust duties under the Hawai'i State Constitution, Article XI; Hawai'i Revised Statutes ("HRS") § 342D-4; and Hawai'i Administrative Rules ("HAR") § 11-54-1.1(b). Plaintiffs move for summary judgment on this Count, arguing that "ADC has violated and continues to violate its public trust duties… by failing to conserve and protect the nearshore marine waters along West Kaua'i." Plf. MSJ at 43. ADC moves to

dismiss this claim for lack of subject matter jurisdiction. Def. MSJ at 13. It argues that because "Plaintiffs have cited to no federal laws or regulations to support their [public trust] claim," ADC has immunity in this Court "under the Eleventh Amendment and the principles of sovereign immunity." *Id.*

Plaintiffs do not contest the applicability of the Eleventh Amendment to their state-law claims against ADC. Instead, they assert that ADC expressly waived this defense by not moving to dismiss this count sooner and by "admitting that so long as Plaintiffs' federal claims remain pending, this Court has pendent jurisdiction over Plaintiffs' public trust claim." Plf. Opp. at 35.

The application of the Eleventh Amendment and principles of sovereign immunity to Plaintiffs' state-law breach of public trust claim against Nakatani in his official capacity is not reasonably disputed. Because the Court determines that Nakatani has neither expressly waived the defense of sovereign immunity nor implicitly waived it based upon his conduct in this matter, Defendant's Motion to Dismiss Count II is GRANTED. Plaintiffs' Motion for Summary Judgment as to this Count is DENIED.

A. Relevant Procedural Background

On January 16, 2018, Plaintiffs filed their FAC, naming Nakatani in his official capacity as Director of ADC and Virginia Pressler in her official capacity as Director of DOH. Dkt. No. 9. The FAC included three causes of action: (1) CWA and HRS § 342D-50(a) claims against Nakatani; (2) a breach of public trust claim against Nakatani; and (3) a breach of public trust claim against Pressler. FAC ¶¶28- 29. Pressler moved to dismiss Plaintiffs' sole claim against her for public trust violations under state law, based upon the State's sovereign immunity. Dkt. No. 26. Nakatani joined in Pressler's motion. Dkt. No. 32. On July 13, 2018, the Court granted Pressler's Motion to Dismiss Count III. Dkt. No. 37. On April 3, 2019, after the completion of discovery, ADC filed a Motion to Dismiss Count II. Dkt. No. 54.

B. Sovereign Immunity Bars State Law Claims Against ADC in Federal Court

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "A State

may waive its sovereign immunity at its pleasure, *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675–676 (1999), and, in some circumstances, Congress may abrogate it by appropriate legislation. But absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State" or its agent sued in his or her official capacity. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253–54 (2011) (footnote omitted).

Here, the Eleventh Amendment immunizes Nakatani, a state official sued in his official capacity, from state law claims brought in this court. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017). *See* FAC ¶8 ("James Nakatani, in his official capacity as Director Agribusiness Development Corporation [is] breaching [his] public trust duties to conserve and protect water resources, including nearshore marine and inland waters, under article XI, §§ 1 and 6 of the Hawai'i Constitution."). Thus, to the extent Plaintiffs seek declaratory and/or prospective injunctive relief via

their state-law claims against Nakatani, those claims are barred by the Eleventh Amendment, and no exception applies.[10]

C. The State Has Not Waived Sovereign Immunity

Plaintiffs do not contest the initial application of sovereign immunity to Count II. However, they contend that the State waived any such defense through litigation conduct that was incompatible with an intent to preserve that immunity. The Ninth Circuit explains that "Eleventh Amendment immunity is an affirmative defense that must be raised 'early in the proceedings' to provide 'fair warning' to the plaintiff." *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (quoting *Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001) (quoting *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d at 761), *amended by* 201 F.3d 1186 (9th Cir. 2000)) (internal citation omitted). Because such immunity is an affirmative defense, it can be waived. *Id.* "The test employed to determine

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[10]Under the *Ex Parte Young* doctrine, *see* 209 U.S. 123 (1908), a federal court may enjoin a state official's future conduct when a plaintiff brings suit alleging a violation of federal law, *Edelman v. Jordan*, 415 U.S. 651, (1974), but not where, as here, a plaintiff alleges a violation of state law. *Pennhurst*, 465 U.S. at 106 (stating that "when a plaintiff alleges that a state official has violated state law," then "the entire basis for the doctrine of *Young* ... disappears"); *see also McNally v. Univ. of Hawaii*, 780 F. Supp. 2d 1037, 1056 (D. Haw. 2011) (discussing *Ex Parte Young* doctrine).

whether a state has waived immunity 'is a stringent one.'" *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) (quoting *In re Mitchell*, 209 F.3d 1111, 1117 (9th Cir. 2000)). "A state generally waives its immunity when it 'voluntarily invokes [federal] jurisdiction or . . . makes a 'clear declaration' that it intends to submit itself to [federal] jurisdiction.'" *Id.* (quoting *In re Lazar*, 237 F.3d 967, 976 (9th Cir. 2001)) (alterations in original). "Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.'" *Id.* (quoting *Hill*, 179 F.3d at 758).

Plaintiffs offer two justifications for their waiver argument. Neither is persuasive. The State did not sit on its Eleventh Amendment rights, wait until late in the proceedings, or act in a manner inconsistent with an intent to preserve its sovereign immunity. Nor has the State made a clear declaration or otherwise conducted itself in a way to cause anyone to reasonably believe that it intends to submit to federal jurisdiction with respect to Plaintiffs' state-law claims. Plaintiffs' assertions to the contrary are unsupported.

First, the waiver arguments set forth by Plaintiffs here are nearly identical to those set forth in opposition to Pressler's Motion to Dismiss, which this Court

granted. Dkt. No. 37. The analysis here does not differ and need not be repeated.

Next, Plaintiffs argue that ADC waived its sovereign immunity defense by waiting to file a Motion to Dismiss ten months after the Court granted Pressler's motion on the same grounds. Plf. Opp. at 36. However, in his Motion for Joinder in Pressler's Motion to Dismiss, Nakatani stated that he would be filing a similar motion regarding the state law claims against him in this case. *Id.* (citing Dkt. No. 32). There is no unfair delay here because Plaintiffs had ample notice of Nakatani's intent to file the Motion now before the Court.

