



September 10, 2024

Via Email

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Re: County of Kauaʻi Proposed New Landfill in Kekaha

Dear Mayor Kawakami, County Council Members, Ms. Fraley, and County Attorney Bracken:

Nā Kiaʻi Kai, Kaunalewa, and Earthjustice¹ write to raise *serious concerns* about the County of Kauaʻi's proposal to site a new landfill in Kekaha and to propose alternatives that would avoid expanding decades of environmental injustice on the west side. As the County knows, the island has no time to waste in securing viable, just, and equitable solutions to the island's long-known waste disposal crisis. We are, therefore, sending a copy of this letter to state agencies with decision-making authority over the County's landfill proposals—*i.e.*, the state **Board of Land and Natural Resources, Agribusiness Development Corporation ("ADC"), Department of Health ("DOH"), and Department of Transportation ("HDOT")**—to ensure a coordinated and timely response to this environmental justice emergency.

¹ **Nā Kiaʻi Kai** is a community-based organization established by West Kauaʻi residents, including Native Hawaiian fishers and cultural practitioners, to protect West Kauaʻi's coastal waters, humans, and aquatic life from pollution. **Kaunalewa** is a Native Hawaiian beneficiary-led non-profit organization dedicated to cleaning up brownfield sites and ending environmental injustice in West Kauaʻi. **Earthjustice** is the premier nonprofit public interest environmental law organization and has a Mid-Pacific Office in Honolulu. For years, Earthjustice has represented West Kauaʻi community groups, including Nā Kiaʻi Kai, in numerous matters to combat environmental injustices on the west side, such as stream diversions, toxic pesticide use, and ocean water pollution.

The County is already planning to expand the *existing* Kekaha Landfill for a fifth time since 1998, which would represent the landfill's greatest height increase to date, *i.e.* another 50+ feet above its current 120 feet of permitted capacity. After that, the County is planning to expand the Kekaha Landfill laterally by piling rubbish on top of the unlined makai portion. The Kekaha Landfill is the island's *only* landfill. The landfill is located close to the shoreline in a low-elevation, former wetland area prone to heavy rains and other coastal hazards. Groundwater monitoring wells downgradient from both the unlined and lined portions are contaminated with elevated levels of arsenic. Over the years, the landfill has been a dumping site for toxic substances including pesticides, asbestos, disaster debris, and hazardous waste.

According to the County, these planned Kekaha Landfill expansions would merely serve as band aid solutions to bigger problems. The County projects that these expansions would buy the island only a handful of years in additional landfill capacity. So, the County has its eyes set on constructing a *new landfill* just north of the current landfill on Mānā Plain agricultural lands owned by the State of Hawai'i and managed by ADC. These developments at the existing and proposed new landfill sites would perpetuate and deepen environmental injustices that these largely Native Hawaiian, low-income communities have been enduring for many decades.

The County's proposed new landfill site would be illegal and inappropriate due to disproportionate harms to Native Hawaiians, as well as the site's location within a tsunami inundation area and on state-owned agricultural lands. The County should, instead, immediately pursue legal and equitable solutions, including alternate sites outside of West Kaua'i and waste diversion strategies, in coordination with state agencies.

I. THE PROPOSED NEW LANDFILL SITE IN KEKAHA IS ILLEGAL AND INAPPROPRIATE

Approving and constructing a new landfill in Kekaha would discriminate against Native Hawaiians, violate state law prohibiting new landfills in tsunami-prone areas, and conflict with the State's mandates to conserve and protect agricultural lands.

A. The Proposed New Landfill Site Would Worsen and Further Entrench the Island's Long History of Environmental Injustices on the West Side.

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. A "program or activity" includes "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended federal financial assistance." 42 U.S.C. §

2000d-4a.² For government entities receiving federal funds like the County and State of Hawai‘i, siting or approving a landfill on Kaua‘i’s west side would have discriminatory impacts on Native Hawaiians and violate their civil rights.

For more than a century, Kekaha and surrounding areas in West Kaua‘i have borne the brunt of the island’s environmental and cultural injustices. Beginning in the late 1800s, sugar plantations filled and channelized the Mānā Plain—once home to a thriving network of wetlands and freshwater springs—to artificially lower the groundwater table and create dry land suitable for sugar cultivation. These dewatering efforts resulted in forty miles of unlined drainage ditches, two pumping stations, and at least six ocean outfalls that span the Mānā Plain and the West Kaua‘i coastline from Kekaha to Polihale. The sugar plantations also dammed and drained the Waimea River and its tributaries to irrigate their crops. This water pumping and water diversion infrastructure is still in operation today and has all but destroyed the complex stream, wetland, and reef ecosystems along West Kaua‘i from mauka to makai.

