EARTHJUSTICE

February 9, 2022

By Certified U.S. Mail, Return Receipt Requested

Mayor Derek S. K. Kawakami
Office of the Mayor, County of Kauaʻi
4444 Rice Street, Suite 235
Līhuʻe, HI 96766

Wade Lord
Capital Improvements Program Manager
Kauaʻi Department of Public Works
4444 Rice Street, Suite 275
Līhuʻe, HI 96766

Elton S. Ushio
Emergency Management Administrator
Kauaʻi Emergency Management Agency
3990 Kaʻana Street, Suite 100
Līhuʻe, HI 96766

The Honorable David Y. Ige
Governor, State of Hawaiʻi
Executive Chambers
State Capitol
Honolulu, HI 96813

Elizabeth A. Char
Director of Health
Department of Health, State of Hawaiʻi
Kīnaʻu Hale
1250 Punchbowl Street
Honolulu, HI 96813

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Martha Guzman
Regional Administrator, Region 9
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

RE: Notice of Intent to Bring Civil Suit for County of Kauaʻi's Violations of the Federal Clean Water Act and for Injunctive Relief Against the Director of Health

We are writing on behalf of Nā Kiaʻi Kai, Surfrider Foundation, and Pesticide Action Network North America (collectively, the "Community Groups") to notify you of serious and ongoing violations of the federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1388, at the Kīkīaola Harbor Drain, located in Kekaha, Kauaʻi, which the County of Kauaʻi ("County") operates and maintains. The purpose of this letter is to provide notice of the Community Groups' intent to file a civil action against the County for these violations at least sixty days after the date of this letter pursuant to section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), which requires sixty days' notice of alleged violations prior to commencement of a citizen suit. The

Community Groups also intend to name the Director of Health ("Director") for the State of Hawaiʻi Department of Health ("DOH") as a necessary party for relief, as explained below.

The County intermittently discharges waters contaminated with pesticides and sediment from the Kīkīaola Harbor Drain, an unlined, earthen ditch located on West Kauaʻi's Mānā Plain. The discharged waters flow into the nearshore ocean waters along Kekaha without the required National Pollutant Discharge Elimination System ("NPDES") permit. These unpermitted discharges violate the CWA.

To come into compliance with the CWA, the County must obtain an NPDES permit or cease all discharges. *See* 33 U.S.C. § 1311(a). We are informed and believe that the County contacted DOH for guidance on how to begin the NPDES permitting process for the Kīkīaola Harbor Drain, but that DOH responded that discharges from the outfall ***do not*** require an NPDES permit. *See* Attachment A. DOH's position and refusal to issue an NPDES permit for the Kīkīaola Harbor Drain directly contradict a 2019 ruling of the U.S. District Court for the District of Hawaiʻi ("Hawaiʻi District Court") that discharges from the *exact same outfall* without an NPDES permit violate the CWA. *See Nā Kiaʻi Kai v. Nakatani*, 401 F. Supp. 3d 1097 (D. Haw. 2019) (Attachment B). DOH initially was a party to that lawsuit but, on its own motion, was dismissed before any briefing on the merits occurred. Although DOH was dismissed, it continued to receive all electronic case file ("ECF") notifications in the case and, thus, was aware of all case developments. At no time did DOH (or anyone else) attempt to appeal the Hawaiʻi District Court's ruling that discharges of pollutants from the Kīkīaola Harbor Drain require an NPDES permit. The legal requirement for an NPDES permit for the Kīkīaola Harbor Drain is a ***settled matter of law***.

We hope that, in light of the clear legal precedent applicable to the Kīkīaola Harbor Drain, this letter will convince the County to take immediate steps to comply with the CWA by submitting an NPDES permit application and reducing discharges from the outfall to the maximum extent practicable.[1] We also hope that the Director will immediately notify the County and the Community Groups in writing that DOH has withdrawn its illegal positions and representations regarding the Kīkīaola Harbor Drain and will instead proceed with issuing an NPDES permit for the outfall. Prompt action by the County, Director, and DOH could avoid expending additional time and taxpayer resources re-litigating a legal issue that the court has already decided. It could also avoid State and County liability for attorneys' fees and costs, for which Community Groups intend to seek recovery pursuant to 33 U.S.C. § 1365(d) if they need to re-litigate this previously resolved legal issue and once again prevail.