Moreover, the Court notes that Ninth Circuit case law reflects a clear aversion to finding waiver based on an assertion that sovereign immunity was invoked too late in a proceeding. Specifically, in *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997), the Ninth Circuit concluded that a sovereign immunity defense had not been waived because it had been raised in the defendants' answer and pretrial statement, even though the defendants did not otherwise litigate the defense in the district court, litigating it for the first time on appeal. *Ashker* is not an anomaly either. In *Gamboa v. Rubin*, 80 F.3d 1338, 1350 (9th Cir. 1996), *vacated on other grounds as recognized in Hill v. Blind*

Indus. & Services of Md., 179 F.3d at 763, the State of Hawai'i raised the defense of sovereign immunity only in its answer, and then proceeded to litigate the substance of the case before the district court by filing a motion for summary judgment. The Ninth Circuit, in particularly definitive language, concluded that the State had not waived the defense of sovereign immunity, stating: "That Hawai'i did not raise the issue in the district court except in its answer does not amount to a waiver of immunity." Here, even prior to this Motion to Dismiss, ADC raised its sovereign immunity defense as the "Third Affirmative Defense" in its Answer, stating, "Plaintiffs' claims are barred against ADC under the doctrine of sovereign immunity." Answer ¶31. Another Ninth Circuit case, *Hill v. Blind Indus. & Services of Md.*, 179 F.3d at 763, is equally instructive. In *Hill*, the Ninth Circuit concluded that sovereign immunity *had been waived, but only* because the defense was raised for the first time on the opening day of trial. *Id.* at 763. The defense had never been raised, not even in an answer, prior to that time. Under these far from demanding standards, ADC's sovereign immunity defense is timely.

Further, ADC neither voluntarily invoked federal jurisdiction nor made a "clear declaration" that it intended to submit itself to federal jurisdiction. *Cf. Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002) (holding a

state waived its Eleventh Amendment immunity by removing the case to federal court). Contrary to Plaintiffs' assertion, ADC's statement in its answer that "this Court may exercise supplemental jurisdiction *only if* Plaintiffs' CWA claims remain pending" is not an express waiver of immunity or invocation of federal jurisdiction. Answer, Dkt. No. 18, ¶14. Instead, it is an indication that ADC acknowledged only a limited basis for this Court's jurisdiction. Under these circumstances, the Court will not infer a waiver of sovereign immunity where the facts indicate precisely the opposite intent, based upon the State's conduct in this litigation.

The Motion to Dismiss based on sovereign immunity is timely, and the State neither expressly nor impliedly waived that defense at any time. The Motion to Dismiss Count II is therefore GRANTED.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is GRANTED IN PART with respect to Count I (violation of the CWA) and DENIED IN PART as to Count II (state-law violation of public trust). Defendant's Motion for Partial Summary Judgment on Count I is DENIED. Pursuant to the Eleventh Amendment and principles of sovereign immunity,

Defendant is immune from suit in this court with respect to the breach of public trust claims, and Defendant's Motion to Dismiss Count II is therefore GRANTED. Plaintiffs' Motion to Strike is DENIED as moot.

IT IS SO ORDERED.

DATED: July 9, 2019 at Honolulu, Hawai'i.

Derrick K. Watson
United States District Judge

Appendix 3 – Na Kia'i Kai, et al. v. County of Kauai and DOH, Case No. 22-cv-00304-DKW-KJM (2023)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

NA KIA'I KAI, *et al.*,

Plaintiffs,

vs.

COUNTY OF KAUA'I, ELIZABETH A. CHAR, *in her official capacity as Director of Health of the Department of Health, State of Hawai'i*,

Defendant.

Case No. 22-cv-00304-DKW-KJM

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs Na Kia'i Kai and Surfrider Foundation (Plaintiffs) move for summary judgment against Defendants County of Kaua'i (County) and Elizabeth Char in her official capacity as the Director of the Department of Health (DOH) on Plaintiffs' sole claim that Defendants violated the Clean Water Act (CWA) by discharging polluted water from the Kikiaola Harbor Drain into waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. The County has taken no position with respect to the motion for summary judgment. The DOH, though, opposes the relief sought, essentially arguing that a NPDES permit is unnecessary for the discharges alleged here.

Having reviewed the parties' briefs, statements of fact, the record generally, and applicable law, the Court finds that Plaintiffs are clearly entitled to summary judgment with respect to their claim. Factually, DOH does not properly dispute *any* of the factual statements or evidence presented by Plaintiffs, given that DOH does not present *any* evidence in support of its purported disputes. Moreover, the meager evidence cited by DOH in support of its own factual statements does not actually support the same. With their factual premise established, each element of Plaintiffs' CWA claim is evident, including the discharge of a pollutant to navigable waters from a point source without a NPDES permit. Therefore, as more fully discussed below, the motion for summary judgment, Dkt. No. 39, is GRANTED.

PROCEDURAL BACKGROUND

On July 14, 2022, Plaintiffs initiated this lawsuit against the County and DOH, bringing one claim related to the County's alleged violation of the CWA by discharging polluted water from Kikiaola Harbor Drain into waters of the United States without a NPDES permit. Dkt. No. 1. Plaintiffs seek injunctive relief, requiring the County to apply for a NPDES permit and DOH to process and issue the same, as well as civil penalties. In August 2022, the County and DOH each answered. Dkt. Nos. 11, 14.

On March 31, 2023, Plaintiffs filed the instant motion for summary judgment (motion). Dkt. No. 39. Plaintiffs also filed a concise statement of facts (PSOF). Dkt. No. 40. Thereafter, the Court set the motion for hearing on June 9, 2023, with briefing pursuant to Local Rule 7.2, which meant that responses to the motion were due by May 19, 2023. *See* Dkt. No. 43; Local Rule 7.2. On April 17, 2023, prior to the response deadline, the parties submitted a joint stipulation, which bifurcated the "liability" and "remedy" portions of this case. Dkt. No. 50. The instant motion concerns the "liability" phase. *See id.* at 2.

Subsequently, on May 17, 2023, Plaintiffs and the County submitted a stipulation regarding the motion. Dkt. No. 52. Specifically, therein, the County agreed to take no position on the motion, and Plaintiffs agreed to waive pursuit of attorneys' fees against the County during the "liability" phase of this case, together with certain civil penalties. A day later, the County filed its statement of no position with respect to the motion. Dkt. No. 54.

On May 19, 2023, DOH filed an opposition to the motion. Dkt. No. 55. DOH also filed a response to Plaintiffs' concise statement of facts, as well as its own statement of additional facts (DSOF). Dkt. No. 56. On May 26, 2023, Plaintiffs filed a reply in support of the motion, as well as a response to DOH's

statement of additional facts. Dkt. Nos. 61, 62. After vacating the hearing on the motion, Dkt. No. 63, this Order now follows.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." When the moving party bears the burden of proof, "it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted...." *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992). This means that the movant "must establish beyond controversy every essential element" of its claim. *See S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (quotation omitted). In assessing a motion for summary judgment, all facts, including disputed facts, are construed in the light most favorable to the non-moving party. *Nelson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009); *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005).

FACTUAL BACKGROUND

The facts in the light most favorable to DOH, as the party opposing the motion, reflect the following. When it is opened, the Kikiaola Harbor Drain Outfall (Outfall) is the point at which water flowing from the Kikiaola Harbor

Drain (Drain)[1] enters the Pacific Ocean within three miles of the coast. PSOF at ¶¶ 4, 19; DSOF at ¶ 1. The Drain is a ditch. PSOF at ¶ 3.[2] In addition, the channels and canals that connect to the Drain are unlined, earthen ditches. Decl. of Andrew P. Hood at ¶ 11, Dkt. No. 40-26.