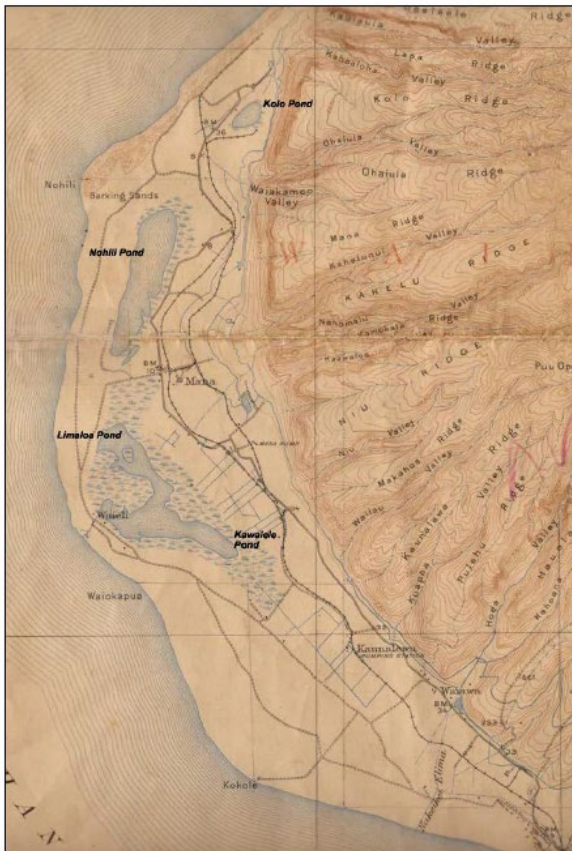


Fig. 1. Historical U.S. Geological Survey topographic map of the Mānā Plain (circa 1910) (Source: DLNR-DOFAW, Final Environmental Assessment Mānā Plain Wetland Restoration Project (Nov. 2013))

² Further, if any part of an entity receives federal funds, the whole entity is covered by Title VI. *Ass'n of Mex.-Am. Educ. v. California*, 195 F.3d 465, 474-75 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (en banc).

After Kekaha Sugar Company—the last sugar plantation on Kaua‘i—closed in 2000, it did little to clean up and remediate the land it had once occupied, leaving the soil and water contaminated with long-lasting pesticides like atrazine, and the Sugar Mill and related facilities and infrastructure left abandoned and deteriorating. Sediment samples from these sites have shown elevated levels of arsenic, dioxins/furans, and mercury.³ There are minimal barriers between this dilapidated infrastructure and nearby homes (including state elderly housing and a Department of Hawaiian Homelands affordable housing subdivision), a church, a Native Hawaiian charter school, drainage ditches leading to the ocean, and beaches.⁴ The Sugar Mill site also contains eleven underground storage tanks, transformers and capacitors that are suspected of releasing polychlorinated biphenyls (“PCB”), and pulverized asbestos in buildings.⁵

Fig. 2. Former Kekaha Sugar Mill (Source: County of Kaua‘i Office of Economic Development, FY2021 US EPA Brownfield Community-Wide Assessment Grant Application for Kekaha, Kaua‘i)



³ See, e.g., County of Kaua‘i Office of Economic Development, FY2021 US EPA Brownfield Community-Wide Assessment Grant Application for Kekaha, Kaua‘i (appended hereto as Attachment A); U.S. Environmental Protection Agency Region 9, Site Reassessment Report, Kekaha Sugar Co., Ltd., EPA ID No.: HID000875203 (Sept. 2013) (appended hereto as Attachment B).

⁴ County of Kaua‘i Office of Economic Development, FY2021 US EPA Brownfield Community-Wide Assessment Grant Application for Kekaha, Kaua‘i.

⁵ *Id.*

With the end of the plantation era, the biotech industry saw an opening to seize agricultural lands on and along the Mānā Plain and quickly transformed West Kauaʻi into ground zero for agrochemical operations.⁶ Rampant pesticide use on the west side came to a head in 2006 and 2008, when students and staff at Waimea Canyon Middle School were taken to the hospital suffering symptoms of pesticide exposure.⁷ Restricted use pesticide applications on the island and in the state continue to be substantially concentrated in West Kauaʻi.