[1] We understand that some amount of discharge may be necessary to prevent flooding of Kekaha Town but urge the County to investigate and implement alternative methods for storing, disposing of, and/or reducing pollution levels in the discharged waters.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

In accordance with 40 C.F.R. § 135.3, notice is hereby given of the Community Groups' names, addresses, and telephone numbers, as well as the names, address, and telephone number of their legal counsel:[2]

Community Groups:

Nā Kia‘i Kai
P.O. Box 291
Kekaha, HI 96752
(808) 651-5332

Surfrider Foundation
P.O. Box 73550
San Clemente, CA 92673
(949) 492-8170

Pesticide Action Network North America
2029 University Avenue, Suite 200
Berkeley, CA 94704
(510) 788-9020

Legal Counsel:

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

II. FACTUAL BACKGROUND

A. The Mānā Plain Drainage Ditch System, Which Includes the Kīkīaola Harbor Drain as One of Six Ocean Outfalls

In the early 1920s, the Kekaha Sugar Company ("KSC") developed a drainage ditch system on the Mānā Plain to lower the water table below the sugarcane rooting depth. In 2001, KSC closed and, in 2003, the management of approximately 12,500 acres of agricultural lands formerly in sugar cultivation was transferred by governor's executive order from the state Department of Land and Natural Resources to the state Agribusiness Development Corporation ("ADC"). ADC also assumed ownership and management of the drainage ditch system and KSC's NPDES permit regulating discharges from the system. The system includes, but is not limited to, forty miles of earthen, unlined drainage canals and ditches, several storage reservoirs,

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

two pumping stations (the Kawaiʻele Pumping Station and the Nohili Pumping Station), and six ocean outfalls. The six outfalls are Kawaiʻele Outfall (or "Kinikini Ditch"), Nohili Outfall, Cox Drain, First Ditch, Second Ditch, and the Kīkīaola Harbor Drain—the last of which is now operated by the County and is the subject of this notice letter.

The Kīkīaola Harbor Drain is located the furthest east of the six outfalls, along the Kaumualiʻi Highway near the eastern end of Kekaha Town. To prevent flooding during heavy rainfall events, the Kīkīaola Harbor Drain is opened by breaching one or more earthen berms that otherwise block drainage waters from entering the nearshore ocean waters. The discharged waters are untreated, and the drainage ditches and outfall are unlined and eroding. Land uses on the Mānā Plain lands drained by the Kīkīaola Harbor Drain include genetically engineered seed crop operations, pasture lands, a gravel and asphalt plant, and the Waimea Wastewater Treatment Plant.

B. Pollution from the Kīkīaola Harbor Drain

Pollution from the Kīkīaola Harbor Drain has detrimental effects on, and poses an ongoing threat to, the water quality and health of West Kauaʻi's nearshore ocean waters and ecosystems. The discharged waters visibly contain sediment, including from the eroding drainage ditches and outfall. According to the 2020 State of Hawaiʻi Water Quality Monitoring and Assessment Report, prepared by the DOH Clean Water Branch pursuant to Sections 303(d) and 305(b) of the CWA, the coastal waters along the Kapilimao Watershed, to which the Kīkīaola Harbor Drain discharges, have been designated as impaired for turbidity.

The discharged waters also contain pesticides. In May 2014, DOH released the draft 2013-14 State Wide Pesticide Sampling Pilot Project Water Quality Findings, a joint investigation by DOH and the state Department of Agriculture. Water quality testing conducted by the U.S. Geological Survey for the project showed the presence of atrazine and metolachlor in the Kīkīaola Harbor Drain waters at levels exceeding aquatic life benchmarks. Other pesticides found in the Kīkīaola Harbor Drain waters include bentazon, cis-propiconazole, fipronil, simazine, trans-propiconazole, and glyphosate.

Atrazine, metolachlor, and simazine are classified as restricted use pesticides under federal and/or state law. *See* 40 C.F.R. pt. 152, subpt. I; Haw. Admin. R. ("HAR") § 4-66-32(a), (b). Atrazine can cause reproductive difficulties and cardiovascular problems in humans. 40 C.F.R. Pt. 141, Subpt. O, App. A; HAR chapter 11-20 App. A, A-11. According to the U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry ("ATSDR"), atrazine may affect pregnant women by slowing their babies' growth in the womb or by causing preterm births. In pregnant animals, exposure to atrazine decreases fetal growth and causes birth defects and fetus mortality. ATSDR warms that, "[i]n areas of high atrazine use, individuals should avoid swimming in or drinking from contaminated water sources and may desire to have personal well water tested for the presence of atrazine," and that "[c]hildren

should avoid playing in soils near uncontrolled hazardous waste sites where atrazine may have been discarded.”[3]

Glyphosate is a broad spectrum herbicide that is the active ingredient in the herbicide known as Roundup, which is used on glyphosate-resistant genetically engineered crops like those cultivated in West Kaua‘i. Glyphosate can cause reproductive difficulties and kidney problems in humans. 40 C.F.R. Pt. 141, Subpt. O, App. A; H.A.R. § 11-20 App. A, A-13. In March 2015, the World Health Organization International Agency on Research on Cancer classified glyphosate as Group 2A carcinogen, meaning it is “probably carcinogenic to humans.”[4]

C. Water Quality Standards and Uses Surrounding the Kīkīaola Harbor Drain

Pursuant to the CWA, all waters must be assigned designated uses that water quality standards are designed to support. 33 U.S.C. § 1313. DOH, the state agency charged with setting state water quality standards, has designated the ocean waters at the Kīkīaola Harbor Drain as Class A, open coastal marine waters. HAR § 11-54-6(b)(2)(B). Protected uses in the area include aesthetic enjoyment and recreation. *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.

