FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAWAIʻI WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB – MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, *Plaintiffs-Appellees*, v. COUNTY OF MAUI, *Defendant-Appellant.*	No. 15-17447 D.C. No. 1:12-cv-00198-SOM-BMK ORDER AND AMENDED OPINION

Appeal from the United States District Court for the District of Hawaii Susan O. Mollway, Senior District Judge, Presiding

Argued and Submitted October 12, 2017
University of Hawaii Manoa

Filed February 1, 2018
Amended March 30, 2018

Before: Mary M. Schroeder, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

Order;
Opinion by Judge D.W. Nelson

SUMMARY*

Environmental Law

The panel filed (1) an order amending its opinion and, on behalf of the court, denying a petition for rehearing en banc; and (2) an amended opinion affirming the district court's summary judgment rulings finding that the County of Maui violated the Clean Water Act when it discharged pollutants from its wells into the Pacific Ocean, and further finding that the County had fair notice of its violations.

The panel concluded that the County's four discrete wells were "point sources" from which the County discharged "pollutants" in the form of treated effluent into groundwater, through which the pollutants then entered a "navigable water," the Pacific Ocean. The wells therefore were subject to National Pollutant Discharge Elimination System regulation. Agreeing with other circuits, the panel held that the Clean Water Act does not require that the point source itself convey the pollutants directly into the navigable water. The panel held that the County was liable under the Act because it discharged pollutants from a point source, the pollutants were fairly traceable from the point source to a navigable water such that the discharge was the functional equivalent of a discharge into the navigable

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

water, and the pollutant levels reaching navigable water were more than *de minimis*. The panel rejected the argument that the County's effluent injections were disposals of pollutants into wells and therefore exempt from the NPDES permitting requirements.

The panel also held that the Clean Water Act provided fair notice, as required by due process, of what conduct was prohibited.

COUNSEL

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ORDER

The Opinion filed on February 1, 2018, is amended as follows:

1. On slip opinion page 12, footnote 2, the following text was added to the end of the footnote: <Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. *See Rice v. Harken Expl.*, 250 F.3d 264, 270 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*, where the Seventh Circuit only considered allegations of a "potential [rather than an actual] connection between ground waters and surface waters," 24 F.3d at 965.>

2. On slip opinion page 19, footnote 3, the following text was added to the end of the footnote: <Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. *See* § 1365. Our approach is firmly grounded in our case law, which distinguishes between

point source and nonpoint source pollution based on whether pollutants can be "traced" or are "traceable" back to a point source. *See Alaska*, 749 F.2d at 558; *Ecological Rights*, 713 F.3d at 508; *supra*, at 12–15.>

3. On slip opinion at page 19, the following text replaces the sentence after the citation to *Haw. Wildlife*, 24 F. Supp. 3d at 1000: <Here, the Tracer Dye Study and the County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells' pollutants reaching the ocean. The Study also traced a southwesterly path from the wells' point source discharges to the ocean.>

With these amendments, Judge McKeown voted to deny County of Maui's Petition for Rehearing En Banc. Judge Schroeder and Judge Nelson recommended denial of petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

The petition for rehearing en banc is **DENIED**. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

D.W. NELSON, Senior Circuit Judge:

The County of Maui ("County") appeals the district court's summary judgment rulings finding the

County violated the Clean Water Act ("CWA") when it discharged pollutants from its wells into the Pacific Ocean, and further finding it had fair notice of its violations. Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation, and West Maui Preservation Association ("Associations") urge us to uphold these rulings. For the reasons set forth below, we affirm the district court.

BACKGROUND

1. The Lahaina Wells and the Effluent Injections

The County owns and operates four wells at the Lahaina Wastewater Reclamation Facility ("LWRF"), the principal municipal wastewater treatment plant for West Maui. Wells 1 and 2 were installed in 1979 as part of the original 1975 plant design, and Wells 3 and 4 were added in 1985 as part of an expansion project. Although constructed initially to serve as a backup disposal method for water reclamation, the wells have since become the County's primary means of effluent disposal into groundwater and the Pacific Ocean.

The LWRF receives approximately 4 million gallons of sewage per day from a collection system serving approximately 40,000 people. That sewage is treated at the Facility and then either sold to customers for irrigation purposes or injected into the wells for disposal. The County disposes of almost all the sewage it receives – it injects approximately 3 to 5 million

gallons of treated wastewater per day into the groundwater via its wells.

That some of the treated effluent then reaches the Pacific Ocean is undisputed. The County expressly conceded below and its expert confirmed that wastewater injected into Wells 1 and 2 enters the Pacific Ocean. The Associations submitted various studies and expert declarations establishing a connection between Wells 3 and 4 and the ocean. Although the County quibbles with how much effluent enters the ocean and by what paths the pollutants travel to get there, it concedes that effluent from all four wells reaches the ocean.

The County has known this since the Facility's inception. The record establishes the County considered building an ocean outfall to dispose of effluent directly into the ocean but decided against it because it would be too harmful to the coastal waters. It opted instead for injection wells it knew would affect these waters indirectly. When the Facility underwent environmental review in February 1973, the County's consultant – Dr. Michael Chun – stated effluent that was not used for reclamation purposes would be injected into the wells and that these pollutants would then enter the ocean some distance from the shore. The County further confirmed this in its reassessment of the Facility in 1991.

According to the County's expert, when the wells inject 2.8 million gallons of effluent per day, the flow of effluent into the ocean is about 3,456 gallons per meter of coastline per day – roughly the equivalent of

installing a permanently-running garden hose at every meter along the 800 meters of coastline. About one out of every seven gallons of groundwater entering the ocean near the LWRF is comprised of effluent from the wells.

2. The Tracer Dye Study

In June 2013, the U.S. Environmental Protection Agency ("EPA"), the Hawaii Department of Health ("HDOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study (the "Tracer Dye Study" or "Study") on Wells 2, 3, and 4 to gather data on, among other things, the "hydrological connections between the injected treated wastewater effluent and the coastal waters." The Study involved placing tracer dye into Wells 2, 3, and 4, and monitoring the submarine seeps off Kahekili Beach to see if and when the dye would appear in the ocean.

The Study concluded "a hydrogeologic connection exists between . . . Wells 3 and 4 and the nearby coastal waters of West Maui." Eighty-four days after injection, tracer dye introduced to Wells 3 and 4 began to emerge "from very nearshore seafloor along North Kaanapali Beach," near Kahekili Beach Park, about a half-mile southwest of the LWRF. According to the Study, the effluent travels in this southwesterly path "due to geologic controls that include a hydraulic barrier created by valley fills to the northwest." The Study found "64 percent of the treated wastewater injected into [Wells

3 and 4] currently discharges [into the ocean]." It further concluded "[t]he major discharge areas are confined to two clusters, only several meters wide, with very little discharge [occurring] in between and around them."

Tracer dye from Well 2 was not detected in the ocean. But this was because Wells 3 and 4 – located between Well 2 and the areas in the ocean where the wastewater discharges – "inject the majority of effluent," which likely diverted the injected wastewater from Well 2 into taking "a different path other than directly towards the submarine springs" where the wastewater from Wells 3 and 4 discharges. If Well 2 were to receive most of the effluent at the Facility, that effluent would also take the southwesterly path taken by the wastewater from Wells 3 and 4. And "[b]ecause Well 1 is located in very close proximity to Well 2, . . . the [T]racer [S]tudy's predictions for the fate of effluent from Well 2 can be used to predict the fate of effluent from Well 1," according to the Associations' expert Dr. Jean Moran.

3. The District Court's Summary Judgment Rulings

The County appeals three of the district court's summary judgment rulings. In the first, the district court found the County liable as to Wells 3 and 4 for discharging effluent through groundwater and into the ocean without the National Pollutant Discharge Elimination System ("NPDES") permit required by the

CWA. *Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 1005 (D. Haw. 2014). The court based its decision on three independent grounds: (1) the County "indirectly discharge[d] a pollutant into the ocean through a groundwater conduit," (2) the groundwater is a "point source" under the CWA, and (3) the groundwater is a "navigable water" under the Act. *Id.* at 993, 999, 1005.

In its second order, the district court held the County liable as to Wells 1 and 2 based largely on the same reasons it found the County liable on Wells 3 and 4. *Haw. Wildlife Fund v. Cty. of Maui*, Civil No. 12-00198 SOM/BMK, 2015 WL 328227, at *5-6 (D. Haw. Jan. 23, 2015). The court acknowledged that no study confirms the "point of entry into the ocean of flow from [W]ells 1 and 2." *Id.* at *2. But it nonetheless held against the County after "repeatedly confirm[ing] at the [summary judgment] hearing . . . that the County was expressly conceding that pollutants introduced by the County into [W]ells 1 and 2 were making their way to the ocean." *Id.*

Finally, the district court found the County could not claim a due process violation because it had fair notice under the plain language of the CWA that it could not discharge effluent via groundwater into the ocean.

This appeal followed.

STANDARD OF REVIEW

The Ninth Circuit "review[s] the district court's grant or denial of motions for summary judgment *de novo*." *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (citation and internal quotation marks omitted). "Thus, on appellate review, [the] [Court] employ[s] the same standard used by the trial court under Federal Rule of Civil Procedure 56(c)." *Id.* "As required by that standard, [the Court] view[s] the evidence in the light most favorable to the nonmoving party, determine[s] whether there are any genuine issues of material fact, and decide[s] whether the district court correctly applied the relevant substantive law." *Id.* at 989 (citation omitted).

DISCUSSION

The Clean Water Act is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the "discharge of any pollutant by any person," *id.* § 1311(a), and defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12) (internal quotation marks omitted). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (internal quotation marks omitted). A party who obtains an NPDES permit is exempt from the general prohibition on point source pollution. *Id.*

§§ 1311(a), 1342(a)(1). Under these provisions, a party violates the CWA when it does not obtain such a permit and "(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001) (citation omitted).

1. Liability under the CWA

The County argues the district court erred in concluding it was liable under the CWA as to all four of its wells. We disagree.

a. Point Source Discharges

Neither side here disputes that each of the four wells constitutes a "point source" under the CWA. Given the wells here are "discernible, confined and discrete conveyance[s] . . . from which pollutants are . . . discharged," and the plain language of the statute expressly includes a "well" as an example of a "point source," the County could not plausibly deny the wells are "point source[s]" under the statute. § 1362(14) (internal quotation marks omitted). The record further establishes that from these point sources the County discharges "pollutants" in the form of treated effluent into groundwater, through which the pollutants then enter a "navigable water[ ]," the Pacific Ocean. *See id.* §§ 1362(7)-(8), (12), (14). As the pollutants here enter navigable waters and can be "traced [back] to . . . identifiable point[s] of discharge," "[the wells] are subject to NPDES regulation, as are all point sources" under

the plain language of the CWA. *Trs. for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) (citations omitted).

That the County's activities constitute "point source" discharges becomes clearer once we consider our jurisprudence on "nonpoint source pollution": "[Such] pollution . . . arises from many dispersed activities over large areas," "is not traceable to any single discrete source," and due to its "diffuse" nature, "is very difficult to regulate through individual permits." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013) (citations omitted). "The most common example of nonpoint source pollution is the residue left on roadways by automobiles" which rainwater "wash[es] off . . . the streets and . . . carrie[s] along by runoff in a polluted soup [to] creeks, rivers, bays, and the ocean." *Id.* Our cases have consistently held that such runoff constitutes nonpoint source pollution unless it is later collected, channeled, and discharged through a point source. *See, e.g.*, *id.* (citations omitted); *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841 n.8 (9th Cir. 2003) (citation omitted). Applying these principles in *Ecological Rights*, we held that rainwater runoff carrying pollutants from the defendants' utility poles to navigable waters constituted nonpoint source pollution under the CWA. 713 F.3d at 509 (citations omitted).

Ours is a different case entirely. Unlike the "millions of cars" discussed in *Ecological Rights*, here we have four "discrete" wells that have been identified and can be "regulate[d] through individual permits." *Id.* at 508 (citations omitted). Furthermore, the automobiles

and the utility poles discussed in *Ecological Rights* did nothing themselves to "discretely collect[] and convey[]" the pollutants to a navigable water, and hence could not constitute "point source[s]" under § 1362(14). *Id.* at 508-10 (citations omitted). The Lahaina Wells, by contrast, collect and inject pollutants in four discrete wells into groundwater connected to the Pacific Ocean, thereby "discretely collect[ing] and convey[ing]" pollutants to a navigable water. *Id.* at 509 (citations omitted); § 1362(14). The Tracer Dye Study confirms this connection as to Wells 3 and 4, and the County conceded as much as to Wells 1 and 2. Given the County knew of these effects well before the LWRF's inception, the record further establishes it "constructed [the wells] for the express purpose of storing pollutants [and] moving them from [the Lahaina Facility] to [the Pacific Ocean]." *Ecological Rights*, 713 F.3d at 509 (citations omitted).[1] This is simply not a case of "nonpoint source pollution . . . caused primarily by rainfall around activities that employ or create pollutants," where the resulting "runoff [can]not be traced to any

[1] We do not mean to suggest that a CWA violation requires some form of intent. It does not. *See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (recognizing CWA "categorically prohibits any discharge of a pollutant from a point source without a permit" (citations omitted)); *accord Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015) (recognizing "regime of strict liability" under the CWA (citation and internal quotation marks omitted)); *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 265 (4th Cir. 2001) (same). But the County's purpose in constructing the wells certainly informs whether they are "conveyance[s]" under the CWA, § 1362(14), and hence, regulable point sources under the statute. *See Ecological Rights*, 713 F.3d at 509 (citations omitted).

identifiable point of discharge." *Alaska*, 749 F.2d at 558 (citing *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)). As the "[County's] activities release[d] pollutants from . . . discernible conveyance[s]" to navigable waters, the County is liable under the CWA. *Id.* (citations omitted).

b. Indirect Discharges

The County contends, however, that under the CWA, it is not sufficient to focus exclusively on the original pollutant source to determine whether an NPDES permit is needed and that how pollutants travel from the original point source to navigable waters matters. More specifically, the County contends the point source itself must convey the pollutants *directly* into the navigable water under the CWA. As the wells here discharge into groundwater, and then *indirectly* into the Pacific Ocean, the County asserts they do not come within the ambit of the statute.[2]

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[2] We assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA. Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. *See Rice v. Harken Expl.*, 250 F.3d 264, 270 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*,

The County first cites *Alaska*, where we held that point source pollution occurs when "the pollution reaches the water through a confined, discrete conveyance," regardless of "the kind of pollution" at issue or "the activity causing [it]." *Id.* at 558 (citation omitted). As the effluent here reaches the Pacific Ocean "through" groundwater – a nonpoint source – the County contends it is not liable under the CWA. The County reads *Alaska* out of context. First, we never addressed in *Alaska* whether a polluter may be liable under the CWA for indirect discharges because the issue was not before us. *See id.* Furthermore, when we stated the "pollution [must] reach[ ] the water through a confined, discrete conveyance," we were merely stating the pollution must come "*from* a discernible conveyance" as opposed to some "[un]identifiable point of discharge." *Id.* (emphasis added) (citations omitted). As the "discharge water [there] [was] released *from* a sluice box, a confined channel within the statutory definition," the activity came within the ambit of the CWA. *Id.* (emphasis added). This case is no different – the effluent comes "from" the four wells and travels "through" them before entering navigable waters. *Id.* It just also travels through groundwater before entering the Pacific Ocean.

A more recent case *Greater Yellowstone Coalition v. Lewis* supports the Associations' contention that the CWA governs indirect discharges. We held there that

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where the Seventh Circuit only considered allegations of a "potential [rather than an actual] connection between ground waters and surface waters," 24 F.3d at 965.

precipitation flowing into pits containing "newly extracted waste rock," "filter[ed]" hundreds of feet underground, and "eventually entering the surface water" did not constitute point source pollution under the CWA. 628 F.3d 1143, 1147, 1153 (9th Cir. 2010) (citation omitted). The "pits that collect[ed] the waste rock [did] not constitute point sources" because "there [was] no confinement or containment of the [polluted] water" before it entered navigable waters, as prohibited by the statute. *Id.* We also concluded, however, that precipitation flowing into a "stormwater drain system" before "enter[ing] the ground and, eventually, surface water" constituted a point source discharge – the "stormwater system [was] exactly the type of collection or channeling contemplated by the CWA." *Id.* at 1152.

The wells here are more akin to the stormwater drain system in *Greater Yellowstone* than they are to the pits that collected the waste rock. Unlike the pits that "[did] not constitute points sources within the meaning of the CWA," the wells here "confine[ ] [and] contain[ ] . . . the [effluent]" before discharging it "[into] the ground and, eventually, surface water." *Id.* at 1152-53. And it was of no import to us in *Greater Yellowstone* that the pollutants – as here – had to travel through the ground before "eventually, [entering] surface water." *Id.* at 1152. The Court was only concerned with whether there was a point source *from which* the defendant discharged the pollutants. As the stormwater drain system constituted this point source, the Court concluded the defendant was required to "obtain[ ] the requisite . . . certification for that system." *Id.* at 1153.

As the County also discharges its pollutants from a point source, it, too, must obtain an NPDES permit under the CWA.

Our sister circuits agree that an indirect discharge from a point source to a navigable water suffices for CWA liability to attach. In *Concerned Area Residents for Environment v. Southview Farm*, the Second Circuit held "[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law." 34 F.3d 114, 119 (2d Cir. 1994). Regardless of whether the field itself was a point source, the court concluded there was a "point source discharge[]" under the CWA because (1) the pollutant itself was released from the tanker, a point source, and (2) there was a "direct[]" connection between the field and the navigable water. *See id.* Both elements are present here. The wells are point sources under the statute, § 1362(14), and the Tracer Dye Study along with the County's concessions establish an undeniable connection between the wells and the Pacific Ocean. The Study establishes effluent injected into the wells travels a southwesterly path from the Facility, appearing in submarine springs only a half-mile away.

Furthermore, in *Sierra Club v. Abston Construction*, the Fifth Circuit recognized that the "ultimate question [as to CWA liability] is whether pollutants [are] discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means." 620 F.2d 41, 45 (5th Cir.

1980). It went on to hold that "[s]ediment basins dug by the miners and designed to collect sediment are . . . point sources . . . *even though the materials [are] carried away from the basins by gravity flow of rainwater*." *Id.* (emphasis added). "Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner *at least initially collected or channeled the water and other materials*." *Id.* (emphasis added). That is what occurred here. The County "initially collected [and] channeled" the pollutants in its wells and injected them into the ground, where they were "carried away from the [wells] by the gravity flow of [ground]water." *Id.* And based on the overwhelming evidence in this case establishing a connection between the wells and the Pacific Ocean, it cannot be disputed the wells are "reasonably likely to be the means by which [the] [effluent] [is] ultimately deposited into a navigable body of water." *Id.* Indeed, the County has known since the LWRF's inception that effluent from the wells would eventually reach the ocean some distance from the shore. That the groundwater plays a role in delivering the pollutants from the wells to the navigable water does not preclude liability under the statute. *See id.*

The Second Circuit further recognized the indirect discharge theory in *Peconic Baykeeper, Inc. v. Suffolk County*, where it rejected the district court's conclusion that "because the trucks and helicopters discharged pesticides into the air, any discharge was indirect, and thus not from a point source." 600 F.3d 180, 188 (2d Cir. 2010). As the pesticides there were "discharged 'from'

the source, *and not from the air*," the court concluded the "spray apparatus . . . attached to [the] trucks and helicopters" constituted a point source under the CWA. *Id.* at 188-89 (emphasis added). The Ninth Circuit has similarly held discharges through the air can constitute "point source pollution" under the statute. *League of Wilderness Def./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1185, 1192-93 (9th Cir. 2002).