Meanwhile, a host of industrial uses have cropped up in and around Kekaha, including a gravel and asphalt plant (located on county lands), a county wastewater treatment plant, a sand and rock mining operation, a proposed hydroelectric facility that would rely on out-of-watershed stream diversions, and a U.S. Navy base that occupies a vast stretch of coastline. The County's plans to expand the Kekaha Landfill and construct a new landfill on the Mānā Plain are the latest in a long line of developments that have relegated West Kauaʻi to the island's dumping grounds.

The Kekaha-Waimea census tract is home to higher proportions of Native Hawaiians and Pacific Islanders and lower proportions of white people than the County as a whole.⁸ The percentages of families and individuals living below the poverty line in Kekaha-Waimea are higher than the county averages.⁹

Now that the County has backed the public into the corner of needing to quickly expand landfill capacity on the island, it comes as little surprise—but with much frustration and outrage—that the County's proposed solutions are located in Kekaha. In addition to being located near Kekaha town, the proposed new landfill site is *less than one-half mile* from the state Department of Hawaiian Homelands' proposed Pu'u 'Ōpae Settlement, located above the landfill on the Kawaloa and Makahoa ridges. The settlement would include residential, agricultural, and pastoral lots, which calls into question whether the proposed new landfill site

⁶ See, e.g., The Moms On a Mission Hui and Pō'ai Wai Ola Title VI Complaint Against State of Hawai'i Department of Agriculture and Agribusiness Development Corporation, Sept. 14, 2016 (appended hereto as Attachment C).

⁷ Pesticide Use by Large Agribusiness on Kauaʻi, Findings and Recommendations of The Joint Fact Finding Study Group, at 80-81 (May 25, 2016), *available at* <https://jffkauai.wordpress.com/wp-content/uploads/2015/10/jff-kauai-final-report1.pdf>

⁸ Department of Public Works, County of Kauaʻi, Final Environmental Assessment for the Kekaha Municipal Landfill Phase II Vertical Expansion, at 3-50 & tbl. 3-2 (Feb. 23, 2024), *available at* https://files.hawaii.gov/dbedt/erp/Doc_Library/2024-02-23-KA-FEA-Kekaha-Municipal-Landfill-Phase-II-Vertical-Expansion.pdf

⁹ *Id.*

would comply with state buffer zone requirements.¹⁰ Hawaiian beneficiaries would regularly be subjected to the smell of trash, especially during periods of Kona winds, and would have to drive past the landfill to access the settlement. Title VI of the Civil Rights Act prohibits such blatant concentration of landfills near these largely Native Hawaiian communities.