The nearshore ocean waters around the Kīkīaola Harbor Drain are used extensively for aesthetic, recreational, cultural, and subsistence purposes. Community members, including Native Hawaiians, catch fish and crab in Kīkīaola Harbor and also surf and swim in the surrounding areas.

D. The County’s and Director of Health’s Failure to Abide by the Hawai‘i District Court’s Ruling that Discharges from the Kīkīaola Harbor Drain Require an NPDES Permit

In 2015, ADC withdrew its NPDES permit application for the Mānā Plain drainage ditch system’s six outfalls. In 2016, Earthjustice, on behalf of the Community Groups, brought a lawsuit in the Hawai‘i District Court against ADC for discharging from the system without an

[3] U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, Atrazine CAS # 1912-24-9, Sept. 2003, at 2.

[4] World Health Organization, International Agency for Research on Cancer, IARC Monographs Volume 112: evaluation of five organophosphate insecticides and herbicides, Mar. 20, 2015.

NPDES permit. DOH was originally named as a defendant in the lawsuit but was later dismissed, on its own motion, before any briefing on the merits occurred. DOH continued to receive all ECF notifications in the case and, thus, was aware of all case developments. In July 2019, the Hawaiʻi District Court ruled that ADC was violating the Clean Water Act by discharging pollutants from two pumping stations (Kawaiʻele and Nohili) and four bermed outfalls (Kīkīaola Harbor Drain, Cox Drain, First Ditch, and Second Ditch) without an NPDES permit. *See Nā Kiaʻi Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1110 (D. Hawaiʻi 2019). ADC did not appeal this ruling, nor did DOH seek to intervene to pursue an appeal.

After the federal court ruling, ADC applied for an NPDES permit for all of the system's outfalls except for the Kīkīaola Harbor Drain. ADC represented it was no longer responsible for discharges from the Kīkīaola Harbor Drain and that the outfall was instead the County's responsibility. According to the 2020 Storm Procedures for the Mānā Plain drainage ditch system, the County is responsible for authorizing discharges from the Kīkīaola Harbor Drain. *See* Attachment C. Thus, to comply with the CWA, the County must secure an NPDES permit for the Kīkīaola Harbor Drain or cease all discharges from the outfall.

We are informed and believe that the County contacted DOH for guidance on how to begin the NPDES permitting process for the Kīkīaola Harbor Drain, but that DOH responded that, notwithstanding the federal court's ruling in *Nā Kiaʻi Kai v. Nakatani*, discharges from the Kīkīaola Harbor Drain do not require an NPDES permit. *See* Attachment A. To our knowledge, the County has not proceeded with submitting an NPDES permit application.

III. THE COUNTY'S VIOLATIONS OF THE FEDERAL CLEAN WATER ACT AND THE NEED FOR INJUNCTIVE RELIEF AGAINST THE DIRECTOR OF HEALTH

The County is discharging pollutants to navigable waters without an NPDES permit in violation of the CWA. 33 U.S.C. § 1311(a). The CWA strictly regulates the discharge of pollutants into the waters of the United States by prohibiting "any addition of any pollutant to navigable waters from any point source" in the absence of an NPDES permit. *Id.* § 1362(12); *see also id.* §§ 1311(a), 1342. In the State of Hawaiʻi, the EPA has delegated authority to DOH to issue NPDES permits pursuant to Section 402(b) of the Act. *Id.* § 1342(b); 40 C.F.R. §123.24. DOH sets forth requirements for applying for and obtaining an NPDES permit in Hawaiʻi. HAR § 11-55-04.

The County intermittently discharges from the Kīkīaola Harbor Drain during heavy rain events. *See* Attachment C; *see also Nā Kiaʻi Kai*, 401 F. Supp. 3d at 1103 (holding that plaintiffs established "intermittent[]" discharges from four outfalls, which include the Kīkīaola Harbor

Drain, that "drain into the nearshore marine waters along West Kauaʻi by opening sand berms in the outfalls") (quotation marks and citation omitted).