But accepting the County's position – that pollutants must "travel via a 'confined and discrete conveyance' " to navigable waters for CWA liability to attach – would necessarily preclude liability in cases such as *Peconic Baykeeper* and *League of Wilderness*. The pollutants in both cases traveled to navigable waters via the air, and not via the point sources from which they were released. *See Peconic Baykeeper*, 600 F.3d at 188; *League of Wilderness*, 309 F.3d at 1185. Taken to its logical conclusion, the County's theory would only support liability in cases where the point source itself directly feeds into the navigable water – e.g., via a pipe or a ditch. That the circuits have recognized CWA liability where such a direct connection does not exist counsels against accepting the County's theory.

Indeed, writing for the plurality in *Rapanos v. United States*, Justice Scalia recognized the CWA does not forbid the " 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.' " 547 U.S. 715, 743 (2006) (plurality opinion) (emphasis in original) (quoting §§ 1311(a), 1362(12)(A)). He further

recognized that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* (emphasis in original) (citations omitted). In support of his "'indirect discharge' rationale," Justice Scalia cited *Concerned Area Residents*, where, as described above, the Second Circuit held the discharge of manure from point sources onto fields (which were not necessarily point sources themselves) and eventually into navigable waters constituted point source discharges under the CWA. *Id.* at 744.

Although the Court in *Rapanos* splintered on other issues, no Justice disagreed with the plurality opinion that the CWA holds liable those who discharge a pollutant from a defined point source to the ocean. Justice Kennedy's opinion concurring in the judgment objected only to the plurality opinion's creation of certain limitations on the Executive Branch's authority to enforce the CWA's environmental purpose and statutory mandate. *Id.* at 778. Similarly, the four-Justice dissent cited the CWA's prohibition of "any addition of any pollutant to navigable waters from any point source" as strong evidence of the law's wide sweep, and disagreed with the plurality opinion's creation of two limitations on CWA enforcement. *Id.* at 787, 800-06 (Stevens, J., dissenting).

In past cases, we have recognized Justice Kennedy's concurrence in *Rapanos*, not Justice Scalia's plurality opinion, as controlling. But we have only done so in the context of "determin[ing] whether a wetland that is not adjacent to and does not contain a navigable-in-fact water is subject to the CWA." *United States v. Robertson*, 875 F.3d 1281, 1288-89 (9th Cir. 2017) (citations omitted); *see also N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007). As this is not a case about wetlands, and we do not decide whether groundwater is a "navigable water" under the statute, we do not apply Justice Kennedy's concurrence here, and consider Justice Scalia's plurality opinion only for its persuasive value, *United States v. Brobst*, 558 F.3d 982, 991 (9th Cir. 2009) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987)) (internal quotation marks omitted). *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) ("No Justice [in *Rapanos*], even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.").

Justice Scalia's plurality opinion demonstrates the County is reading into the statute at least one critical term that does not appear on its face – that the pollutants must be discharged "directly" to navigable waters from a point source. As "the plain language of a statute should be enforced according to its terms," we therefore reject the County's reading of the CWA and affirm the district court's rulings finding the County liable under the Act. *ASARCO, LLC v. Celanese Chem.*

Co., 792 F.3d 1203, 1210 (9th Cir. 2015) (citations omitted).

We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*.[3] The second point in particular is an important one. We therefore disagree with the district court that "liability under the Clean Water Act is triggered when pollutants reach navigable water, *regardless of how they get there*." *Haw. Wildlife*, 24 F. Supp. 3d at 1000 (emphasis added). Here, the Tracer Dye Study and the County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells' pollutants reaching the ocean. The Study also traced a

[3] The EPA as *amicus curiae* proposes a liability rule requiring a "direct hydrological connection" between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA ("direct" and "hydrological") that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a "fairly traceable" connection, consistent with Article III standing principles. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. *See* § 1365. Our approach is firmly grounded in our case law, which distinguishes between point source and nonpoint source pollution based on whether pollutants can be "traced" or are "traceable" back to a point source. *See Alaska*, 749 F.2d at 558; *Ecological Rights*, 713 F.3d at 508; *supra*, at 12-15.

southwesterly path from the wells' point source discharges to the ocean. We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.

c. Disposals of Pollutants into Wells

Finally, the County contends its effluent injections are not discharges into navigable waters but "disposal[s] of pollutants into wells," and that the Act categorically excludes well disposals from the permitting requirements of § 1342. *See, e.g.*, § 1342(b)(1)(D). As the County urges a "construction that the statute on its face does not permit," we "reject" it here. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (citation and internal quotation marks omitted).

The County first relies on § 1342(b), which permits the EPA to delegate CWA authority to "each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction." So long as the State "submit[s] to the Administrator a full and complete description of [its] program" and "a statement . . . that the laws of [the] State . . . provide adequate authority to carry out the described program," the State may "issue [NPDES] permits which[,] [among other things] *control the disposal of pollutants into wells*." § 1342(b)(1)(D) (emphasis added). The County contends based on this language the NPDES permitting requirements do not apply at all to well

disposals. Not so. The plain language of the statute clearly permits States to issue NDPES permits for well disposals, and such permits are required only for "discharges into navigable waters." *Id.* § 131242(b) [sic]; *see also id.* § 1342(a)(1). The provision furthermore makes no judgment about whether a "disposal" always constitutes a "discharge" requiring a NPDES permit. Indeed, only when a "disposal" is also a "discharge" is a permit required. *See Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1422 (7th Cir. 1990) (noting § 1342(b)(1)(D) "was not intended to authorize [States to] regulat[e] . . . *all* wells used to dispose of pollutants, regardless of absence of any effects on navigable waters" (emphasis in original)).

The County also argues that under § 1342(b)(1)(D), *only the State*, not the EPA, has authority to regulate well disposals. This Court, however, has already concluded the Act does not "expressly grant[] to the EPA or [the administering] state agency the exclusive authority to decide whether [there is a CWA violation]," even while recognizing § 1342 "suspend[s] the availability of federal NPDES permits once a state-permitting program has been submitted and approved by the EPA." *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1010-12 (9th Cir. 2002) (citing § 1342(c)(1)). That the administering state agency, HDOH, has "cho[sen] to sit on the sidelines . . . is not a barrier to a citizen's otherwise proper federal suit to enforce the Clean Water Act" and does not somehow "divest [this Court] of jurisdiction" over this case. *Id.* at 1012; *see also Cmty. Ass'n for*

Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 949-50 (9th Cir. 2002) ("Under the CWA[,] private citizens may sue any person alleged to be in violation of the conditions of an effluent standard or limitation under the Act or of an order issued with respect to such a standard or limitation by the Administrator of the [EPA] or any state." (citation omitted)).

The County next relies on § 1314(f)(2)(D), which "directs the [EPA] to give States information on the evaluation and control of [nonpoint source] 'pollution resulting from . . . [the disposal of pollutants in wells].'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004) (citing and quoting § 1314(f)(2)). According to the County, § 1314(f)(2)(D) affirmatively establishes disposals into wells constitute nonpoint source pollution and that it need not obtain NPDES permits under the CWA. But the Supreme Court itself acknowledged in *South Florida* that while § 1314(f)(2) listed a variety of circumstances constituting "nonpoint source[ ] [pollution]" – including well disposals – the provision "does not explicitly exempt [these] nonpoint pollution sources from the NPDES program *if they also fall within the 'point source' definition*." *Id.* (emphasis added). Consistent with our reading of § 1342(b)(1)(D), the implication here is that well disposals do not *always* constitute nonpoint source pollution. If pollutants from those wells are discharged into a navigable water from a discrete source, that is point source pollution, and the polluter must obtain an NPDES permit if it wants to avoid liability under the CWA. *See* §§ 1311(a), 1342(a)(1).

The CWA's definition of "pollutant" also supports this reading. *See* § 1362(6)(B). Under the Act, "[t]his term [excludes] . . . water derived in association with oil or gas production and disposed of in a well, if [1] the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and [2] such State *determines that such injection or disposal will not result in the degradation of ground or surface water resources*." *Id.* (emphasis added). By contrast, pollutants "disposed of in . . . well[s]" that "alter the water quality" of "surface water[s]" are "subject to NPDES permitting requirements." *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1161-62 (9th Cir. 2003) (citing § 1362(6)(B)). Section 1362(6)(B), therefore, confirms that contrary to the County's contentions, the CWA does not categorically exempt all well disposals from the NPDES requirements. "Were we to conclude otherwise," and create out of whole cloth a categorical exemption for well disposals, we would improperly amend the statute and "undermine the integrity of [the CWA's] prohibitions." *Id.* at 1162 (citation and internal quotation marks omitted). We decline to do so here.

2. Fair Notice

"Due process requires that [a statute] provide fair notice of what conduct is prohibited before a sanction can be imposed." *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) (citation and internal quotation marks omitted). "To provide sufficient notice, a statute . . . must give the

person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) (internal quotation marks omitted). If the "[p]lain [l]anguage of the [s]tatute" is "sufficiently clear to warn a party about what is expected," a court may find the party had "fair notice" under the due process clause. *Id.*; *see also Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 584 (D.C. Cir. 1999) (finding the defendant had "fair notice" based on "plain language" of regulation).

In determining whether there has been fair notice, this Court must "first look to the language of the statute itself." *Shark Fins*, 520 F.3d at 980 (citation omitted). Here, the Clean Water Act prohibits the "discharge of any pollutant by any person." § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (internal quotation marks omitted). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (internal quotation marks omitted). Finally, there is an exception to the general prohibition on point source pollution if a party obtains an NPDES permit. *Id.* §§ 1311(a), 1342(a)(1).

It is undisputed the County "add[s] . . . pollutants" – treated effluent – "to navigable waters" – the Pacific Ocean – "from . . . point source[s]" – its four injection wells. *See id.* §§ 1362(6), (12), (14). As its actions fall squarely within the "[p]lain [l]anguage of the

[s]tatute," we conclude the County had "fair notice" its actions violated the CWA. *See Shark Fins*, 520 F.3d at 980; *Garvey*, 190 F.3d at 584; *Lee v. Enter. Leasing Co.-West, LLC*, 30 F. Supp. 3d 1002, 1012 (D. Nev. 2014) (finding "reasonable reading of the statute . . . afforded [the] [d]efendants fair notice that their conduct was at risk").

But the County contends it did not have "fair notice" because the statutory text can be fairly read to exclude the wells from the NPDES permit requirements. It argues again that pollution via its wells and the groundwater is nonpoint source pollution not subject to the CWA's prohibitions. Even so, "due process does not demand unattainable feats of statutory clarity." *Planned Parenthood of Cent. and N. Ariz. v. State of Ariz.*, 718 F.2d 938, 948 (9th Cir. 1983) (citation and internal quotation marks omitted). That there is a "difference[ ] of opinion" on "the precise meaning of [the CWA]" is "[ ]not . . . enough to render [it]" violative of the due process clause. *Id.*

The County further contends it did not have "fair notice" because HDOH – the state agency tasked with administering the NPDES permit program – has maintained an NPDES permit is unnecessary for the wells. The County does not describe HDOH's position accurately. As late as April 2014, HDOH stated in a letter to the County it was still "in the process of determining if an NPDES permit is applicable" to the wells. That HDOH has not solidified its position on the issue does not affirmatively demonstrate it believes the permits are unnecessary, as the County contends. And the

fact that the County "has been unable to receive an interpretation of the [CWA] from . . . [HDOH] officials administering the program" is also "[ ]not . . . enough to render [enforcement of the CWA]" unconstitutional. *Id.* As a "reasonable person would [have] underst[oo]d the [CWA]" as prohibiting the discharges here, enforcement of the statute does not violate the due process clause. *Id.* at 948-49; *see also Shark Fins*, 520 F.3d at 980 (holding liability would attach if "regulation is . . . sufficiently clear to warn a party about what is expected of it" (citation and internal quotation marks omitted)).

CONCLUSION

At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions. Under the circumstances of this case, we therefore affirm the district court's summary judgment rulings finding the County discharged pollutants from its wells into the Pacific Ocean, in violation of the CWA, and further finding the County had fair notice of what was prohibited.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB – MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; and WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, Plaintiffs, vs. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM/BMK ORDER DENYING DEFENDANT'S MOTION FOR STAY AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (Filed May 30, 2014)

ORDER DENYING DEFENDANT'S MOTION FOR STAY AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION.

Plaintiffs Hawaii Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association move for partial summary judgment against Defendant County of Maui, arguing that the undisputed evidence demonstrates that the County has violated the Clean Water Act by discharging effluent, without a National Pollutant Discharge Elimination System ("NPDES") permit, at four injection wells at

the Lahaina Wastewater Reclamation Facility ("LWRF"). Plaintiffs contend that the wastewater eventually finds its way into the ocean on Maui's west shore.

The County brings its own motion, arguing that, given the County's application for an NPDES permit, the court should dismiss or stay this case to give Hawaii's Department of Health and the Environmental Protection Agency an opportunity to consider the need for a permit in the first instance.

The County concedes, and the undisputed evidence shows, that pollutant discharged at the two largest wells at the LWRF is migrating into the ocean. The court has not been given any firm date for a final decision on the County's NPDES permit application. The court therefore denies the County's motion for stay or dismissal and grants Plaintiffs' motion for partial summary judgment.

II. BACKGROUND.

The County of Maui operates the LWRF, a wastewater treatment facility approximately three miles north of the town of Lahaina on the island of Maui. *See* Tracer Dye Study Final Report at ES-21, ECF No. 73-10. The facility receives approximately four million gallons per day of sewage from a collection system serving approximately 40,000 people. The facility filters and disinfects the sewage, then releases the treated effluent (sometimes called "reclaimed water" or "wastewater") into four on-site injections wells. *Id.* The injection wells are long pipes into which effluent

is pumped. The effluent then travels approximately 200 feet underground into a shallow groundwater aquifer beneath the facility. *See* 1993 Injection Well Report, ECF No. 73-21. While "the precise depth of this aquifer fluctuates somewhat, depending on water inputs and other conditions," it contains "a sufficient quantity of ground water to supply a public water system." UIC Consent Decree at 28-29, ECF No. 73-24. The LWRF typically discharges three to five million gallons of effluent into the four injection wells on a daily basis. *See* Tracer Dye Study Final Report at 1-16. Approximately 80% of the effluent is discharged from wells 3 and 4. *Id.* at ES-21.

It is undisputed that effluent pumped into injection wells 3 and 4 eventually finds its way to the Pacific Ocean, emerging through "submarine springs" in the waters off Kahekili Beach on Maui's west shore. *Id.* at ES-2, 3. This finding was the conclusion of a study conducted jointly by the EPA, the Hawaii Department of Health ("DOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii. The study involved placing tracer dye into each of the LWRF injection wells and monitoring the submarine seeps off Kahekili Beach to see if and when the dye would flow into the ocean. *Id.* Dye from wells 1 and 2 did not emerge at the seeps, but the dye introduced into wells 3 and 4 was detected eighty-four days after being placed in the wells. *Id.* The study concluded that the presence of the dye "conclusively demonstrate[s] that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby

coastal waters of West Maui." *Id.* at ES3. The study further estimated that "64% of the dye injected into Wells 3 and 4 will [eventually be] discharged at the submarine spring areas." *Id.* As a result of that finding, the report also concluded that "64% of the treated wastewater injected into [the] wells currently discharges from the submarine spring areas" and into the ocean. *Id.*

The County appears to have been aware for some time of the hydrologic connection between the aquifer under the LWRF and the ocean. A 1991 environmental assessment, conducted by the County's Department of Public Works, noted that treated effluent – including suspended solids, dissolved oxygen, nitrogen, and phosphorous – flows from the injection wells into the ocean. *See* LWRF Environmental Assessment, ECF No. 73-33.

In 2007, the University of Hawaii at Manoa conducted a study that showed an elevated level of a nitrogen isotope in algae growing in nearshore waters south of the LWRF. *See* Declaration of Jennifer E. Smith ¶ 8-9, ECF No. 72-2. The study concluded that the nitrogen came from the LWRF. *Id.* The United States Geological Survey also did a study that found "wastewater presence" in the ocean and elevated levels of a nitrogen isotope in ocean water samples. *See* A Multitracer Approach to Detecting Wastewater Plumes from Municipal Injection Wells in Nearshore Marine Waters at Kihei and Lahaina, ECF No. 73-13.

In 2010, the EPA responded to the County's request to renew its Underground Injection Control ("UIC") permit for the LWRF by informing the County that recent studies "strongly suggest that effluent from the facility's injection wells is discharging into the near shore coastal zone of the Pacific Ocean." EPA Letter, ECF No. 73-34.

Plaintiffs' experts contend that the water emerging from the submarine seeps near Kahekili beach is significantly affecting the chemical, physical, and biological integrity of the nearshore water. *See generally* Declaration of Adina Paytan, ECF No. 73-1; Smith Decl. In particular, Plaintiffs' experts conclude that the water near the seeps has elevated levels of inorganic nitrogen and phosphorus, low salinity, low pH, and high temperature. *See* Paytan Decl. ¶¶ 5, 23-36; Smith Decl. ¶¶ 13-40. The County's experts admit that the water *directly* above the seeps bears this properties, but argues that when the water mixes with ocean water these effects rapidly diminish. Declaration of Steven Dollar ¶¶ 9-14, ECF No. 79-2; Declaration of Susan C. Paulsen ¶¶ 19, 21-23, ECF No. 79-3. The County's experts conclude that the effect on nearshore water is not significant. *Id.*

Plaintiffs argue that the impact of the effluent on Kahekili's nearshore waters is "more than theoretical." Smith Decl. ¶ 22. Plaintiffs' experts state that, because of the additional nitrogen and phosphorus, the coral reefs at Kahekili have been repeatedly subjected to algal blooms, which have contributed to a dramatic decline in coral cover. *Id.* ¶ 13. Plaintiffs' experts also say

that the effluent flowing into the ocean has substantially lower pH levels and oxygen concentration than the receiving water. Smith Decl. ¶¶ 29, 35; Paytan Decl. ¶¶ 31, 34. The low pH, Plaintiffs' experts say, is causing some species of reef-building corals and coralline algae to dissolve and die, and the low level of oxygen is suffocating coral, leading to loss of coral tissue and coral death. Smith Decl. ¶¶ 30, 34. In addition, Plaintiffs experts say that the effluent has lower salinity and higher temperature than the receiving water, properties that can also endanger and kill coral. *See* Paytan Decl. ¶¶ 25-29, 34; Smith Decl. ¶¶ 31-33, 37-38.

The County's expert argues, on the other hand, that visual inspection of the coral reveals that "all reef areas appeared essentially pristine," and that he "observed [no] bleached, diseased, or otherwise stressed corals." Dollar Decl. ¶ 44. The County points to photographs of the reef close to the seeps, which appear to have healthy coral. Defendants' Exhs. 6 to 11, ECF Nos. 79-9, 79-10, 79-11, 79-12, 79-13 and 79-14.

In August 2001, the County of Maui and the EPA entered into a consent decree regarding the injection wells and compliance with the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c), 300j-4(a). *See* ECF No. 8-3. This consent decree did not discuss whether an NPDES permit was needed for the injection wells under the Clean Water Act, although it required the County to obtain a water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341, from the State of Hawaii. The County has applied for that certification, but, as of March 6, 2014, not even a

preliminary determination had been made as to whether the County will receive such certification. *See* DOH letter dated March 6, 2014, ECF No. 71-4.