The waters discharged from the Kikiaola Harbor Drain System contain sediment. PSOF at ¶ 12; DSOF at ¶ 1. Some of this sediment originates from the banks and beds of the Drain and its connecting ditches. Hood Decl. at ¶ 12. Stormwater runoff is collected within the boundaries of the "Waimea 400 Parcel" and, when an earthen berm is removed from the Drain, "polluted" water from the Waimea 400 Parcel flows through the Drain into the Pacific Ocean at the Outfall. DSOF at ¶ 1(a). The waters discharged from the Kikiaola Harbor Drain System contain enterococci, which enter via stormwater runoff from the surrounding land, including the Waimea Wastewater Treatment Plant. PSOF at ¶ 16; DSOF at ¶ 1.

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[1]The Court notes that DOH appears to define Kikiaola Harbor Drain as Kikiaola Stream. *See* DSOF at ¶ 1(a). Although the Court has not been made aware of a meaningful difference in the parties' differing terms, herein, the Court uses Kikiaola Harbor Drain or the Drain.

[2]DOH objects to the characterization of the Drain as a ditch. DSOF at ¶¶ 2, 3(a), 3(b). DOH does so, though, without citing to *any* evidence. *See id.* This is improper given the evidence to which Plaintiffs cite, notably, DOH's own admission in its Answer and in its "Mana Plain Site Report", both of which concede that the Drain is a ditch. *See* PSOF at ¶ 3 (citing, *inter alia*, Dkt. No. 11 at ¶ 1 ("the modified stream channel that ends at Kikiaola Small Boat Harbor is an unlined earthen ditch") (definition omitted), Dkt. No. 40-24 at 9-10); Fed.R.Civ.P. 56(c)(1)(providing that a party asserting that a fact is genuinely disputed must support the same by either citing to evidence in the record or showing that materials cited by the movant do not establish the fact). Here, DOH has done neither.

The discharged waters also contain TPH-diesel, oil, and grease, which enter via stormwater runoff from the surrounding land, including a gravel and asphalt plant. PSOF at ¶ 17; DSOF at ¶ 1. The discharged waters also contain nutrients, including nitrogen, total kjeldahl nitrogen, total phosphorous, and nitrate-nitrite. PSOF at ¶ 18; DSOF at ¶ 1.

Since at least May 15, 2017, the County has been solely responsible for authorizing discharges from the Outfall into the Pacific Ocean. PSOF at ¶ 5; DSOF at ¶ 1. Since August 22, 2019, the County has owned, operated, and maintained the portion of the Drain located mauka (mountain-side) of the Kaumuali'i Highway, as well as ditches located within the boundaries of the Waimea 400 Parcel that are connected to the Drain. PSOF at ¶ 6; DSOF at ¶ 1. Upon the County's authorization, the Outfall is opened by breaching one or more earthen berms to allow drainage waters to enter the Pacific Ocean. PSOF at ¶ 8; *see* DSOF at ¶ 1(c). In recent years, the County has authorized the opening of the Outfall on at least three occasions: approximately March 17, 2020, March 12, 2021, and December 6, 2021. PSOF at ¶ 9; DSOF at ¶ 1. The County will continue to authorize the opening of the Outfall during times of significant rainfall events. PSOF at ¶10; DSOF at ¶ 1.

The County does not have a NPDES permit for pollutant discharges from the Outfall to the Pacific Ocean. PSOF at ¶ 20; DSOF at ¶ 1. In fact, there has not been a NPDES permit in place for pollutant discharges from the Outfall since August 3, 2015, approximately two years before the County became solely responsible for it. PSOF at ¶ 21; DSOF at ¶ 1.[3]

DISCUSSION

In the motion, Plaintiffs argue that they are entitled to summary judgment on their sole claim of a violation of the CWA because the County is discharging pollutants into navigable waters from a point source without a NPDES permit. For the reasons discussed below, the Court agrees.

A violation of the CWA occurs when a defendant: (1) discharges (2) a pollutant (3) to navigable waters (4) from a point source (5) without a NPDES permit. *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305,

[3]In its additional statement of facts, DOH asserts (1) the Drain is a "State water", and (2) the Drain is a "navigable water of the United States[] and has the characteristics of a stream." DSOF at ¶ 4. The evidence to which DOH cites, however, supports neither statement. First, the "Mana Plain Surface Water Quality Regulatory Analysis" on which DOH relies does not state that the Drain is a "State water." Rather, it states that "the modified stream channels, canals, and ocean outlets associated with *ADC's [Agricultural Development Corporation] Mana Plain facility* are state waters...." Moreover, the cited document is one created "at the direction" of DOH. Dkt. No. 57 at 2. DOH cannot simply create so-called facts to its liking. Second, the letter from the U.S. Army Corps of Engineers, on which DOH also relies, does not state that the Drain is a navigable water of the United States with characteristics of a stream. Rather, it states that "*the outlet to the Pacific Ocean at Kikiaola Harbor* has been determined to be a Section 10 water" and is "associated with a stream." Dkt. No. 59-1 at 2.

308-309 (9th Cir. 1993). Here, the County does not dispute that Plaintiffs have established each of these elements. *See* Dkt. Nos. 38, 53. For its part, DOH does not dispute four of the five elements above. Specifically, DOH does not dispute that the County (1) discharges (2) pollutants (3) to navigable waters (5) without a NPDES permit. In other words, the only element DOH disputes is whether the County's discharges of pollutants to navigable waters without a NPDES permit come (4) from a point source. *See generally* Dkt. No. 55. The Court, therefore, focuses its analysis below on that element.

Plaintiffs argue that the discharges here come from a point source because the Kikiaola Harbor Drain System consists of ditches, which the CWA expressly defines as a type of point source. Dkt. No. 39-1 at 26-27. In light of the facts set forth above, which, as explained, have not been disputed or, at least, properly disputed by DOH, the Court agrees. Specifically, the facts show that the Drain is a ditch and the channels and canals that connect to it are unlined, earthen ditches. Under the CWA, therefore, the discharges at issue here come from a point source. *See* 33 U.S.C. § 1362(14) (defining "point source" as "any discernible, confined and discrete conveyance, including but not limited to any…ditch….").

DOH argues otherwise. First, DOH appears to argue that, because there are allegedly nonpoint sources within the Mana Plain, of which the Drain is a part, the

entire Plain should be subject to nonpoint source regulation—regulation that DOH asserts is "currently being developed" by the state. Dkt. No. 55 at 3-5. DOH provides neither legal nor factual support for this proposition. Specifically, DOH cites not one piece of evidence for the proposition that there are nonpoint sources within the Mana Plain. *See id.* Similarly, DOH cites not one case to support the proposition that, even if an area contained both point and nonpoint sources, the CWA's NPDES permit requirements are essentially waived with respect to the area's point sources. *See id.* Therefore, the Court does not find this to be a persuasive reason to ignore the plain language of the CWA.

Second, DOH argues that the Drain is a navigable water or a "Water of the United States" and, because it flows into the Pacific Ocean, which is also a Water of the United States, discharges from the same are excluded from needing a NPDES permit. Dkt. No. 55 at 6-9. As noted earlier, however, the evidence to which DOH cites for the proposition that the Drain is a navigable water does not, in fact, support the same. *See supra* n.3. At most, it suggests that the *Outfall* may be a navigable water—something that does nothing to substantiate that the water mauka of the Outfall, *i.e.*, water in the Drain that leads to the Outfall, is similarly navigable water. Moreover, even it was, DOH fails to adequately establish that the same would be excluded from NPDES permit requirements.

