



May 24, 2023

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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RE: Notice of Intent to Bring Civil Suit for County of Hawai'i's Violations of the Federal Clean Water Act

We are writing on behalf of Hui Mālama Honokōhau ("the Hui") to notify you of serious and ongoing violations of the federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 *et seq.*, at the Kealakehe Wastewater Treatment Plant ("Kealakehe WWTP"), located in Kealakehe, Keahulua, North Kona, Hawai'i, which the County of Hawai'i ("County") operates and maintains. The purpose of this letter is to provide notice of the Hui's intent to file a civil action against the County for these violations at least sixty days after the date of this letter pursuant to CWA section 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), which requires sixty days' notice of alleged violations prior to commencement of a citizen suit.

Since 1993, the Kealakehe WWTP has been continuously discharging treated sewage into the Pacific Ocean via groundwater. The discharged wastewater flows into the nearshore ocean waters in and adjacent to the Honokōhau Small Boat Harbor without the required National Pollution Discharge Elimination System ("NPDES") permit. These unpermitted discharges

violate the CWA. As the owner and operator of the Kealakehe WWTP, the County is responsible for these violations and for remedying them.

We hope that this letter will convince the County immediately to investigate and correct these ongoing violations. To come into compliance with the CWA, the County must obtain an NPDES permit for the Kealakehe WWTP’s point-source discharge of pollutants to navigable waters or cease all discharges. *See* 33 U.S.C. § 1311(a). Until the County obtains an NPDES permit, discharging treated sewage to the ocean via groundwater subjects the County to civil penalties under the CWA. *See* 33 U.S.C. § 1319(d).

I. IDENTITY OF PERSON GIVING NOTICE AND THEIR COUNSEL

In accordance with 40 C.F.R. § 135.3, notice is hereby given of the Hui’s name, address, and telephone number, as well as the names, address, and telephone number of the Hui’s legal counsel:¹

Person Giving Notice:

Hui Mālama Honokōhau
P.O. Box 4454
Kailua-Kona, HI 96745-4454
(808) 640-3871

Legal Counsel:

David L. Henkin
Kylie W. Wager Cruz
Elena L. Bryant
Earthjustice
850 Richards Street, Suite 400
Honolulu, HI 96813
(808) 599-2436

II. FACTUAL BACKGROUND

A. The Kealakehe Wastewater Treatment Plant

The Kealakehe WWTP currently discharges about 1.7 million gallons per day of treated sewage into a natural, 10,000 square-foot disposal pit located in a permeable lava field upslope from Honokōhau Harbor, which is on the Kona (west) side of Hawai‘i Island. The facility is located on a nearly 53-acre parcel north of Kailua-Kona, about 3,700 feet (0.70 miles) south of the Honokōhau Small Boat Harbor.²

¹ Please note that the Hui is represented by the undersigned counsel in this matter. You are hereby requested to contact David L. Henkin, Kylie W. Wager Cruz, and Elena L. Bryant of Earthjustice if you would like to discuss the contents of this letter.

² Wilson Okamoto Corporation *for* County of Hawai‘i, Department of Environmental Management, *Kealakehe Wastewater Treatment Plant R-1 Upgrade, Draft Environmental*

The Kealakehe WWTP receives wastewater generated by the North Kona Sewerage system, which extends across the greater Kailua-Kona region from just south of Kealakehe Parkway at its northern edge to Ali‘i Heights at the southern edge. DEIS at 1-1. When the County constructed the facility in 1993, the plan was for a proposed municipal golf course near the facility to reuse the treated wastewater for irrigation. *Id.* The golf course was never constructed and, as a result, since 1993, the County has disposed of all the facility’s wastewater into the disposal pit. *Id.*

At the Kealakehe WWTP, wastewater receives secondary treatment before it is pumped to the off-site disposal pit. DEIS at 1-1, 1-8. The wastewater that the Kealakehe WWTP discharges has a high nutrient load, primarily nitrogen and phosphorus.³ DEIS at 3-8. The facility discharges this nutrient-laden wastewater from two pipes into the disposal pit. The discharged wastewater then travels with groundwater and ultimately enters the ocean. DEIS at 2-22, 3-10. The volume of wastewater that the facility treats, and therefore the mass of nutrients that discharges to the disposal pit, will increase over time as population and commercial growth occur in the area the facility services. DEIS at 2-22. Under future permitted conditions, overall nutrient concentrations in the ocean near to the WWTP will increase due to the drastic increase in nutrient mass load from the additional anticipated effluent discharge.⁴ As a result, absent prompt efforts to control the pollutants the facility discharges, the mass of nutrients that the Kealakehe WWTP contributes to the area groundwater and, ultimately, the ocean will increase over time with this growth. DEIS at 2-22.

