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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI‘I

KUPALE OOKALA, INC., a Hawai‘i  
non-profit corporation; CENTER FOR  
FOOD SAFETY, a Washington, D.C.  
non-profit corporation,

Plaintiffs,

v.

BIG ISLAND DAIRY, LLC, a Hawai‘i  
limited liability company,

Defendant.

Civil No. 17-00305-SOM-KSC

PLAINTIFFS’ MEMORANDUM  
OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS’ MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT ON LIABILITY

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1 **I. INTRODUCTION**

2 Plaintiffs Kupale Ookala, Inc., and Center for Food Safety (collectively,  
3 “Plaintiffs”) respectfully submit the following Memorandum of Points and  
4 Authorities in Support of Plaintiffs’ Motion for Partial Summary on Liability. As  
5 described herein, there is no dispute of material fact that Defendant Big Island  
6 Dairy, LLC (“Big Island Dairy” or the “Dairy”) is a “person” that has “discharged”  
7 “pollutants” from a “point source” into jurisdictional waters, without first having  
8 obtained the requisite National Pollutant Discharge Elimination System Permit  
9 (“NPDES” Permit). Indeed, the undisputed (and often admitted) facts show that  
10 Big Island Dairy has violated the Federal Water Pollution Control Act, otherwise  
11 known as the Clean Water Act (“CWA” or the “Act”) *at least* 31 times by  
12 discharging manure and manure-contaminated water into the Gulches draining the  
13 Dairy facility and reaching the Pacific Ocean. Big Island Dairy has a long and  
14 sordid history of using these Gulches as a means of disposal of manure-  
15 contaminated process and stormwater from its operation. Plaintiffs therefore  
16 respectfully request that the Court find, as a matter of law, that Big Island Dairy is  
17 strictly liable under the CWA. Plaintiffs further request that the Court find  
18 Plaintiffs have constitutional standing to maintain this suit.

19 //

20 //

1 **II. STATEMENT OF MATERIAL FACTS.**

2 Big Island Dairy, LLC, owns and operates a Concentrated Animal Feeding  
3 Operation or “CAFO” on the northeastern coast of Hawai’i, above the community  
4 of Ookala. Plaintiffs’ Concise Statement of Material Facts (“PSF”) No. 1. The  
5 Dairy is situated on approximately 2,324 acres of land, which is owned by the  
6 State and leased to Defendant. PSF No. 2. Big Island Dairy has a herd size of  
7 approximately 1,500 milking cows, 1,000 heifers, 100 dry cows, and 400 calves,  
8 for a total of 3,000 animals.<sup>1</sup> PSF No. 4. Big Island Dairy meets the definition of a  
9 “large” CAFO and is registered as a 2,000 head CAFO with the United States  
10 Department of Agriculture. PSF No. 7. At no time has Big Island Dairy possessed  
11 an NPDES permit for its dairy facility. PSF No. 9.

12 The Dairy’s herd generates at least 61,196 gallons per day of liquid manure  
13 and urine, which is intended to be stored in two storage lagoons before being land-  
14 applied to application fields. PSF Nos. 5 & 15. The “Upper Lagoon” has a  
15 presumed capacity of 2.2 million gallons, and is connected to the “Lower Lagoon,”  
16 which has a stated capacity of 4.9 million gallons. PSF Nos. 23 & 24. The Lower  
17 Lagoon is directly connected to the Kaohaoha Gulch by an earthen channel that  
18 carries excess liquid from the lagoon into that Gulch. PSF No. 25. The Hawai’i  
19 Department of Health (“HDOH”) has informed Big Island Dairy that, due to storm

20 \_\_\_\_\_  
<sup>1</sup> The Dairy represents it will reduce its herd size in the future.

1 events and prolonged periods of wet weather, the Dairy should keep the Lower  
2 Lagoon at 90% available capacity at all times to allow for adequate storage. PSF  
3 No. 26. Solid manure generated by the herd is “composted” on-site for use as  
4 bedding. PSF No. 11. Both liquid and solid cow manure contains numerous  
5 bacteria and other pathogens, among them *Escherichia coli* (*E. coli*), fecal  
6 coliforms, enterococci, and *Clostridium perfringens*. PSF No. 8.

7 While it applies manure from its herd to its application fields, PSF No. 15,  
8 the Dairy admits that it does not document the quantities of nitrogen or phosphorus  
9 contained within its manure applications.<sup>2</sup> PSF No. 16. Before 2016, the Dairy  
10 never maintained records of its manure applications. PSF No. 17. Records of  
11 manure applications in 2016 and 2017 are incomplete. *Id.*

12 Flowing through and adjacent to Big Island Dairy are three Class II Inland  
13 Waters, the Kaula Gulch (a/k/a “A Gulch”), the Alaiialoa Gulch (a/k/a “B Gulch”),  
14 and the Kaohaoha Gulch (a/k/a “C Gulch”). PSF No. 3. All three Gulches flow to  
15 the Pacific Ocean. *Id.* Stormwater from the compost area and parking lots  
16 sometimes flows into the Alaiialoa Gulch. PSF No. 12; *see also* PSF No. 14.  
17 Stormwater that runs off the roofs of Big Island Dairy’s cow barns is collected in a  
18 trough and discharged directly into the Alaiialoa Gulch. PSF No. 13.

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20 <sup>2</sup> BID purportedly intends to change this practice, as the Dairy updated and revised its “Certified  
Nutrient Management Plan (CNMP)” during the pendency of this lawsuit, in June 2018.



1 *Unlawful Discharges from Big Island Dairy*

2 Big Island Dairy has discharged manure pollutants into the three Gulches on  
3 numerous occasions, many of which are described below:

4 Alaialoa (“B”) Gulch

5 1. June 30, July 1-2, 2014 (at least three days of discharges). HDOH  
6 documented the Dairy discharging animal waste from its “airstrip” heifer pen  
7 operation area through a well-defined flow path directly into the Alaialoa Gulch.  
8 PSF No. 21.

9 2. September 14, 2016 (at least one day of discharge). Plaintiffs’  
10 members documented evidence of Big Island Dairy discharging animal waste into  
11 the Alaialoa Gulch. PSF No. 36.

12 3. September 24, 2016 (at least one day of discharge). Plaintiffs’  
13 members documented evidence of Big Island Dairy discharging animal waste into  
14 the Alaialoa Gulch. PSF No. 37.