Specifically, as DOH acknowledges, to be exempt from NPDES permit requirements, the transferring Water of the United States must not introduce pollutants into the receiving Water of the United States. *See* Dkt. No. 55 at 7 (citing 40 C.F.R. § 122.3(i) (providing that the exclusion from NPDES permit requirements "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.")). Here, Plaintiffs have established and, as mentioned, DOH does not dispute, that the Kikiaola Harbor Drain System, which includes the Drain and the Outfall, discharges pollutants into the Pacific Ocean. This is more than sufficient to establish that the exemption upon which DOH relies does not apply here. *See Na Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1109 (D. Haw. 2019) (concluding that "the entire [Mana Plain Drainage Ditch] System represents the water transfer activity, not the pumps studied in isolation."). Therefore, the Court rejects these arguments as grounds to ignore the CWA's NPDES permitting requirements.[4]

Because Plaintiffs have established each of the elements of their sole claim under the CWA, the Court GRANTS the motion for summary judgment, Dkt. No. 39, on the issue of liability.

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[4]At the conclusion of its opposition, DOH asserts that its determination–that a NPDES permit is not required for the Drain–should not be set aside "without an opportunity to provide new and additional facts not available to this Court in 2019" when *Nakatani* was issued. Dkt. No. 55 at

CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' motion for summary judgment, Dkt. No. 39. The parties are instructed to contact the assigned Magistrate Judge for purposes of preparing a Fed.R.Civ.P. 16 scheduling order for the "remedy" portion of this case. *See* Dkt. No. 50 at 4.

IT IS SO ORDERED.

DATED: June 13, 2023 at Honolulu, Hawai'i.

Derrick K. Watson
Chief United States District Judge

10. The instant motion provides precisely that opportunity. Yet, as described, DOH has abjectly failed to present any evidence disputing Plaintiffs' statements of fact and, with respect to DOH's own statements, evidence that is inapplicable. Moreover, DOH has not suggested that any new facts it wishes to present are unavailable to it and, thus, may warrant a continuance of the instant motion. *See* Fed.R.Civ.P. 56(d). Therefore, the Court does not find this plea to be a ground to ignore the CWA either.

Appendix 4 – Na Kia'i Kai and Surfrider Foundation v. County of Kauai and DOH Civil No. 22-00304 DKW-KJM (2024)

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

NĀ KIA'I KAI, an unincorporated association, and SURFRIDER FOUNDATION, a non-profit corporation, Plaintiffs, v. COUNTY OF KAUA'I, and ELIZABETH A. CHAR, in her official capacity as Director of Health of the DEPARTMENT OF HEALTH, STATE OF HAWAI'I, Defendants.	Civil No. 22-00304 DKW-KJM SETTLEMENT AGREEMENT AND ORDER (Remedy Phase); ATTACHMENTS A – B

* Pursuant to Local Rule 10.2(b), please refer to the signature page for the complete list of parties represented.

SETTLEMENT AGREEMENT

WHEREAS, in July 2019, this Court ruled in a previous related lawsuit that discharging pollutants from the Mānā Plain Drainage Ditch System—which has six (6) ocean outfalls including the Kīkīaola Harbor Drain—to the Pacific Ocean without the required National Pollutant Discharge Elimination System ("NPDES") permit violates the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, *see Nā Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1100, 1103, 1104 (D. Hawai'i 2019);

WHEREAS, in July 2018, the Court granted the Director of Health for the State of Hawai'i Department of Health's ("DOH's") motion to be dismissed from the previous related lawsuit;

WHEREAS, after the Court issued its July 2019 order in the previous related lawsuit, the State of Hawai'i Agribusiness Development Corporation applied for a NPDES permit for all of the Mānā Plain Drainage System outfalls except for the Kīkīaola Harbor Drain;

WHEREAS, since May 15, 2017, if not earlier, the County of Kaua'i ("County") has been solely responsible (per relevant standard operating procedures) for authorizing discharges from the Kīkīaola Harbor Drain to the Pacific Ocean during times of significant rainfall events (ECF No. 38, ¶3);

WHEREAS, on or about March 31, 2022, the County submitted to DOH a NPDES permit application for discharges to the Pacific Ocean from the Kīkīaola Habor Drain (ECF No. 38, ¶27);

WHEREAS, to date, DOH/the Director of Health has not issued any NPDES permit for any of the Mānā Plain Drainage Ditch System's six (6) outfalls, including the Kīkīaola Harbor Drain;

WHEREAS, on July 14, 2022, Plaintiffs Nā Kia'i Kai and Surfrider Foundation (hereinafter, collectively referred to as "Plaintiffs") filed suit in this case against the County and Elizabeth A. Char, in her official capacity as Director of Health of DOH (hereinafter, collectively referred to as "Defendants") alleging that the County was violating the CWA by discharging polluted drainage waters from the Kīkīaola Harbor Drain to the Pacific Ocean without the required NPDES permit (ECF No. 1);

WHEREAS, Plaintiffs named the Director of Health as a necessary party to the action because DOH, through the Director of Health, is responsible for issuing NPDES permits in compliance with the CWA, and because Plaintiffs alleged that DOH had refused to issue a NPDES permit for discharges from the Kīkīaola Harbor Drain (ECF No. 1, ¶26);

WHEREAS, Plaintiffs further requested injunctive relief and civil penalties pursuant to 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, among other relief, to

remedy the County's alleged CWA violations (ECF No. 1 at 25-26), as well as an award of litigation costs, including reasonable attorney and expert witness fees, pursuant to 33 U.S.C. § 1365(d);

WHEREAS, on March 31, 2023, Plaintiffs and the County entered into a joint stipulation of facts regarding the County's discharges from the Kīkīaola Harbor Drain (ECF No. 38), which included stipulated facts that the Kīkīaola Harbor Drain collects stormwater runoff from land uses located both on and off of the Waimea 400 Parcel Site that the County owns, including from a gravel and asphalt plant ("Maui Asphalt") and the Waimea Wastewater Treatment Plant ("Waimea WWTP"), and then discharges that stormwater runoff to the nearshore waters of the Pacific Ocean (ECF No. 38, ¶14);

WHEREAS, on March 31, 2023, Plaintiffs moved for summary judgment regarding the County's liability under the CWA for pollution from the Kīkīaola Harbor Drain (ECF No. 39);

WHEREAS, on April 17, 2023, this Court approved and ordered the parties' joint stipulation to bifurcate this action into two phases, *i.e.*, the "Liability Phase" and the "Remedy Phase," to conserve judicial resources and to provide additional time for the parties to explore settlement before incurring substantial further costs (ECF No. 50);

WHEREAS, on May 18, 2023, the County filed its statement of no position on Plaintiffs' motion for summary judgment (ECF Nos. 53 & 54), pursuant to the Plaintiffs' and the County's joint stipulation, approved and ordered by the Court on May 19, 2023, whereby the County agreed to file the statement of no position in exchange for Plaintiffs' agreement not to seek attorneys' fees and civil penalties against the County associated with the "Liability Phase" of this lawsuit (ECF No. 60);