The discharged waters contain pollutants regulated under the CWA. The CWA broadly defines "pollutant" to include "dredged spoil," "rock," "sand," "chemical wastes," "biological materials," and "agricultural waste." 33 U.S.C. § 1362(6). The discharged waters visibly contain sediment, which contributes to ocean turbidity. *See* HAR §§ 11-54-6 (containing numeric criteria for marine water turbidity). The discharged waters also contain residual pesticides, including atrazine, bentazon, cis-propiconazole, fipronil, metolachlor, simazine, trans-propiconazole, and glyphosate. *See Nā Kiaʻi Kai*, 401 F. Supp. 3d at 1103 (holding that the discharged waters contain pollutants within the meaning of the CWA, including "sediment and dirt" from the unlined canals and ditches and "pesticide residue").

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 the 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). The nearshore ocean waters along Kīkīaola Harbor constitute jurisdictional waters under the CWA. *See Nā Kiaʻi Kai*, 401 F. Supp. 3d at 1104 (holding that the nearshore waters of the Pacific Ocean surrounding Kauaʻi are navigable waters protected under the CWA).

The County is discharging pollutants to navigable waters from a point source. Under the CWA, a "point source" is "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch, channel, . . . [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Under this broad definition, the Kīkīaola Harbor Drain is a point source. Therefore, the County's unpermitted pollutant discharges from the Kīkīaola Harbor Drain to the nearshore ocean waters violate the CWA. *See Nā Kiaʻi Kai*, 401 F. Supp. 3d at 1104 (holding that the Mānā Plain drainage ditch system, which includes the Kīkīaola Harbor Drain, is a point source under the CWA).

Due in part to the Director's refusal to abide by the federal court's ruling, the County lacks the requisite NPDES permit for discharges from the Kīkīaola Harbor Drain.

IV. NOTICE OF INTENT TO SUE FOR THE COUNTY'S VIOLATONS OF THE CLEAN WATER ACT AND FOR INJUNCTIVE RELIEF AGAINST THE DIRECTOR OF HEALTH

By this letter, pursuant to CWA section 505, 33 U.S.C. § 1365, the Community Groups hereby put you on notice that, after the expiration of sixty (60) days from the date of service of this notice, the Community Groups intend to file an enforcement action in federal court against the County to address its violations of the CWA and against the Director, in her official capacity,

for prospective injunctive relief requiring the Director to issue an NPDES permit for the Kīkīaola Harbor Drain. The Community Groups intend 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. 33 U.S.C. § 1365(a), (d). Pursuant to CWA section 309(d) and its implementing regulations, each of the above-described CWA violations subjects the County to a penalty of up to $59,973 per day. *Id.* § 1319(d); 40 C.F.R. § 19.4.

The Community Groups are 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 kwager@earthjustice.org, dhenkin@earthjustice.org, and ebryant@earthjustice.org. Due to the serious, ongoing harm to West Kaua‘i waters from the illegal discharges at the Kīkīaola Harbor Drain, 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,

Kylie Wager Cruz
David L. Henkin
Elena Bryant
EARTHJUSTICE
Attorneys for the Community Groups

Attachments A - C

From:	Wade Lord
To:	eushio@kauai.gov; Kylie Wager Cruz; alarrimore@kauai.gov
Cc:	David Henkin
Subject:	RE: County Discharges from Kikiaola
Date:	Thursday, September 2, 2021 11:37:03 AM
Attachments:	ATT00001.png ATT00002.png

Aloha Kylie -

My name is Wade Lord. I am the CIP Program Manager for the County of Kauai. I was asked to assist in this matter as I have responsibility for some of the management functions of the asset.

The County wanted to get back to you on the matter of the NPDES permit for the Kikiaola outfall. The last time the County reached out, it indicated that it was seeking to procure external consultants to help us in our compliance work going forward. We have contacted ecological firms that specialize in stormwater management planning, and are seeking proposals with a key objective to minimize the flow of stormwater from the site.

The County did want to keep you aware of developments in its compliance activities with the State. The County did reach out to the State for guidance on how to begin the NPDES permit process and requirements for the Kikiaola outfall. The State informed the County that the opening of the outfall did not require a NPDES permit, as they considered it a State water under Hawai'i Revised Statutes § 342D-1.

The State directed us to the U.S. Army Corps of Engineers to determine whether a Department of the Army (DA) permit is required to open the outfall that would trigger the need to obtain a Section 401 Water Quality Certification (WQC) from the State. We provided the U.S. Army Corps of Engineers with information and photos of the outfall. They are currently gathering additional information from the landowner of the outfall.

In moving forward with a NPDES permit, the County is cognizant that the State is responsible for administering the NPDES permitting system in Hawai'i and they have informed us that a different compliance strategy applies to our situation. The County's aim is the development of an effective water management plan. Any assistance, insight, and best management practices you could share with us in order to reach that objective would be appreciated.

We will continue to provide you with updates as we progress with our efforts.