The County has also applied for an NPDES permit. *Id.* Despite maintaining that such a permit is not required, the County submitted its application for the permit to the State's DOH on November 14, 2012, which was after this lawsuit was filed. The application was forwarded to the EPA on November 20, 2012. *Id.* As of March 6, 2014, the DOH had "not made a tentative or preliminary determination" on the application, nor received any comments from EPA. *Id.* However, after the hearing on the present motions, the County received a draft permit and was invited to comment on the draft by June 9, 2014. *See* ECF No. 106. The DOH says that, after receiving comments from Plaintiffs' counsel, the County, and the EPA, it will revise the draft permit if appropriate and proceed to notice and a thirty-day public comment period and public hearing. Depending on the public comments it receives, DOH intends to issue a final permit within a few months thereafter. *Id.*

Plaintiffs contend that the County's continued discharge of wastewater without an NPDES permit violates the Clean Water Act.

The Clean Water Act, passed in 1972, was intended by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To further that objective, the Clean Water Act prohibits the "discharge of any

pollutant" unless certain provisions of the Clean Water Act are complied with. *See* 33 U.S.C. § 1311(a). The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). In relevant part, the Clean Water Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Clean Water Act defines "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). The Clean Water Act allows discharges of pollutants when an NPDES permit is obtained and complied with. *See* 33 U.S.C. § 1342.

The Clean Water Act is enforced by state and federal authorities working together. Under the Act, a state may apply for a transfer of permitting authority

to state officials. *See* 33 U.S.C. § 1342. Hawaii obtained permitting authority in 1974. 48 F.R. 15662-01. Once "authority is transferred, then state officials – not the federal EPA – have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). The state must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit. 33 U.S.C. §§ 1342(d)(1), (2). If the state does not adequately address EPA's concerns, authority over the permit reverts to the EPA. *Id.* § 1342(d)(4).

Plaintiffs sued the County, seeking to compel it to apply for and comply with the terms of an NPDES permit, and to pay civil penalties for its earlier allegedly unlawful discharge. The County moved to dismiss on various grounds. Among other things, the County contended that the court should defer acting until the DOH and the EPA had first reviewed what was then only a future NPDES permit application. On August 08, 2012, 2012 WL 3263093, this court denied the County's motion to dismiss. *See* ECF No. 34. As noted above, subsequent to that dismissal, the County applied for an NPDES permit. It now renews its argument that this action should be dismissed or stayed until the DOH and the EPA have ruled on the permit application. The County also moves to strike several of the declarations introduced into evidence by Plaintiffs, including portions of the declarations of experts Jennifer Smith and Adina Paytan, and asks this court to take judicial notice of several documents.

Plaintiffs move for summary judgment, arguing that, in light of the findings of the tracer study, the undisputed evidence demonstrates that the County has violated the Clean Water Act.

III. ANALYSIS

A. Requests that the Court Strike Evidence and Take Judicial Notice.

Recognizing that the County's motion to strike evidence may bear on the contents of the record that the court will consult to resolve the parties' substantive motions, the court addresses that motion first.

The County first challenges the declarations of Hannah Bernard, Lauren Campbell, Antoinette Lucienne de Naie, Sharyn Matin, and Gary Savage, all of whom are representatives of the various organizations bringing suit. The County argues that certain statements in these declarations constitute hearsay and/or impermissible legal or scientific opinion that the declarants are not qualified to give. Plaintiffs respond that all of these declarations simply support the various Plaintiff organizations' standing, and that none of the opinions is intended to bear on the question of the County's liability. The County has not challenged any Plaintiff's standing. There is therefore no reason to strike the declarations.

More significantly, the County challenges the declarations of both of Plaintiffs' experts, Adina Paytan and Jennifer Smith.

First, the County argues that Paytan's only qualification is in chemical oceanography and that she therefore has no expertise regarding the effects of the ocean's chemistry on marine biology and on coastal ecosystems. Plaintiffs introduce a supplementary declaration by Paytan, which notes that chemical oceanography is an interdisciplinary field that includes the study of the effects of the ocean's chemistry on marine biology, and that Paytan runs a biogeochemistry laboratory at the University of California, Santa Cruz. Paytan Opp. Decl. ¶¶ 2, 3, ECF No. 92-1. According to the declaration, biogeochemists study how chemical cycles affect biological activity, and the research Paytan has directly conducted or overseen at the laboratory has been published in numerous peer-reviewed journals that focus on biogeochemistry and marine biology, including peer-reviewed articles specifically addressing effects on coral reefs. *Id.* The County's argument appears largely dependent on Paytan's own characterization of herself as qualified in "chemical oceanography" and the County's assertion that such a qualification is inadequate.

The County has not asked for an evidentiary hearing under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993), regarding Paytan's alleged lack of expert qualification. The assertions in the County's motion do not, without more, establish that Paytan is not qualified as an expert. This court therefore declines to strike any part of her statements.

Second, the County challenges statements made by both Paytan and Smith regarding the theoretical

effects of elevated levels of nitrogen, phosphorus, and oxygen on marine life. The County describes Paytan and Smith's testimony as "speculation" and therefore inadmissible. However, the theoretical contentions made by both Smith and Paytan are not speculative. Rather, they appear to be based on "the expert[s'] scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. The declarations directly relate to the potential effects effluent may have on ocean water, and therefore go to whether there is a significant nexus between the aquifer and the ocean. Even if such statements were insufficient to establish such a nexus in themselves, the County does not show that they are either irrelevant or prejudicial with respect to the matters that are to be decided on the present motions.

Third, the County objects to the term "wastewater," used in both the Paytan and Smith declarations and in a declaration submitted by Plaintiffs' attorney, David Henkin. The County believes the material discharged from the LWRF should be described as "reclaimed water" or "effluent." "Wastewater" is a term that has been used throughout this litigation to refer to treated sewage that emerges from the LWRF and is the term used by the independently produced Tracer Dye Study. It is also what the "W" stands for in "LWRF," the acronym the County itself uses to describe the Lahaina facility. The court understands that the treatment of sewage at LWRF may eliminate various toxins from the water, and even make it safe for drinking. Whether this treated water is referred to as "wastewater," "effluent," or "reclaimed water" has no

bearing on any of the County's arguments. The court understands the terms being used, and there is no prejudice to any party flowing from the use of the term "wastewater."

Finally, with regard to Plaintiffs' experts, the County objects that Smith's algal bloom study – Smith Decl. ¶ 9 – is prejudicial because it analyzes the impact of water taken directly from the LWRF, without taking into account the diffusion and mixing that the effluent undergoes as it travels through groundwater and ocean water. The court recognizes that Smith's study does not account for these diffusion and mixing effects, but nevertheless finds the study's analysis probative as to the potential effect that effluent has on marine life. This is a matter going to the weight of the evidence, not its admissibility. Defendant was free to seek its own analysis or expert testimony showing that the diffusive effects of the effluent's journey undermine Smith's analysis. The impact of the alleged diffusion is a matter in dispute between the experts, not a reason to strike one side's expert testimony.

The County also challenges parts of the declaration of David Henkin. The County argues that various statements describing data in the Henkin declaration should be stricken because Henkin is not an expert. The County asks that the court consider the data without his interpretation. Henkin's statements do no more than point to other evidence in the record, but, in any event, the court does not rely on the Henkin declaration in interpreting any study in the record. The County further suggests that it is incorrect for Henkin

to call the LWRF discharges "unpermitted" because the County held various permits other than a NPDES permit. There is no prejudice caused by the use of the word "unpermitted," which the court construes as referring specifically to an NPDES permit and not all permits. Finally, Plaintiffs admit that the Henkin declaration's description of Defendant's NPDES application as "incomplete" is better suited to a legal brief than a declaration. The court does not rely on this statement in paragraph 29 of Henkin's declaration.

For the reasons stated above, this court denies the County's motion to strike evidence. Plaintiffs do not oppose either of the County's two requests for judicial notice. ECF Nos. 80, 89. Those requests are therefore granted.

B. Primary Jurisdiction.

The Ninth Circuit has stated that a defendant must obtain an NPDES permit when it "(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). It is not disputed that the effluent being discharged at the LWRF constitutes a pollutant that is being discharged from a point source. The only area of dispute between the parties is whether the discharge into the aquifer beneath the facility constitutes a discharge into "navigable waters."

The County argues that for the aquifer itself to be considered "navigable water" under the Clean Water Act, it must have both "a direct and immediate hydrological

connection" to the ocean and "significantly affect the chemical, physical, and biological integrity" of the ocean waters. The County argues that this is a fact-sensitive inquiry best left to the DOH and the EPA.

The County therefore moves for judgment on the pleadings, or, in the alternative, for a stay, asking this court to rule that the DOH and the EPA have primary jurisdiction to decide whether the County requires an NPDES permit to discharge effluent at the Lahaina facility. Even if this court were to conclude that the agencies have primary jurisdiction, the court would not enter judgment on the pleadings in the County's favor.

"The rule in this Circuit is that where a court suspends proceedings in order to give preliminary deference to an independent adjudicating body . . . jurisdiction should be retained by a stay of proceedings, not relinquished by a dismissal." *United States v. Henri*, 828 F.2d 526, 528 (9th Cir. 1987) (internal quotation omitted). Therefore, the court denies the County's motion for judgment on the pleadings and considers only its request for a stay.

The doctrine of primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). Primary jurisdiction "is not a doctrine that implicates the subject matter jurisdiction of the federal courts," and it is left "to the sound discretion of the

court" whether to stay a case pending resolution of an agency proceeding. *Id.* at 780-81.

"No fixed formula exists for applying the [primary jurisdiction] doctrine." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006) (internal quotation marks and citation omitted). However, the Ninth Circuit has stated that the doctrine "should be used 'if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency, and if protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'" *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010) (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008)).

The County argues that the primary objective of this lawsuit is to compel the County to apply for an NPDES permit, and that, because that application has been made, this court should allow the DOH and the EPA to decide whether a permit is required. The County further contends that this case involves "highly technical fact-specific inquiries" that require "the specialized expertise typically possessed by the agencies." Memo. in Support of Primary Jurisdiction Motion at 10-11, ECF No. 71-1.

The decision as to whether the County requires an NPDES permit is certainly within the jurisdiction and competence of the DOH and the EPA. However, "while competence of an agency to pass on an issue is a necessary condition to the application of the [primary

jurisdiction] doctrine, competence alone is not sufficient." *United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003) (internal quotation marks omitted). Given the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976), the primary jurisdiction doctrine should not be invoked unless "it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *Culliton*, 328 F.3d at 1082. *See also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) ("Whether there should be judicial forbearance hinges . . . on the authority Congress delegated to the agency in the legislative scheme.").

It would not be inconsistent with the Clean Water Act's legislative scheme for this court to decide the question of whether the County requires an NPDES permit for its discharge at the LWRF. The citizen suit provision in the Clean Water Act was specifically designed to allow courts to ensure direct compliance with the Act's requirements. The presence of the citizen suit provision demonstrates that Congress believed courts were competent to make fact-sensitive determinations over whether a particular discharge requires a permit. Congress could easily have committed that judgment to the sole discretion of an agency, or, at the very least, limited citizen suits to situations in which an agency had taken no action. Congress did not do that.

The Clean Water Act contains other express limitations on citizen suits. For example, it bars suits undertaken prior to the giving of notice to the agency and suits initiated during the pendency of any government-initiated court action. *See* 33 U.S.C. § 1365(b). The absence of any textual limitation on citizen suits initiated during agency review is a strong indication that Congress intended such suits to proceed. *See Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 460 (E.D. La. 2013) ("If Congress had intended for the primary jurisdiction doctrine to bar citizen suits, it would have included the doctrine among the specifically delineated circumstances under which citizen suits are barred."). *See also Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002) (allowing citizen suit despite prior agency determination of no NPDES permit requirement, because "Congress [has] empowered citizens to pursue enforcement of the Clean Water Act when all procedural requirements [are] satisfied").

Moreover, courts are plainly competent to address the types of questions raised by the present citizen suit, such as whether there is a hydrologic connection and significant nexus between two bodies of water. Indeed, those are precisely the types of determinations that the Supreme Court made in *Rapanos v. United States*, 547 U.S. 715 (2006), and that the Ninth Circuit made in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007). The very existence of the citizen suit provision in the Clean Water

Act indicates that Congress expected courts to make such judgments.

The County's references to *Montgomery Environmental Coalition Citizens Coordinating Committee of Friendship Heights v. Washington Suburban Sanitary Commission*, 607 F.2d 378 (D.C. Cir. 1979), and *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D. N.M. 1995), are unpersuasive. Those cases "concerned the contents of a NPDES permit . . . and not whether a permit should be issued in the first place." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 1001 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988). Here, by contrast, "[r]esolution of plaintiffs' claim[s] does not require the court to set effluent standards or to write a permit for the defendant." *Sierra Club v. El Paso Gold Mines, Inc.*, 198 F. Supp. 2d 1265, 1271 (D. Colo. 2002), *rev'd on other grounds*, 421 F.3d 1133 (10th Cir. 2005). Instead, all that is required of this court is a determination as to whether the County is discharging a pollutant from a point source into the navigable waters of the United States. Such a judgment is within the conventional expertise of courts and does not require the type of complex technical judgment at issue in *Montgomery* and *LAC Minerals*.

The County argues, "Given that the administrative process is underway, an agency decision may make a court order moot, or, should this litigation proceed, a court order could subject the County to conflicting obligations." Memo. in Support of Primary Jurisdiction Motion at 17. However, even if the DOH and the EPA

were to render a decision during the pendency of this suit, or shortly afterwards, that would neither make the case moot nor create conflicting obligations. "[A] court may, in entertaining a citizen suit, decide whether a discharge of particular matter into navigable waters violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007). If this court requires a permit, the DOH and the EPA cannot supersede a decision by this court by determining that an NPDES permit is not required. *See Hammersley*, 299 F.3d at 1012. And if the agencies require an NPDES permit, that does not render this entire case moot, because the County could still be liable for the payment of civil penalties. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) ("[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.") (internal quotation marks omitted). In other words, there is no discernible harm in proceeding with this litigation while the agencies consider the County's application.

By contrast, further delay in this case will result in the continued alleged discharge of pollutants into the ocean. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (noting that in assessing whether to issue a stay, a court must consider "the possible damage which may result from the granting of [the] stay"). Over a year and a half has passed since the County submitted its permit application.

The recent issuance of a draft permit suggests that the DOH has concluded that some permit is indeed required. That is, the County may not presently argue that it expects the DOH to announce that no permit is needed. While not privy to the content of the draft permit, this court assumes that its details remain to be resolved. No firm deadline for resolution has been set. At most, the DOH has set a deadline for comments by the EPA, the County, and Plaintiffs' counsel. Revisions may follow, then an opportunity for the public to comment. The best the DOH can predict is the issuance of a final permit "a few months" after it reacts to public comment. The County is therefore asking for the disfavored remedy of an "indefinite, and potentially lengthy" stay for as long as administrative proceedings may continue. *See Yong v. I.N.S.*, 208 F.3d 1116, 1121 (9th Cir. 2000).[1]

It is well settled that "a stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). If a court were to grant an indefinite stay in circumstances such as those now before this court, a defendant would be able to buy itself

[1] At the hearing on the present motion, the County suggested, as an alternative to an indefinite stay, a stay of three to six months, based on its suggestion that the DOH was concluding a relevant study in July. The County provides no evidence, however, that the DOH and the EPA are likely to render a decision soon after this alleged study. Nor does it show why this court cannot or should not address the need for an NPDES permit absent this study.

potentially years of further pollution through last-minute applications for an NPDES permit. Indeed, a polluting entity would be able to spend years in litigation prior to even applying for an NPDES permit, then seek to stay proceedings for several more years during the pendency of a belatedly submitted application, all the while continuing to release pollutants in violation of the Clean Water Act. An application for an NPDES permit, without more, cannot justify a lengthy or indefinite stay.

Congress placed no restrictions on citizen suits during the pendency of administrative proceedings, and the County can identify no particular harm associated with allowing this particular suit to proceed. "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). The County has failed to meet its burden and, as a result, no stay is ordered.

C. Summary Judgment.

1. Legal standard.

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The movants must support their position that a material fact is or is not genuinely disputed by either "citing to particular parts of materials in the record, including depositions, documents, electronically stored

information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"; or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. The burden initially falls on the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.*, 477 U.S. at 323). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted).

The nonmoving party may not rely on the mere allegations in the pleadings and instead must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv.*, 809 F.2d at 630. At least some "'significant probative evidence tending to support the complaint'" must be produced. *Id.* (*quoting First Nat'l*

Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)); *see also Addisu*, 198 F.3d at 1134 ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact."). "[I]f the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch'l Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (*citing Matsushita Elec. Indus. Co.*, 475 U.S. at 587). *Accord Addisu*, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

In adjudicating summary judgment motions, the court must view all evidence and inferences in the light most favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *Id.* When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id.*

2. A party is liable under the Clean Water Act if, without an NPDES permit, it indirectly discharges a pollutant into the ocean through a groundwater conduit.

The County contends that, to prevail, Plaintiffs must show that the aquifer beneath the LWRF is "navigable water" under the jurisdiction of the Clean Water Act.

It has long been settled "that the meaning of 'navigable waters' in the CWA is broader than the traditional understanding of that term." *Rapanos*, 547 U.S. at 731 (2006). "[T]he term 'navigable' is of 'limited import' and . . . Congress [has] evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001) (*quoting United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

The framework for understanding what waters are regulable under the Clean Water Act beyond such "navigable-in-fact" water comes from the Supreme Court's decision in *Rapanos*. *Rapanos* presented the Court with the question of whether wetlands adjacent to tributaries of navigable-in-fact water could be described as regulable "waters of the United States." The Court split 4-4-1, with the four Justices in the plurality limiting the definition of "navigable water" under the Act to "those relatively permanent, standing or

continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739 (*quoting* Webster's New International Dictionary 2882 (2d ed.)). The four Justices in the dissent viewed all wetlands adjacent to tributaries of navigable waters as protected under the Act. *Id.* at 797.

Justice Kennedy, concurring with the plurality, examined whether there was a hydrologic connection sufficient to establish a "significant nexus." *See id.* at 786. Under Justice Kennedy's view, a "significant nexus" exists "if . . . wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Justice Kennedy opined that this nexus is not satisfied by a "hydrologic linkage" that is "speculative or insubstantial," but wetlands adjacent to navigable waterways are covered by the Act given "the reasonable inference of ecologic interconnnection [sic]" with navigable-in-fact water. *Id.*

In *Healdsburg*, the Ninth Circuit read Justice Kennedy's concurrence as providing the controlling rule. 496 F.3d at 999-1000. *Healdsburg* involved a waste treatment plant that discharged sewage into a body of water known as "Basalt Pond," a rock quarry pit that was filled with water from a surrounding aquifer located next to the Russian River. *See id.* at 995. The Russian River and Basalt Pond were situated on top of a gravel bed saturated with water such that

there was "a continuous passage of water between Basalt Pond and the Russian River." *Id.* at 997. The Ninth Circuit deemed the unpermitted discharge of pollutants into Basalt Pond to be a violation of the Clean Water Act. Noting that "water from the Pond seeps into the river through both the surface wetlands and the underground aquifer" and that "this hydrological connection . . . [had] a significant effect on the chemical, physical, and biological integrity of the Russian River," the Ninth Circuit held that the relationship between the two bodies of water was "sufficient to confer jurisdiction under the Act pursuant to Justice Kennedy's substantial nexus test." *Id.* at 1000.