15 4. March 5 and 10, 2017 (at least two days of discharges). Plaintiffs  
16 documented evidence, including water quality sampling, of Big Island Dairy  
17 discharging animal waste into the Alaialoa Gulch. PSF No. 38.

18 5. March 14, 2017 (at least one day of discharge). HDOH obtained  
19 water quality samples showing that manure pollutants were discharged into the  
20 “Ookala Stream,” otherwise known as the Alaialoa Gulch. PSF No. 40.

1           6.     April 2, 2017 (at least one day of discharge). Between April 1 and  
2 April 16, 2017, Big Island Dairy applied 777,600 gallons of manure to Fields 1 and  
3 5. The Alaiialoa Gulch flows through Field 1. PSF No. 44. Plaintiffs documented  
4 evidence of Big Island Dairy discharging animal waste into the Alaiialoa Gulch.  
5 PSF No. 45.

6           7.     April 17, 2017 (at least one day of discharge). Plaintiffs documented  
7 further evidence of Big Island Dairy discharging animal waste into the Alaiialoa  
8 Gulch. PSF No. 45.

9           8.     May 15, 2017 (at least one day of discharge). Between May 3 and  
10 May 14, 2017, Big Island Dairy applied 494,400 gallons of manure to Fields 1 and  
11 5. The Alaiialoa Gulch flows through Field 1. PSF No. 46. Plaintiffs' members  
12 took videographic evidence of manure-contaminated water flowing in the Gulch on  
13 May 15, 2017. PSF No. 47.

14           9.     November 28, 2017 (at least one day of discharge). BID applied at  
15 least 1,825,000 gallons of manure to Fields 1 and 5 between November 6 and  
16 November 26, 2017. The Alaiialoa Gulch flows through Field 1. PSF No. 31.  
17 Plaintiffs obtained water quality sampling on November 28, 2017, confirming that  
18 manure-contaminated water was discharged into the Gulch. PSF No. 32.

19           10.    March 27, 2018 (at least one day of discharge). From March 20, 2018  
20 to March 27, 2018, BID applied 784,000 gallons of manure from the Lower

1 Lagoon to Field 5. Field 5 is adjacent to both Alaiialoa and Kaohaoha Gulches.  
2 Flows from Field 5 make their way to both Alaiialoa and Kaohaoha Gulches. PSF  
3 No. 33. Plaintiffs obtained water quality sampling on March 27, 2018, confirming  
4 that manure-contaminated water was discharged into the Gulch. PSF No. 34.

5 11. April 13, 2018 (one day of discharge). Big Island Dairy admits it  
6 discharged 300 gallons of manure from a nearby field into the Gulch. PSF No. 22.

7 12. May 6, 2018 (one day of discharge). Big Island Dairy admits it  
8 discharged 10,000 gallons of liquid manure into the Alaiialoa Gulch. PSF No. 14.

9 For purposes of this Summary Judgment motion, Big Island Dairy  
10 unlawfully discharged manure pollutants into the Alaiialoa Gulch *at least* 15 times.<sup>3</sup>

11 Kaohaoha (“C”) Gulch

12 1. March 10, 2017 (at least one day of discharge). Plaintiffs’ water  
13 quality sampling confirmed that manure pollutants were discharged to this Gulch.  
14 PSF No. 39.

15 2. March 19, 2017 (at least one day of discharge). Plaintiffs’ members  
16 took videographic evidence of manure-contaminated water flowing through the  
17 Gulch and into the Pacific Ocean. PSF No. 41.

18  
19 \_\_\_\_\_  
20 <sup>3</sup> Plaintiffs intend to show at trial that many of these discharges were ongoing for multiple days, if not weeks. Because that testimony will be in the form of expert opinion, Plaintiffs do not raise it in the instant motion. Plaintiffs will also provide evidence at trial, in part through expert testimony, of numerous additional discharges to all three Gulches.

1           3.     March 28-29, 2017 (*at least* two days of discharges). HDOH  
2 inspected the site and found “a direct discharge of cow waste into the Kaohaoha  
3 Gulch,” “evidence of previous discharges from the Dairy’s wastewater lagoons,”  
4 and “evidence of recent and regular discharges of wastewater from the Dairy’s  
5 field irrigation operations to the Kaohaoha Gulch.” PSF No. 27. HDOH fined Big  
6 Island Dairy for a total of one discharge “from its crop irrigation system to  
7 Kaohaoha Gulch.” PSF No. 20. The other discharges were not addressed by  
8 HDOH in its penalty.

9           4.     November 28, 2017 (at least one day of discharge). BID applied  
10 1,825,000 gallons of manure to Fields 1 and 5 between November 6 and November  
11 26, 2017. Field 1 is adjacent to the Kaohaoha Gulch. Field 5 is adjacent to the  
12 Kaohaoha Gulch. Flows from parts of both Fields 1 and 5 make their way to the  
13 Kaohaoha Gulch. PSF No. 31. Plaintiffs obtained water quality sampling on  
14 November 28, 2017, confirming that manure-contaminated water was discharged  
15 into the Gulch. PSF No. 32.

16           5.     March 27, 2018 (at least one day of discharge). From March 20 to  
17 March 27, 2018, BID applied 784,000 gallons of wastewater from the Lower  
18 Lagoon to Field 5. Field 5 is adjacent to the Kaohaoha Gulch. Flows from Field 5  
19 make their way to the Kaohaoha Gulch. PSF No. 33. Plaintiffs obtained water  
20

1 quality sampling confirming that manure-contaminated water was discharged into  
2 the Gulch. PSF No. 34.

3 6. March 28, 2018 (at least one day of discharge). Plaintiffs obtained  
4 further water quality sampling confirming that manure-contaminated water was  
5 discharged into the Gulch. PSF No. 35.

6 7. May 7-9, 2018 (at least three days of discharges). Big Island Dairy  
7 admits that it intentionally discharged 2,298,000 gallons of wastewater directly  
8 from its Lower Lagoon into the Gulch. PSF No. 28.

9 8. August 23-25, 2018 (at least three days of discharges). Big Island  
10 Dairy admits that it intentionally discharged 5,848,000 gallons of animal  
11 wastewater from its operations into the Gulch. PSF No. 29.

