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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND, SIERRA CLUB – MAUI GROUP, SURFRIDER FOUNDATION, AND WEST MAUI PRESERVATION ASSOCIATION,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

Civil Case No. 12-00198 SOM BMK

DEFENDANT COUNTY OF MAUI'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE

Hearing: May 27, 2015, 9:45 a.m.
Judge: Hon. Susan Oki Mollway
Trial: August 11, 2015

Related to: Docket Entry No. 172

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I. INTRODUCTION

Under Plaintiffs' rationale, the constitutionally protected due process right to fair notice that constrains a federal agency's ability to assess penalties does not apply to Plaintiffs in a Clean Water Act ("CWA") citizen suit. This fundamental flaw in logic topples Plaintiffs' Opposition.

Plaintiffs improperly conflate CWA liability with CWA penalties in concluding the Court's earlier liability determination dictates penalties. This simplistic view disregards the constitutionally mandated need for fair notice.

Plaintiffs argue the County had fair notice of the need for an National Pollution Discharge Elimination System ("NPDES") permit based on Plaintiffs' public statements. However, agency public statements and directives – not Plaintiffs'– are relevant factors in determining fair notice.

As described in detail below, the County could not reasonably have had "ascertainable certainty" of the need for an NPDES permit. During more than twenty years of the United States Environmental Protection Agency ("EPA") and Hawaii Department of Health ("HDOH") permitting of the Lahaina Wastewater Reclamation Facility ("LWRF") neither agency raised the need for an NPDES permit. This is true despite a CWA NPDES enforcement action, a federal underground injection control ("UIC") permit consent agreement, and annual HDOH facility inspections and quarterly County updates to EPA. Likewise, when

the County explored a possible NPDES permit with each agency, neither told the County it was required. Rather, both agencies' public statements and directives were that a UIC permit would protect ocean water quality. Under these circumstances, due process mandates summary judgment for the County.

II. THE COUNTY DID NOT HAVE FAIR NOTICE OF THE NPDES PERMIT REQUIREMENT

The fair notice doctrine is derived from the Due Process clause of the U.S. Constitution. Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm'n, 142 F.3d 1179, 1182 (9th Cir. 1998). Fair notice requires "ascertainable certainty" of legal requirements to impose penalties. Gen. Elec. Co. v. U.S. Envtl. Prot. Agency, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 645, 649 (5th Cir. 1976)). Ascertainable certainty is measured objectively and is based on whether a "person of ordinary intelligence [has] 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) ("Shark Fins") (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

A. No Agency Statements Or Directives Provided Fair Notice

Plaintiffs' Opposition avoids reference to "ascertainable certainty." It speaks only to what Plaintiffs told the County. As outlined below, the County

could not reasonably have known an NPDES permit was required given the contrary agency public statements and directives.

1. For Over Twenty Years EPA Maintained LWRF UIC Permits Protected Ocean Water Quality

Starting as early as 1985, EPA maintained that LWRF UIC permits protected ocean water quality. EPA memorialized this approach in public statements, directives to the County, and communications with HDOH. Given EPA's actions as well as its authorized state NPDES oversight authority and CWA enforcement authority,[1] the County reasonably believed its UIC permits were protective of ocean water quality and an NPDES permit was not required.

When plant operations commenced, the County obtained an NPDES permit for direct stream discharges. [D.E. 204-4]. In an 1985 NPDES inspection, EPA noted CWA compliance as "[no] discharge to receiving waters. All effluent to injection wells or irrigation." [D.E. 204-5].[2] When algae plume concerns arose in the early 1990s, EPA asserted its "primary enforcement authority regarding the injection wells" and that UIC permits could require ocean monitoring. [D.E. 173-7]. After conducting a 1993 effluent impact study [D.E. 173-39], EPA issued its own UIC permit in addition to the existing state permit. [D.E. 204-13]. To respond to the algae bloom allegations, EPA's permit added an effluent nitrogen

[1] 33 U.S.C. §§ 1319(a)(3), 1342(c)(3).

[2] The County ceased stream discharges and did not renew the NPDES permit after 1994. [D.E. 204-7].

action level of 10 mg/l. Declaration of Kyle Ginoza in Support of the County's Reply Memorandum in Support of the County's Motion for Summary Judgment Based on Lack of Fair Notice ("Ginoza Dec."), ¶ 7; [D.E. 173-13, 173-14].[3] During the permitting process, EPA explained that UIC permits can protect ocean water quality. [D.E. 173-40, 173-41].