Mahalo,

Wade Lord
Capital Improvements Program Manager

ATTACHMENT A

Public Works
County of Kaua'i
4444 Rice Street | Suite 275
Lihu'e, Kaua'i, Hawai'i 96766

T 808.241.4906
C 808.652.1912
F 808.241.6604
County of Kaua'i

From: Elton Ushio <eushio@kauai.gov>
Sent: Thursday, May 20, 2021 5:29 PM
To: Kylie Wager Cruz <kwager@earthjustice.org>; Aaron Larrimore <alarrimore@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Kylie,

Aloha!

We'll keep you updated.

We don't have any questions for Earthjustice at this time, but we'll let you know if we do.

Mahalo,

Elton

From: Kylie Wager Cruz <kwager@earthjustice.org>
Sent: Wednesday, May 19, 2021 8:59 AM
To: Elton Ushio <eushio@kauai.gov>; Aaron Larrimore <alarrimore@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Elton,

Thank you very much for the update. We are glad the county is moving forward with securing a consultant to assist with the permitting process. Would you be able to provide us updates as that process progresses? Also, let us know if you need any information from us.

Best, Kylie

From: Elton Ushio <eushio@kauai.gov>
Sent: Tuesday, May 18, 2021 5:24 PM
To: Kylie Wager Cruz <kwager@earthjustice.org>; alarrimore@kauai.gov
Cc: David Henkin <dhenkin@earthjustice.org>
Subject: RE: County Discharges from Kikiaola

Kylie,

Aloha!

It's good to hear from you. We weren't able to set up a meeting with DOH yet, but we're moving forward anyway.

After additional internal discussions, we realized it would be good for us to bring in someone with greater issue area expertise on how to proceed with a permit. To get that help, we're beginning the procurement process to bring a consultant on board.

Let us know if you would like to chat about that process.

Mahalo,

Elton S. Ushio

Emergency Management Administrator
Kaua`i Emergency Management Agency (formerly Civil Defense)
3990 Kaana Street Suite 100
Lihue, HI 96766
Bus: (808) 241-1800
Fax: (808) 241-1860
24/7 Cell: (808) 652-4009
www.kauai.gov/kema

From: Kylie Wager Cruz <kwager@earthjustice.org>
Sent: Monday, May 17, 2021 9:39 AM
To: Aaron Larrimore <alarrimore@kauai.gov>; Elton Ushio <eushio@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Hi Aaron and Elton,

We're just checking in to see whether you've been in touch with DOH regarding an NPDES permit for the Kikiaola outfall.

Mahalo,
Kylie

From: Kylie Wager Cruz
Sent: Friday, April 30, 2021 8:25 AM
To: Aaron Larrimore <alarrimore@kauai.gov>; eushio@kauai.gov
Cc: David Henkin <dhenkin@earthjustice.org>
Subject: RE: County Discharges from Kikiaola

Works for me. I'll send a calendar invite. It will be a zoom link that also has a dial-in number.

Thanks, Kylie

From: Aaron Larrimore <alarrimore@kauai.gov>
Sent: Friday, April 30, 2021 4:20 AM
To: eushio@kauai.gov; Kylie Wager Cruz <kwager@earthjustice.org>
Cc: David Henkin <dhenkin@earthjustice.org>
Subject: RE: County Discharges from Kikiaola

3 pm would work for me.

From: Elton Ushio <eushio@kauai.gov>
Sent: Thursday, April 29, 2021 6:08 PM
To: Kylie Wager Cruz <kwager@earthjustice.org>; Aaron Larrimore <alarrimore@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Kylie,

Both Aaron and I have a recurring Monday meeting in that time slot.

We would normally be free by 2:00 PM, but given that it will be the day before the intercounty quarantine vaccination travel exception program goes live, I could imagine us going longer.

How's 3:00 PM, pending Aaron's availability?

Mahalo,

Elton

From: Kylie Wager Cruz <kwager@earthjustice.org>
Sent: Thursday, April 29, 2021 12:25 PM
To: Elton Ushio <eushio@kauai.gov>; Aaron Larrimore <alarrimore@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Elton,

Thanks for getting back to me and sorry to hear about your colleague.

How about May 10 at 1 p.m.? (I am actually available anytime after 1 p.m. that day.)

Mahalo, Kylie

From: Elton Ushio <eushio@kauai.gov>
Sent: Thursday, April 29, 2021 8:46 AM
To: Kylie Wager Cruz <kwager@earthjustice.org>; alarrimore@kauai.gov
Cc: David Henkin <dhenkin@earthjustice.org>
Subject: RE: County Discharges from Kikiaola

Kylie,

Aloha!

I'm emailing to touch base with you and to assure you that we are still tracking this item.