12 For purposes of this Summary Judgment motion, Big Island Dairy  
13 unlawfully discharged manure pollutants into the Kaohaoha Gulch *at least* 13  
14 times.

15 Kaula (“A”) Gulch

16 1. May 15, 2017 (at least one day of discharge). Plaintiffs’ members  
17 took videographic evidence of manure-contaminated water flowing through the  
18 Gulch. PSF No. 42.



1 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). There is also no issue of fact if, on  
2 the record as a whole, a rational trier of fact could not find in favor of the non-  
3 moving party. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

#### 4 **IV. PLAINTIFFS HAVE STANDING.**

5 The CWA's "citizen suit provision extends standing to the outer boundaries  
6 set by the 'case or controversy' requirements of Article III of the Constitution."  
7 *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir.  
8 2000). Consequently, "the threshold question of citizen standing under the CWA  
9 is whether an individual can show that she has been injured in her use of a  
10 particular area because of concerns about violations of environmental laws, not  
11 whether the plaintiff can show there has been actual environmental harm." *Id.* at  
12 1151.

13 For organizations such as Plaintiffs, standing to sue requires (1) that  
14 Plaintiffs' members would otherwise have standing to sue in their own right; (2)  
15 the interests at stake are germane to the organization's purpose; and (3) neither the  
16 claim asserted nor the relief requested requires the participation of individual  
17 members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432  
18 U.S. 333, 343 (1977). Here, Plaintiffs are organizations devoted to protection of  
19 the environment, with a special focus on environmental concerns arising from food  
20 production. PSF Nos. 48-50. This lawsuit also does not require the participation

1 of any one individual member. The only remaining question is whether Plaintiffs’  
2 individual members having standing to sue in their own right.

3 For an individual to have Article III standing, she must (1) suffer an “injury  
4 in fact;” (2) that is fairly traceable to the challenged action of the defendant; and  
5 (3) that is likely to be redressed by a favorable decision. *Friends of the Earth, Inc.,*  
6 *v. Laidlaw Env’tl. Servs., Inc. (Laidlaw)*, 528 U.S. 167, 180-81 (2000).

7 Plaintiffs have filed herewith three declarations from their members  
8 establishing that those members have suffered injuries to their constitutionally-  
9 protected interests<sup>4</sup>:

10 Sophia Cabral-Maikui is a lifelong resident of Ookala and is a founding  
11 member of Plaintiff Kupale Ookala. Declaration of Sophia Cabral-Maikui  
12 (“Cabral-Maikui Decl.”) ¶¶ 1-2. Ms. Cabral-Maikui is also a member of Plaintiff  
13 Center for Food Safety. *Id.* ¶ 1. She and her husband grew up playing and  
14 gathering food in the Gulches surrounding the land on which Big Island Dairy sits,  
15 as well as the nearby Pacific Ocean. *Id.* ¶ 2. When Big Island Dairy’s discharges  
16 began fouling the Gulches, Ms. Cabral-Maikui stopped gathering food because of  
17 concerns about contamination. *Id.*; *see also id.* ¶ 4 (“Were the contamination to  
18 stop I would definitely engage in these cultural and recreational activities again.”).

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19  
20 <sup>4</sup> See PSF Nos. 48-50. Plaintiffs cite directly to the members’ declarations in the paragraphs that follow, as they provide the substance of the standing allegations.



1 While she used to swim, streamwalk, hike, birdwatch, and pick guava and other  
2 native fruits in and around the Gulches, those activities have been ceased now due  
3 to brown and smelly contaminated water in the Gulches. *Id.* ¶ 3. Her use and  
4 enjoyment of the Pacific Ocean has similarly diminished. *Id.* ¶ 4. Foul odors from  
5 the Dairy invade her home, which is located between “the Middle [Alaiialoa] and  
6 Kaula” Gulches downstream of the Dairy. *Id.* ¶ 5. At times, she is forced to keep  
7 her windows closed and re-wash her clothes due to the odors. *Id.* Ms. Cabral-  
8 Maikui now buys bottled water because of concerns about the Dairy’s impacts on  
9 groundwater. *Id.* ¶ 6. Finally, Mrs. Cabral-Maikui contends that the Dairy’s  
10 unlawful discharges are “destroying my ability to pass down my cultural practices  
11 to my 11-year old granddaughter, because she cannot enjoy the streams like we  
12 used to.” *Id.* ¶ 7.

13 Genard Frazier is also a founding member of Kupale Ookala and a member  
14 of Center for Food Safety. Declaration of Genard Frazier ¶ 1. He has lived in  
15 Ookala his entire life, and the natural areas are extremely important to his cultural  
16 heritage. *Id.* ¶ 2. He grew up catching and harvesting native foods in and around  
17 the Gulches and where the streams flow into the Pacific Ocean – a way of life he is  
18 trying to pass on to his children. *Id.* Mr. Frazier now avoids contact with the  
19 water in the Gulches because of manure contamination. *Id.* ¶ 3. Before Big Island  
20 Dairy’s discharges, he would regularly catch prawns, opi, and opihi from the

1 Gulches for parties and social events, and would fish at the mouths of the streams  
2 and the shoreline of the Pacific Ocean. *Id.* ¶ 4. He has ceased those activities  
3 because of the manure pollution of the water, out of concern for his health. *Id.* He  
4 has also witnessed numerous discharges and poor application practices by the  
5 Dairy. *Id.* ¶ 15(g).

6 Mary Charlene Nishida is also a founding member of Kupale Ookala and a  
7 member of Center for Food Safety. She owns a historic home in Ookala, but does  
8 not presently live in it due to manure discharges from Big Island Dairy.