The Court approved an EPA/HDOH 1999 Consent Decree ("CD") resolving alleged discharges to navigable water without an NPDES permit. The CD was designed to ensure CWA compliance for all County wastewater facilities including the LWRF. While noting the UIC wells, the CD did not allege violations for failure to have an NPDES permit for the wells. [D.E. 173-48].

After EPA issued its draft August 2008 LWRF UIC permit, the public began expressing concerns about ocean water quality. [D.E. 209-4]. They reiterated these concerns again in 2009 and 2011, including the need for the County to obtain an NPDES permit. [D.E. 209-5, 209-6]. EPA responded by proposing more stringent UIC permit terms. Ginoza Dec., ¶ 13. EPA never said the County needed an NPDES permit. Ginoza Dec., ¶¶ 12-15. Likewise, both prior to and

[3] For the Court's convenience, documents referenced in the Reply have been incorporated into the County's Appendix that has accompanied the penalty summary judgment briefing as the Fourth Supplemental Appendix A. The Fourth Supplemental Appendix A also includes documents provided by EPA on May 5, 2015 and May 6, 2015. All new entries are highlighted in green. A complete copy of the Appendix, containing all docket entries, will be provided with the Court's courtesy copies.

after issuance of its draft 2008 UIC permit, EPA referenced modifications to the UIC permits as a means to protect ocean water quality. Declaration of Stephanie Chen in support of the County's Reply in support of the County's Motion for Summary Judgment Based on Lack of Fair Notice ("Chen Dec."), ¶ 2, Ex. 7-8.[4]

Similarly, in 2009 and 2011, EPA informed HDOH that state UIC laws provided authority to protect ocean water quality. [D.E. 190-7, 190-14]. In April 2009, when the County asked EPA whether it should consider an NPDES permit, EPA did not answer. Rather, it directed the County to HDOH as the authorized NPDES permitting agency. Ginoza Dec., ¶ 12.

Plaintiffs' contention that EPA's March 2010 letter requiring 401 water quality certification ("WQC") provided fair notice of the need for an NPDES permit misrepresents EPA's direction. Opp. at 18. EPA requested 401 WQC "as a prerequisite to EPA's issuance of a new UIC permit." [D.E. 209-26]. When submitting its 401 application, the County informed EPA and HDOH of its position – injection into groundwater did not trigger CWA compliance concerns. [D.E. 204-14, 204-15]. Again, EPA's response was a UIC permit Consent Agreement providing further effluent treatment. [D.E. 173-50]. In May 2011,

[4] On May 5, 2015 and May 6, 2015, EPA provided further responses to the County's May 2014 FOIA request. These documents accompany the Chen Dec. (See Chen Dec., ¶ 2).

EPA acknowledged that neither EPA nor HDOH had previously required NPDES permits for UIC wells. [D.E. 190-13].

In May 2011, EPA's "goal [was] not to force an NPDES permit action [at the LWRF]. . . ." [D.E. 190-13]. As NPDES permits are statutorily required,[5] EPA discretion could only apply if an NPDES permit was optional.

When Plaintiffs signaled they would pursue litigation, EPA chose silence. In April 2011, EPA elected to wait and see HDOH's explanation on a "voluntary" County NPDES permit application or for Plaintiffs to file a lawsuit. [D.E. 190-11]. After Plaintiffs filed suit, EPA "steer[ed] clear of the issue about whether an NPDES permit is required or not." [D.E. 190-15]. Again in 2013, EPA decided to stay on the "sideline" to see the litigation outcome.[6] [D.E. 194-6]. Given this history, EPA's January 2015 letter advising HDOH that a UIC permit was not sufficient to protect ocean water quality is immaterial to the fair notice determination. See Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2168 (2012) ("where . . . an agency's . . . interpretation is preceded by a very lengthy period of conspicuous inaction, the potential unfair surprise is acute[]" and

[5] 33 U.S.C. §§ 1311(a), 1342.