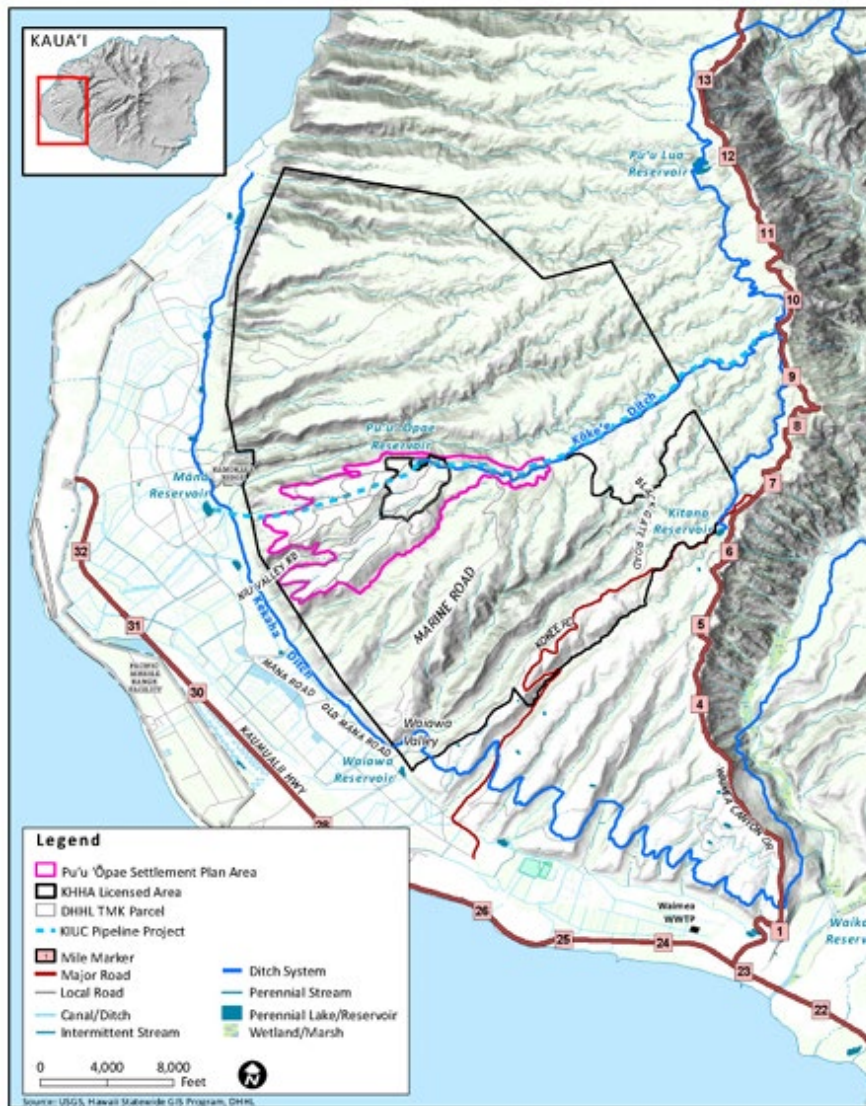


Fig. 3. Proposed Pu'u 'Ōpae Settlement Plan Area (Source: DHHL Pu'u 'Ōpae Kuleana Homestead Settlement Plan Final Environmental Assessment (Aug. 8, 2020))

B. The Proposed New Landfill Site is Located Within a Tsunami Inundation Area.

State law prohibits the siting of new landfills in “possible tsunami inundation areas.” Haw. Admin. R. § 11-58.1-13(g). Although the state Department of Health has yet to update its

¹⁰ Haw. Rev. Stat. § 342H-52(b) establishes buffer zones of “no less than one-half mile” between a landfill and the nearest residential property line.

regulations with best-available data, the Hawai'i Emergency Management Agency's ("HIEMA's") updated statewide tsunami inundation maps from 2015 indicate that the proposed new landfill site is located within the tsunami inundation area and is, therefore, prohibited.¹¹ Illegally siting a landfill in the tsunami inundation area would put west side communities at risk. If a tsunami or severe wet weather event were to inundate the new landfill site, toxic releases could render nearby communities uninhabitable, and the nearshore ecosystems destroyed.

C. The Proposed New Landfill Site is Located on State Agricultural Lands, Where Landfills Are Prohibited.

The proposed new landfill site is located on agricultural lands owned by the State and managed by ADC, pursuant to Executive Order No. 4007. Executive Order No. 4007 authorizes ADC to use these lands only for "agricultural and related purposes."¹² ADC, therefore, lacks authority to authorize the County to use the site for a landfill.

In any event, using the proposed site for a landfill would require land reclassification from its current agricultural use. Reclassifying the land to allow for a landfill in this low-lying, former wetland area that is hydrologically connected to the ocean and surrounded by thousands of acres of active agricultural fields would be entirely inappropriate and inconsistent with state policy to protect and maintain agricultural, natural, and cultural resources. Haw. Rev. Stat. § 205-17(3); *see also* Haw. Const. art. XI, § 3 ("The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.").

¹¹ Haw. Admin. R. § 11-58.1-13(g) still references outdated maps from 1991 to define the tsunami inundation area. But DOH's delay in updating its regulations to incorporate the new, best-available tsunami inundation maps provides no legal justification for ignoring this information in the agency's landfill permitting decisions. Under article XI, section 1 of the Hawai'i constitution and well-settled case law, DOH's outdated regulations "do not override the public trust doctrine or render it superfluous [T]he doctrine continues to inform [state law] interpretation, define its permissible 'outer limits,' and justify its existence." *In re Water Use Permit Applications*, 94 Hawai'i 97, 133, 9 P.3d 409, 445 (2000). Rather, the State has a duty to "take the initiative in considering, protecting, and advancing public rights in [public trust] resource[s] at every stage of the planning and decisionmaking process." *Id.* at 143, 9 P.3d at 455 (emphasis added).

¹² Hawai'i Executive Order No. 4007 (2003) (appended hereto as Attachment D).

Fig. 4. Existing and Proposed Landfill Sites in Kekaha
(Source: Department of Public Works, County of Kaua'i)



Fig. 5. West Kaua'i Tsunami Inundation Zone
(Source: Hawai'i Emergency Management Agency)



II. THE COUNTY MUST CONSIDER ALTERNATE SITES OUTSIDE OF WEST KAUAʻI
AS WELL AS OTHER WASTE DIVERSION STRATEGIES

Because the proposed new landfill site is illegal and inappropriate, the County, in coordination with other governmental entities, must immediately shift gears and pursue other solutions for addressing Kauaʻi's waste disposal crisis.