Although neither *Rapanos* nor *Healdsburg* addressed the context of groundwater, the County argues that, in *Healdsburg* the Ninth Circuit established a two-part test for determining whether there is a significant nexus between bodies of water, including groundwater. The County says that, given this test, Plaintiffs must show *both* that a "hydrological connection exists between the Lahaina Facility's UIC groundwater discharges and coastal waters" *and* that "there are significant physical, chemical and biological impacts as a result of the connection to warrant issuance of an NPDES permit." *See* Defendant's Primary Jurisdiction brief at 10-11. Whether or not this reading of *Healdsburg* is correct, the parties appear to agree that such a two-part test is a reasonable interpretation of the standard Plaintiffs must meet to show that the aquifer under LWRF is *itself* "navigable water" under the Act.

However, this court concludes that such a showing is not necessarily the only way in which Plaintiffs may prevail. Under this court's reading of the Clean Water Act and the court's extrapolation from appellate law, Plaintiffs may also prevail if they show that the discharge into the groundwater below the LWRF is functionally equivalent to a discharge into the ocean itself. That is, liability arises even if the groundwater under the LWRF is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.

The plurality in *Rapanos* made clear that the prohibition in the Clean Water Act is not limited to "the addition of any pollutant *directly* to navigable waters from any point source," but rather extends to "the addition of any pollutant *to* navigable waters." *Rapanos*, 547 U.S. at 743 (emphasis in original) (internal quotation marks omitted). "Thus, . . . lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit directly into covered waters, but pass through conveyances in between." *Id.* (internal quotation marks omitted).

The *Rapanos* plurality also approvingly noted that "many courts have held that . . . upstream, intermittently flowing channels themselves constitute "point sources" under the Act." *Rapanos*, 547 U.S. at 743. The definition of "point source" under the Clean Water Act includes "any discernible, confined and discrete conveyance, including . . . but not limited to any conduit

. . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act specifically excludes from the definition of a point source "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* It may be inferred from this narrow list of exclusions that Congress sought to include sufficiently "confined and discrete" groundwater conduits as "point sources" under the Act. *See Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir. 1996) ("An item which is omitted from a list of exclusions is presumed not to be excluded.") (internal quotation marks omitted).

There is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits under the Clean Water Act. When either type of waterway is a conduit through which pollutants reach the ocean, then there has been the "addition of [a] pollutant to navigable waters." 33 U.S.C. § 1362(12)(A).

"It would, of course, make a mockery of [the Clean Water Act's regulatory scheme] if [the] authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). No less can be said for groundwater flowing directly into the ocean. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) ("Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either

directly or through groundwater."); *Washington Wilderness Coal. v. Hecla Min. Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("[S]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit."). *See also* Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 HARV. ENVTL. L. REV. 569, 596 (1988) ("To forbid pollution of a surface stream, but to permit the stream to be polluted by a nearby waste injection well is a manifest absurdity.").

This view is consistent with the EPA's pronouncements. "As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act." National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule, 66 FR 2960-01, 3017 (Jan. 12, 2001); *see also* Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 FR 64876, 64892 (Dec. 12, 1991) ("[T]he affected ground waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters."). *Cf. Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002)

(noting that an agency's proposed rule "warrants respectful consideration").

This does not mean that groundwater is always and necessarily *itself* part of the navigable waters of the United States. *See* 66 FR 2960-01 at 3017 ("EPA does not argue that the CWA directly regulates ground water quality."); Definition of "Waters of the United States" Under the Clean Water Act, 79 FR 22188-01, 22218 (Apr. 21, 2014) ("The agencies have never interpreted 'waters of the United States' to include groundwater."). An unpermitted discharge into the groundwater, without more, does not constitute a violation of the Clean Water Act. It is the migration of the pollutant into navigable-in-fact water that brings groundwater under the Clean Water Act. In other words, if a party were only releasing rocks or other fill material that did not cause pollutants to migrate through groundwater, this court would not be talking about this "conduit" theory for liability under the Clean Water Act. This theory applies only when pollutants find their way to navigable-in-fact waters. In that event, a permit is required. *See Hecla Mining*, 870 F. Supp. at 990 ("[P]ollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.").

While there appears to be a split in authority over whether groundwater pollution violates the Clean Water Act, this split may largely flow from a lack of clarity by courts as to whether they are determining that groundwater itself may or may not be regulated under the Clean Water Act or are determining that groundwater may or may not be regulated when it serves as a

conduit to water that is indeed regulated. Almost every court that has allowed unpermitted discharges into groundwater has done so under the theory that the groundwater is not *itself* "water of the United States." That is, those courts were not determining whether discharging pollutants into groundwater *conduits* required a permit. *See, e.g.*, *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1318 (D. Or. 1997).

While it makes sense to regulate groundwater under the conduit theory, this court acknowledges that it cannot point to controlling appellate law or statutory text expressly allowing this theory in the present context.[2] The Supreme Court in *Rapanos* dealt only with wetlands that the EPA argued had ecological value in and of themselves. The value of the wetlands in question was not necessarily that they were conduits into navigable-in-fact water, but that they had independent ecological worth because of such functions as "providing critical habitat for aquatic animal species." 547 U.S. at 766. Even when the wetlands in question required protection because of their "critical functions related to the integrity of other waters," those

[2] In deciding that Justice Kennedy's concurrence in *Rapanos* is the controlling rule of law in the Ninth Circuit, the majority in *Healdsburg* was addressing only the question in that case, which, as in *Rapanos*, involved whether particular wetlands were *themselves* navigable waters of the United States. Admittedly, neither *Healdsburg* nor Justice Kennedy's concurrence in *Rapanos* applied the conduit theory discussed here to groundwater.

functions, "such as pollutant trapping, flood control, and runoff storage" went beyond the simple transmission of pollutants. *Id.* at 779. For those reasons the wetlands at issue in *Rapanos* may have required protection even if there was no possibility that the pollutants would migrate into navigable-in-fact water. *Id.* at 744 (noting that the case involved "dredged or fill material, which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an addition . . . to navigable waters when deposited in upstream isolated wetlands").

By contrast, Plaintiffs here do not appear to be arguing that the County would necessarily require an NPDES permit if it deposited material in the aquifer that did not find its way to the ocean. Instead, the harm alleged appears to be based on the migration of the effluent to the ocean. That is, Plaintiffs do not appear to be arguing that the groundwater requires protection for its own independent ecological value. Instead, the concern is that the County should not be allowed to pollute the ocean *through* that groundwater.

The test articulated by the Ninth Circuit in *Healdsburg* is not a good fit when groundwater is involved. If the *Healdsburg* test is the *only* way through which a discharge into groundwater could be determined to come under the Clean Water Act, *Healdsburg* poses enormous barriers to the regulation of groundwater – barriers that even the plurality in *Rapanos* would likely not endorse. Under a strict application of *Healdsburg*, even with definitive proof that 100% of all

pollutants discharged from a point source into groundwater rapidly reach the ocean, a permit would not be required unless there are also significant effects on the physical, biological, and chemical integrity of the ocean.

The Clean Water Act creates a strict liability scheme that "categorically prohibits any discharge of a pollutant from a point source without a permit," irrespective of whether that discharge affects the receiving water. *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). Applying *Healdsburg* to cases of groundwater pollution could undermine the Clean Water Act's strict liability scheme, as it would require plaintiffs to show *both* that pollutants are being discharged into navigable water *and* that those pollutants are affecting the receiving water. Congress intended to bar all unpermitted discharges, without regard to their effects on protected waters; Congress did not intend a scheme whereby certain citizen suit plaintiffs were subject to entirely different proof requirements based solely on the manner in which pollutants reach the ocean. Drawing such a distinction is not only illogical, it runs counter to the structure and intent of the Act.

This court is not reading *Healdsburg* as requiring such a distinction. *Healdsburg* does not *sub silentio* create novel and significant barriers to groundwater regulation. Instead, this court reads *Healdsburg* as limited to situations in which, as in *Rapanos*, a plaintiff seeks to protect a particular wetland in and of itself. *Healdsburg* does not require that a plaintiff who

shows that pollutants indirectly reach navigable-in-fact water must make a further showing that those pollutants have significantly affected the receiving water.

Of course, a plaintiff must demonstrate more than "a general hydrological connection between all waters." *Hecla Min. Co.*, 870 F. Supp. at 990. Plaintiffs in the present case must show that pollutants can be *directly traced* from the injection wells to the ocean such that the discharge at the LWRF is a *de facto* discharge into the ocean. Further, Plaintiffs must show that the level of pollutants emerging into navigable-in-fact water is more than *de minimis*. If they make these showings, it would make no sense to exempt a polluter from regulation simply because its pollution passes through a conduit. If the point of emission is readily identified, and the transmission path to the ocean is clearly ascertainable, the discharge is functionally one into navigable water.

That is not to say that groundwater can never be regulated under the *Healdsburg* test. An aquifer with a substantial nexus with navigable-in-fact water may itself be protected under the Clean Water Act even if it is not necessarily a conduit for pollutants. But when it is established that groundwater is a conduit for pollutants, liability may attach to a discharge into that groundwater even if the groundwater is not itself protected under the Act.

3. It is undisputed that the County has discharged pollutants into the ocean through the conduit of the groundwater below the LWRF.

Applying the above analysis to the present case, the court first addresses whether the groundwater under the LWRF constitutes a conduit to the ocean.

The central finding of the Tracer Dye Study – and the centerpiece of Plaintiffs' case – is that "64% of the treated wastewater injected into wells [3 and 4] currently discharges from the submarine spring areas" and into the ocean. Tracer Dye Study at ES-2, 3; Paytan Decl. ¶ 18. Because wells 3 and 4 "receive more than 80 percent of the treated wastewater," *see* Tracer Dye Study ES-21, it appears that over 50% of the wastewater discharged at the LWRF emerges into the ocean. At the hearing on the present motions, the County admitted that pollutants discharged at the LWRF are reaching the ocean, but disputed the specific quantities stated in the Trace Dye Study. What the County failed to do was explain why it believed the quantities cited in the Study were incorrect. Nor did the County point to any evidence in the record disputing the Study's precise findings.

The County's expert, Paulsen, maintains that, "as groundwater moves through the subsurface, various chemical and biological reactions can occur that alter the characteristics of the groundwater." Paulsen Decl. ¶ 17. However, neither that statement nor the rest of Paulsen's declaration indicates that the chemical and

biological reactions that occur as the effluent travels through the groundwater to the ocean transform the effluent into something other than a "pollutant." In other words, even if, for example, the levels of nitrogen and phosphorus in the water being released at the seeps are less than in the effluent injected at the wells, that does not mean that the water at the seeps is not or does not contain a "pollutant" within the meaning of the Act. Indeed, at the hearing on the present motion, the County explicitly disclaimed any such argument, conceding that "pollutants" were released at the seeps.

The County appeared to be arguing at the hearing that deep groundwater could not, as a matter of law, be viewed as a "conduit" because of these diffusive effects. That is, the County appeared to be arguing that any channel or conveyance to the ocean may be considered a conduit only if it "confine[s] or contain[s] the water." This argument elides the distinction between a point source and a conduit. A point source is specifically defined in the Clean Water Act as a "confined and discrete conveyance." While any conduit that is a "confined and discrete conveyance" is a point source, that does not mean that all conduits must be "confined and discrete conveyances." An injection well itself is a point source, and the groundwater acting as a conduit need not also be "confined and discrete." Courts have adopted "the 'indirect discharge' rationale and the 'point source' rationale *in the alternative.*" *Rapanos*, 547 U.S. at 744 (emphasis added). It would be anomalous for those alternative rationales to merge into a single rationale.

In any event, nothing in the record suggests that the groundwater is not itself a "confined and discrete conveyance." *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."). The definition of "point source" is limited to "confined and discrete conveyances" to minimize the difficulty of discerning the source of pollutants. *See Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984). The finding of the Tracer Dye Study is that more than 50% of the effluent originating at the LWRF is finding its way into the ocean. Any conveyance that transmits such a high proportion of a pollutant from one place to another is consistent with being "confined and discrete," irrespective of its other geologic properties.

The County's theory that groundwater cannot be considered a conduit because it is not "confined and discrete" would lead to the radical conclusion that *all* conveyances through groundwater into the ocean are permissible under the Act, even if 100% of the pollutants find their way into the ocean. Recognizing that such a contention conflicts with the numerous cases holding that the Act prohibits indirect pollution through groundwater, the County carves out an exception to its theory for transmission through "shallow subsurface" water. Neither logic nor case law supports distinguishing between "shallow" and "deep" groundwater. The key factor is not the depth of the groundwater, but the

existence of a pollutant that eventually reaches the ocean. It would make no sense to conclude that the release of pollutants into "shallow subsurface water" surrounded by impermeable rock requires a permit, but the release of pollutants into "deep" groundwater does not require a permit even if the latter involves far greater transmission of pollutants into the ocean. And neither case authorities nor statutory or regulatory language provides any clue as to the precise measurement that might render groundwater deep.

Of course, releasing water deeper underground may correlate to diffusion of a pollutant before it reaches the ocean. That diffusion may sometimes be so great that it is no longer reasonable to conclude that any pollutant is reaching the ocean. But depth is not the only consideration in determining whether pollutants are reaching navigable-in-fact water. Other factors, such as the permeability of the rock, may be equally important. There is no support, therefore, for creating a categorical exclusion for "deep" groundwater. The core inquiry must be a case-by-case determination of whether pollutants are reaching navigable-in-fact water. That determination is immensely simplified in the present case by the presence of an independently produced report that traces pollutants from the LWRF to the ocean.

At the hearing, the County also suggested that the effluent was diffused as it spread through the groundwater, and that such diffusion precluded a finding that the groundwater was a conduit to navigable water. But liability under the Clean Water Act is triggered when

pollutants reach navigable water, regardless of *how* they get there. As with a "deep" conduit, a diffused conduit is no less covered under the Act if it actually conveys pollutants to navigable-in-fact water.

Under the County's "diffusion" theory, for example, a single pipe taking effluent to the ocean would be covered under the Clean Water Act, but 50 smaller pipes, taking the same quantity of pollutant into the ocean, might not. Nothing in the Act supports relying on the manner in which the pollutants travel to determine liability.

Similarly, at the hearing, the County argued that the injection wells were "too far" from the ocean to qualify as conduits. Counsel for the County admitted, however, that if the pollutant traveled in a half-mile-long lava tube that confined the water, it would constitute a "direct" discharge into the ocean. To the County therefore, distance appeared to be a proxy for the degree of diffusion. Because diffusion is itself only relevant to the extent it may prevent the water from reaching the ocean, there is no support for a categorical rule that allows any discharge of pollutants through groundwater so long as the discharge originates a certain distance from the ocean.

This court recognizes that, in the absence of a tracer dye study, depth, diffusion, and distance might serve as proxies to help a court determine how much, if any, pollutant is reaching navigable-in-fact water. But such approximations are unnecessary when pollutants

have been precisely traced from the point of discharge to the ocean.

Liability under the Clean Water Act is triggered as soon as pollutants are discharged into navigable water from a point source. *See Headwaters*, 243 F.3d at 532. The core undisputed fact of this case is that pollutants discharged by the County at the LWRF injection wells migrate to the ocean. Having no NPDES permit allowing this discharge, the County is violating the Clean Water Act.

4. Even under *Healdsburg*'s two-part test, Plaintiffs are entitled to summary judgment on the issue of whether the County has violated the Clean Water Act.

As discussed in Section III(C)(2) of this order, the *Healdsburg* test may present significant obstacles to the regulation of groundwater by requiring plaintiffs who are able to clearly show pollutants flowing into protected water to also demonstrate that the flow of those pollutants has "significant effects." In many cases, "significant effects" may not be discernable until considerable pollution has already occurred. In other cases, plaintiffs may not have the resources to identify such effects. The present case does not present those difficulties. The record before this court is exceptionally extensive. The discharges from the LWRF have been the subject of investigation and scrutiny by scientists and federal and state authorities for over a decade. The consensus of the numerous studies and

reports placed before the court appears to be that effluent from the LWRF is reaching the ocean and is significantly affecting the water near the submarine seeps where it is being discharged. This record allows this court to conclude, even under the *Healdsburg* test, that the County is violating the Clean Water Act.

In referring to the *Healdsburg* test, this court notes that the parties appear to agree that, under *Healdsburg*, Plaintiffs must show that there is both a "hydrologic connection" between the aquifer under the LWRF and the ocean, and that the aquifer "either alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of [the ocean]." *Healdsburg*, 496 F.3d at 1000 (internal quotation marks omitted).

Healdsburg itself does not actually speak of a "two-part" test. Instead it simply states that "wetlands are regulable under the CWA only if there is a significant nexus between the wetlands at issue and the navigable waterway." 496 F.3d at 1000. *Healdsburg* notes that "mere hydrologic connection should not suffice in all cases [because] the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* (internal quotation marks omitted). Instead of expressly articulating a "two-part" test, this statement recognizes that a hydrologic connection does not alone meet the significant nexus test. In other words, if there are two bodies of water with no hydrologic connection that affect one another's "chemical,

physical or biological integrity," they may still be regulable under the Act. Because the aquifer under the LWRF and the ocean have a clear hydrological connection, the court is not faced with such a circumstance. However, given the parties' agreement that *Healdsburg* creates a two-part test, the court applies their framework for the purposes of deciding this part of the motion, although the court is not thereby ruling that the parties' agreement is necessarily the correct application of *Healdsburg*.

As a threshold matter, the County argues that groundwater categorically cannot be considered a "water of the United States," irrespective of any nexus it may have with navigable-in-fact water. The County's primary basis for this assertion is a recently proposed rule by the EPA and the Army Corps of Engineers stating, "Groundwater, including groundwater drained through subsurface drainage systems . . . [is] expressly not 'water[ ] of the United States' by rule." 79 FR 22188-01 at 22218. If this rule were to become final, it would be entitled to deference by this court under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and would likely mean that the groundwater under the LWRF could not itself be considered "water of the United States." It is important to note that, even if this rule does become final, it need not affect the indirect discharge theory discussed in Section III(C)(2) of this order. In keeping with the agencies' pronouncements, the indirect discharge theory does not treat groundwater as itself "water of the United States," but as a conduit to such water. If

adopted, the proposed rule would, however, affect whether Plaintiffs may prevail on the alternative theory that the discharge at the LWRF meets the *Healdsburg* test.

In the Ninth Circuit, "proposed regulations carry no more weight than a position advanced on brief." *Tedori v. United States*, 211 F.3d 488, 492 (9th Cir. 2000) (citation omitted). The proposed rule purports to interpret the statutory language of the Clean Water Act. When agencies have asserted new interpretations of statutory language in legal briefs, the Ninth Circuit has consistently declined to give controlling weight to the agency's pronouncements. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 395 (9th Cir. 2011); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 780 (9th Cir. 2011). Because proposed rules are not entitled to more respect than positions advocated in briefs, the proposed groundwater rule is similarly not owed deference here. To hold otherwise would give similar force in the courts to an agency's proposed and final rules. Such a result would, to some degree, allow agencies to circumvent the very notice and comment process that the Supreme Court has found to be highly relevant in determining the deference owed to an agency interpretation. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

Therefore, while the court gives "respectful consideration," *Blumer*, 534 U.S. at 497, to the agencies' proposed categorical exclusion of groundwater from the definition of the "waters of the United States," the agencies' view does not control. Instead, the court must

make a determination based on the unique facts present here regarding whether the aquifer under the LWRF is regulable under the Clean Water Act. This court now applies the parties' two-part test to that subject.