9 Declaration of Mary Charlene Nishida, ¶¶ 2-4, filed herewith. The Alaiialoa Gulch,  
10 to which Big Island Dairy discharges manure, runs directly through her property,  
11 coming so close that water splashes from the Gulch onto her home. *Id.* ¶ 5. Ms.  
12 Nishida and her family were sickened by water from the Alaiialoa Gulch when they  
13 were clearing out vegetation along the embankment. *Id.* ¶ 6. Her family has  
14 invested substantial funds into her Ookala property, but due to manure  
15 contamination and foul odors from Big Island Dairy, cannot find full value renters  
16 for the home or buyers for the property. *Id.* ¶ 7. She no longer recreates in the  
17 Alaiialoa Gulch due to manure contamination. *Id.* ¶ 8. “Were it not for BID’s  
18 manure discharges, we would occupy the home that we expended significant  
19 resources to renovate, and engage in daily recreation in and around the Alaiialoa  
20 Gulch running through our property. BID’s ongoing discharges of manure

1 wastewater are thus directly harming my economic, recreational, aesthetic, and  
2 health interests.” *Id.*

3 As to traceability, Plaintiffs must merely demonstrate that Big Island Dairy  
4 “discharges a pollutant that causes or contributes to the kinds of injuries alleged in  
5 the specific geographic area of concern.” *Nat. Res. Def. Council v. Sw. Marine,*  
6 *Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) (citation and quotation marks omitted);  
7 *accord Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996)  
8 (“[T]he Constitution does not require Sierra Club to produce an affiant who claims  
9 that Cedar Point’s discharge in particular injured him in some way.”); *Nat. Res.*  
10 *Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (“[T]o meet the ‘fairly  
11 traceable’ requirement of *Valley Forge*, plaintiffs must merely show that a  
12 defendant discharges a pollutant that causes or contributes to the kinds of injuries  
13 alleged by the plaintiffs.”) (quotation and citation omitted); *Pub. Interest Research*  
14 *Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990).

15 In this case, the evidence shows that Big Island Dairy discharges manure and  
16 manure-contaminated water from the Dairy into the Alaiialoa, Kaohaoha, and  
17 Kaula Gulches. *See, e.g.*, PSF Nos. 12-14; 18-22, 25-29, 42-43. Plaintiffs’  
18 members’ injuries arise from Big Island Dairy’s discharges of manure into these  
19 Gulches, which, *inter alia*, negatively impact the members’ usual activities in these  
20 waters. PSF Nos. 48-50.

1 Finally, it should be readily evident that an order from this Court (after trial)  
2 requiring Big Island Dairy to cease its ongoing discharges and stop polluting the  
3 Gulches and the Pacific Ocean, along with imposition of civil penalties to deter  
4 further violations, will redress Plaintiffs' injuries. *Friends of the Earth, Inc.*, 528  
5 U.S. at 185-86 (imposition of civil penalties redresses plaintiff's injury in Clean  
6 Water Act case); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204  
7 F.3d 149, 162-63 (4th Cir. 2000) (plaintiff seeking injunctive relief satisfies  
8 redressability prong by showing continuing violations of the CWA).

9 **V. BIG ISLAND DAIRY IS STRICTLY LIABLE UNDER THE CLEAN**  
10 **WATER ACT FOR UNLAWFUL DISCHARGES.**

11 The CWA authorizes any person to enforce an "effluent standard or  
12 limitation" against an alleged violator of the Act.<sup>5</sup> 33 U.S.C. § 1365(a), (f). The  
13 effluent standard or limitation at issue in this case is 33 U.S.C. § 1311(a), often  
14 referred to as the "cornerstone" of the CWA. *Northwest Environmental Advocates*  
15 *v. U.S. E.P.A.*, 537 F.3d 1006, 1020 (9th Cir. 2008). That provision prohibits "the  
16 discharge of any pollutant by any person," unless such discharge is authorized by a  
17 NPDES permit. Strict liability applies to violators of this prohibition. *Comm. To*  
18 *Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993).

19 \_\_\_\_\_  
20 <sup>5</sup> The citizen suit provision requires sixty days pre-suit notice to an alleged violator before  
initiating litigation. 33 U.S.C. § 1365(b). Plaintiffs provided the requisite sixty-day notice to  
Big Island Dairy prior to initiating this lawsuit. Dkt. #1, Ex. A.

1 To prevail on summary judgment, Plaintiffs must demonstrate that Big  
2 Island Dairy is a “person” that has “discharged” a “pollutant” from a “point  
3 source” into “waters of the United States” without first having obtained a NPDES  
4 permit. 33 U.S.C. § 1311(a); *see also Hawai'i Wildlife Fund v. Cty. of Maui*, 886  
5 F.3d 737, 744 (9th Cir. 2018) (citing *Headwaters, Inc. v. Talent Irrigation Dist.*,  
6 243 F.3d 526, 532 (9th Cir. 2001)). Here, there is no dispute that Big Island Dairy,  
7 LLC is a “person” within the meaning of the Act. 33 U.S.C. § 1362(5) (“person”  
8 means “corporation”). There can also be no dispute that manure and manure-  
9 contaminated stormwater discharged from the site is a “pollutant.” 33 U.S.C.  
10 § 1362(6) (definition of “pollutant” includes “biological materials”); *see also*  
11 *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d  
12 Cir. 1994) (manure is a pollutant). Big Island Dairy does not have an NPDES  
13 permit. PSF No. 9. “Any discharge of pollutants to the waters of the United States  
14 by a CAFO without a NPDES or in violation of its terms violates the CWA.” *Cnty.*  
15 *Ass'n for Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp.2d 976, 981  
16 (E.D. Wash. 1999).

17 *A. Big Island Dairy is a “Point Source.”*

18 Big Island Dairy is a “point source” as that term is defined in the Act,  
19 because it meets the conditions to be classified as a Large CAFO. 33 U.S.C.  
20 § 1362(14) (“point source” expressly includes “concentrated animal feeding

1 operation.”); PSF No. 7. Discharges from the Dairy’s application fields are not  
2 exempt as “agricultural stormwater” and discharges from the “Production Area”<sup>6</sup>  
3 are never eligible as exempt agricultural stormwater, “because they involve the  
4 type of industrial activity that originally led Congress to single out CAFOs as point  
5 sources.” 68 Fed. Reg. 7198 (2003 CAFO Rule, pertinent section highlighted,  
6 attached hereto as Appendix A).