[6] EPA's silence is troubling given its willingness to communicate directly with Plaintiffs. As evidenced by D.E. 204-18 (Bates No. P004393- P004496), between 2009 and 2011, EPA openly discussed LWRF permitting issues with Plaintiffs and Earthjustice. As noted on P004445, Earthjustice initially raised 401 WQC applicability to EPA, with EPA thanking Earthjustice for "the reference" and agreeing to "look[] further at this issue . . . ."

the more likely the agency "did not think the industry's practice was unlawful.") (citing Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 510-511 (2007)).

EPA had ample opportunity to notify the County of an NPDES permit requirement but never did. Since 1995, EPA has received quarterly County UIC permit reports. Ginoza Dec., ¶ 9. Since 1999, it also has received quarterly County CD updates. Id. Bottom-line: EPA's public statements and directives during this time did not provide the County "ascertainable certainty" that an NPDES permit was required.

2. EPA Then Maintained It Needed The Tracer Study Outcome Before A Permit Decision Could Be Made

In late 2009, EPA's mantra started shifting – no NPDES permit decision could be made until after completion of the Tracer Study. [D.E. 190-8, 204-18]. EPA relied on this rationale to fund Tracer Study work. [D.E. 190-10]. As Tracer Study results came in, EPA continued to maintain it was too early to make an NPDES permit decision. [D.E. 173-51]. EPA reiterated this stance after release of the November 2012 Interim Tracer Study. As of May 2013, EPA's position was it had not received enough data to determine whether an NPDES permit was necessary. [D.E. 194-4]. EPA also identified connections between its decisions and the litigation, requesting an update from HDOH on the status of the Earthjustice suit against the County. [D.E. 194-4]. After the June 2013 release of the final Tracer Study, EPA was still not ready to take a position. As of August

2013, EPA was "carefully reviewing the final study results and . . . consulting with the Hawaii DOH on appropriate next steps . . . ." [D.E. 194-5]. Again, EPA's public statements and directives during this time did not provide the County "ascertainable certainty" that an NPDES permit was required.

3. For Over Twenty Five Years HDOH Has Maintained Its LWRF UIC Permit Protects Ocean Water Quality

As the authorized NPDES permit authority,[7] HDOH would issue an NPDES permit for the LWRF. That said, HDOH could not have provided the County with "ascertainable certainty" of the NPDES permit requirement because HDOH never believed discharges to groundwater were regulated under the CWA. Ginoza Dec., ¶ 32. HDOH annual LWRF inspection reports confirm this. They note NPDES permits were inapplicable to the LWRF. [D.E. 204-10, 204-11]. In November 2009 and again in February 2010, HDOH notified EPA of this position. Chen Dec., ¶ 2, Ex. 9-10. Even though EPA understood HDOH was waiting for an "EPA determination of CWA jurisdiction," EPA remained silent. Chen Dec., ¶ 2, Ex. 10. As HDOH explained earlier this month, the Court's May 2014 order is "unprecedented" and it is grappling with how to implement it as HDOH has never issued an NPDES permit for a UIC well. Ginoza Dec., ¶ 32; [D.E. 209-12].

Given HDOH regulations allow for a permit "equivalent" to an NPDES permit (an "equivalent control document" under HAR § 11-55-01), HDOH is still

[7] 39 Fed. Reg. 43,759 (Dec. 18, 1974) [D.E. 173-26].

considering whether both UIC and NPDES permits are necessary or whether a state-issued UIC permit will suffice. Ginoza Dec., ¶¶ 27-28; [D.E. 209-12]. Following the Court's May 2014 ruling, HDOH notified EPA that the draft UIC permit referenced in the State's May 23, 2014 letter to the Court was intended "to be an equivalent NPDES permit." [D.E. 194-9]. While HDOH has yet to take action on the County's pending NPDES application, HDOH requires ocean water quality testing and development of an effluent nitrogen and phosphorus reduction management plan in its May 2014 draft UIC permit. Ginoza Dec., ¶ 29, Ex. 4.

Even with the Court's 2014 ruling and EPA's 2015 letter to HDOH explaining EPA does not think a UIC permit adequately protects ocean water quality [D.E. 209-14], HDOH has not determined an NPDES permit is necessary. Ginoza Dec., ¶ 32. Likewise, when the County inquired about a possible NPDES permit in 2011, HDOH responded that the discussion was premature and directed the County wait until the 401 WQC work was complete.[8] Ginoza Dec., ¶ 23.