The County argues that, to meet the first part of its reading of the *Healdsburg* test, Plaintiffs must demonstrate a hydrologic connection between the aquifer and the ocean that is "direct and immediate." The County cites almost no authority to support its novel "direct and immediate" requirement and does not articulate what constitutes a sufficiently "direct" or "immediate" connection. The cases the County relies on in describing its "direct and immediate" requirement actually support the conclusion that the hydrologic connection between the aquifer and ocean here is sufficiently "direct and immediate."

For example, in *Greater Yellowstone Coalition v. Larson*, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009), the court held that it was not arbitrary and capricious for the EPA to decide that there was no hydrologic connection when pollutants traveled "between one to four miles until reaching the surface water," and "would take between 60 and 420 years for peak concentrations . . . to arrive at surface water." Here, the effluent travels for less than half a mile and reaches the ocean within three months of discharge. The *Larson* court considered the degree of hydrologic connection to involve a close question despite the much longer distance and vastly slower speed the pollutants traveled in that case. *Larson* therefore supports the conclusion that the

discharge at the LWRF has a "direct and immediate" hydrologic connection with the ocean.

Similarly, the court in *Association Concerned Over Resources and Nature, Inc. v. Tennessee Aluminum Processors, Inc.*, 2011 WL 1357690 at *18 (M.D. Tenn. Apr. 11, 2011), required the plaintiffs to show only "a link between contaminated ground waters and navigable waters." Nothing in that case suggests that the link between the aquifer under the LWRF and the ocean is insufficiently direct.

The County further argues that the "direct and immediate" requirement is consistent with *Healdsburg* because the court in that case found "a hydrological connection between a pond and nearby river where 'a change in the water level in one *immediately* affect[ed] the water level in the other.'" Opp. at 7 (emphasis in original) (*quoting Healdsburg*, 496 F.3d at 1000). But that language in *Healdsburg* relates to the "physical connection" between the Basalt Pond and the Russian River under the second prong of the test, not to the degree of hydrologic connection under the first prong. In any event, *Healdsburg* does not purport to set the outer bounds of the Clean Water Act's applicability. The County fails to establish that any hydrologic connection less than the one at issue in *Healdsburg* is insufficient to trigger liability under the Clean Water Act.

Unlike the courts in the cases discussed above, this court has before it the Tracer Dye Study, which indisputably demonstrates the relatively rapid flow of

significant quantities of pollutant from the LWRF to the ocean. In these circumstances, it would be anomalous for the court to read *Healdsburg*, or any other case, as requiring a finding of no hydrologic connection. Plaintiffs clearly meet the first prong of the *Healdsburg* test.

This court turns to the second part of the test defined by the parties – whether the water in the aquifer "significantly affects the [ocean's] physical, biological and chemical integrity." *See Healdsburg*, 496 F.3d at 1001. Plaintiffs contend that the ocean water close to the submarine seeps has been affected in five separate ways.

First, Plaintiffs contend that water near the seeps has "exceptionally elevated" levels of nitrogen and phosphorus. *See* Smith Decl. 11, 17-19. In particular, the area near the seeps apparently has the highest levels of sewage-derived nitrogen "ever reported in the scientific literature." *Id.* ¶ 8. Elevated levels of such nutrients can accelerate the growth of fleshy seaweed and algae, which can compete with, outgrow, and kill coral. *Id.* ¶ 20. In keeping with this conclusion, the coral reefs near the submarine seeps have been subject to algal blooms that have led to a decline in coral cover from 55% to 33% between 1994 and 2006. *Id.* ¶ 25.

Second, Plaintiffs show that the water near the submarine seeps is substantially more acidic than the rest of the ocean's nearshore water. *Id.* ¶ 29; Tracer Dye Study at 2-12, 2-13. This ocean acidification reduces the amount of carbonate ions available for

species such as corals, mussels, and limpets, and promotes the growth of seaweed that competes with coral. Smith Decl. ¶ 27.

Third, Plaintiffs demonstrate that the emerging water has lower salinity than the ocean water, *see* Tracer Dye Study at 2-12, 2-13, and this low salinity can be harmful to coral that has evolved to live in seawater rather than freshwater. Smith Decl. ¶ 33.

Fourth, Plaintiffs show that oxygen concentrations from the water emerging from the seeps is substantially lower than in the marine water elsewhere in West Maui. Smith Decl. ¶ 35; Paytan Decl. ¶ 34. The lack of oxygen can suffocate coral and promote the growth of seaweed. Smith Decl. ¶¶ 34-36; Paytan Decl. ¶¶ 34-35.

Fifth, Plaintiffs show that the water temperature is substantially elevated near the seeps. *See* Tracer Dye Study at 2-12, 2-13. The Tracer Dye Study found that these higher temperatures extended over more than 167 acres around the seeps. *See* Paytan Decl. ¶¶ 26-29. These higher temperatures can lead to bleaching and death of the coral in the affected area. *See* Smith Decl. ¶ 37.

Neither the County nor their experts dispute that the water directly emerging from the seeps bears these properties. Nor do they dispute that the theoretical effect of such alterations to ocean water would be to damage coral in the ways described above. Rather, the County argues that "measurements at the seeps fail to account for mixing of the seep discharge with ocean

water." Memo. in Opp. to Motion for Summary Judgment at 16; *see also* Paulsen Dec., ¶¶ 23, 38; Dollar Dec., ¶ 12-13. The County and their experts note that, as the water emerging from the seeps moves through the water column, the effects of the effluent dissipate. *Id.* As the County puts it, "[a]ny effects of the seep discharge are . . . attenuated, particularly given the small area of the seeps compared to the entire reef." Memo in Opp. at 17-18. The County's experts contend that, given this dispersion of effluent, the reef in the nearshore area is not being harmed by the discharge at the LWRF. *See, e.g.*, Dollar Dec., ¶ 44. ("[A]ll reef areas appeared essentially pristine, i.e., no observed bleached, diseased, or otherwise stressed corals.").

Even accepting these statements by the County's experts, the court finds that there is no genuine dispute that the discharge at the LWRF significantly affects the physical, chemical, and biological integrity of the ocean water. There is no dispute that water is flowing from the aquifer into the ocean, and that the properties of the aquifer water can and are altering the properties of water near the seeps. Of course, given the vastness of the ocean, these effects will dissipate as the aquifer water is dispersed into ocean water. To hold that an "effect" is "insignificant" merely because of such dispersion would license unfettered discharge into any body of water voluminous enough to rapidly diffuse the effects of the effluent. Ocean water near the seeps is, indisputably, being significantly affected. The County provides no basis for the contention that these

effects must be felt throughout all the nearshore waters to meet the "significant effects" test.

Notably absent from the County's analysis is any framework for determining when such dispersion renders an effect "insignificant." The effects of any amount of pollutant will eventually disperse as the pollutant travels through the ocean, but the County does not articulate how great a distance from the discharge an "effect" must be felt for it to be deemed "significant."

The crux of the "significant effects" test is determining whether the aquifer's "effects on water quality are speculative or insubstantial, [such that] they fall outside the zone fairly encompassed by the statutory term 'navigable waters.' " *Healdsburg*, 496 F.3d at 1000 (*quoting Rapanos*, 547 U.S. at 717 (Kennedy, J., concurring in judgment)). Here, the effect is indisputably neither speculative nor insubstantial. The LWRF releases three to five million gallons of effluent a day; an independent EPA study has determined that at least 50% of this effluent makes its way relatively rapidly into the ocean; this effluent has properties that can radically alter the properties of the water it is introduced into; and such radical effects have been observed and measured at the point of discharge into the ocean. If such a relationship is considered "speculative" and "insubstantial," it is hard to imagine any groundwater connection meeting what the parties construe as the *Healdsburg* test.

Finally, the County's assertion that coral is not being damaged and is "pristine," even if true, is

irrelevant for determining a significant nexus. An "effect" on the ocean is not coextensive with "harm" to the ocean. *Comm. to Save Mokelumne River*, 13 F.3d at 309 (noting that the CWA "does not impose liability only where a point source discharge creates a net increase in the level of pollution" but instead creates a strict liability scheme that "categorically prohibits any discharge of a pollutant from a point source without a permit"). The undisputed physical, chemical and biological changes observed in the water near the seeps are sufficient to establish that the aquifer and the ocean have the required nexus. To establish the County's liability, Plaintiffs need not show that coral or other marine life has been damaged or harmed.

The only reasonable inference that the undisputed evidence permits is that the discharge into the aquifer significantly affects the physical, chemical and biological integrity of the receiving waters. Both prongs of the *Healdsburg* test defined by the parties are met here. Therefore, the County's discharge of pollutants into the aquifer beneath the LWRF without an NPDES permit is a violation of the Clean Water Act.

In concluding that Plaintiffs in this case prevail even under the *Healdsburg* two-part test they have defined, this court is not suggesting that *Healdsburg* must be applied to all cases involving groundwater pollution. This case does not require this court to address, for example, whether *Healdsburg* bars the introduction of pollutants into groundwater that do not migrate to navigable-in-fact water. This court holds only that, given the undisputed evidence in the record showing

that pollutants rapidly flow from the aquifer into the ocean and cause significant change to the ocean water near the submarine seeps, the County is liable under both the *Healdsburg* framework articulated by the parties and the indirect discharge (or "conduit") framework. The *Healdsburg* test, which developed in the context of wetlands that plaintiffs sought to protect for the wetlands' own ecological value, may not always provide a good fit for cases involving groundwater. If *Healdsburg*, rather than the "conduit" theory, is to govern groundwater cases, it may require further clarification and elaboration in cases with fact patterns different from the one before this court. In the present case, however, the *Healdsburg* test relied on by the parties leads ineluctably to the same conclusion as the "conduit" theory: the County's release of pollutants at the LWRF without an NPDES permit violates the Clean Water Act.

IV. CONCLUSION.

The court denies Defendant's motion for judgment on the pleadings or, in the alternative, a stay. The court grants Plaintiffs' motion for partial summary judgment as to the County's liability under the Clean Water Act. The court makes no determination at this stage regarding any civil penalties.

The court grants the County's two requests for judicial notice and denies the county's motion to strike expert declarations.

Because Plaintiffs are prevailing on the substantive motions before this court, the court sees no need to address the merits of their Motion to Strike Defendant's Second May 23, 2014 Letter. That motion is denied.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 30, 2014.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District Judge

[SEAL]

Hawaii Wildlife Fund, et al. v. County of Maui; Civil No. 12-00198 SOM/BKM; ORDER DENYING DEFENDANT'S MOTION FOR STAY AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB-MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; and WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, Plaintiffs, vs. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM/BMK ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION.

Before the court are cross-motions for partial summary judgment filed by Plaintiffs Hawai'i Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association (collectively, "Plaintiffs") and by Defendant County of Maui (the "County"). The cross-motions concern whether the County has violated the Clean Water Act by

discharging effluent without a National Pollutant Discharge Elimination System ("NPDES") permit at two of four injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). The court grants Plaintiffs' motion and denies the County's motion.

II. FACTUAL BACKGROUND.

The County of Maui operates the LWRF, a wastewater treatment facility approximately three miles north of the town of Lahaina on the island of Maui. *See* ECF No. 41, PageID # 451; ECF No. 139-10, PageID # 5029. The facility receives approximately four million gallons per day of sewage from a collection system serving approximately 40,000 people. *See* ECF No. 139-10, PageID # 5029. The facility filters and disinfects the sewage, then releases the treated effluent (sometimes called "reclaimed water" or "wastewater") into four on-site injection wells. *See id*. The effluent reaches a groundwater aquifer, the precise depth of which "fluctuates somewhat, depending on water inputs and other conditions." The aquifer contains "a sufficient quantity of ground water to supply a public water system." *See* ECF No. 129-13, PageID # 4230.

This court granted summary judgment to Plaintiffs as to the County's liability under the Clean Water Act for discharges of effluent into two of the injection wells, wells 3 and 4, that cause pollutants to make their way to the Pacific Ocean. *See* ECF No. 113. Both parties now seek summary judgment on the issue of whether the County has violated the Clean Water Act

by discharging effluent into the two remaining wells, wells 1 and 2.

The Environmental Protection Agency ("EPA"), the State of Hawaii Department of Health ("DOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study "to provide critical data about the possible existence of a hydraulic connection between the injection of treated wastewater effluent at the [LWRF] . . . and nearby coastal waters, confirm locations of emerging injected effluent discharge in these coastal waters, and determine a travel time from the LWRF injection wells to the coastal waters." ECF No. 139-10, PageID # 5026. The study involved placing tracer dye into injection wells 2, 3, and 4, and monitoring the submarine springs of Kahekili Beach on Maui's west shore. *See id*.

Although dye introduced into wells 3 and 4 was detected at the seeps (i.e., the areas where the groundwater reaches the surface) eighty-four days after being placed in those wells, dye introduced to well 2 was not detected. *Id*., PageID #s 5028, 5042. The study concluded that the presence of dye from wells 3 and 4 at the seeps "conclusively demonstrate[s] that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui." *Id*., PageID # 5028. No tracer study has been conducted on well 1. *See* ECF No. 127, PageID # 3733; ECF No. 139, PageID # 4889.

Irrespective of the tracer study's results for well 2 and the lack of such a study for well 1, the parties do not dispute that effluent pumped into wells 1 and 2 eventually finds its way to the Pacific Ocean. *See* ECF No. 129, PageID # 3933; ECF No. 136, PageID # 4515. Though the County contends that the point of entry into the ocean of flow from wells 1 and 2 cannot be identified, the County acknowledges that there is a hydrogeologic connection between wells 1 and 2 and the ocean. *See* ECF No. 136, PageID # 4515. Indeed, this court repeatedly confirmed at the hearing on the present cross-motions that the County was expressly conceding that pollutants introduced by the County into wells 1 and 2 were making their way to the ocean.

Plaintiffs contend that the County's continued discharge of effluent into wells 1 and 2 without an NPDES permit violates the Clean Water Act. *See* ECF No. 128-1, PageID # 3927. The County contends that it is not subject to liability with respect to wells 1 and 2. *See* ECF No. 125, PageID # 3708.

III. STATUTORY FRAMEWORK.

The Clean Water Act, passed in 1972, was intended by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To further that objective, the Clean Water Act prohibits the "discharge of any pollutant" unless certain provisions of the Clean Water Act are complied with. *See* 33 U.S.C. § 1311(a). The Clean Water Act defines "discharge of a pollutant" as

"any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). In relevant part, the Clean Water Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Clean Water Act defines "point source" as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). The Clean Water Act allows discharges of pollutants when an NPDES permit is obtained and complied with. *See* 33 U.S.C. § 1342.

Plaintiffs sued the County, seeking to compel it to apply for and comply with the terms of an NPDES permit, and to pay civil penalties for discharges Plaintiffs contend were unlawful.

IV. STANDARD.

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1134 (9th Cir. 2000). The movant must support his or her position that a material fact is or is not genuinely disputed by either "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id*. at 323. A moving party without the ultimate burden of persuasion at trial – usually, but not always, the defendant – has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102 (9th Cir. 2000).

The burden initially falls on the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.,* 477 U.S. at 323). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (footnote omitted).

The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv., Inc.,* 809 F.2d at 630. At least some "'significant probative evidence tending to support the complaint'" must be produced. *Id*. (quoting *First Nat'l Bank of Ariz. v. Cities Serv.* Co., 391 U.S. 253, 290 (1968)); *see also Addisu,* 198 F.3d at 1134 ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact."). "[I]f the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch'l Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir. 1987) (citing *Matsushita Elec. Indus. Co.,* 475 U.S. at 587); *accord Addisu,* 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

All evidence and inferences must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc.,* 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *Id*. When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id*.

V. ANALYSIS.

A. Requests for Judicial Notice.

The County makes multiple requests for judicial notice. *See* ECF Nos. 127-13, 137-13, 141-8. There being no opposition from Plaintiffs, the court grants those requests and takes judicial notice of the documents as public records and government documents.

B. Plaintiffs are Entitled to Summary Judgment on the County's Liability Under the Clean Water Act for Discharges into Wells 1 and 2 at the LWRF.

To establish the County's liability under the Clean Water Act, Plaintiffs must show that the County has discharged a pollutant into navigable waters from a point source without an NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also Headwaters, Inc. v.*

Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001).

There is no dispute that the County is discharging a pollutant into navigable waters without an NPDES permit. *See* ECF No. 136, PageID # 4515 ("The County does not dispute that effluent injected into Wells 1 and 2 enters groundwater and eventually flows to and enters the ocean. In other words, Plaintiffs meet three of the four elements of the 'discharge of any pollutant' definition, *i.e.*, 'addition of any pollutant to navigable waters.'").[1] The only area of dispute between the parties is whether the discharge is from a point source. *See id*.

The County contends that an indirect discharge of pollutant to navigable waters requires "a series of sequential point sources conveying [the] pollutant[ ] from the initial point of discharge to navigable waters." ECF No. 125, PageID # 3710. In other words, according to the County, when a single point source does not discharge pollutant directly into navigable waters, liability under the Clean Water Act does not arise unless the pollutant passes through point sources along the entire pathway it travels. Because Plaintiffs do not offer evidence of such multiple point sources, the County

[1] As this court has noted earlier in this order, the County's statement that, with respect to wells 1 and 2, there is no tracer study data of the type available with respect to wells 3 and 4 concerns a meaningless distinction for purposes of the present motions given the County's concession that pollutants from wells 1 and 2 reach the ocean. The County nowhere contends that the amount of effluent is *de minimis*.

says that the effluent injected into wells 1 and 2 cannot be said to be discharged into navigable waters from a point source. According to the County, the groundwater though [sic] which the effluent travels cannot be a point source under 33 U.S.C. § 1362(14) because groundwater is not a "discernible, confined and discrete conveyance." *Id*., PageID # 3715.

The County acknowledges that, in making its present argument, it is seeking to persuade this court to revisit its earlier ruling granting Plaintiffs summary judgment as to wells 3 and 4. In its earlier order, this court addressed the County's argument that groundwater could not be considered a conduit because there is no "confinement or containment of the water," as required of a point source under the Clean Water Act. ECF No. 97, PageID # 3504 (internal quotation marks omitted). This court stated:

> This argument elides the distinction between a point source and a conduit. A point source is specifically defined in the Clean Water Act as a "confined and discrete conveyance." While any conduit that is a "confined and discrete conveyance" is a point source, that does not mean that all conduits must be "confined and discrete conveyances." An injection well itself is a point source, and the groundwater acting as a conduit need not also be "confined and discrete."

ECF No. 113, PageID # 3654

Plaintiffs note that the County failed to file a timely motion for reconsideration of this court's earlier

order, and argue that the County cannot now challenge this court's prior decision given the law of the case doctrine. Under that doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Cuddy,* 147 F.3d 1111, 1114 (9th Cir. 1998) (internal quotation marks omitted). The County urges this court to depart from the law of the case because the prior ruling was clearly erroneous and results in a manifest injustice. *See id*. ("[A] court may have discretion to depart from the law of the case if: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result.").