7 *B. The Gulches and the Pacific Ocean are “Waters of the United States.”*

8 The Alaiialoa, Kaohaoha, and Kaula Gulches – the waterways to which Big  
9 Island Dairy discharges manure pollutants – are “waters of the United States.”  
10 PSF No. 3; 33 U.S.C. § 1362(7) (“navigable waters” means “waters of the United  
11 States”). Under the EPA’s “2015 Waters of the United States” rule, which is  
12 currently applicable in the State,<sup>7</sup> the Gulches are “waters of the United States”

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13 <sup>6</sup> The “Production Area” is defined at 40 C.F.R. § 122.23(b)(8): “Production area means that part  
14 of an AFO that includes the animal confinement area, the manure storage area, the raw materials  
15 storage area, and the waste containment areas. The animal confinement area includes but is not  
16 limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns,  
17 milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways,  
18 and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage  
19 sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting  
20 piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and  
bedding materials. The waste containment area includes but is not limited to settling basins, and  
areas within berms and diversions which separate uncontaminated storm water. Also included in  
the definition of production area is any egg washing or egg processing facility, and any area used  
in the storage, handling, treatment, or disposal of mortalities.”

<sup>7</sup> The “WOTUS” rule is presently being litigated. EPA has a website providing updates; as of  
the date of this filing, the 2015 rule applies in the State of Hawai’i. *See*  
<[https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-  
update](https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update)>.

1 because they are “tributaries” to the Pacific Ocean, which itself is a water of the  
2 United States. 33 C.F.R. § 328.3(a)(5), (c)(3).<sup>8</sup> Specifically, the Gulches  
3 contribute “flow” directly into the Pacific Ocean, and are “characterized by the  
4 presence of the physical indicators of a bed and banks and an ordinary high water  
5 mark.” 33 C.F.R. § 328.3(c)(3); *see also, e.g.*, Tebbutt Decl. Ex. 7 at 14  
6 (describing streambed and flow of Kaohaoha Gulch).

7 In addition, the Pacific Ocean, which directly receives pollution from Big  
8 Island Dairy’s discharges, is a “water of the United States.” 33 U.S.C.  
9 § 1362(12)(B) (defining “discharge of a pollutant” as “any addition of any  
10 pollutant to the waters of the contiguous zone”); § 1362(9) (“contiguous zone”  
11 means the entire zone established by the United States under article 24 of the  
12 Convention of the Territorial Sea and the Contiguous Zone); § 1362(8) (“territorial  
13 seas means the belt of the seas measured from the line of ordinary low water along  
14 that portion of the coast which is in direct contact with the open sea and the line  
15 marking the seaward limit of inland waters, and extending seaward a distance of  
16 three miles.”); *see also Hawai'i Wildlife Fund*, 886 F.3d at 745 (Pacific Ocean is  
17 navigable water); *Hawai'i Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 993-

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18  
19 <sup>8</sup> Alternatively, the Court could conclude that the Gulches are “adjacent” waters under 33 C.F.R.  
20 § 328.3(a)(6), *or* have a “significant nexus” to jurisdictional waters under § 328.3(a)(7) (namely, the Pacific Ocean). One further alternative is that the Gulches themselves constitute “point sources” as they are confined and discrete conveyances or ditches. 33 U.S.C. §1362(14).

1 98 (D. Haw. 2014) (discussing case law concerning navigability). As such, the  
2 waterways to which Defendant discharges are jurisdictional waters under the Act.

3 C. *Big Island Dairy has “Discharged” Manure Pollutants.*

4 The primary question on summary judgment is whether Big Island Dairy  
5 “discharged” pollutants from its CAFO. The uncontroverted facts show the answer  
6 is unequivocally “Yes.” Big Island Dairy has admitted numerous discharges.

7 Circumstantial evidence is also routinely used to prove that an unlawful discharge

8 occurred. *Concerned Area Residents for the Env’t*, 34 F.3d at 120 ((citing *O’Brien*

9 *v. Nat’l Gypsum Co.*, 944 F.2d 69, 72 (2nd Cir. 1991) (“it is beyond any doubt that

10 circumstantial evidence alone may suffice to prove adjudicative facts.”). For

11 instance, discharges from a CAFO were established when two eyewitnesses

12 observed manure application practices placing manure onto a field, while a third

13 witness observed manure flowing from the field and into a stream on a separate

14 day. *Concerned Area Residents for the Env’t*, 34 F.3d at 120. It did not matter that

15 the witnesses did not physically observe manure exiting the field and entering the

16 navigable water. *Id.* The plaintiffs in that case also had photographic evidence of

17 manure-laden streams, which was further relied upon to establish an unlawful

18 discharge. *Id.*; see also *Cmty. Ass’n for Restoration of the Env’t. v. Henry Bosma*

19 *Dairy*, 65 F. Supp. 2d 1129, 1148 (E.D. Wash. 1999) (discharges established by



1 eyewitness testimony); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1176  
2 (D. Idaho 2001) (same).

3         Additionally, courts routinely find unlawful discharges of pollutants based  
4 on water quality sampling. For instance, the court in *Baykeeper v. Kramer Metals,*  
5 *Inc.*, 619 F. Supp. 2d 914, 929 (C.D. Cal. 2009) relied upon water quality samples  
6 taken by the Baykeeper organization in finding that unlawful discharges occurred.  
7 The court noted that the samples were taken by a qualified individual, with  
8 descriptions of the locations that samples were obtained, and the analytical results.  
9 *Id.* Similarly, water quality samples obtained from areas surrounding coal ash  
10 ponds were sufficient for a court to conclude, on a preponderance of the evidence,  
11 that unlawful discharges were occurring. *Tenn. Clean Water Network v. TVA*, 273  
12 F. Supp. 3d 775, 838 (M.D. Tenn. 2017). Other courts have reached similar  
13 results. *See, e.g., Draper v. H. Roberts Family, LLC*, No. 1:06-CV-3057-CC, 2009  
14 U.S. Dist. LEXIS 132853, at \*88-89 (N.D. Ga. Mar. 30, 2009); *Georgia v. City of*  
15 *E. Ridge*, 949 F. Supp. 1571, 1574-1578 (N.D. Ga. 1996); *Envtl. Prot. Info. Ctr. v.*  
16 *Pac. Lumber Co.*, 469 F. Supp. 2d 803, 819 (N.D. Cal. 2007); *Ohio Valley Env'tl.*  
17 *Coal., Inc. v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673, 696-97 (S.D. W. Va. 2015).