B. Pollution from the Kealakehe WWTP Enters the Ocean

The County knows that the Kealakehe WWTP discharges pollutants into the ocean via groundwater. In the 2019 Draft Environmental Impact Statement for the proposed upgrade of the Kealakehe WWTP, the County acknowledged that the facility’s effluent containing nitrogen and phosphorus “ultimately enters the ocean via ground water.” DEIS at S-3.

Multiple, peer-reviewed studies have confirmed concentrated discharge of nutrient-laden groundwater into the Honokōhau Harbor and the adjacent Honokōhau Bay, where significant

Impact Statement 1-1 (Feb. 2019), available at http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2019-02-23-HA-DEIS-Kealakehe-WWTP-R1-Upgrade.pdf (“DEIS”).

³ The typical nutrient concentration of the wastewater treated at the Kealakehe WWTP is 22.6 mg/L for total nitrogen and 7.01 mg/L for total phosphorous. DEIS app. B at 9-1. The Kealakehe WWTP disposal pit currently has an average flow rate of approximately 1.7 million gallons per day with nitrogen and phosphorous mass loads of 320 and 99 pounds per day, respectively. *Id.*

⁴ Christopher A. Wada *et al.*, *Identifying wastewater management tradeoffs: Costs, nearshore water quality, and implications for marine coastal ecosystems in Kona, Hawai‘i*, PLOS ONE 11 (2021).

quantities of groundwater enter the ocean.⁵ At least two studies identify Kealakehe WWTP as a “point-source” for pollutants into the ocean.⁶ These scientific investigations leave no doubt that wastewater from the Kealakehe WWTP that is discharged into the off-site disposal pit flows with groundwater into the coastal waters in and adjacent to Honokōhau Harbor.

C. Water Quality Standards and Uses Surrounding the Honokōhau Harbor

Pursuant to the CWA, all waters are assigned designated uses that water quality standards are designed to support. 33 U.S.C. § 1313. The Hawai‘i Department of Health (“DOH”), the state agency charged with setting state water quality standards, has classified the entire Kona Coast, which includes waters adjacent to Honokōhau Harbor, as Class AA open coastal waters. Haw. Admin. R. (“HAR”) § 11-54-6(b)(2)(A) & app. D. State policy is that Class AA waters “remain in their natural pristine state as nearly as possible with an absolute minimum of pollution or alteration of water quality from any human-caused source or actions.” *Id.* § 11-54-3(c)(1). Protected uses in the area include oceanographic research, the support and propagation of shellfish and other marine life, conservation of coral reefs and wilderness areas, and compatible recreation and aesthetic enjoyment. *Id.*

DOH has classified the Honokōhau Boat Harbor as a Class A embayment. *Id.* § 11-54-6(a)(3) & app. C. State policy for Class A waters is to protect “their use for recreational purposes and aesthetic enjoyment.” *Id.* § 11-54-3(c)(2). Any other use must be “compatible with the protection and propagation of fish, shellfish, and wildlife, and with recreation in and on these waters.” *Id.* Class A waters “shall not act as receiving waters for any discharge which has not received the best degree of treatment or control compatible with the criteria established for this class.” *Id.* HAR § 11-54-4 contains numeric water quality criteria that are applicable to all waters. HAR § 11-54-6(d)(3) contains numeric criteria specific to the Kona Coast, and HAR § 11-54-6(a)(3) contains numeric water quality criteria that apply to Honokōhau Harbor.

⁵ Nancy G. Prouty *et al.*, *Groundwater-Derived Nutrient and Trace Element Transport to a Nearshore Kona Coral Ecosystem: Experimental Mixing Model Results*, 11 JOURNAL OF HYDROLOGY: REGIONAL STUDIES 173 (2017) (evaluating elevated phosphate and nitrogen in coastal aquifer near Kealakehe WWTP); Michael L. Parsons *et al.*, *A Multivariate Assessment of the Coral Ecosystem Health of Two Embayments on the Lee of the Island of Hawai‘i*, 56 MARINE POLLUTION BULLETIN 1138, 1140, 1145-46 (2008) (showing groundwater discharge concentrated in Honokōhau Harbor and increasing phosphate and nitrate + nitrite levels over time); Adam G. Johnson *et al.*, *Aerial Infrared Imaging Reveals Large Nutrient-Rich Groundwater Inputs to the Ocean*, 35 GEOPHYSICAL RESEARCH LETTERS (2008) (mapping groundwater and nutrient discharge points along Kona Coast including Honokōhau Harbor).