Unfortunately, our designated Deputy County Attorney has been on the mainland for a few weeks due to a family emergency, but we anticipate his return sometime next week.

Given that, could we arrange a Teams meeting with you and any appropriate colleagues during the workweek of May 10-14?

If so, please provide some available dates and time slots, and I'll set it up.

Mahalo,

Elton S. Ushio

Emergency Management Administrator
Kaua`i Emergency Management Agency (formerly Civil Defense)
3990 Kaana Street Suite 100
Lihue, HI 96766
Bus: (808) 241-1800
Fax: (808) 241-1860
24/7 Cell: (808) 652-4009
www.kauai.gov/kema

From: Elton Ushio
Sent: Tuesday, April 06, 2021 8:50 AM
To: Kylie Wager Cruz <kwager@earthjustice.org>; Aaron Larrimore <alarrimore@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Kylie,

Aloha!

I want to update you by confirming that your communication was received and is currently under review.

Deputy County Attorney Aaron Larrimore is copied here and will be assisting with this item.

We should be getting back to you in the not too distant future.

Mahalo,

Elton S. Ushio

Emergency Management Administrator
Kaua`i Emergency Management Agency (formerly Civil Defense)
3990 Kaana Street Suite 100
Lihue, HI 96766
Bus: (808) 241-1800
Fax: (808) 241-1860
24/7 Cell: (808) 652-4009
www.kauai.gov/kema

From: Kylie Wager Cruz <kwager@earthjustice.org>
Sent: Tuesday, March 30, 2021 1:35 PM
To: Emergency Management <kema@kauai.gov>; Elton Ushio <eushio@kauai.gov>; COK County Attorney <cokcountyattorney@kauai.gov>
Cc: dhenkin@earthjustice.org
Subject: RE: County Discharges from Kikiaola

Administrator Ushio and County Attorney Bracken:

My apologies for the typo in the subject line of the email I sent at 1:27 p.m. The language “draft email for your review” was inadvertently included in the subject line. The substance of the email was otherwise was intended to be sent to you both.

Mahalo, Kylie

From: Kylie Wager Cruz
Sent: Tuesday, March 30, 2021 1:27 PM
To: 'kema@kauai.gov' <kema@kauai.gov>; 'eushio@kauai.gov' <eushio@kauai.gov>; 'cokcountyattorney@kauai.gov' <cokcountyattorney@kauai.gov>
Cc: David Henkin <dhenkin@earthjustice.org>
Subject: County Discharges from Kikiaola - draft email for your review

Dear Administrator Ushio (County Attorney Bracken, cc’d):

As I previewed a couple weeks ago, we are writing to inquire about water discharges from the Kikiaʻola Harbor Drain in Kekaha.

In 2016, Earthjustice, on behalf of Na Kiaʻi Kai, Surfrider Foundation, and Pesticide Action Network, brought a lawsuit against the state Agribusiness Development Corporation for discharging from the Mana Plain drainage ditch system in Kekaha without a discharge permit (NPDES permit). We won in July 2019, when the Hawaiʻi federal district court ruled that ADC was violating the Clean Water Act by discharging from two pumping stations (Kawaiʻele and Nohili) and four bermed outfalls (Kikiaʻola, Cox Drain, First Ditch, and Second Ditch) without an NPDES permit. See Na Kiaʻi Kai v. Nakatani, 401 F. Supp. 3d 1097 (D. Hawaiʻi 2019), attached.

Since our victory, ADC has applied for an NPDES permit for all outfalls except for Kikiaʻola. ADC’s justification for excluding Kikiaʻola from coverage under its permit is that Kauaʻi County now controls the Kikiaʻola Harbor Drain. See ADC’s NPDES permit application, attached. For example, at PDF pg. 92 of its permit application, ADC states “former Kikiaola Harbor Drain (NPDES 004) is no longer part of the ADC’s system and is the County of Kauai’s responsibility.” We’ve also learned that Kikiaʻola was opened during storms in early 2020 and March of this year, and we understand that County makes the call on whether or not to open Kikiaʻola. See Standard Operating Procedure for Drainage Facilities, attached.

We confirmed with the Department of Health Clean Water Branch that the County has not applied for an NPDES permit for the Kikiaʻola Harbor Drain. We hope that in light of the clear legal precedent applicable to this outfall, the County will take immediate steps to come into compliance with the Clean Water Act to ensure that any discharges from Kikiaʻola are regulated and monitored. We are reaching out to you with a genuine desire to resolve this issue informally, so please let us know what the County plans to do to address the situation. We would be happy to set up a conference call to discuss this further.

Mahalo for your time and consideration.

Warm regards,
Kylie

Kylie W. Wager Cruz (*she/her/hers*)
Staff Attorney
Earthjustice Mid-Pacific Office
850 Richards Street, Suite 400
Honolulu, HI 96813
T: 808.599.2436, ext. 6618
F: 808.521.6841
earthjustice.org

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

[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,

[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)

[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,

[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.