18         Here, first and foremost, Big Island Dairy *admits* that it unlawfully  
19 discharged manure pollutants on the following dates:

- 1 - April 13, 2018. 300 gallons of wastewater discharged to Alaialoa Gulch.  
2 PSF No. 22.
- 3 - May 6, 2018. 10,000 gallons of wastewater discharged to the Alaialoa  
4 Gulch. PSF No. 14.
- 5 - May 7-9, 2018. 2,298,000 gallons of wastewater discharged to Kaohaoha  
6 Gulch. PSF No. 28.
- 7 - August 23-25, 2018. 5,848,000 gallons of wastewater discharged to the  
8 Kaohaoha Gulch. PSF No. 29.

9 The Court should treat these admissions as conclusively establishing Defendant's  
10 strict liability under the Clean Water Act for purposes of summary judgment.

11 Second, HDOH has documented, and nowhere has it been contested,  
12 numerous discharges by the Defendant, as described in public records:

- 13 - June 30, July 1-2, 2014. HDOH confirms manure-laden water was  
14 discharged into the Alaialoa Gulch. PSF No. 21.
- 15 - March 28-29, 2017. HDOH documented "clear" evidence of prior  
16 discharges from the Dairy's "Lower Lagoon" into the Kaohaoha Gulch.  
17 PSF No. 27. HDOH also documented ongoing discharges from one of  
18 the Dairy's application fields into the Kaohaoha Gulch, the only  
19 discharge that the Dairy has been penalized for by the State. PSF No. 20.
- 20

1 Third, water quality sampling demonstrates that manure pollutants from the  
2 Dairy have discharged into the Gulches:

- 3 - Water quality sampling obtained on March 5 and 10, 2017 shows manure  
4 pollutants were discharged into the Alaialoa Gulch. PSF No. 38.
- 5 - Water quality sampling obtained on March 10, 2017 shows manure  
6 pollutants were discharged into the Kaohaoha Gulch. PSF No. 39.
- 7 - HDOH water quality sampling obtained on March 14, 2017 shows  
8 manure pollutants were discharged into the Alaialoa Gulch. PSF No. 40.
- 9 - Big Island Dairy reports that it applied 1,825,000 gallons of wastewater  
10 to Fields 1-5 between November 6 and November 27, 2017. PSF No. 31.  
11 On November 28, 2017, Plaintiffs obtained water quality samples from  
12 all of the Gulches, which confirmed that manure pollutants were  
13 discharged by the Dairy. PSF No. 32.
- 14 - Big Island Dairy reports that it applied 784,000 gallons of wastewater  
15 from the Lower Lagoon into Field 5 between March 20 and March 27,  
16 2018. PSF No. 33. Plaintiffs took water quality samples on March 27,  
17 2018, which confirmed that manure had been discharged into the  
18 Alaialoa and Kaohaoha Gulches. PSF No. 34. Sampling on March 28,  
19 2018, confirmed additional discharges occurred to the Kaohaoha Gulch.  
20 PSF No. 35.

1 Plaintiffs have also adduced eyewitness testimony of manure discharges into  
2 the various Gulches, many of which follow, or coincide with, the Dairy's  
3 application of manure wastewater to its application fields:

- 4 - September 14, 2016. Plaintiffs documented evidence that Big Island  
5 Dairy discharged wastewater into the Alaialoa Gulch. PSF No. 36.
- 6 - September 24, 2016. Plaintiffs documented evidence of Big Island Dairy  
7 discharging wastewater into the Alaialoa Gulch. PSF No. 37.
- 8 - March 19, 2017. Plaintiffs documented evidence of Big Island Dairy  
9 discharging wastewater into the Kaohaoha Gulch. PSF No. 41.
- 10 - Between May 3 and May 14, 2017, Big Island Dairy reports that it  
11 applied 494,400 gallons of wastewater to Fields 1 and 5. PSF No. 46.
- 12 - May 15, 2017. Plaintiffs documented evidence of Big Island Dairy  
13 discharging wastewater into the Kaula Gulch. PSF No. 42.
- 14 - May 15, 2017. Plaintiffs documented evidence of Big Island Dairy  
15 discharging wastewater into the Alaialoa Gulch. PSF No. 47.
- 16 - May 18, 2017. Plaintiffs documented evidence of Big Island Dairy  
17 discharging wastewater into the Kaula Gulch. PSF No. 43.

## 18 VI. CONCLUSION

19 There can be no genuine dispute that Big Island Dairy has discharged  
20 manure pollutants in contravention of the Clean Water Act *at least* 31 times, as

1 well as the community of Ookala's right to live free from the Dairy's pollution.  
2 Partial summary judgment on liability should be found in Plaintiffs' favor for these  
3 specific discharges. Liability for additional discharges, along with requests for  
4 imposition of civil penalties, injunctive relief, and attorneys' fees and costs will be  
5 presented at trial.

6  
7 Respectfully Submitted This 17th Day of September, 2018.

8 

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that, on the dates and by the methods of service noted below,  
3 a true and correct copy of the foregoing document was served on the following at  
4 their last known address:

5 Served electronically via the Court’s CM/ECF system to the e-mail addresses listed  
6 below on September 17, 2018:

7 Daniel V. Steenson, <i>pro hac vice</i>	Glen T. Hale, # 005171
8 David P. Claiborne, <i>pro hac vice</i>	LAW OFFICES OF GLEN T. HALE
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12 Served by First-Class Mail:

13 None.

14 Served by hand-delivery:

15 None.

16 /s/ Charles M. Tebbutt  
17 Charles M. Tebbutt  
18 Law Offices of Charles M. Tebbutt, P.C.  
19  
20



# Federal Register

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**Wednesday,  
February 12, 2003**

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**Part II**

**Environmental  
Protection Agency**

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**40 CFR Parts 9, 122, 123, and 412  
National Pollutant Discharge Elimination  
System Permit Regulation and Effluent  
Limitation Guidelines and Standards for  
Concentrated Animal Feeding Operations  
(CAFOs); Final Rule**



**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 9, 122, 123 and 412**

[FRL-7424-7]

RIN 2040-AD19

**National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)****AGENCY:** Environmental Protection Agency.**ACTION:** Final rule.

**SUMMARY:** Today's final rule revises and clarifies the Environmental Protection Agency's (EPA) regulatory requirements for concentrated animal feeding operations (CAFOs) under the Clean Water Act. This final rule will ensure that CAFOs take appropriate actions to manage manure effectively in order to protect the nation's water quality.