⁶ Charles D. Hunt, Jr., U.S. Department of the Interior, U.S. Geological Survey, *Baseline Water-Quality Sampling to Infer Nutrient and Contaminant Sources at Kaloko-Honokōhau National Historical Park, Island of Hawai‘i*, 2009, SCIENTIFIC INVESTIGATIONS REPORT 2014–5158 (2009), at 10; Prouty *et al.*, *supra* note 5, at 167.

The Honokōhau Small Boat Harbor and adjacent ocean waters are used extensively for aesthetic, recreational, cultural, and subsistence purposes. Given the rich marine environment in the waters surrounding Honokōhau Harbor, the area is also a popular location for viewing dolphins, sea turtles, and humpback whales. Hui members, including Native Hawaiians, catch fish, crab, and octopus in the ocean adjacent to the Honokōhau Harbor and enter the waters in and around the harbor to swim, dive, snorkel, scuba dive and paddle.

D. Impacts on the Nearshore Marine Environment and Public Health

The Clean Water Act creates a strict liability scheme that “‘categorically prohibits any discharge of a pollutant from a point source without a permit,’ irrespective of whether that discharge affects the receiving water.” *Hawai‘i Wildlife Fund v. Cnty. of Maui*, 24 F. Supp. 3d 980, 997 (D. Haw. 2014), *aff’d* 886 F.3d 737 (9th Cir. 2018), *vacated and remanded on other grounds sub nom, Cnty. of Maui v. Hawai‘i Wildlife Fund*, 140 S. Ct. 1462 (2020). While the Hui need not prove adverse impacts to establish the County’s CWA liability, here, the County’s failure to obtain and comply with an NPDES permit for its discharges has had—and continues to have—significant, detrimental effects on water quality and health of the nearshore ocean waters and ecosystems in and adjacent to Honokōhau Harbor and on public health. The County should take prompt action to prevent additional harm.

Worldwide, anthropogenic nutrient loading of submarine groundwater discharge has been linked to macroalgal blooms, shifts from coral to macroalgal dominated ecosystems, harmful phytoplankton blooms and eutrophication.⁷ Such threats to coral reefs can have devastating impacts on coral reef ecology and the array of ecosystem services provided by these systems.⁸ Long-term eutrophication of coasts sets up situations for likely invasive macroalgal and/or turf algal blooms, loss of coral health, and increases in pathogenic microbial communities, profoundly changing the reef communities that draw people to live in coastal communities.⁹ Effects of declining nearshore water quality may also include decreased water clarity from increased phytoplankton abundance, decreases in coral resilience to bleaching, as well as decreased fish and coral quantity and diversity.¹⁰

Consistent with peer-reviewed studies regarding the adverse impacts of nutrient-rich groundwater on nearshore ecosystems, Hui members have observed algal blooms in Honokōhau Harbor on several occasions, and community members documented elevated nutrient levels associated with an October 2020 algal bloom. Waiwai Ola, a community group that investigates sources of nutrient pollution along the Kona Coast, conducted sampling during the October 2020 algal bloom, and the levels of nitrate, nitrite, nitrogen, phosphate, and ammonia nitrogen all

⁷ Wada, *supra* note 4, at 2.

⁸ *Id.*

⁹ *Id.* at 21.

¹⁰ *Id.*

exceeded the state water quality standards that DOH established for Honokōhau Harbor. *See* HAR § 11-54-6(a)(3).

Hui members have reported contracting staph infections—in some instances methicillin-resistant *Staphylococcus aureus* (MRSA) infections—after entering the harbor and surrounding waters, and community members are concerned that the Kealakehe WWTP’s discharges of treated sewage are the culprit.

In the absence of compliance with an NPDES permit that regulates the Kealakehe WWTP’s discharges to nearshore waters, the detrimental effects on the offshore environment and public health will continue unabated.

III. THE COUNTY’S VIOLATIONS OF THE FEDERAL CLEAN WATER ACT

Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To further this central goal, section 301(a) of the Act prohibits “the discharge of any pollutant” into the nation’s waters without an appropriate permit. *Id.* § 1311(a). The CWA defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12). The Act, therefore, prohibits the (1) discharge (2) of any pollutant (3) to navigable waters (4) from a point source (5) without an NPDES permit. *Comm. to Save Mokolumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). The County’s discharges from the Kealakehe WWTP satisfy each of these elements, violating Clean Water Act section 301(a), 33 U.S.C. § 1311(a).

First, since 1993, the County has discharged wastewater from the Kealakehe WWTP, and it continues to do so. Wastewater from the Kealakehe WWTP is conveyed by two pipes to a disposal pit. The Kealakehe WWTP currently discharges approximately 1.7 million gallons of wastewater per day, and the County has plans to increase the volume of wastewater that the facility treats and discharges, DEIS at 2-22, so discharges from the Kealakehe WWTP will continue to occur into the future.