WHEREAS, on June 13, 2023, the Court entered an order granting Plaintiffs' motion for summary judgment, which completely resolved the "Liability Phase" of this lawsuit (ECF No. 65);

WHEREAS, the parties have reached an agreement resolving the "Remedy Phase" of this case;

WHEREAS, the parties have agreed to enter into this Settlement Agreement ("Agreement"), without any admission of fact or law, which they consider to be a just, fair, adequate, and equitable resolution of the "Remedy Phase" of this action; and

WHEREAS, it is in the interest of the public, the parties, and judicial economy to resolve the "Remedy Phase" of this action without protracted litigation;

NOW, THEREFORE, the parties to this Agreement ("Parties") agree, and the Court orders, as follows:

DOH/THE DIRECTOR OF HEALTH OBLIGATIONS

1. Within three hundred sixty-five (365) days of execution of this Agreement, DOH/the Director of Health shall issue one or more draft NPDES permits for all outfalls of the Mānā Plain Drainage Ditch System, including but not limited to the outfalls of Kīkīaola Harbor Drain, Kawai'ele Outfall, Nohili Outfall, First Ditch, Second Ditch, and Cox Drain as identified in *Nā Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1100, 1103, 1104 (2019); and *Nā Kia'i Kai v. Cnty. of Kaua'i*, No. 22-CV-00304-DKW-KJM, 2023 WL 3981422, at *4 (D. Haw. June 13, 2023). DOH/the Director of Health shall notify Plaintiffs upon the preparation and public notice of any and all draft NPDES permits pursuant to this Paragraph.

2. DOH/the Director of Health shall issue one or more final NPDES permits for all outfalls of the Mānā Plain Drainage Ditch System, including but not limited to Kīkīaola Harbor Drain, Kawai'ele Outfall, Nohili Outfall, First Ditch, Second Ditch, and Cox Drain as identified in *Nā Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1100, 1103, 1104 (2019); and *Nā Kia'i Kai v. Cnty. of Kaua'i*, No. 22-CV-00304-DKW-KJM, 2023 WL 3981422, at *4 (D. Haw. June 13, 2023). For each and every draft NPDES permit prepared and publicly noticed pursuant to Paragraph 1, *supra*, DOH/the Director of Health shall issue a final NPDES permit

within one hundred eighty (180) days of public notice of such draft NPDES permit. DOH/the Director of Health shall notify Plaintiffs upon the issuance of any and all final NPDES permits pursuant to this Paragraph.

3. If DOH/the Director of Health anticipates missing a draft or final NPDES permit deadline set forth in Paragraphs 1 or 2, *supra*, DOH/the Director of Health shall notify Plaintiffs at least thirty (30) days before the missed deadline. Plaintiffs and DOH/the Director of Health shall meet and confer over a period of at least ten (10) days on whether to extend the deadline by agreement. If Plaintiffs and DOH/the Director of Health are unable to reach agreement during the ten (10)-day meet-and-confer period, DOH/the Director of Health may file a motion to extend the deadline based on unforeseen circumstances.

COUNTY OBLIGATIONS

4. The County shall not withdraw its NPDES permit application, submitted to DOH on or about March 31, 2022, for discharges from the Kīkīaola Harbor Drain.

5. Until the DOH/the Director of Health issues a final NPDES permit to the County for discharges from Kīkīaola Harbor Drain, the County shall conduct water quality monitoring via either Department of Public Works employees or third parties under contract as follows:

a. Frequency:

i. Beginning within ninety (90) days of execution of this Agreement, dry weather sampling twice each calendar year (in separate quarters) in water and bed sediment (Note: Bed sediment samples and testing are required for only enterococcus, TPH, PAH, glyphosate, and the extended panel of pesticides (*see* Paragraph 5.b, *infra*)).

ii. Beginning upon execution of this Agreement, wet weather sampling in water for each time that the Kīkīaola Harbor Drain is opened as follows:

1. Upon determining the need to open the Kīkīaola Harbor Drain, the County Department of Public Works shall immediately notify all contractors and subcontractors that are directly or indirectly responsible for sample collection so that samples may be collected as soon as practicable after opening the Kīkīaola Harbor Drain.
2. The County shall make best efforts to sample once as soon as practicable within six (6) hours after opening the Kīkīaola Harbor Drain.
3. If, despite best efforts, the County is unable to conduct wet weather sampling within six (6) hours after opening, the County shall sample once within twelve (12) hours after opening. In addition, within twenty-four (24) hours after opening the Kīkīaola Harbor Drain, the County shall notify Plaintiffs of the failure to conduct wet weather sampling within the six (6)-hour timeframe and the specific reasons therefor.
4. The County shall sample once twenty-four (24) hours after opening, if the outfall is discharging into the ocean.
5. The County shall sample once forty-eight (48) hours after opening, if the outfall is discharging into the ocean.
6. Plaintiffs acknowledge that if the County has not secured an agreement with third-party contractors to conduct the water quality monitoring required under Paragraph 5 of this Agreement before the Kīkīaola Harbor Drain is opened, the County will conduct the wet weather water

quality monitoring required under Paragraph 5 of this Agreement pursuant to an emergency contract.

b. Parameters: Turbidity, all species of nitrogen, phosphorous, enterococcus, TSS, TPH, PAH, glyphosate, and extended panel of pesticides (*see* Attachment A).

c. Holding times: The County shall make best efforts to ensure that water quality testing is conducted within holding times as follows:

Turbidity: 48 hours

All species of nitrogen: 48 hours for NO2; otherwise, 28 days

Phosphorous: 28 days

Enterococcus: 8 hours

TSS: 7 days

TPH: 7 days

PAH: 7 days

Glyphosate: 14 days

Extended panel of pesticides (*see* Attachment A): 7 days

If water quality testing is not conducted within a holding time, the County shall, in its quarterly water quality reporting to Plaintiffs, *see* Paragraph 5.h, *infra*, notify Plaintiffs of the failure to conduct water quality testing within the holding time and the specific reasons therefor.

d. Sampling Location: The ditch between the berm at Kīkīaola Small Boat Harbor and Kaumualiʻi Highway (*see* Attachment B).

e. Flow measurements: The County shall measure flow in the ditch at the same time and location as each dry and wet weather sampling event described in Paragraphs 5.a and 5.d, *supra*;

f. Except for any wet weather sampling conducted under an emergency contract pursuant to Paragraph 5.a.ii.6, *supra*, the County shall prepare a sampling and analysis plan (SAP) outlining the protocols and methods and a quality assurance plan for Plaintiffs' review and input prior to implementation; Plaintiffs acknowledge that the County's third-party contractors will need a minimum of four (4) weeks from their contract notice to proceed (NTP) with the County to coordinate and develop a draft of their SAP;

g. All laboratories conducting water quality testing pursuant to Paragraphs 5.a.i and 5.b, *supra*, will follow quality assurance/quality control protocols; and

h. The County shall provide all testing results and flow measurements to Plaintiffs on a quarterly basis.