This court remains unpersuaded by the County's reading of what the Clean Water Act requires. The authorities the County refers to are neither binding authority for the County's theory nor analyses establishing error in this court's prior ruling. In this court's "Inclinations," routinely issued by this judge in advance of hearings, the County was asked to come to the hearing on the present motions prepared to discuss authority specifically requiring pollutants not directly discharged into navigable waters to travel though "a series of sequential point sources conveying pollutants from the initial point of discharge to navigable waters." ECF No. 156 (internal quotation marks omitted). At the hearing, the County discussed: *Rapanos v. United States,* 547 U.S. 715 (2006); *South Florida Water*

Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); *United States v. Ortiz,* 427 F.3d 1278 (10th Cir. 2005); *Sierra Club v. El Paso Gold Mines, Inc.,* 421 F.3d 1133 (10th Cir. 2005); *Concerned Area Residents for Environment v. Southview Farm,* 34 F.3d 114 (2d Cir. 1994); *Committee To Save Mokelumne River v. East Bay Municipal Utility District,* 13 F.3d 305 (9th Cir. 1993); *Dague v. City of Burlington,* 935 F.2d 1343 (2d Cir. 1991); *Alaska Community Action on Toxics v. Aurora Energy Services, LLC,* 940 F. Supp. 2d 1005 (D. Alaska 2013); *San Francisco Baykeeper v. West Bay Sanitary District,* 791 F. Supp. 2d 719 (N.D. Cal. 2011); and *United States v. Velsicol Chemical Corp.,* 438 F. Supp. 945 (W.D. Tenn. 1976).

These cases, many of which were cited in the County's papers, do not directly address the County's point source theory. Some of the cases involve sequential point sources, and some consider whether groundwater itself constitutes a point source, but none actually holds that a pollutant's indirect journey to navigable waters must be through a series of point sources.

At the hearing on this matter, the County articulated its position by saying that it could only be liable under the Clean Water Act if a pollutant from well 1 and/or well 2 ultimately reached navigable waters through a point source. Even assuming this particular articulation could be said to have been included in what the County advanced in its papers, the County fails to cite any binding authority for that proposition. Additionally, exempting discharges of pollutants from

a point source merely because the polluter is lucky (or clever) enough to have a nonpoint source at the tail end of a pathway to navigable waters would undermine the very purpose of the Clean Water Act.

The County's present expansion of arguments made during earlier proceedings does not establish a basis for this court to read the point source requirement for wells 1 and 2 differently from the requirement for wells 3 and 4. The statutory language at issue includes no suggestion that a pollutant taking an indirect path from a well to the ocean must pass through "a series of sequential point sources." *See* ECF No. 125, PageID # 3710. The Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Neither this language nor the statutory definition of "point source" supports the County's theory.

This court rests on the analysis set forth in its order addressing wells 3 and 4. Adopting the County's interpretation of the point source requirement would erode the Clean Water Act's prohibition on discharges of pollutants without an NPDES permit. It would be nonsensical to regulate a polluter that discharges effluent to the ocean through a series of sequential point sources, while exempting a polluter that discharges the same effluent through a combination of an initial point source and subsequent nonpoint sources. In both situations, pollutants are discharged into navigable waters from point sources. There is no basis for distinguishing between the two.

This court's rejection of the County's interpretation of the point source requirement by no means "nullifie[s] the meaning of point source" or "read[s] the point source requirement out of the statute," as the County contends. ECF No. 125, PageID # 3713, 3714 (internal quotation marks omitted). The injection wells are indisputably point sources. *See* ECF No. 125, PageID # 3715 ("The LWRF injection wells are the only confined and discrete conveyances here. 33 U.S.C. § 1362(14) (point source includes well)."). The County's discharge of effluent into the injection wells satisfies the point source requirement, the only disputed issue before this court on the present motions.

The parties' discussions concerning the location and expanse of the pollutant's entry into the ocean and the harm, or lack thereof, resulting from discharge of the pollutants, are irrelevant to the County's liability. *See, e.g., Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.,* 13 F.3d 305, 309 (9th Cir. 1993) ("[T]he Act categorically prohibits any discharge of a pollutant from a point source without a permit. Thus, the factual issue raised by defendants concerning the historical level of pollution compared to the current level of pollution is not material to the resolution of the Committee's claim, and therefore does not preclude summary judgment on the issue of liability." (citations omitted)). This court sees no need to address those arguments on the present motions, which go solely to the issue of whether the County is liable.

Because Plaintiffs meet the point source requirement, and because there is no dispute regarding any of

the other elements necessary for liability under the Clean Water Act, this court concludes that there is no genuine issue of material fact precluding a finding that the County is liable for discharges from wells 1 and 2 without an NPDES permit.

C. Requests to Strike Evidence.

Both parties request that this court strike opposing experts' statements. *See* ECF No. 138, PageID # 4851; ECF No. 140, PageID # 5322; ECF No. 145. Whether this court considered the challenged evidence or not, the court's ruling would be unchanged. This court in actuality does not deem the challenged material necessary to deciding the summary judgment motions before it. The requests to strike are denied on the ground that parsing the assertions in those requests will have no impact on the summary judgment motions.

VI. CONCLUSION.

Plaintiffs' motion for partial summary judgment is granted and the County's motion for partial summary judgment is denied.

The requests for judicial notice are granted, and the requests to strike evidence are denied.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 23, 2015.

/s/ Susan Oki Mollway
[SEAL] Susan Oki Mollway
Chief United States District Judge

Hawai'i Wildlife Fund, et al. v. County of Maui; Civil No. 12-00198 SOM/BMK; ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB-MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; and WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, Plaintiffs, vs. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM/BMK ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CIVIL PENALTIES

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CIVIL PENALTIES

I. INTRODUCTION.

The court has before it a motion for summary judgment filed by Defendant County of Maui asserting that the County lacked fair notice that it was subject to penalties given actions it took without a National Pollutant Discharge Elimination System ("NPDES") permit.

Also before the court is a motion for partial summary judgment filed by Plaintiffs Hawai'i Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association (collectively, "Plaintiffs") that seeks to establish the maximum number of statutory violations. The court denies the County's motion and grants Plaintiffs' motion.

II. FACTUAL BACKGROUND.

The County of Maui operates the Lahaina Wastewater Reclamation Facility ("LWRF"), a wastewater treatment facility approximately three miles north of the town of Lahaina on the island of Maui. *See* ECF No. 41, PageID # 451; ECF No. 139-10, PageID # 5029. The facility receives approximately four million gallons of sewage per day from a collection system serving approximately 40,000 people. *See* ECF No. 139-10, PageID # 5029. The facility filters and disinfects the sewage, then releases the treated effluent into four on-site injection wells. *See id.* The effluent reaches a groundwater aquifer and eventually the ocean. *See* ECF No. 129-13, PageID # 4230.

In a summary judgment order issued on May 30, 2014, this court ruled that the County was violating the Clean Water Act by discharging into navigable waters effluent containing pollutants from two of the injection wells, wells 3 and 4, without an NPDES permit. *See* ECF No. 113. In a separate summary judgment order issued on January 23, 2015, this court ruled that the County was similarly violating the Clean Water

Act with respect to discharges from the remaining two injection wells, wells 1 and 2. *See* ECF No. 162.

Having been found liable under the Clean Water Act, the County seeks summary judgment in its favor with respect to potential penalties, arguing that this court cannot assess statutory penalties against the County because the County lacked fair notice that an NPDES permit was required. *See* ECF No. 172.[1]

Plaintiffs, for their part, seek partial summary judgment regarding the method of calculating the civil penalties that may be assessed against the County. *See* ECF No. 176. Plaintiffs ask this court to determine the maximum possible number of the County's violations of the Clean Water Act by counting the number of days within the limitations period that effluent from each injection well was discharged and then totaling the results for all four wells. *See* ECF No. 176-1, PageID # 6204.

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[1] In the County's motion for summary judgment, it stated that it "reserves its right to provide additional undisputed facts regarding agency public statements once the County receives a complete response to its May 2014 FOIA to EPA." ECF No. 172-1, PageID # 5974. Based on this statement, the County supplemented Appendix A to its motion for summary judgment three times without leave of court. Under Local Rule 7.4, "[n]o further or supplemental briefing shall be submitted without leave of court." Court staff responded to a request from the County's counsel regarding the manner of filing at least one of the County's supplements, but that was merely a logistical discussion that did not constitute leave of court. The County may not reserve a right it does not have. However, whether considering or striking ECF Nos. 190, 194, and 216-8, the court reaches the same result on the County's motion.

III. STANDARD.

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The movant must support his or her position that a material fact is or is not genuinely disputed by either "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. A moving party without the ultimate burden of persuasion at trial – usually, but not always, the defendant – has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

The burden initially falls on the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.*, 477 U.S. at 323). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted).

The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. At least some "'significant probative evidence tending to support the complaint'" must be produced. *Id.* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)); *see also Addisu*, 198 F.3d at 1134 ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact."). "[I]f the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch'l Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 587); *accord Addisu*, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

All evidence and inferences must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc.*, 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *Id.* When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id.*

IV. REQUESTS FOR JUDICIAL NOTICE.

In connection with its motion for summary judgment, the County requests that this court take judicial notice of numerous documents. *See* ECF No. 173-2, PageID #s 6007-18; ECF No. 190-2, PageID #s 6405-19; ECF No. 216-17, PageID #s 7074-80. Plaintiffs have not opposed any of the County's requests.

The court takes judicial notice of the following exhibits in support of the County's motion for summary judgment as either public records, government documents, or the contents of the Federal Register: Exhibits 1 to 21, 23 to 42, the second page of 43, and 44 to 45. *See* ECF No. 173. The court also takes judicial notice of Exhibits 1 to 5 in support of the County's reply memorandum as public records and government documents. *See* ECF No. 216.

The court declines to take judicial notice of Exhibit 22 (a letter), ECF No. 173, and Exhibits 52 to 67

(emails), ECF No. 190, in support of the County's motion, and Exhibits 6 to 12 (emails and notes) in support of the County's reply memorandum, ECF No. 216. The County has not demonstrated that those exhibits, even if generated by government officials, are proper subjects for judicial notice.

V. THE COUNTY IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON A LACK OF FAIR NOTICE.

A. This Court Applies the Ninth Circuit's Articulation of the Required Fair Notice.

The County contends that it had no notice from relevant statutes, regulations, or agency statements that its discharges from the LWRF required an NPDES permit. *See* ECF No. 172-1, PageID # 5966. According to the County, this lack of "fair notice" precludes the assessment of penalties against it for violations of the Clean Water Act. *See id.*

The Due Process Clause of the Constitution requires "fair notice of what conduct is prohibited before a sanction can be imposed." *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996). To provide fair notice, "a statute or regulation must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). In the

absence of fair notice, a party may not be deprived of property through civil or criminal penalties. *See id.*

The County relies on the D.C. Circuit's articulation of the required fair notice as notice that allows "a regulated party acting in good faith [to] be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Ninth Circuit uses a different articulation of the requirement, saying that a statute or regulation must "give the person of ordinary intelligence a *reasonable opportunity to know what is prohibited* so that he may act accordingly." *Shark Fins*, 520 F.3d at 980 (emphasis added and internal quotation marks omitted). The Ninth Circuit recognizes that "due process does not demand unattainable feats of statutory clarity" and "absolute precision in drafting laws is not demanded, particularly where the law does not impose a criminal penalty." *Planned Parenthood of Cent. & N. Arizona v. State of Ariz.*, 718 F.2d 938, 948 (9th Cir. 1983) (internal quotation marks omitted).

At the hearing on its motion, the County contended that the Ninth Circuit "directly and indirectly" relied on the "ascertainable certainty" standard in its decisions in *Shark Fins*, *United States v. Trident Seafoods Corporation*, 60 F.3d 556 (9th Cir. 1995), and *Phelps Dodge Corporation v. Federal Mine Safety & Health Review Commission*, 681 F.2d 1189 (9th Cir. 1982).

Under the circumstances of the present case, any distinction between the Ninth Circuit's and the D.C. Circuit's articulations is immaterial to this court's analysis.

B. The County Has Not Demonstrated That it Lacked Fair Notice.

The County contends that the plain language of the Clean Water Act does not provide notice that an NPDES permit is required for the County's discharges from the LWRF. The County reads the Clean Water Act as indicating that "wastewater disposal through a UIC [Underground Injection Control] well into groundwater does not require an NPDES permit." ECF No. 172-1, PageID # 5970.

The Clean Water Act prohibits the "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). There is an exception to the general prohibition on the discharge of pollutants if a party obtains an NPDES permit. *See* 33 U.S.C. § 1342.

The County has never disputed that it releases pollutants from the LWRF that ultimately reach the ocean. The County's motion itself characterizes this information as "public knowledge." ECF No. 172-1, PageID # 5972.

Nor has the County ever disputed that the four injection wells at the LWRF are "point sources" under

the Clean Water Act. *See, e.g.*, ECF No. 125, PageID # 3715 ("The LWRF injection wells are the only confined and discrete conveyances here."). Indeed, the County could not plausibly deny that each injection well qualifies as a point source, given the inclusion of "well" in the definition of "point source" in 33 U.S.C. § 1362(14).

The County's discharges from the LWRF clearly implicate each statutory element necessary to trigger the NPDES permit requirement: (1) the addition of a pollutant, (2) the pollutant's reaching of navigable waters, and (3) a point source as an origin of the discharge of a pollutant. It therefore makes no sense to say as a matter of law that the County lacked fair notice.

The Ninth Circuit has recognized that the imposition of civil penalties under 33 U.S.C. § 1319(d) is mandatory once a violation of the Clean Water Act is found. *See Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 1001 (9th Cir. 2000); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995). Implicit in the Ninth Circuit's recognition is the concept that the Clean Water Act, by listing the elements of a violation, provides the required notice.

The County's argument also ignores the fair notice of violations that Plaintiffs, as citizens, gave the County before filing this action. This is a citizens' lawsuit, a vehicle expressly countenanced by the Clean Water Act that allows private parties to protect Hawaii's waters by suing over Clean Water Act violations in the absence of protective action by public officials. *See Molokai Chamber of Commerce v. Kukui (Molokai),*

Inc., 891 F. Supp. 1389, 1402 (D. Haw. 1995) ("Both the Congress and the courts of the United States have regarded citizen suits under the Act to be an integral part of its overall enforcement scheme. The Ninth Circuit has recognized that Congress intended citizen suits to be 'handled liberally, because they perform an important public function.' ").

Under the Clear [sic] Water Act, sixty days before filing this kind of lawsuit, citizens must give an alleged violator of the Clean Water Act notice of the alleged violations. 33 U.S.C. § 1365(b). The notice must be detailed enough to allow the alleged violator to identify the specific standard, limitation, or order allegedly being violated; must describe the allegedly violating activity; and must include the location of the alleged violation, the persons responsible for the alleged violation, the dates of the alleged violation, and the contact information for the person giving notice and for any attorney representing that person. 40 C.F.R. § 135.3. "Notice is sufficient if it is reasonably specific and if it gives the accused . . . the opportunity to correct the problem." *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 917 (9th Cir. 2004) (internal quotation marks omitted).

The County has never claimed that Plaintiffs are proceeding in this lawsuit without having given the statutorily required notice.

Plaintiffs have submitted evidence of notice they gave the County even before the sixty-day notice period. Plaintiffs contend that, for several years before

the filing of this lawsuit, many of their members and other concerned citizens repeatedly warned the County of potential Clean Water Act liability resulting from the County's discharges at the LWRF. *See* ECF No. 208, PageID # 6758. For example, on November 6, 2008, a member of Plaintiff Sierra Club-Maui Group, among other individuals, testified regarding the County's noncompliance with the Clean Water Act at an Environmental Protection Agency ("EPA") hearing attended by County personnel. *See* ECF No. 209-2, PageID #s 6780-81; ECF No. 209-4. Evidence of such repeated warnings raises, at the very least, triable issues of fact as to whether the County lacked notice of potential liability. *See also* ECF No. 209-1.

The County's assertion that it is entitled to summary judgment on the fair notice issue is also called into question by factual disputes regarding the nature of agency action relating to the LWRF. Plaintiffs contend that the EPA put the County on notice that its discharges from the LWRF might violate the Clean Water Act on at least two specific occasions. The first allegedly occurred in January 2010, when the EPA required the County "to conduct sampling, monitoring and reporting . . . pursuant to section 308(a) of the Clean Water Act" to determine compliance with the Act. ECF No. 209-25, PageID # 6920; ECF No. 208, PageID # 6752. According to Plaintiffs, such a requirement can only be imposed under section 308(a) on the "owner or operator of [a] point source." 33 U.S.C. § 1318(a)(A).

The second allegedly occurred in March 2010, when the County received a letter from the EPA instructing the County to apply for a water quality certification from the State of Hawaii pursuant to section 401 of the Clean Water Act. *See* ECF No. 208, PageID # 6753. The EPA required the certification based on its determination that "the County of Maui's operation of the [LWRF] may result in a discharge into navigable waters." ECF No. 209-26, PageID # 6928. The section 401 certification required the State of Hawaii to certify that discharges from the LWRF complied with 33 U.S.C. § 1311, the section under which this court eventually found the County liable. *See* 33 U.S.C. § 1341. Plaintiffs contend that these two EPA actions were clear indications to the County that it was at risk of being found liable for violating the Clean Water Act.

The County views the EPA's directives in a different light. *See* ECF No. 216, PageID # 6972. According to the County, the EPA was acting in connection with the issuance of a new UIC permit, not in connection with potential Clean Water Act liability for discharges from the LWRF. *See id.* The EPA's intent appears to be the subject of a factual dispute precluding summary judgment at this point.

At the very latest, the County had fair notice that it was violating the Clean Water Act once this court issued its first summary judgment order on May 30, 2014. In that order, this court found the County liable under the Clean Water Act in connection with discharges into navigable waters of effluent from two of

the four injection wells without an NPDES permit. *See* ECF No. 113.

The County says that even with this court's earlier order it lacked fair notice because it had already taken the only action it says it could have taken to ensure compliance by filing an NPDES permit application in November 2012. This application does not establish a lack of fair notice. It is, rather, an argument as to the practicability of ending the violation, a different issue entirely. Moreover, it makes little sense to say that one can violate the Clean Water Act without penalty as long as one has an NPDES permit application pending. One might as well argue that one can drive a car if one has a driver's license application pending, or can travel to a country requiring a visa if one has a visa application pending. The County's argument may go to other reasons that the County believes it could continue discharges even after this court's ruling, or to circumstances that might mitigate any penalty, but the argument does not speak to fair notice.

Because the County fails to demonstrate that it is entitled to judgment as a matter of law as to its fair notice argument, its motion is denied.

VI. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT REGARDING THE CALCULATION OF THE MAXIMUM NUMBER OF THE COUNTY'S CLEAN WATER ACT VIOLATIONS.

The Clean Water Act provides for the mandatory imposition of civil penalties once a violation is found. *See* 33 U.S.C. § 1319(d); *Sw. Marine, Inc.*, 236 F.3d at 1001. The Clean Water Act sets forth a maximum penalty per day for each violation. 33 U.S.C. § 1319(d). Plaintiffs contend that the number of the County's violations of the Clean Water Act should be calculated by counting the number of days within the limitations period that the County discharged effluent from each of the four injection wells, then adding the totals from the four wells. *See* ECF No. 176-1, PageID # 6204.

The County contends that partial summary judgment should not be granted to Plaintiffs on this calculation issue because the number of violations is not necessarily relevant to this court's penalty calculation. *See* ECF No. 203, PageID # 6599. The County argues that "[t]he number of violations is an important step under the 'top down' method [of calculating penalties], but under the 'bottom up' method, may be just one factor among many considered." *Id.* at PageID # 6600.

Under the "top down" method of determining penalties, "a court is to [first] calculate the maximum penalties that can be awarded against a violator of the Act." *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993). The court then "us[es] the maximum penalty as a guideline" to "set the actual penalties by analyzing the specific statutory factors" in 33 U.S.C. § 1319(d). *Id.*

Under the "bottom up" method, "the economic benefit a violator gained by noncompliance is

established and adjusted upward or downward using the remaining five factors in § 1319(d)." *United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 265 (3d Cir. 1998).