Second, the treated sewage that the Kealakehe WWTP discharges contains pollutants within the meaning of the CWA. The CWA broadly defines “pollutant” to include the “sewage,” “sewage sludge,” “biological materials,” and “municipal . . . waste” that the Kealakehe WWTP discharges. 33 U.S.C. § 1362(6). The County admits that the treated sewage discharged from the Kealakehe WWTP contains nutrients, including nitrogen and phosphorous, as well as metals, trace organic compounds, endocrine disrupting compounds, and other pollutants. DEIS at S-2.

Third, the County is discharging these pollutants into navigable waters. The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas,” and defines “territorial seas” as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.” 33 U.S.C.

§ 1362(7), (8). Honokōhau Harbor’s ocean waters, which are part of the Pacific Ocean, are well within three miles from the coast and therefore constitute navigable waters covered by the CWA. *See Hawai‘i Wildlife Fund v. Cnty. of Maui*, 550 F. Supp. 3d 871, 885 (D. Haw. 2021) (holding that the Pacific Ocean is a “navigable water” under the CWA).

Fourth, the Kealakehe WWTP’s two disposal pipes that discharge wastewater into the disposal pit are point sources within the meaning of the CWA. The CWA broadly defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, . . . channel, tunnel, conduit, well, [or] discrete fissure . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). A pipe under Queen Ka‘ahumanu Highway carries the wastewater treated at the Kealakehe WWTP to the off-site disposal pit located mauka of the highway and terminates in two separate pipes that discharge into the pit. These two disposal pipes are, by definition, “point sources.”

The U.S. Supreme Court in *County of Maui v. Hawai‘i Wildlife Fund*, held that a discharge of “pollutants that reach navigable waters after traveling through groundwater” is “from a point source,” within the meaning of the CWA, “if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.” 140 S. Ct. at 1477. While many factors might be relevant to the “functional equivalence” determination, the Court identified the distance pollution travels from the point source to the receiving surface waterbody and the transit time as being determinative in most cases. *Id.* at 1476-77; *see also Hawai‘i Wildlife Fund*, 550 F. Supp. 3d at 885. Here, the distance traveled—about 0.7 miles from the disposal pit to the harbor—and transit time—a matter of months, at most—are similar to the values the Hawai‘i district court on remand in *Hawai‘i Wildlife Fund* concluded trigger CWA liability. *See Hawai‘i Wildlife Fund*, 550 F. Supp. 3d at 886-888.

Finally, the County does not have—and never had—an NPDES permit for discharges from the Kealakehe WWTP to the Pacific Ocean.

Each of the five elements that establish a CWA violation are present. The County is discharging pollutants from the Kealakehe WWTP to the navigable waters of the Pacific Ocean from a point source without an NPDES permit. The County’s discharges have violated and, unless and until the County either ceases discharges from the Kealakehe WWTP or secures and complies with an NPDES permit, will continue to violate the CWA.

IV. NOTICE OF INTENT TO SUE FOR THE COUNTY’S VIOLATIONS OF THE CLEAN WATER ACT

By this letter, pursuant to CWA section 505, 33 U.S.C. § 1365, the Hui hereby puts you on notice that, after the expiration of sixty (60) days from the date of service of this notice, the Hui intends to file an enforcement action in federal court against the County to address its CWA violations. The Hui intends to seek civil penalties for past violations, injunctive relief to prevent further illegal discharges, attorneys’ fees and costs, and other relief as permitted by law. *Id.* § 1365(a), (d). Pursuant to CWA section 309(d) and its implementing regulations, each of the

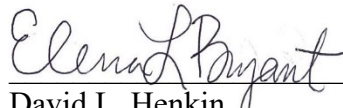
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above-described CWA violations subjects the County to a penalty of up to \$64,618 per day. *Id.* § 1319(d); 40 C.F.R. § 19.4.

The Hui is open to resolving this matter without the need for litigation. If you wish to pursue such discussions, we urge you to contact us promptly via telephone (at (808) 599-2436) or email (at dhenkin@earthjustice.org, kwager@earthjustice.org, and ebryant@earthjustice.org). Due to the serious, ongoing harm to public health and the environment, we are unwilling to hold off on pursuing a judicial resolution of this matter if the parties are unable to reach agreement during the sixty-day notice period. As such, we strongly urge your prompt attention to this matter.

Sincerely,



David L. Henkin
Kylie W. Wager Cruz
Elena L. Bryant
EARTHJUSTICE

Attorneys for Hui Mālama Honokōhau