6. Waimea 400 Parcel. Beginning within thirty (30) days of execution of this Agreement, the County shall implement the following best management practices to minimize pollution from the Waimea 400 Parcel and the ditches leading to the Kīkīaola Harbor Drain:

a. Pollution control measures including biofilters and absorbent fabric for petroleum products shall be deployed and maintained in the area where equipment is staged; and

b. Any future activity requiring grubbing shall include deployment of erosion control measures including biofilter socks or silt fences.

7. Waimea WWTP. Beginning within thirty (30) days of execution of this Agreement, the County shall implement the following pollution control measures at the Waimea WWTP:

a. Covered storage and secondary containment for lubricating oil, and all fuel shall be stored in approved containers and storage cabinets;

b. Absorbents shall be utilized during repair of the Waimea WWTP pumps and other mechanical equipment to prevent contamination from oil and other petroleum products;

c. Herbicides made with glyphosate shall not be used at the Waimea WWTP;

d. The County shall provide R-1 quality effluent to the Waimea Athletic Field and shall continue to seek new customers for the use of R-1 water;

8. Maui Asphalt. Beginning within thirty (30) days of execution of this Agreement:

a. The County shall conduct quarterly inspections of Maui Asphalt's operations via either a Department of Public Works employee or a third-party inspector under contract. Maui Asphalt's Stormwater Pollution Prevention Program, as per its NPDES Permit from DOH, will be used to develop a best management practice checklist for each potential pollutant source at Maui Asphalt's operation, which the County will use in conducting the quarterly inspections.

b. The County shall provide quarterly updates to Plaintiffs regarding Maui Asphalt's progress on securing a new site for its plant.

NOTIFICATIONS

9. Whenever notifications, reporting, or other communications to Plaintiffs or Defendants are required by this Agreement, they shall be in writing, and be addressed and sent via U.S. Mail and/or electronic mail as follows:

To Plaintiffs in this lawsuit, via Plaintiffs' attorneys of record:

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David L. Henkin
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To Defendant the Director of Health, via the Director of Health's attorneys of record:

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Dale K. Sakata
Joanna B.K.F. Yeh
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To Defendant County of Kaua'i, via the County Engineer and the County's attorneys of record:

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County Engineer
Department of Public Works
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Andrew Michaels
Matthew Bracken
Deputy County Attorney
Office of the County Attorney
County of Kaua'i
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mbracken@kauai.gov

10. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided in Paragraph 9, *supra*.

ENFORCEMENT OF THE AGREEMENT

11. The United States District Court for the District of Hawai'i will retain jurisdiction to enforce the terms of this Agreement. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). In granting any motion by Plaintiffs to enforce the terms of the Agreement, the Court shall be limited to ordering specific performance. Should the Court order specific performance and Plaintiffs subsequently seek to enforce that order, the Court shall have available to it all remedies for any violation of the Court's specific performance order.

USE AND EFFECT OF AGREEMENT

12. This Agreement was negotiated and executed by the Parties in good faith to avoid expensive and protracted litigation regarding the "Remedy Phase" of this lawsuit. This Agreement shall not constitute an admission or adjudication with respect to any allegation made by any Party. This Agreement shall not constitute

an admission of any wrongdoing or misconduct on the part of Defendants. This Agreement shall not constitute an acknowledgment by Plaintiffs that there was no wrongdoing or misconduct.

13. Plaintiffs reserve their right to bring subsequent actions challenging the adequacy of any NPDES permit that the County may obtain from DOH/the Director of Health. This Agreement shall not constitute an admission by Plaintiffs that the County's compliance with the Agreement satisfies its obligations under the CWA.

14. Plaintiffs and DOH/the Director of Health agree that nothing in this Agreement precludes DOH/the Director of Health from regulating discharges into ditches of the Mānā Plain Drainage Ditch System, in addition to the discharges from the outfalls into the ocean.

15. Plaintiffs and DOH/the Director of Health agree that nothing in this Agreement affects the Director of Health's dismissal from the lawsuit *Nā Kia'i Kai. v. Nakatani*, 401 F. Supp. 3d 1097 (2019).

CIVIL PENALTIES

16. Plaintiffs waive their rights to seek assessment of civil penalties against the County for past discharges and for any discharges that have or will occur during the "Remedy Phase" of the lawsuit through DOH/the Director of Health's issuance of a NPDES permit for the Kīkīaola Harbor Drain.

FEES AND COSTS

17. Plaintiffs reserve their rights to seek recovery from DOH/the Director of Health of attorneys' fees incurred in the "Liability Phase" of this lawsuit through the Court's June 13, 2023 order granting Plaintiffs summary judgment. Plaintiff have waived their rights to seek recovery from the County of attorneys' fees incurrent in the "Liability Phase" of this lawsuit, as previously stated in paragraph 2 of the Joint Stipulation Between Plaintiffs and Defendant County of Kaua'i Re: Plaintiff's Motion for Summary Judgment, filed May 19, 2023.

18. Plaintiffs waive their rights to seek recovery from the County and DOH/the Director of Health of attorneys' fees incurred in the "Remedy Phase" of the lawsuit, *i.e.* after June 13, 2023, through the Court's approval of this Agreement.

19. Plaintiffs reserve their rights to seek recovery from DOH/the Director of Health of Plaintiffs' costs other than attorneys' fees incurred in the "Liability Phase" or "Remedy Phase" of this lawsuit, through the Court's approval of this Agreement.

20. The County shall remit to Plaintiffs' counsel within 45 days of the execution and delivery of this Agreement FIVE THOUSAND DOLLARS ($5,000), which shall fully satisfy Plaintiffs' claim against the County for costs

other than attorneys' fees incurred in the "Liability Phase" and "Remedy Phase" of this lawsuit, through the Court's approval of this Agreement.

21. Once the Court has entered an order dismissing this case with prejudice, Plaintiffs and DOH/the Director of Health will have sixty (60) days to reach agreement regarding Plaintiffs' claim for an award of attorneys' fees and costs. If Plaintiffs and DOH/the Director of Health are unable to reach agreement on an amount pursuant to the pre-motion meet-and-confer provisions set forth in Local Rule 54.2(d):

a. Plaintiffs and DOH/the Director of Health shall file a joint statement pursuant to Local Rule 54.2(e) within forty-five (45) days after entry of an order dismissing the case with prejudice, and

b. Plaintiffs shall file a motion for attorneys' fees and costs within (60) days after the Court's entry of an order dismissing the case with prejudice.

22. Plaintiffs reserve their rights to seek recovery from the County and DOH/the Director of Health of attorneys' fees and costs incurred in enforcing the terms of this Agreement after the Court's approval of this Agreement.

AUTHORIZATION TO SIGN

23. This Agreement shall apply to and be binding upon the Parties, their members, delegates, and assigns. The undersigned representatives certify that they

are authorized by the Party or Parties they represent to enter into this Agreement and to execute and legally bind that Party or Parties to the terms and conditions of this Agreement.

Executed this 30th day of January, 2024.