Despite substantial improvements in the nation's water quality since the inception of the Clean Water Act, nearly 40 percent of the Nation's assessed waters show impairments from a wide range of sources. Improper management of manure from CAFOs is among the many contributors to remaining water quality problems. Improperly managed manure has caused serious acute and chronic water quality problems throughout the United States.

Today's action strengthens the existing regulatory program for CAFOs. The rule revises two sections of the Code of Federal Regulations (CFR), the National Pollutant Discharge Elimination System (NPDES) permitting requirements for CAFOs (Sec. 122) and the Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (Sec. 412).

The rule establishes a mandatory duty for all CAFOs to apply for an NPDES permit and to develop and implement a nutrient management plan. The effluent guidelines being finalized today establish performance expectations for existing and new sources to ensure appropriate storage of manure, as well as expectations for proper land application practices at the CAFO. The required nutrient management plan would identify the site-specific actions to be taken by the CAFO to ensure proper and effective manure and wastewater management, including compliance with the Effluent Limitation Guidelines. Both sections of the rule also contain new regulatory requirements for dry-litter chicken operations.

This improved regulatory program is also designed to support and

complement the array of voluntary and other programs implemented by the United States Department of Agriculture (USDA), EPA and the States that help the vast majority of smaller animal feeding operations not addressed by this rule. This rule is an integral part of an overall federal strategy to support a vibrant agriculture economy while at the same time taking important steps to ensure that all animal feeding operations manage their manure properly and protect water quality.

EPA believes that these regulations will substantially benefit human health and the environment by assuring that an estimated 15,500 CAFOs effectively manage the 300 million tons of manure that they produce annually. The rule also acknowledges the States' flexibility and range of tools to assist small and medium-size AFOs.

**DATES:** These final regulations are effective on April 14, 2003.

**ADDRESSES:** The administrative record is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC) in the basement of the EPA West Building, Room B-102, at 1301 Constitution Ave., NW., Washington, DC. The administrative record is also available via EPA Dockets (Edocket) at <http://www.epa.gov/edocket> under Edocket number OW-2002-0025. The rule and key supporting materials are also electronically available on the Internet at <http://www.epa.gov/npdes/caforule>.

**FOR FURTHER INFORMATION CONTACT:** Gregory Beatty, U.S. EPA, Office of Water, Office of Wastewater Management (4203M), 1200 Pennsylvania Avenue NW., Washington, DC 20460, 202-564-0724, for information pertaining to the NPDES Regulations (Part 122) or Paul Shriner, U.S. EPA, Office of Water, Office of Science and Technology (4303T), 1200 Pennsylvania Avenue NW., Washington, DC 20460, 202-566-1076, for information pertaining to the Effluent Guideline (Part 412).

**SUPPLEMENTARY INFORMATION:****A. General Information**

1. What entities are potentially regulated by this final rule?
  2. How Can I Get Copies of This Document and Other Related Information?
- B. Under what legal authority is this final rule issued?**
- C. How is this preamble organized?**
- D. What is the Comment Response Document?**
- E. What other information is available to support this final rule?**

**I. Background Information**

- A. What is the context for this rule?
- B. Why is EPA revising the existing effluent guidelines and NPDES regulations for CAFOs?

**C. What are the environmental and human health concerns associated with improper management of manure and wastewater at CAFOs?**

1. How do the amounts of animal manure compare to human waste?
2. What are "excess manure nutrients" and why are they an indication of environmental concern?
3. What pollutants are present in animal manure and wastewater?
4. How do these pollutants reach surface water?
5. How is water quality impaired by animal manure and wastewater?
6. What ecological and human health impacts have been caused by CAFO manure and wastewater?

**D. What are the roles of the key entities involved in the final rule?**

1. CAFOs.
  2. States.
  3. EPA.
  4. USDA.
  5. Other stakeholders.
  6. The public.
- E. What principles have guided EPA's decisions embodied in this rule?**
- F. What are the major elements of this final rule? Where do I find the specific requirements?**

1. NPDES Regulations for CAFOs.
2. Effluent Limitations Guidelines requirements for CAFOs.

**II. What Events Have Led to This Rule?****A. The Clean Water Act**

1. The National Pollutant Discharge Elimination System (NPDES) permit program
2. Effluent limitations guidelines and standards
3. Effluent guidelines planning process—Section 304(m) requirements

**B. Existing Clean Water Act requirements applicable to CAFOs**

1. Scope and requirements of the 1976 NPDES regulations for CAFOs
2. Scope and requirements of the 1974 feedlot effluent guidelines

**C. USDA-EPA Unified National Strategy for Animal Feeding Operations****III. How Was This Final Rule Developed?****A. Small Business Advocacy Review (SBAR) Panel**

- B. Proposed Rule
- C. 2001 Notice of Data Availability
- D. 2002 Notice of Data Availability
- E. Public Comments
- F. Public outreach

1. Pre-proposal activities
2. Post-proposal activities

**IV. CAFO Roles and Responsibilities****A. Who is affected by this rule?**

1. What is an AFO?
2. What is a CAFO?
3. What types of animals are covered by today's rule?
4. Is my AFO a CAFO if it discharges only during large storm events?
5. How are land application discharges of manure and process wastewaters at CAFOs covered by this rule?
6. How is EPA applying the Agricultural Storm Water Exemption with respect to Land Application of CAFO Manure and Process Wastewaters?

ensure appropriate agricultural utilization of nutrients, some runoff of nutrients may occur during rainfall events, but EPA believes that this potential will be minimized and any remaining runoff can reasonably be considered an agricultural storm water discharge.

EPA notes that any dry weather discharge of manure or process wastewater resulting from its application to land area under the control of a CAFO would not be considered an agricultural storm water discharge and would thus be subject to Clean Water Act requirements. As a matter of common sense, only storm water can be agricultural storm water. Further, if manure or process wastewater were applied so thickly that it ran off into surface waters even during dry weather, this would not be consistent with practices designed to ensure appropriate agricultural utilization of nutrients.