---

[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

[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

[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

[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

---

¶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

---

[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

AGRIBUSINESS DEVELOPMENT CORPORATION
Kekaha Agricultural Lands

STANDARD OPERATING PROCEDURE FOR DRAINAGE FACILITIES

STORM PROCEDURES
August 2020

Good judgment must be used in dealing with storm conditions. The speed of response is key to minimizing flooding impacts. Factors to consider include the locality, intensity of rains, potential flooding to crops, threats to residential areas, etc. Recent rainfall should also be taken into consideration since saturated grounds can cause fast run-off from hillsides into ravines.

Lastly, preparation to avert flooding should be done as much as possible during daylight hours.

Storm preparation work will be authorized by Agribusiness Development Corporation (ADC) upon recommendation from the Kekaha Agriculture Association (KAA) Manager. The work will be performed by ADC's operation and maintenance contractor(s) and KAA's contractor(s).

The personnel below will perform the storm operating procedure work. Emergency contact information is listed on the last page of this document.

KAA Manager = Kekaha Agriculture Association Manager (Mike Faye)
ADC Contractor = ADC's Operation and Maintenance Contractor-April 2020 to March 31, 2025 (Lords Electric LLC)
Equipment Contractor = KAA's Heavy Equipment Contractor (usually J&R Equipment)
ADC Project Coordinator = ADC's Kauai Project Coordinator (Lyle Roe)
Consultant- = ADC's Discharge Monitoring Consultant Element Environmental LLC

Listed herewith are general guidelines in storm preparation.

I. FOR 1 TO 2 INCHES OF RAIN IN THE KEKAHA AND WAIMEA AREAS:

Check general area for any problems.

II. FOR 2 TO 3 INCHES OF RAIN

A. ADC Contractor must ensure that all three pumps at Kawaiele pumping are set to automatic.

1. IMPORTANT: Keep close watch over the Pacific Missile Range Facility (PMRF) Kinikini bypass ditch dam (makai of bridge). Be sure there is at least 3 ft. to 4 ft. fill above the operating water level to prevent seawater intrusion.

B. KAA to ensure shutdown of all irrigation, including mauka and source pumps.

ATTACHMENT C

III. FOR SEVERE STORM (TORRENTIAL RAINS) – MORE THAN 3 INCHES OF RAIN WITH STORM WARNINGS, ETC.:

A. In Kekaha Town, major storm drains to the ocean must be open upon instructions from the KAA Manager (or Alternate KAA Emergency Coordinator, ADC Office or KAA Property Manager). The KAA Manager shall inform the ADC Office or ADC Property Manager of planned action. The ADC Office and the ADC Property Manager shall ensure each other are kept informed.

1. Unless otherwise instructed by KAA Manager, Equipment Contractor will open beach outlets to sea by priority as follows:

   a. Cox
   b. 1st Ditch
   c. 2nd Ditch
   d. Kikiaola – Only if authorized by County of Kauai

IMPORTANT: PRIORITY MAY CHANGE, AS DETERMINED BY KAA MANAGER, BASED ON LOCAL CONDITIONS AT THE TIME.

The ADC Office shall notify the Department of Health, Clean Water Branch by phone, of the opening of outfalls (1st Ditch, 2nd Ditch, Cox). The ADC may delegate this responsibility to its Consultant. The ADC Contractor shall log time and dates of opening and closing outfalls and their flow rates.

B. In the **Kekaha Agricultural Lands**, storm preparation instructions will be given by KAA Manager. During his absence, the Alternate KAA Emergency Coordinator shall give the instructions.

The KAA Manager will:

1. Inform the ADC Office or ADC Kauai Project Coordinator of imminent flooding at Pacific Missile Range Facility.

2. Instruct to close Field 104 canal gate on main canal to divert all Kekaha waters through Cox Drain. Make sure the field 104 relay pump is set on Auto. This pump will now prevent flooding on Kekaha roadway as well as the surrounding housing areas.

3. Send an excavator to dig a by-pass ditch around the field 201 relay pump as well as another by-pass ditch from the field 201 canal into the Cox Drain. This will divert all Kekaha storm flows out through Cox Drain.

4. Check Field 309 culvert. Remove any restrictions.

5. Have backhoe available to travel along the Main Track road, going from Kekaha to Mana and open restrictions as needed.

6. Instruct to reduce inflows from Waimea Valley to Waiawa Hydro to about six (6) MGD.

   a. Excess Kekaha Main Ditch water can be discarded by opening Orange Tree Gate
   b. Maintain about 5 MGD for movement of silt from Waiawa to Polihale on the Kekaha Main Ditch.