Given the NPDES permitting authority historically believed the CWA did not apply, and it is still considering whether a UIC permit may suffice (Ginoza Dec., ¶¶ 27-28), the County reasonably believed its UIC permits could protect ocean water quality. Like EPA, HDOH's public statements and directives did not provide the County "ascertainable certainty" that an NPDES permit was needed.

[8] HDOH has yet to complete its review of the County's pending 401 WQC application. Ginoza Dec., ¶¶ 27-28, 32.

B. Plaintiffs' Pre-Litigation Statements Were Not Fair Notice

Not being able to identify agency public statements or directives providing the County with "ascertainable certainty" of the need for an NPDES permit, Plaintiffs argue their public statements sufficed. Opp. at 8, 22-24. This position fails because it ignores fair notice criteria. Fair notice is evaluated based on *agency* public statements and directives – not Plaintiffs'. See Ass'n of Irritated Residents v. Fred Schakel Dairy, No. 1:05-cv-00707 OWW SMS, 2008 WL 850136, at *15 (E.D. Cal. Mar. 28, 2008); United States v. S. Ind. Gas and Elec. Co., 245 F. Supp. 2d 994, 1011-12 (S.D. Ind. 2003); United States v. Cinergy Corp, 495 F. Supp. 2d 892, 900-01 (S.D. Ind. 2007); United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 886 (S.D. Ohio 2003) (all citing consistency of agency public statements, agency pre-enforcement efforts and a confused party's voluntary agency inquiry in evaluating fair notice).

Plaintiffs also omit half the story. Both EPA and HDOH received Plaintiffs' 2008, 2009 and 2011 public statements. Bernard Dec., ¶¶ 5-7, Opp. Ex. 2-3 (showing cc to EPA and HDOH (2011 only)) [D.E. 209-5, 209-6]; De Naie Dec., ¶¶ 3, 4, 6, 7. [D.E. 209-4]; Opp. Ex. 6 (notice letter addressees include EPA and HDOH) [D.E. 209-9]; [D.E. 204-16]. As part of an ongoing 2009-2011 dialog among EPA, Plaintiffs and Earthjustice (which the County was not privy to), Earthjustice provided EPA a proposed agenda for an upcoming December 2009

meeting with the County's Mayor. [D.E. 204-18, Bates No. P004404]. Even though the draft agenda spelled out Plaintiffs' position on the need for an NPDES permit [Id.], EPA never directed the County to obtain an NPDES permit. Ginoza Dec., ¶ 14.

Likewise, in 2010, one of the Plaintiffs filed a petition with HDOH alleging the County's LWRF effluent discharge was violating its state UIC permit because of impacts on the ocean. HDOH's response was not that the County needed an NPDES permit, but rather HDOH had "considered environmental concerns" when issuing the permit.[9] [D.E. 204-16]. Tellingly, Plaintiffs' Opposition is devoid of any claim that EPA or HDOH ever told Plaintiffs (or the County) an NPDES permit was needed.

C. Plaintiffs' Cited Legal Authority Did Not Provide Fair Notice

Plaintiffs' claim that prior case law applying the CWA to groundwater hydrologically connected to surface water provided fair notice misses the mark as the case law lacks consistency. Opp. at 21-22. Cases Plaintiffs cite identify significant differences of opinion on whether the CWA prohibits discharges into groundwater that reach surface waters without an NPDES permit. See Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D. P.R. 2009); Idaho Rural

[9] Plaintiffs' citation to a 2010 appeal to the Maui Planning Commission on a different County wastewater facility also does not support fair notice. Opp. at 23. Plaintiffs fail to note the Planning Commission denied the appeal. Chen Dec., ¶ 3, Ex. 13.

Council v. Bosma, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001); and Washington Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) (all acknowledge splits among the courts).

Plaintiffs also fail to cite decisions (including Ninth Circuit decisions) where groundwater discharges reaching navigable waters were not sufficient to impose CWA liability. See Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1318 (D. Or. 1997); United States. v. ConAgra, Inc., No. CV 96-0134-S-LMB, 1997 WL 33545777, at *7 (D. Idaho, Dec. 31, 1997); Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at *7-8 (E.D. Pa. Nov. 21, 2013); PennEnvironment v. PPG Industries, Inc., 964 F. Supp. 2d 429, 454-55 (W.D. Pa. 2013); Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011).