/s/ Kylie W. Wager Cruz
DAVID L. HENKIN
KYLIE W. WAGER CRUZ
ELENA L. BRYANT
EARTHJUSTICE

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ELIZABETH A. CHAR, in her official capacity as Director of Health of the STATE OF HAWAI'I DEPARTMENT OF HEALTH

APPROVED AND SO ORDERED.

DATED: April 3, 2024 at Honolulu, Hawai'i.

Derrick K. Watson
Chief United States District Judge

OMIC list (Extended Profile)
1,4-Dimethylnaphthalene
2-(1-Naphthyl) Acetamide
2,3,5,6-Tetrachloroaniline
2,6-Diisopropylnaphthalene
Abamectin
Acephate
Acetamiprid
Acetochlor
Acibenzolar-S-methyl
Acrinathrin
Alachlor
Aldicarb
Aldicarb-sulfone
Aldicarb-sulfoxide
Aldrin
Ametryn
Amitraz
Anilofos
Atrazine
Azaconazole
Azamethiphos
Azinphos-ethyl
Azinphos-methyl
Azoxystrobin
Benalaxyl
Bendiocarb
Benfluralin
Benfuresate
Benoxacor
Bensulide
Benthiavalicarb-isopropyl
Benzobicyclon
Benzofenap
BHC (alpha)
BHC (beta)
BHC (delta)
Bifenox
Bifenthrin
Bitertanol
Boscalid
Bromacil
Bromobutide
Bromophos-ethyl
Bromophos-methyl

ATTACHMENT A

Bromopropylate
Bupirimate
Buprofezin
Butachlor
Butafenacil
Butamifos
Butralin
Butylate
Cadusafos
Cafenstrole
Captan
Captan Metabolite (THPI)
Carbaryl
Carbendazim
Carbetamide
Carbofuran
Carbofuran-hydroxy-3
Carbofuran-keto-3
Carbophenothion
Carboxin
Carfentrazone-ethyl
Carpropamid
Chlorantraniliprole
Chlorbenside
Chlorbufam
Chlordane (cis)
Chlordane (trans)
Chlorethoxyfos
Chlorfenapyr
Chlorfenson
Chlorfenvinphos
Chloridazon
Chlornitrofen
Chlorobenzilate
Chlorobenzuron
Chloroneb
Chloroxuron
Chlorpropham
Chlorpyrifos
Chlorpyrifos-methyl
Chlorthal-dimethyl
Chlorthiofos
Chlozolinate
Cinidon-ethyl
Cinmethylin
Clodinafop-propargyl
Clofentezine

Clomazone
Clomeprop
Cloquintocet-mexyl
Clothianidin
Coumafos / Coumaphos
CPMC (Etrofol)
Cumyluron
Cyanazine
Cyanophenphos
Cyanophos
Cyantraniliprole
Cyazofamid
Cycloate
Cyflufenamid
Cyfluthrin
Cyhalofop-butyl
Cyhalothrin (lambda)
Cymoxanil
Cypermethrin
Cyproconazole
Cyprodinil
Daimuron
DDD
DDE
DDT
Deltamethrin
Demeton O & S
Demeton-S-methyl
Desmedipham
Dialifos
Di-allate
Diazinon
Dichlobenil
Dichlofenthion (ECP)
Dichlormid
Dichlorvos (DDVP)
Diclobutrazol
Diclocymet
Diclofop-methyl
Diclomezine
Dicloran
2,4-Dichlorobenzophenone*
4,4-Dichlorobenzophenone*
Dicrotophos
Dieldrin
Diethofencarb

Difenoconazole
Diflubenzuron
Diflufenican
Dimepiperate
Dimethachlor
Dimethametryn
Dimethenamid
Dimethipin
Dimethoate
Dimethomorph
Dimethylvinphos
Diniconazole
Dinotefuran
Dioxathion
Diphenamid
Diphenylamine
Disulfoton
Disulfoton-sulfone
Dithiopyr
Diuron
Edifenphos
Endosulfan (alpha)
Endosulfan (beta)
Endosulfan-sulfate
Endrin
EPN
Epoxiconazole
EPTC
Esfenvalerate
Esprocarb
Ethalfluralin
Ethion
Ethiprole
Ethofumesate
Ethoprophos (Ethoprop)
Ethychlozate
Etobenzanid
Etofenprox
Etoxazole
Etridiazole
Etrimfos
Famoxadone
Famphur
Fenamidone
Fenamiphos
Fenamiphos-sulfone
Fenarimol

Fenazaquin
Fenbuconazole
Fenchlorphos (Ronnel)
Fenhexamid
Fenitrothion
Fenobucarb
Fenothiocarb
Fenoxanil
Fenoxaprop-Ethyl
Fenoxycarb
Fenpropathrin
Fenpropimorph
Fenpyroximate
Fensulfothion
Fenthion
Fentrazamide
Ferimzone E
Ferimzone Z
Fipronil
Flamprop-methyl
Flonicamid
Fluazifop-butyl
Fluazuron
Flucythrinate
Fludioxonil
Fluensulfone
Flufenacet
Flufenpyr-ethyl
Fluometuron
Fluopicolide
Fluopyram
Flupyradifurone
Fluquinconazole
Fluridone
Flusilazole
Flusulfamide
Fluthiacet-methyl
Flutianil
Flutolanil
Flutriafol
Fluvalinate
Fluxapyroxad
Folpet
Folpet Metab. (Phthalimide)
Fonofos (Dyfonate)
Forchlorfenuron
Fosthiazate

Fthalide
Fuberidazole
Furametpyr
Furathiocarb
Furilazole
Halfenprox
Haloxyfop-methyl
Heptachlor
Heptachlor-epoxide
Heptenophos
Hexachlorobenzene
Hexaconazole
Hexaflumuron
Hexazinone
Hexythiazox
Hydroprene
Imazalil
Imazamethabenz-ME
Imibenconazole
Imicyafos
Imidacloprid
Inabenfide
Indoxacarb
Ipconazole
Ipfencarbazone
Iprobenfos
Iprodione
Iprovalicarb
Isazophos
Isocarbophos
Isofenphos
Isofenphos-methyl
Isofetamid
Isoprocarb
Isoprothiolane
Isopyrazam
Isotianil
Isouron
Isoxaben
Isoxadifen-ethyl
Isoxaflutole
Isoxathion
Kresoxim-methyl
Lenacil
Lindane (gamma-BHC)
Linuron
Lufenuron