C. In **Pacific Missile Range Facility (PMRF)**, if flooding is imminent, the ADC Office or ADC Kauai Project Coordinator will notify PMRF Public Works Office before taking any action. Storm drains will be opened by ADC Contractor upon instruction from the ADC Office or ADC Property Manager.

1. The ADC Contractor shall open Kawaiele storm drains at PMRF as follows:

   a. When Kawaiele Pumping Station gauge is 2.5 feet above sea level and continuing to rise with waters from Nohili, 419, 421, etc, ADC Contractor will open Dry Ditch in the following manner:

      1. PMRF Public Works will send someone to show the location of their water line and communication cables that cross the Dry Ditch mauka side of the berm.
      2. Open Dry Ditch to ocean (BEACH FIRST).
      3. Lower Kawaiele flood gate on Kawaiele discharge to divert all Kawaiele Pumping Station water through Dry Ditch.
      4. ADC Contractor, in consultation with PMRF Public Works and ADC Kauai Project Coordinator, may remove dirt embankment at Kinikini Ditch on mauka side of the bridge. The Dry Ditch will now take all waters from Kawaiele Pumps. The Kinikini drain on the Polihale side will take water from Nohili Canal, 419 and 421, etc. by gravity out to the ocean. Discharge rate can be improved by opening channel cut at the mouth of the drain.
      5. The ADC shall notify the Department of Health, Clean Water Branch by phone, of the opening of outfalls (Kawaiele). The ADC may delegate this responsibility to the Consultant.

   b. When Kawaiele pumping station gauge reads 2.5 feet above sea level, close Kinikini Ditch by adding fill 3 ft – 4 ft above ditch water level across the entire ditch.

      Restore embankment if sea water continues to backflow into Kinikini Ditch. (The dirt embankment will prevent seawater from coming back into canals and Fields 419 and 421).

   MONITOR OCEAN SURF CONDITIONS TO PREVENT SEA WATER FROM COMING BACK INTO CANALS (as canals water levels return to normal).

D. Other work performed by KAA and its contractors at Kekaha agricultural lands irrigation system will be coordinated by KAA Manager.

I. Reservoirs:

a. Puulua: Maximum Height …… 60'

Discard excess at Waipo-Camp 3, and Kauhao Valley (Lee's) as needed.

b. Check other reservoirs and ditches for safe levels.

II. Ditch system and agricultural lands:

a. Always maintain a small flow in the Kekaha Ditch system, or ditch along hillsides to prevent silting.

b. Divert as much water as possible through gravity flows in drains to sea. This will reduce pumping load.

c. Maintenance personnel should inspect and sluice silt in the Kekaha ditch by opening various gates into ravines – Pump 3, Waiawa, Marine Road, 119, 123, 127, and 130.

d. Maintenance personnel should inspect and remove all debris at pump stations, culverts, drains, bridges, etc. Have backhoe travel along Main Track Road.

e. Maintenance personnel should inspect roads – where possible, remove ponding water (shovel cut, etc.)

Emergency Notification List

As of August 2020

	Office	Mobile	Home
ADC Main Office (Oahu):	808-586-0186		
Contact: Lynn Owan	808-586-0187	808-753-2485	
Alternate: Ken Nakamoto	808-586-0087	808-783-6624	
KAA Manager			
Mr. Michael Faye		808-639-3900	
Alternate KAA Emergency Coordinator			
Mr. Michael Tambio		808-639-7515	808-338-1103
ADC Kauai Project Manager			
Lyle Roe	808-622-6696	808-372-8743	808-799-3240
Discharge Monitoring Consultant			
Element Environmental LLC (Ryan Yamasaki)		808 864-3952 (Oahu)	
Marvin Heskett		808 728-4617 (Oahu)	
Kauai Emergency Management Agency			
Elton S. Ushio (Administrator)	Office: 241-1800	808-652-4009 (24/7)	
District Environmental Health Program-Kauai			
Mr. Gerald Takamura, District Environmental Health Program Chief			
(Chief Sanitarian)	Office: 241-3323		
Mr. Gary Ueunten	Office 241-3323		
Hawaii Department of Health			
Clean Water Branch (Oahu)	808-586-4309	After hours: 808-247-2191	
Mr. Darryl Lum			

PACIFIC MISSILE RANGE FACILITY (PMRF):		
Commanding Officer CAPT Vincent Young	808-335-4251	
Public Works		
LCDR Jeremy Schwartz, PWO	808-335-4635	
Mr. Scott Zenger, Deputy PWO	808-335-4637	
Mr. Steven Hironaka, Public Works Engineer	808-335-4628	808-651-9814
PMRF Security		
Bill Emilyon	808-335-4526	
PMRF Contractor: Manu Kai		
John Hare	808-335-4599	