Plaintiffs' citation to EPA preambles is equally non-availing. Opp. at 20-21. The 66 Fed. Reg. 2960, 3015-16 (Jan. 12, 2001) citation is from a proposed rule. In the final rule, EPA rejected "establishing requirements related to discharges to surface water that occur via ground water with a direct hydrologic connection" in part because "EPA also recognizes there are conflicting legal precedents on this issue." 68 Fed. Reg. 7176, 7217 (Feb, 12, 2003) [D.E. 141-3]. Neither of the other citations – or other EPA statements – take the position that groundwater is a "point source."

Rather than supporting "ascertainable certainty," Plaintiffs' CWA statutory and regulatory language argument (Opp. at 19-20) highlights the ambiguity in classifying groundwater as a point source under the CWA. As Plaintiffs note, CWA references to groundwater pertain to non-point source pollution. Likewise, simply because a well is an identified point source, there is nothing in the CWA providing fair notice that a discharge from a well into diffuse non-navigable groundwater meets the CWA requirement of a "discernible, confined and discrete" discharge to navigable water 33 U.S.C. §§ 1311, 1362(12), (14). EPA and HDOH's differing views on CWA applicability to groundwater discharges demonstrates the lack of clarity. HDOH never believed the CWA applied to groundwater discharges (Ginoza Dec., ¶ 32), whereas EPA needed the Tracer Study before it could make a determination. [D.E. 190-10].

III. NO PENALTY IS APPROPRIATE FOR THE TIME PERIOD SINCE THE FILING OF THIS LAWSUIT

Contrary to Plaintiffs' claim, penalties are not appropriate for the period after the lawsuit was commenced. Opp., at 21, 24. The Court's Motion to Dismiss ruling did not provide the County fair notice as it was silent on the need to obtain an NPDES permit. By the time of the Court's May 2014 liability ruling, the County's NPDES permit application had been pending for a year and a half.

After the Court's 2012 denial of the County's Motion to Dismiss, the County applied for an NPDES permit. [D.E. 173-47]. Having heard nothing from

HDOH about the status of its application despite repeated emails requesting an update, the County wrote HDOH in February 2014 and followed up again in April 2014. Ginoza Dec., ¶¶ 26-28. HDOH responded in April 2014 saying it was still evaluating the application. Ginoza Dec., ¶ 28. Following the Court's May 2014 ruling, the County met with HDOH only to be told HDOH would not discuss their permit application. Ginoza Dec., ¶ 30. Having still received nothing from HDOH, in March 2015, the County provided HDOH with a draft NPDES permit and supporting fact sheet in an attempt to jump start the permitting discussion. Ginoza Dec., ¶ 31, Ex. 5. Following a request from the County, HDOH and the County met May 6, 2015. Ginoza Dec., ¶ 32. At that meeting, HDOH informed the County (i) HDOH did not believe discharges to groundwater required an NPDES permit; (ii) HDOH had not made any decision on the County's November 2012 NPDES permit application, the County's 401 WQC application or HDOH's draft UIC permit; (iii) HDOH had no timeline for a decision; and (iv) HDOH was grappling with how to apply the Court's "unprecedented" May 2014 ruling. Id. Given the County's yeoman's efforts to resolve permitting requirements for the LWRF UIC wells, it is unclear what more Plaintiffs expect.

IV. FAIR NOTICE DUE PROCESS REQUIREMENTS APPLY TO CITIZEN SUITS

Plaintiffs' contention that constitutionally protected due process fair notice requirements do not apply in CWA citizen suits is wrong. Opp. at 6-12. CWA

citizen plaintiffs act as private attorneys' generals. Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987). "[C]itizen enforcement suits are analogous to EPA enforcement suits . . . ." Id. Due process prohibits penalty assessments in governmental enforcement actions absent fair notice of the requirements being enforced. See, e.g., Shark Fins, 520 F.3d at 983 (due process mandated reversal of forfeiture judgment when neither the statute nor regulations provided adequate notice of what was required); Phelps Dodge Corp. v. Fed. Mine Safety and Health Review Comm'n, 681 F.2d 1189 (9th Cir. 1982) (due process required reversal of citation and fine where regulation did not clearly indicate it applied); United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995) (fair notice limited Clean Air Act ("CAA") penalty assessment to a one-time violation rather than a continuing violation when neither the statute nor the regulation specified the nature of the violation). [10]