A. The County Should Reopen Discussions with HDOT Regarding the Maʻalo Road Proposed Landfill Site.

The lowest hanging fruit for finding a new landfill site outside of West Kauaʻi would be to revisit the Maʻalo Road location. The County has already completed and poured substantial taxpayer dollars into an environmental impact statement and extensive community engagement for this site.¹³ Unlike, the proposed Kehaka site, the Maʻalo Road site is centrally located near the island's most densely populated region and would, therefore, minimize road traffic to and from the landfill and more equitably and cost-effectively place waste disposal near waste generation.

According to county officials, HDOT (under prior leadership) and the County ultimately were unable to reach an agreement on a plan to mitigate the risk of bird strikes at the Līhuʻe Airport, so the County abandoned plans for the Maʻalo Road site at the eleventh hour after conducting substantial studies and gaining broad-based community support. Due to this breakdown in negotiations, the County has also preemptively stricken other possible landfill sites in the vicinity of the Līhuʻe Airport, including the Kālepa and Kīpū sites.¹⁴

Because the County currently has no legally valid location in mind for siting a new landfill, the County and HDOT should promptly reopen discussions regarding the Maʻalo Road site and other sites in the vicinity of the Līhuʻe Airport. Given the seriousness and urgency of Kauaʻi's waste disposal crisis and the illegality of siting another landfill in Kekaha near frontline environmental justice communities, it is the County's and HDOT's kuleana to exhaust all options for making other sites viable.

¹³ Department of Public Works, County of Kauaʻi, Final Environmental Impact Statement (FEIS) For New Kauaʻi Landfill, Maʻalo (Aug. 8, 2018), *available at* https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2018-08-08-KA-FEIS-New-Kauai-Landfill.pdf

¹⁴ Department of Public Works, County of Kauaʻi, Final Environmental Assessment for the Kekaha Municipal Landfill Phase II Vertical Expansion, at 1-10 (Feb. 23, 2024).

B. The County Should Immediately Identify and Analyze All Possible Sites for a Landfill, Including Sites Previously Considered and Excluding Sites in the Tsunami Inundation Area.

We were pleased to hear that the County has retained a contractor to newly analyze possible landfill sites to inform a forthcoming environmental impact statement.¹⁵ The County, however, should further direct the contractor to: (1) consider all options new and old, rather than excluding previously considered but rejected sites, and (2) exclude tsunami inundation areas as identified in HIEMA's 2015 maps, discussed in Part II.B, above. Refining the analysis will avoid arbitrarily striking viable sites and expending further resources planning for illegal, tsunami-prone areas.

C. The County Should Aggressively Pursue Waste Diversion and Other Strategies to Promptly and Substantially Reduce the Need for Additional Landfill Capacity.

The irony of the County's landfill plans is that they continue to prioritize and push for landfill capacity expansions while slow-walking waste diversion strategies and other alternatives to landfilling. This puts the proverbial cart before the horse to the detriment of Kaua'i residents. The County should promptly examine and implement alternatives to reduce waste and, based on these strategies, reanalyze how much additional landfill capacity is actually needed. The County has been talking about measures like curbside recycling, a construction and demolition waste disposal facility, and a waste-to-energy facility in passing for years, but continually puts these measures on the backburner. It is long overdue for the County to put its words to action and prioritize waste reduction before landfill expansion.

The County and State must act with urgency to fulfill its legal obligations and do right by West Kaua'i communities today and for generations to come. Please don't hesitate to contact us at kwager@earthjustice.org or (808) 599-2436 if you have any questions. We would be happy to meet with you and other government officials to help identify legal and equitable solutions to the waste disposal challenges facing the County.

Sincerely,

/s/ Kylie W. Wager Cruz

Kylie W. Wager Cruz
Earthjustice

/s/ Kawai Warren

Kawai Warren
Nā Kia'i Kai

/s/ Sean Andrade

Sean Andrade
Kaunalewa

¹⁵ Kaua'i County Council, Public Works & Veterans Services Committee, Aug. 7, 2024, Video Recording at 2:54:52, https://kauai.granicus.com/player/clip/2719?view_id=2&redirect=true

Mayor Kawakami, County Council Members, Allison Fraley, Deputy Attorney Bracken
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Attachments

cc: (via Email)

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