As the County itself acknowledges, the number of violations is relevant to both approaches. *See* ECF No. 203, PageID # 6600. This court is not required to deny Plaintiffs' motion simply because the number of violations is "just one factor among many" using the "bottom up" approach. Regardless of which approach this court uses, the number of violations may be considered. *See Hawaii's Thousand Friends*, 821 F. Supp. at 1383 ("In evaluating the seriousness of the city's . . . violations, the court looks to several factors, including, but not limited to . . . the number of violations.").

With respect to calculating the number of the County's violations, Plaintiffs contend that "an unpermitted discharge from one point source constitutes a distinct and separate violation from an unpermitted discharge from another point source." *See* ECF No. 176-1, PageID # 6203.

The County, on the other hand, contends that it is subject, at most, to one violation per day even if it discharged effluent from each of the four wells during that day. *See* ECF No. 203, PageID # 6597. The County, reading this court's order of May 30, 2014, as determining that groundwater itself is a point source, says that discharges from all four wells went into the groundwater, and it was through the groundwater that pollutants reached the ocean. According to the County, the

aggregate discharge through groundwater must be a single violation each day.

The County's reading of this court's order is incorrect. Contrary to the County's assertion, this court's order merely noted that groundwater *could* constitute a "confined and discrete conveyance." *See* ECF No. 113, PageID #s 3654-55. This court did not rely on the proposition that the groundwater in this case served as a point source.

The County also argues that, in indirect discharge cases, "it is the outfall to navigable waters that matters for purposes of liability." *See* ECF No. 203, PageID # 6598. As noted above, the County contends that groundwater is a single source, subjecting the County to only one violation per day, rather than to four violations per day. *Id.* at PageID # 6598.

The County fails to cite any authority supporting the proposition that the number of Clean Water Act violations is tied to the "outfall to navigable waters." *See* ECF No. 203, PageID # 6598. At most, the County cites this court's order of May 30, 2014, but this court made no determination in that order that the calculation of violations is based on the outfall to navigable waters.

The court disagrees with the County's approach. The County's argument ignores the four point sources involved. If the County discharged effluent from all four wells in a day, it is liable for four violations. *See Highlands Conservancy v. E.R.O., Inc.*, Civ. A. No. A:90-0489, 1991 WL 698124, at *4 (S.D.W. Va. Apr. 18, 1991) ("[T]he Clean Water Act considers each point source as

giving rise to a distinct and separate discharge violation."). The Clean Water Act would require penalties even if the discharge of effluent into the ocean came solely from well 1. No governing law suggests that, when four wells are involved, the same single violation is in issue. Indeed, counting multiple acts as a single violation could invite increased pollution.

Plaintiffs are entitled to summary judgment as to the method of calculating the maximum number of violations by the County under the Clean Water Act. That maximum is calculated by first counting the number of days within the limitations period that effluent from each injection well was discharged, then totaling the figures for the four wells. This calculation will not necessarily equate with actual penalties that end up being assessed, but the court here determines that a discharge of pollutants from one well on one day counts as one violation, and a discharge on the same day from another well counts as a separate violation.

VII. CONCLUSION.

The County's motion for summary judgment based on lack of fair notice is denied. Plaintiffs' motion for partial summary judgment regarding civil penalties is granted.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 25, 2015.

[SEAL] /s/ Susan Oki Mollway

Susan Oki Mollway
Chief United States District Judge

Hawai'i Wildlife Fund, et al. v. County of Maui; Civil No. 12-00198 SOM/BMK; ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CIVIL PENALTIES

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

HAWAI'I WILDLIFE FUND, a Hawai'i non-profit corporation, SIERRA CLUB – MAUI GROUP, a non-profit corporation, SURFRIDER FOUNDATION, a non-profit corporation, and WEST MAUI PRESERVATION ASSOCIATION, a Hawai'i non-profit corporation, Plaintiffs, v. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM BMK SETTLEMENT AGREEMENT AND ~~[PROPOSED]~~ ORDER RE: REMEDIES; EXHIBIT A

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

SETTLEMENT AGREEMENT AND
~~[PROPOSED]~~ ORDER RE: REMEDIES

WHEREAS, on April 16, 2012, Plaintiffs Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation, and West Maui Preservation Association (collectively, "Plaintiffs") filed a Complaint against Defendant County of Maui ("Defendant"), since amended, alleging violations of section 301(a) of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), and Haw. Rev. Stat. § 342D-50(a) associated with the discharge into the nearshore ocean waters of West Maui of wastewater from injection wells operated by Defendant at the Lahaina Wastewater Reclamation Facility ("LWRF"), which is located at 3300 Honoapi'ilani Highway, Lahaina, Hawai'i 96761;

WHEREAS, Defendant maintains it has authorization under State and federal Safe Drinking Water Act permits for its four underground injection control wells that allows Defendant to discharge treated wastewater to groundwater that has a hydrological connection to navigable waters;

WHEREAS, on May 30, 2014 and January 23, 2015, the Court found that Defendant's discharges of treated wastewater from each of the LWRF injection wells without a National Pollutant Discharge Elimination System ("NPDES") permit violate the CWA;

WHEREAS, on June 25, 2015, the Court held Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required;

WHEREAS, Plaintiffs and Defendant (collectively, "the Parties") have agreed to enter into this Settlement Agreement and Order Re: Remedies ("Agreement"), without any admission of fact or law; and

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the remaining issues related to remedies without protracted litigation;

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PLAINTIFFS AND DEFENDANT, AND THE COURT ORDERS AS FOLLOWS:

1. This Agreement resolves all remaining issues in the remedies phase of the above-captioned lawsuit. The effective date ("Effective Date") of this Agreement is the date the Agreement is entered by the Court.

DEFENDANT'S RESERVATION OF RIGHT TO APPEAL

2. By entering into this Agreement, Defendant does not admit liability. The Parties agree Defendant reserves the right to appeal any and all rulings of this Court other than the entry of this Agreement, including the Court's rulings on liability and fair notice.

3. Appeals may be made to the Court of Appeals for the Ninth Circuit and the Supreme Court.

4. Defendant's obligations under Paragraph 8 shall be triggered by this Court's entry of this Agreement. Defendant's obligations under Paragraphs 9

through 13 herein are triggered by a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required. For purposes of this Agreement, the phrase "Final Judgment" is defined as in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(G).

5. In the event of a remand, the Parties agree that the remedies provided for in this Agreement control and are binding, that no additional remedies shall be assessed and that this Agreement and the remedies provided herein resolve all remaining issues regarding the remedy phase of the above-captioned lawsuit. Notwithstanding the foregoing, neither Party waives its right to litigate any remanded issue(s), including a liability determination as to any well or a ruling on fair notice.

LIMITATION ON FUTURE ACTIONS PENDING APPEAL

6. From the date of execution of this Agreement through Final Judgment, Plaintiffs shall not bring any claim in any State or federal court against Defendant seeking additional civil penalties or injunctive or declaratory relief for alleged violations under State or federal law based on the lack of an NPDES permit for the LWRF's injection wells.

7. No penalties shall accrue or otherwise be imposed in this action from the Effective Date through the Final Judgment.

NPDES PERMIT

8. Defendant shall make good faith efforts to secure and comply with the terms of an NPDES permit for the LWRF injection wells. Such good faith efforts shall include, but not be limited to, cooperating in good faith with the Hawai'i Department of Health to secure an NPDES permit, including providing additional information when requested. Defendant's obligations under this paragraph as to any well shall cease only in the event of a Final Judgment that discharges of treated wastewater from that well without an NPDES permit do not violate the CWA.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

9. In the event of a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required, Defendant shall fund and implement one or more projects located in West Maui, to be valued at a minimum of Two Million Five Hundred Thousand Dollars ($2.5 million), the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West

Maui. Examples of projects that would further this purpose include, but are not limited to, expansion of the R-1 distribution system for the LWRF's treated wastewater and indirect or direct potable reuse. Projects under this Agreement shall not include projects already required to be implemented by third parties.

10. No later than thirty (30) days following the Final Judgment as provided for in Paragraphs 4 and 9, the Parties shall meet and confer (in-person not required) in a good faith effort to reach agreement on one or more projects that further the purpose set forth in Paragraph 9, which agreement shall not be unreasonably withheld. If the Parties are unable to reach agreement within sixty (60) days of the Final Judgment as provided for in Paragraphs 4 and 9, Defendant shall, within ninety (90) days thereafter, instead pay a penalty of Two Million Five Hundred Thousand Dollars ($2.5 million) to the U.S. Treasury. If the Parties reach agreement on one or more projects that do not meet the Two Million Five Hundred Thousand Dollars ($2.5 million) value threshold, the balance shall be paid to the U.S. Treasury (for example, if a mutually agreed-upon project is valued at $1.5 million, with no agreement as to other projects, Defendant would submit a $1.0 million penalty payment to the U.S. Treasury).

11. No later than two (2) years following a Final Judgment as provided for in Paragraphs 4 and 9, Defendant shall complete the design of the project(s) agreed upon pursuant to Paragraph 10. Defendant shall complete the construction of those project(s) no later than five (5) years of the Final Judgment.

12. Defendant shall provide notification to Plaintiffs in accordance with Paragraph 27 when design of the project(s) is complete and when construction is complete.

CIVIL PENALTIES

13. In the event of a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required, Defendant shall pay a penalty in the amount of One Hundred Thousand Dollars ($100,000.00) to the U.S. Treasury within ninety (90) days of the Final Judgment.

DELAY IN PERFORMANCE AND STIPULATED PENALTIES

14. Unless excused due to a Force Majeure event as defined below, Defendant shall be liable for Stipulated Penalties for each day it fails to comply with any of its obligations under Paragraph 11, as follows:

a. $250 per day for the first 15 days;

b. $500 per day for days 16 to 60; and

c. $1,000 per day for days 61 and beyond.

15. Stipulated Penalties shall begin to accrue on the day a violation occurs and shall continue to accrue through the final day of the correction of the violation.

a. Plaintiffs may seek Stipulated Penalties under this Section by making a written demand. Plaintiffs shall send notice to Defendant in accordance with Paragraph 27 that Plaintiffs intend to seek Stipulated Penalties and stating the basis for Plaintiffs' demand.

b. If Defendant disputes Plaintiffs' demand for Stipulated Penalties, the Parties shall meet and confer (in-person not required) in a good faith effort to resolve the dispute. If the Parties are unable to resolve their dispute within ten (10) days after receipt of the written notice, Plaintiffs may submit the dispute to the Court for resolution. Stipulated Penalties shall continue to accrue during the Court's resolution of any dispute, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

    i. If Plaintiffs prevail in whole or in part in a Court action regarding Stipulated Penalties, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within thirty (30) days of receiving the Court's decision or order, except as provided in subparagraph ii., below. Defendant shall also pay Plaintiffs' costs of litigation (including reasonable attorneys' fees).

    ii. If any party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing,

together with interest, within fifteen (15) days of receiving the final appellate court decision. If Plaintiffs prevail in whole or in part in an appeal regarding Stipulated Penalties, Defendant shall also pay Plaintiffs' costs of litigation (including reasonable attorneys' fees).

c. If Defendant does not dispute Plaintiffs' demand for Stipulated Penalties, within thirty (30) days of service of the written demand, Defendant shall pay the Stipulated Penalty set forth in Plaintiffs' demand.

d. Defendant shall pay any Stipulated Penalties by certified check or cashier's check in the amount due, payable to: Hawai'i Department of Health, Environmental Response Revolving Fund and provide timely proof of payment to Plaintiffs in accordance with Paragraph 27.

16. The payment of Stipulated Penalties shall not alter in any way Defendant's obligation to comply with the terms of this Agreement.

FORCE MAJEURE

17. A "Force Majeure event" is any event beyond the control of Defendant, Defendant's employees, consultants or contractors, or any entity controlled by Defendant, that delays or prevents the performance of any obligation under this Agreement despite Defendant's best efforts to fulfill the requirements of the Agreement and includes, but is not limited to, acts of God or war. "Best efforts" includes anticipating any

potential Force Majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize to the greatest extent possible any resulting delay in fulfillment of the requirements of the Agreement. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Agreement.

18. If and to the extent Defendant is prevented from performing any of its obligations under Paragraph 11 by a Force Majeure event, while Defendant is so prevented, Defendant shall be relieved of its obligations to perform and pay Stipulated Penalties, but shall make its best efforts to continue to perform its obligations under this Agreement as far as reasonably practicable.

19. If and to the extent Defendant suffers a delay in performing as a result of a Force Majeure event, Defendant shall be entitled to a reasonable extension of time to complete performance.

20. Defendants shall provide timely notice orally or by electronic transmission as soon as practicable, after the time Defendant first knew of, or by the exercise of due diligence, should have known of, a claimed Force Majeure event.

21. Defendant shall also provide notice to Plaintiffs in accordance with Paragraph 27 within seven (7) business days of the time Defendant first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the nature and duration of the Force Majeure event, its cause(s), the

anticipated delay of performance of any obligation(s) under Paragraph 11, a schedule for carrying out those obligations, and Defendant's rationale for attributing the delay to a Force Majeure event.

22. If Defendant provides notice of a claimed Force Majeure event in accordance with Paragraphs 20 and 21, Plaintiffs shall, within a period not to exceed twenty (20) days from the date of Defendant's notice of the event, provide a response to Defendant in accordance with Paragraph 27 about whether Plaintiffs agree that a Force Majeure event has occurred. Plaintiffs "agree that a Force Majeure event has occurred" when they agree with Defendant in writing as to both the nature and duration of the event.

23. If Plaintiffs fail to provide a written response to Defendant within the twenty (20) day period provided for in Paragraph 22, Plaintiffs will have been deemed to agree with Defendant's determination that a Force Majeure event has occurred.

24. If Defendant provides notice of a claimed Force Majeure event in accordance with this Agreement and:

a. Plaintiffs timely agree that a Force Majeure event has occurred as provided in Paragraph 22, the Parties may agree to extend the time for Defendant to come into compliance with the Agreement by making the appropriate modification via stipulation pursuant to Paragraph 32; or

b. Plaintiffs do not agree that a Force Majeure event has occurred or fail to timely provide the response pursuant to Paragraph 22, Defendant may, within thirty (30) days of receipt of written notice of the disagreement or the deadline for Plaintiffs' response, file a written motion with the Court seeking an extension of time to perform. If Defendant does not file a motion within that time frame, Defendant waives its claim that a Force Majeure event has occurred.

25. To prevail on any written motion under Paragraph 24(b), Defendant bears the burden of proving, by clear and convincing evidence, that any claimed Force Majeure event is a Force Majeure event, that Defendant gave the notice required by this Agreement, that the Force Majeure event caused any delay in Defendant's performance of any obligation under Paragraph 11 that Defendant claims was attributable to that event, and that Defendant exercised best efforts to avoid or minimize any delay caused by the event.

26. When Plaintiffs agree or the Court rules that a Force Majeure event has occurred that delays performance of an obligation under Paragraph 11, Defendant shall not be liable for Stipulated Penalties for the time period of the delay caused by the Force Majeure event.

ADDRESSES FOR NOTICES, SUBMISSIONS, OTHER COMMUNICATIONS

27. Unless otherwise specified herein, whenever notifications, submissions, and/or communications are

required by this Agreement, they shall be in writing, and be addressed and sent via U.S. Mail or electronic mail as follows:

To Plaintiffs, via Plaintiffs' attorney of record:

David Lane Henkin
Earthjustice
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Phone: (808) 599-2436
E-mail: dhenkin@earthjustice.org

To Defendant, via Defendant's attorney of record:

Patrick K. Wong
Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawai'i 96793
Phone: (808) 270-7740
Email: pat.wong@co.maui.hi.us and
corpcoun@co.maui.hi.us

28. Any Party may, by written notice to the other Party, change its designated notice recipient or notice address provided above.

ATTORNEYS' FEES AND COSTS

29. Within thirty (30) days of the Effective Date, the Parties will meet and confer (in-person not required) in a good faith effort to reach agreement as to the amount of Plaintiffs' costs of litigation (including reasonable attorneys' and expert witness fees) pursuant to Section 505(d) of the CWA, 33 U.S.C. § 1365(d),

for proceedings before this Court. If the Parties are unable to reach agreement, Plaintiffs may file a motion with this Court for the recovery of fees and costs no later than sixty (60) days after the Effective Date, pursuant to Federal Rule of Civil Procedure 54(d)(2)(B).

30. Defendant shall not be required to pay Plaintiffs' attorneys' fees and costs until ninety (90) days following Final Judgment. During any appeals period, interest on any award of attorneys' fees and costs shall be calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until ninety (90) days following Final Judgment.

ENFORCEMENT OF THIS AGREEMENT

31. This Court has jurisdiction to enforce the terms of this Agreement. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

32. This Agreement may be modified by the Court upon good cause shown by written stipulation between the Parties filed with and approved by the Court.

33. In the event that either Party seeks to enforce the terms of this Agreement, including any of the deadlines for any action set forth herein, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either Party believes that the other Party has failed to comply with any term or condition of this Agreement, the Party raising the

dispute, or seeking enforcement, shall provide the other Party with written notice of the claim. The Parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good faith effort to resolve the claim before bringing any matter to the Court. If the Parties are unable to resolve the claim within ten (10) days after the notice, either Party may bring the claim to the Court.

ENTRY OF AGREEMENT

34. Upon the Government's confirmation of no objection to, or no action on, this Agreement within forty-five (45) days of receipt of this Agreement pursuant to 40 C.F.R. § 135.5, the Court shall enter this Agreement and enter judgment in this action. The Parties shall not withdraw their consent to this Agreement during the period of Governmental review of this Agreement without further notice; provided, however that either Party has the right to withdraw its consent to this Agreement if, prior to entry, the Court changes or the Government objects to any term or provision of this Agreement.

EPA FOIA DOCUMENTS

35. Plaintiffs agree that all EPA FOIA documents obtained by the County in response to a May 2, 2014, FOIA request that were submitted to the Court are authentic and that Plaintiffs will not challenge the authenticity of the documents. A listing of all EPA

FOIA documents that were submitted to the Court is attached hereto and incorporated herein as Exhibit A.

AUTHORIZATION TO SIGN

36. This Agreement shall apply to and be binding upon the Parties, their members, delegates, and assigns. The undersigned representatives certify that they are authorized by the Party or Parties they represent to enter into the Agreement and to execute and legally bind that Party or Parties to the terms and conditions of this Agreement.

COUNTY OF MAUI
200 South High Street
Wailuku, Maui, Hawai'i 96793

By: /s/ Alan M. Arakawa — September 24, 2015
ALAN M. ARAKAWA — DATE
Its Mayor

EARTHJUSTICE
DAVID L. HENKIN
SUMMER KUPAU-ODO
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813

By: /s/ David L. Henkin — September 24, 2015
DAVID L. HENKIN — DATE
Attorneys for Plaintiffs Hawai'i
Wildlife Fund, Sierra Club –
Maui Group, Surfrider Foundation,
and West Maui Preservation Association

APPROVED AS TO FORM AND LEGALITY

By: /s/ Richelle M. Thompson
RICHELLE M. THOMPSON
Deputy Corporation Counsel
Attorney for Defendant
County of Maui

September 24, 2015
DATE

DATED: Honolulu, Hawaii; November 17, 2015.