In this rule, EPA is clarifying how it believes the scope of regulated point source discharges from a CAFO is limited by the agricultural storm water exemption. EPA does not intend its discussion of how the scope of point source discharges from a CAFO is limited by the agricultural storm water exemption to apply to discharges that do not occur as the result of land application of manure, litter, or process wastewater by a CAFO to land areas under its control and are thus not at least potentially CAFO point source discharges. In explaining how the scope of CAFO point source discharges is limited by the agricultural storm water exemption, EPA intends that this limitation will provide a "floor" for CAFOs that will ensure that, where a CAFO is land applying manure, litter, or process wastewater in accordance with site specific practices designed to ensure appropriate agricultural utilization of nutrients, no further effluent limitations will be authorized, for example, to ensure compliance with water quality standards. Any remaining discharge of manure or process wastewaters would be covered by the agricultural storm water exemption and would be considered nonpoint source runoff. Further, the Agency does not intend that the limitation on the scope of CAFO point source discharges provided by the agricultural storm water exemption be in any way constrained, so long as manure, litter, or process wastewater is land applied by the CAFO in accordance with site specific nutrient management practices that ensure appropriate utilization of nutrients. In particular, EPA does not intend that the applicability of the agricultural storm

water exemption to discharges from land application areas of a CAFO be constrained by requirements to control runoff resulting from the application of pesticides or other agricultural practices.

Although as noted above, manure and process wastewater discharges from the land application area are not directly subject to water quality-based effluent limits, EPA encourages States to address water quality protection issues in their technical standards for determining appropriate land application practices.

The Agency disagrees with the commenters who would interpret the agricultural storm water provision to exclude all of the runoff from a CAFO's land application areas. It would not be reasonable to believe that Congress intended to exclude as an "agricultural" storm water discharge any and all discharges of CAFO manure from land application areas, for example, no matter how excessively such manure may have been applied without regard to true agricultural needs. Similarly, EPA does not agree with the commenters who believe that the agricultural storm water discharge exclusion does not apply at all to CAFOs because Congress singled out CAFOs by specifically including them in the definition of point source. There is nothing in the text of the point source definition (CWA section 502(14)) that indicates that Congress intended the agricultural storm water discharge exclusion not to apply to CAFOs.

After considering all the comments, EPA has decided that it is not necessary to include a definition of the term "agricultural storm water" in the rule text at section 122.23(b). EPA believes that the amended regulatory text at 40 CFR 122.23(e), in combination with this preamble discussion, adequately clarifies the distinction between regulated point source discharges and non-regulated agricultural storm water discharges from the land application area of a CAFO.

Under the final rule, as proposed, discharges from the production area at the CAFO (e.g., the feedlot and lagoons) are not eligible for the agricultural storm water exemption at all, because they involve the type of industrial activity that originally led Congress to single out CAFOs as point sources.

Today's final rule also requires all permits for CAFOs to include terms and conditions to address land application. See section 122.42(e) and Part 412. The Agency has included this requirement because it has the authority to regulate point source discharges and any discharge of CAFO manure, litter, or process wastewaters from the land

application area of a CAFO which is not agricultural storm water is subject to the Clean Water Act. EPA believes that the only way to ensure that non-permitted point source discharges of manure, litter or process wastewaters from CAFOs do not occur is to require that CAFOs apply for NPDES permits that will establish requirements that ensure that manure, litter, and process wastewater are only applied to CAFO land application areas in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater.

#### 7. When and How Is an AFO Designated as a CAFO?

In today's final rule, EPA is retaining the requirement for an on-site inspection and a determination that an AFO is a significant contributor of pollutants to waters of the United States prior to designating an AFO as a CAFO. A small AFO may be designated only if it discharges either: (1) Into waters of the United States through a man-made ditch, flushing system, or other similar man-made device or (2) directly into waters of the United States that originate outside of the facility and pass over, across, or through the facility or otherwise come into contact with the confined animals. Medium operations may also be designated as CAFOs even if they do not meet either of the two conditions for being defined as a CAFO.

*What did EPA propose?* In the proposed rule, EPA presented two options with respect to the designation criteria. EPA proposed to retain the existing criteria under a three-tier structure and proposed to eliminate them under a two-tier structure. In addition, EPA requested comment on several additional alternatives that would have retained the criteria only for small operations.

EPA also proposed to modify the on-site inspection requirement to explicitly include other forms of information gathering such as use of monitoring data, fly-overs, and satellite imagery. EPA also proposed a technical correction, changing the term "significant contributor of *pollution*" to "significant contributor of *pollutants*."

*What were the key comments?* EPA received limited comment concerning proposed changes to the designation criteria. Only a few States specifically supported the elimination of the criteria. A few representatives of the livestock industry generally supported elimination of the criteria for operations of all sizes. Commenters were generally opposed to EPA's proposal to modify the on-site inspection requirement to

## **Appendix B**

### **Big Island Dairy, LLC's Discharge Events**

#### ***Alaialoa Gulch***

1. June 30, 2014. PSF No. 21.
2. July 1, 2014. PSF No. 21.
3. July 2, 2014. PSF No. 21.
4. September 14, 2016. PSF No. 36.
5. September 24, 2016. PSF No. 37.
6. March 5, 2017. PSF No. 38.
7. March 10, 2017. PSF. No. 38.
8. March 14, 2017. PSF No. 40.
9. April 2, 2017. PSF No. 45.
10. April 17, 2017. PSF No. 45.
11. May 15, 2017. PSF No. 47.
12. November 28, 2017. PSF No. 32.
13. March 27, 2018 PSF. No. 34.
14. April 13, 2018. PSF No. 22.
15. May 6, 2018. PSF No. 14.

#### ***Kaohaoha Gulch***

16. March 10, 2017. PSF No. 39.
17. March 19, 2017. PSF No. 41.

- 18.March 28, 2017. PSF No. 27.
- 19.March 29, 2017. PSF No. 27.
- 20.November 28, 2017. PSF No. 32.
- 21.March 27, 2018. PSF No. 34.
- 22.March 28, 2018. PSF No. 35.
- 23.May 7, 2018. PSF No. 28.
- 24.May 8, 2018. PSF No. 28.
- 25.May 9, 2018. PSF No. 28.
- 26.August 23, 2018. PSF No. 29.
- 27.August 24, 2018. PSF No. 29.
- 28.August 25, 2018.PSF No. 29.

***Kaula Gulch***

- 29.May 15, 2017. PSF No. 42.
- 30.May 18, 2017. PSF No. 43.
- 31.November 28, 2017. PSF No. 32.