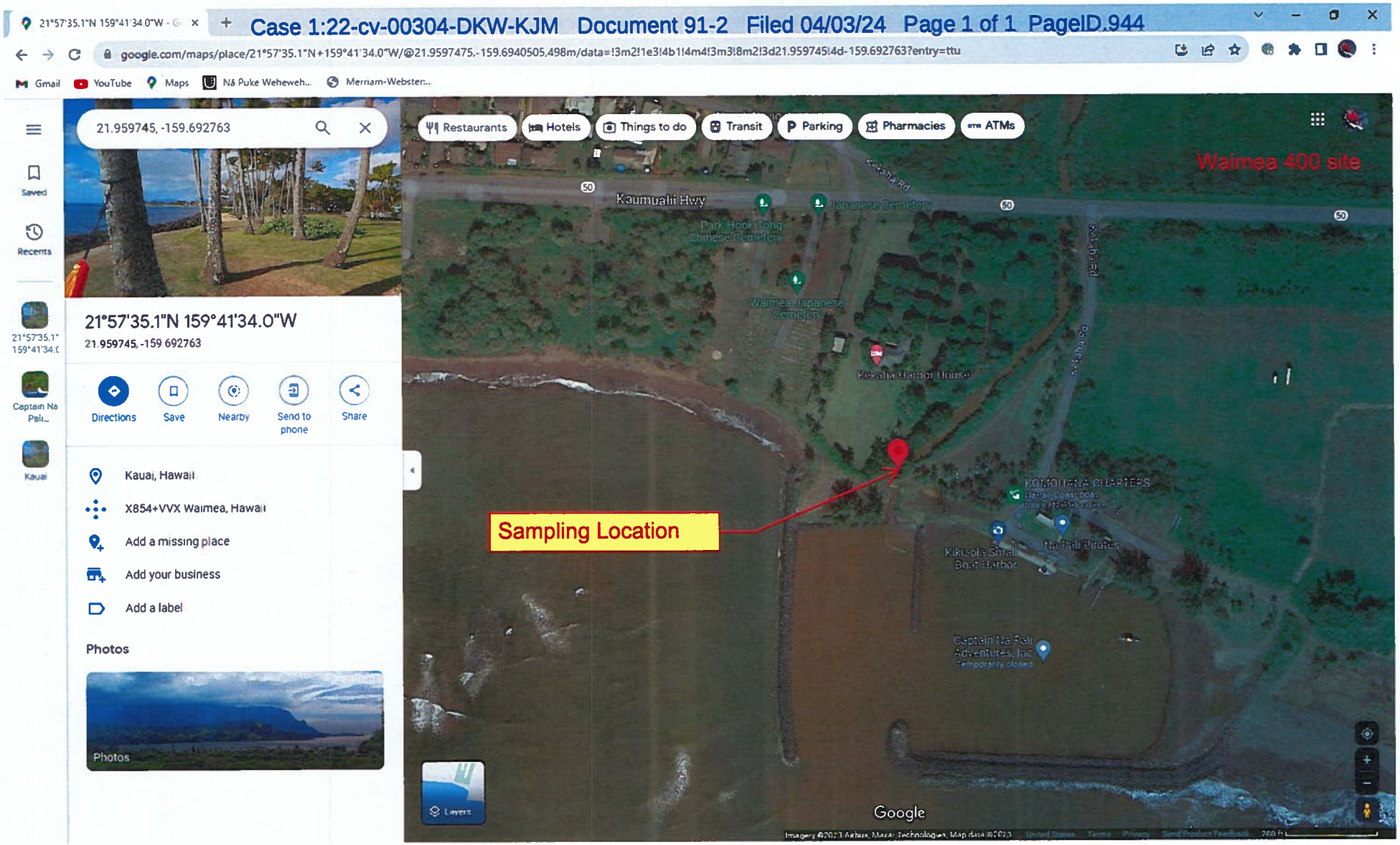
Malathion
Mandipropamid
Mecarbam
Mefenacet
Mefenpyr-Diethyl
Mepanipyrim
Mephosfolan
Mepronil
Metaflumizone
Metalaxyl / Mefenoxam
Metconazole
Methabenzthiazuron
Methacrifos
Methamidophos
Methidathion
Methiocarb
Methiocarb-sulfone
Methiocarb-sulfoxide
Methomyl
Methoprene
Methoxychlor
Methoxyfenozide
Metolachlor
Metolcarb
Metominostrobin
Metrafenone
Metribuzin
Mevinphos
MGK 264
Mirex
Molinate
Monocrotophos
Monolinuron
Myclobutanil
Naphthalophos
Naproanilide
Napropamide
Nitenpyram
Nitrofen
Nitrothal-isopropyl
Nonachlor (cis)
Nonachlor (trans)
Norflurazon
Novaluron
Nuarimol
Ofurace
Omethoate

o-Phenylphenol
Orysastrobin
Oryzalin
Oxadiazon
Oxadixyl
Oxamyl
Oxaziclomefone
Oxycarboxin
Oxydemeton-methyl
Oxyfluorfen
Paclobutrazol
Parathion
Parathion-methyl
Parbendazole
Pebulate
Penconazole
Pencycuron
Pendimethalin
Penflufen
Penthiopyrad
Pentoxazone
Permethrin
Perthane
Phenmedipham
Phenothiol (MCPA-thioethyl)
Phenothrin
Phenthoate
Phorate
Phorate-sulfone
Phosalone
Phosfolan
Phosmet
Phosphamidon
Phoxim
Picolinafen
Piperonyl-butoxide
Piperophos
Pirimicarb
Pirimioxyphos
Pirimiphos-ethyl
Pirimiphos-methyl
Pretilachlor
Prochloraz
Procymidone
Prodiamine
Profenofos
Prohydrojasmon

Promecarb
Prometryn
Propachlor
Propanil
Propaphos
Propargite
Propazine
Propetamphos
Propiconazole
Propisochlor
Propoxur
Propyzamide
Prosulfocarb
Prothiofos
Pyraclofos
Pyraclonil
Pyraclostrobin
Pyraflufen-ethyl
Pyrazolynate
Pyrazophos
Pyrazoxyfen
Pyrethrins
Pyribencarb
Pyributicarb
Pyridaben
Pyridafenthion
Pyrifenox
Pyrifluquinazon
Pyriftalid
Pyrimethanil
Pyrimidifen
Pyriminobac-methyl
Pyriproxyfen
Pyroquilon
Pyroxasulfone
Quinalphos
Quinoclamine
Quinoxyfen
Quintozene (PCNB)
Quintozene Metab. (PCA)
Quintozene Metab. (PCTA)
Quintozene Metab. (PeCB)
Quizalofop-ethyl
Resmethrin
Salithion (Dioxabenzofos)
Sedaxane
Sethoxydim

Silafluofen
Simazine
Simeconazole
Simetryn
Spinosad
Spiromesifen
Sulfotep
Sulprofos
TCMTB (Benthiazole)
Tebuconazole
Tebufenozide
Tebufenpyrad
Tebupirimfos (Phostebupirim)
Tebuthiuron
Tecnazene
Tefluthrin
TEPP
Terbacil
Terbufos
Terbuthylazine
Terbutryn
Tetrachlorvinphos
Tetraconazole
Tetradifon
Tetramethrin
Thenylchlor
Thiabendazole
Thiacloprid
Thiamethoxam
Thiazopyr
Thidiazuron
Thifluzamide
Thiobencarb
Tiadinil
Tolclofos-methyl
Tralomethrin (as Deltamethrin)
Triadimefon
Triadimenol
Tri-allate
Triazophos
Tribuphos
Trichlamide
Trichlorfon
Tricyclazole
Tridiphane
Trifloxystrobin
Triflumizole

Triflumuron
Trifluralin
Triforine
Triticonazole
Uniconazole-P
Vamidothion
Vinclozolin
XMC
Xylylcarb
Zoxamide



ATTACHMENT B