/s/ Susan Oki Mollway
[SEAL] Susan Oki Mollway
Senior United States District Judge

Hawai'i Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM-BMK (D. Haw.); SETTLEMENT AGREEMENT AND ~~[PROPOSED]~~ ORDER RE: REMEDIES; EXHIBIT A

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND, SIERRA CLUB – MAUI GROUP, SURF-RIDER FOUNDATION, AND WEST MAUI PRESERVATION ASSOCIATION, Plaintiffs, vs. COUNTY OF MAUI, Defendant.	Civil Case No. 12-00198 SOM BMK **DECLARATION OF KYLE GINOZA, P.E., IN SUPPORT OF DEFENDANT COUNTY OF MAUI'S REPLY IN SUPPORT OF THE COUNTY'S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE, INCLUDING EXHIBITS 1-5** Hearing: May 27, 2015, 9:45 a.m. Judge: Susan Oki Mollway Trial Date: August 11, 2015

DECLARATION OF KYLE GINOZA, P.E.

I, Kyle Ginoza, declare as follows:

1. I am the Director of the Department of Environmental Management for Defendant County of Maui ("County"). I have held this position since January 2011. I submit this declaration in support of the

County's Reply in support of its Motion for Summary Judgment Based on Lack of Fair Notice ("Reply") based on my own personal knowledge as well as information obtained from County files and discussions with current and former County employees who have been involved with the state and federal permitting of the Lahaina Wastewater Reclamation Facility ("LWRF"). If necessary, I could and would testify competently to the information provided in this declaration.

2. In March 1973, prior to the construction of the LWRF, the County prepared an Environmental Impact Statement ("EIS") for the LWRF. During the February 1973 public meeting for the EIS, the EIS engineer stated that effluent injected into the UIC wells would eventually reach the ocean. Both the United States Environmental Protection Agency ("EPA") and the Hawaii Department of Health ("HDOH") were aware of the EIS as both submitted comments and letters on it.

EPA PUBLIC STATEMENTS, DIRECTIVES AND GUIDANCE TO THE COUNTY ON THE LWRF INJECTION WELLS

3. EPA financed the construction of the LWRF through a construction grants program.

4. In September 1979, HDOH issued the LWRF a National Pollutant Discharge Elimination System ("NPDES") permit for reservoir emergency overflow point source discharges to Honokowai Stream. In a May 1985 NPDES Compliance Monitoring Report,

EPA found that the County was operating in compliance with its NPDES permit as all effluent was either entering the injection wells or being used for irrigation.

5. In November 1993, the County informed HDOH and EPA that renewal of the NPDES permit was no longer necessary. From the issuance to the termination of the NPDES permit for discharges to Honokowai Stream, neither EPA nor HDOH ever informed the County the injection wells required an NPDES permit.

6. In an August 31, 1992 letter to the County, EPA expressed its concern over the algae blooms in West Maui. EPA informed the County that while HDOH had the lead in resolving the algae issues, EPA retained "primary enforcement authority" over the LWRF injection wells and would "continue to monitor the resolution of these issues and provide technical and programmatic assistance." Although EPA acknowledged that stormwater discharges may require an NPDES permit for Clean Water Act ("CWA") compliance, in its discussion on the LWRF injection wells, EPA did not inform the County that it needed an NPDES permit but only shared its plan to conduct a study to determine the fate of the effluent before granting any UIC permits to construct and operate new injection wells.

7. Following its June 1993 study on possible nutrient sources entering the ocean, EPA issued the LWRF its first federal UIC permit in March 1995. In

June 1996 [D.E. 173-13] and June 1999 [D.E. 173-14], EPA issued revised UIC permits that added a total nitrogen effluent limit of 10 mg/1 to address ocean water quality.

8. In November 1999, an EPA/HDOH Consent Decree ("CD") was entered that addressed alleged discharges to navigable waters without NPDES permits at a number of County facilities including the LWRF. Although the injection wells were discussed in the CD and CWA compliance was the primary objective, neither EPA nor HDOH ever told the County that its use of the wells violated the CWA or required the County to apply for an NPDES permit.

9. Per its federal UIC permit and the November 1999 CD, the County has consistently submitted quarterly reports to EPA since July 1995 through the present. EPA has never responded to these submittals directing the County to apply for an NPDES permit.

10. In December 2004, the County submitted its renewal application for its federal UIC permit to EPA. In June 2005, EPA administratively extended the permit, and the County continues to operate the LWRF under this permit. A true and correct copy of EPA's June 2005 extension letter is attached hereto as Exhibit 1.

11. EPA published a draft UIC permit for the LWRF in August 2008 and held a November 2008 public hearing on the draft UIC permit. Despite the County's statement at the public hearing that the effluent reaches the ocean and testimony from Hawai'i

Wildlife Fund, DIRE Coalition ("DIRE"), and Sierra Club, Maui Group raising concerns over ocean water quality, EPA never instructed the County to apply for an NPDES permit.

12. In April 2009, the County asked EPA if the County should consider the applicability of an NPDES permit for the LWRF. In response, EPA did not state that the LWRF operations required an NPDES permit but only informed the County that if it applied for an NPDES permit, it would need to coordinate with HDOH given HDOH's authority over the NPDES program.

13. In May 2009, EPA published its revised draft UIC permit for the LWRF containing more stringent nitrogen effluent limits to address public concerns raised at the November 2008 hearing on ocean water quality and held an August 2009 public hearing on the revised permit. At the hearing, DIRE requested EPA require the County to submit a compliance schedule for obtaining an NPDES permit for the injection wells as a condition to EPA approval of any UIC permit. Despite DIRE's request and EPA's own acknowledgment in its Statement of Basis that the proposed conditions in the revised 2009 permit "address[ed] the main concerns brought to our attention in the previous public comment period," EPA again did not raise the need for an NPDES permit with the County.

14. In December 2009, EPA, DIRE and Mayor Tavares met to discuss the injection wells' alleged impact on ocean water quality. In February 2011, Mayor

Arakawa, DIRE, and County representatives met to discuss UIC and NPDES permitting for the LWRF. DIRE sent letters to EPA after each of these meetings summarizing its position on why the LWRF required an NPDES permit. Following these 2009 and 2011 meetings and letters, EPA never informed the County that the LWRF wells required an NPDES permit.

15. In a March 10, 2010 letter in response to the County's request to renew its federal UIC permit, EPA told the County that a CWA § 401 water quality certification ("WQC") was a prerequisite to EPA's reissuance of a UIC permit for the LWRF. EPA stated that it had determined that effluent may reach the ocean and, accordingly, was requiring the County to submit a CWA § 401 WQC application. EPA never raised any NPDES permit requirement.

16. In May 2010, the County informed EPA by letter that it did not believe LWRF operations resulted in direct discharges to navigable waters. The County never received a response from EPA on its position.

17. In September 2011, EPA and the County entered into a Consent Agreement ("CA") for complete non-chlorine disinfection of all injected effluent at the LWRF to protect ocean water quality. Again, EPA stated that it could not reissue the County's federal UIC permit until HDOH issued a CWA § 401 WQC. EPA never mentioned the need for an NPDES permit despite its acknowledgment in the 2011 CA that effluent entered unconfined groundwater and flowed towards the ocean.

18. Based on EPA's public statements, directives and guidance described above, the County reasonably believed throughout this entire period that EPA would address ocean water quality via a federal UIC permit. In comments on the state's draft UIC permit in January 2015, EPA informed HDOH for the first time that the state UIC permit conditions would not function as NPDES permit requirements and were unlikely to achieve CWA compliance. EPA has never directly informed the County that an NPDES permit is required for the injection wells.

HDOH PUBLIC STATEMENTS, DIRECTIVES AND GUIDANCE TO THE COUNTY ON THE LWRF INJECTION WELLS

* * *

32. At a May 6, 2015 meeting with HDOH Safe Drinking Water and Clean Water Branches (again requested by the County) and the Deputy Attorney General, HDOH informed the County that: (i) HDOH did not believe discharges to groundwater required an NPDES permit; (ii) HDOH had not made any decision on the County's September 2008 UIC permit renewal application, March 2012 CWA § 401 WQC application, or November 2012 NPDES permit application; (iii) HDOH had no timeline on when any decisions would be made; and (iv) the Court's May 2014 and January 2015 rulings were unprecedented and HDOH was grappling with how to apply them.

* * *

I declare under penalty of perjury that the foregoing is true and correct to the best of my own knowledge.

Dated: Wailuku, HI, May 12, 2015

By: /s/ Kyle Ginoza
KYLE GINOZA, P.E.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

[SEAL]

LINDA ROSEN M.D., M.P.H.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. BOX 3378
HONOLULU, HI 96801-3378

In Reply, please refer to:
EMD/CWB

March 7, 2014

Mr. Eric Nakagawa
Chief
Wastewater Reclamation Division
Department of Environmental Management
County of Maui
2200 Main Street, Suite 100
Wailuku, Hawaii 96793

Dear Mr. Nakagawa:

SUBJECT: Lahaina Wastewater Reclamation Facility National Pollutant Discharge Elimination System (NPDES) Permit and Section 401 Water Quality Certification (WQC) Applications NPDES Permit No. HI0021848, WQC File Nos. WQC0787 and WQC0795

The Department of Health (DOH), Clean Water Branch (CWB), acknowledges receipt of your letters, dated February 28, 2014, requesting formal written responses to questions pertaining to the statuses of your NPDES and Section 401 WQC applications for the

subject facility. Please see below for the DOH-CWB responses to your questions.

NPDES Permit Application (NPDES Permit No. HI0021848)

1. *Do you have an estimated time on when DOH will consider the application complete or incomplete?*

   No.

2. *Has DOH made a tentative or preliminary determination as to the application?*

   The DOH-CWB has not made a tentative or preliminary determination on the NPDES application. You will be notified once a decision is made.

3. *Did DOH forward the application to the EPA, and if so, on what date was the application transmitted and did you receive any comments from EPA?*

   Yes. DOH-CWB forwarded the application to EPA on November 20, 2012. DOH-CWB did not receive any comments from EPA.

4. *Would DOH consider our existing UIC permit No. UM-1357 to be "equivalent" to an NPDES permit? It appears that the existing UIC permit (with or without modifications) may be considered such an "authorization, license, or equivalent control document issued by the EPA or the director to implement the requirements of 40 CFR Parts 122, 123, and 124" (See, definition of NPDES permit in HAR 11-55-01). The County would like to explore this option, if DOH is willing.*

The DOH-CWB has not made a decision yet. You will be notified once a decision is made.

Section 401 WQC Applications (Section 401 WQC File Nos. WQC0787 and WQC0795)

1. *Do you have an estimated time on when DOH will consider the application complete or incomplete?*

   No.

2. *Has DOH made a tentative or preliminary determination as to the application and will it issue comments on the proposed AMAP and other proposed information sources?*

   No. DOH-CWB has not made a tentative or preliminary determination on the Section 401 WQC applications. The applications and proposed AMAP are still under review. The County of Maui will be notified of any comments on the applications and AMAP once a decision is made.

3. *Did DOH forward the application to the EPA, and if so, on what date was the application transmitted and did you receive any comments from EPA?*

   No. The DOH-CWB did not forward the application to EPA. EPA provided comments on the Section 401 WQC application.

If you have any questions, please contact the Engineering Section, CWB, at (808) 586-4309.

Sincerely,

/s/ Stuart Yamada

STUART YAMADA, P.E., CHIEF
Environmental Management Division

DCL:np

c: Mr. Edward Bohlen, Deputy Attorney General [via e-mail only]

From: Albright, David
Sent: Tuesday, October 29, 2013 3:45 PM
To: Woo, Nancy
Subject: RE: agenda items for DOH/EPA call

Thanks Nancy. Plan A looks great if it actually comes to pass. Plan B is much less clear to me, but obviously their energy is on making Plan A work – fine. You appropriately asked Stuart for timeframes as well and I did not see any reference to timing for either Plan A or Plan B. Also, there was no reference to Earthjustice below. I presume they would be supportive of Plan A, but are they now on the sideline like us waiting for this to fall into place (or fall apart)? Just some questions that come to mind while reading this interesting message.

From: Woo, Nancy
Sent: Tuesday, October 29, 2013 12:25 PM
To: Yin, Christina; Slay, Hudson; Albright, David; Smith, David W
Subject: FW: agenda items for DOH/EPA call

Interesting and good that Stuart finally found this email and resent.

nw

Nancy Woo
Deputy Director, Water Division
EPA, Region 9
Phone: 415.972-3409

From: David W Smith
To: Wong, Alec Y; Lum, Darryl C; Edward. G.Bohlen@hawaii.gov
Cc: David Albright; Elizabeth Sablad
Subject: Fw: Community Groups Sue Maui County To Stop Illegal Sewage Discharges
Date: 04/16/2012 03:44 PM

As I mentioned a few minutes ago. We are not looking for press on this, but if we talk to the press, it will be David Albright speaking about the disinfection order we issued before and our cooperative research work with you folks and others – steering clear of the issue about whether an NPDES permit is required or not.

David Smith
Manager
NPDES Permits Office (WTR-5)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3464
(415 947-3545 (fax)

* * *

UIC Inventory by State – 2011

Region	State	Population (,000)	Area (sq. mi)	Class I HW Wells	Class I Other Wells	Class II Wells	Class III Sites	Class III Wells	Class IV Sites	Class V Wells
8	SD	755	69179	0	0	87	14	14	0	271
8	UT	2233	81279	0	0	462	2	18	8	5346
8	WY	494	94867	0	41	5005	9	10552	0	2041
9	AS	65	90	0	0	0	0	0	0	0
9	AZ	5131	82584	0	0	0	3	15	0	23471
9	CA	33872	157980	0	46	47624	1	212	0	19419
9	GU	154	217	0	0	0	0	0	0	460
9	HI	1212	6459	0	0	0	0	0	0	5660
9	MP	72	189	0	0	0	0	0	0	37
9	NV	1998	108647	0	0	18	0	0	0	1110
10	AK	627	615094	0	29	1347	0	0	0	1761
10	ID	1294	82286	0	0	0	0	0	0	16636
10	OR	3421	95930	0	0	8	0	0	14	33394
10	WA	5894	66642	0	0	1	0	0	0	42253
Total		**285639**	**3638897**	**117**	**561**	**168089**	**171**	**22131**	**33**	**468543**

From: "Chen, Edward" <edward.chen@doh.hawaii.gov.
To: Hudson Slay/R9/USEPA/US@EPA
Date: 02/19/2010 02:43 PM
Subject: RE: CWA, Section 401(a)(1) requirements

Good Afternoon, Mr. Slay:

Is Lahaina's **effluent** (the "pollutant") "**discharged** into Navigable waters (? by CWA definition) or is it discharged into ground water (receiving State waters) than [sic] being **transferred** with/from the ground water into Navigable waters (Pacific Ocean, State waters classified as "Open Coastal Waters). Please note CWA content using term "ground water" to separate ground water from Navigable waters when ground water is involved.

EC

From: Slay.Hudson@epamail.epa.gov [mailto:Slay.Hudson@epamail.epa.gov]
Sent: Friday, February 19, 2010 1:48 PM
To: Chen, Edward
Subject: Fw: CWA, Section 401(a)(1) requirements

So is Section 401(a)(1) where you see a problem? It says 'may' result in any **discharge into navigable waters** but you still believe EPA needs to establish that the discharge is indeed to navigable waters? Perhaps I misunderstood what you were saying yesterday. Let me know if I've missed something.

Hudson

JOHN WAIHEE
GOVERNOR OF HAWAII

[SEAL]

JOHN C. LEWIN, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. BOX 3378
HONOLULU, HI 96801

October 31, 1994

Mr. Milton Morales
EPA Region IX (W-6-3)
75 Hawthorne Street
San Francisco, CA 94104

Dear Mr. Morales:

Thank you for the opportunity to comment on the Underground Injection Control (UIC) Draft Permit for the Lahaina Wastewater Reclamation Facility (LWRF).

* * *

Additional wastewater injection would increase nutrient loads to the groundwater and subsequently to the ocean. Although no direct connection has been documented, all experts agree that the wastewater does enter the ocean.

* * *

Sincerely,

/s/ Wendy Wiltse
Wendy Wiltse, Ph.D.
West Maui Watershed
Coordinator

Enclosures
CC: Chauncey Hew, DOH
Doris Betuel, EPA
Eassie Miller, Maui County

LINDA CROCKETT LINGLE
Mayor
TELEPHONE 243-7855

[SEAL]

OFFICE OF THE MAYOR
COUNTY OF MAUI
WAILUKU, MAUI, HAWAII 96793

September 16, 1991

Mr. Brian J. J. Choy, Director
Office of Environmental Quality Control
465 S. King Street, Room 104
Honolulu, HI 96814

Dear Mr. Choy:

Subject: Lahaina WWRF Additions and Modifications Negative Declaration

The Department of Public Works, County of Maui, has reviewed the attached Environmental Assessment for the Lahaina WWRF Additions and Modifications, and has determined there are no significant impacts. Therefore, we have found this document to be a negative declaration.

If there are any questions concerning the environmental assessment, please contact Mr. Pedro Foronda of our Wastewater Reclamation Division at 243-7417.

Very truly yours,

/s/ Linda Crockett Lingle
Linda Crockett Lingle
Mayor

PF:sv
attachs.

c: Bill Meloy, Brown and Caldwell

County of Maui
Department of Public Works

Lahaina Wastewater
Reclamation Facility
Stage I Design

Environmental Assessment and
Negative Declaration

September 1991

Brown and Caldwell Consultants [LOGO]

5485163a 8-30-91

* * *

Water. Effluent from the Lahaina Wastewater Reclamation Facility currently is discharged via injection wells to fractures in the underlying basalt. This effluent, via gravity and the pressure from up-gradient groundwater, flows toward the ocean.

* * *

Ultimately, the flow probably enters the ocean with the fresh groundwater. It is not clear at what distance from shore this occurs. At Kahului this effluent is thought to enter seawater at a distance of 2,000 to 3,000 feet from shore.

* * *

FINAL
ENVIRONMENTAL IMPACT STATEMENT FOR
CONSTRUCTION OF SEWAGE COLLECTION
SYSTEM AND WASTE WATER RECLAMATION
PLANT LAHAINA, MAUI, HAWAII

PREPARED BY PARK ENGINEERING, INC.
FOR DEPT. OF PUBLIC WORKS,
COUNTY OF MAUI

APPROVED BY:

/s/ Stanley S. Goshi
STANLEY S. GOSHI
Director of Public Works
County of Maui

March 27, 1973

* * *

IV. PUBLIC MEETING: FEBRUARY 21, 1973

LAHAINA SEWER SYSTEM AND WASTE WATER RECLAMATION PLANT

KAMEHAMEHA III SCHOOL CAFETERIA

The public meeting on the Lahaina Sewer System and Waste Water Reclamation Plant was called to order by Stanley S. Goshi, Director of Public Works, at 7:12 P.M., Wednesday, February 21, 1973, at the Kamehameha III School Cafeteria, Lahaina, Maui, Hawaii.

STANLEY S. GOSHI: Good evening ladies and gentlemen. I would like to call this public meeting to order. My name is Stanley Goshi, the Director of Public Works for the County of Maui. To start of [sic] this

evening, I would like to read in the records the public notice published in the Maui News issue of February 8, 1973.

* * *

All right, to begin, the purpose of the public hearing is to bring to the people the status of the planning and design to this point and to receive from the public comments, inputs. The testimony will be received after the presentation of the project by our consultant Park Engineering, Inc. After the presentation by the consultant we'll be open for questions and answers after which we will take a short recess so that those wishing to testify may prepare themselves. So with those few simple rules, this will be very informal, I would like to introduce Dr. Michael Chun, representing Park Engineering.

* * *

QUESTION: This injection well, will it be able to handle all the effluent that is developed from the plant?

DR. CHUN: Yes

QUESTION: It will be able to dissipate into the soil.

DR. CHUN: Well eventually, this will eventually reach the ocean some distance from the shore. This clarifies that one.

* * *