Contrary to Plaintiffs' assertions, there is nothing inherently different in citizen suits that eliminates due process protections. Opp. at 6-12. Ass'n of Irritated Residents, 2008 WL 850136, at *14 (E.D. Cal. Mar. 28, 2008) does not support Plaintiffs' position. Following the March 2008 decision denying defendant's motion to dismiss the citizen-suit-alleged CAA violations, defendant

[10] See also Diamond Roofing Co., 528 F.2d at 649; Diebold, Inc. v. Marshall, 585 F.2d 1327, 1336-37 (6th Cir. 1978); Gen. Elec. Co., 53 F.3d at 1333-34; United States v. Hoechst Celanese Corp., 128 F.3d 216, 224 (4th Cir. 1997).

moved for an interlocutory appeal. In granting it, the Court discussed plaintiff's fair notice argument at length, confirming that courts within the Ninth Circuit apply the fair notice doctrine in citizens' suit cases.[11] Ass'n of Irritated Residents v. Fred Schakel Dairy, 634 F. Supp. 2d 1081, 1089 (E.D. Cal. 2008).

Likewise, Plaintiffs' speculation that the Ninth Circuit would not apply the fair notice doctrine in citizens' suit cases lacks merit. Opp. at 11, 12. The Ninth Circuit has addressed the fair notice doctrine on at least three separate occasions. See Shark Fins, 520 F.3d 976; Trident Seafoods Corp., 60 F.3d 556; Phelps Dodge Corp., 681 F.2d 1189. In each decision, the Ninth Circuit directly or indirectly relies on Gen. Elec. Co., 53 F.3d 1324, and Diamond Roofing Co., 528 F.2d 645, in applying the fair notice doctrine. Fair notice citizen suit cases outside the Ninth Circuit rely on the same underlying cases. See Wis. Res. Prot. Council v. Flambeau Mining Co., 727 F.3d 700, 708 (7th Cir. 2013); Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth., 618 F. Supp. 2d 815, 831-33 (E.D. Tenn. 2009). Given the overlap in underlying case law, there is every reason to believe the Ninth Circuit would evaluate the fair notice doctrine in a citizens' suit case.

[11] The CWA citizen suit provision is modeled on the CAA provision. Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 699 (D.C. Cir. 1974).

V. APPLYING THE FAIR NOTICE DOCTRINE NOW PROMOTES JUDICIAL ECONOMY

A. Plaintiffs Erroneously Conflate Penalties And Liability

Plaintiffs erroneously argue that once CWA liability is found, penalties are mandatory. Opp. at 4-6. Plaintiffs' reliance on Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc. 299 F.3d 1007 (9th Cir. 2002) is misplaced (Opp. at 10-12) as the case addresses CWA liability; it does not discuss penalties or fair notice. As the case explains, CWA liability determinations are not limited to EPA or authorized states as citizen suits are explicitly allowed. Id. at 1012.[12]

Even with a liability determination, application of the fair notice doctrine can preclude penalty assessment. See Hoechst Celanese Corp., 128 F.3d at 224 (Court deferred to EPA's CAA interpretation imposing liability but declined to assess penalties when plaintiff did not have fair notice of EPA's interpretation). Absent fair notice, penalties are not permissible. See, e.g., Shark Fins, 520 F.3d at 983; Phelps Dodge Corp., 681 F.2d 1189.

B. Fair Notice Can Be Decided On Summary Judgment

Plaintiffs' contention that fair notice is only relevant in evaluating CWA penalty factors is wrong. Opp. at 1. A lack of fair notice can be decided on

[12] The Ninth Circuit decided Ass'n to Protect Hammersley in 2002. Both before and after the decision, the Ninth Circuit applied the fair notice doctrine, thereby refuting any claim that Ass'n to Protect Hammersley precludes its application. See Trident Seafoods Corp., 60 F.3d 556; Shark Fins, 520 F.3d 976.

summary judgment. See Hoechst Celanese Corp., 128 F.3d at 230 (affirming district court lack of fair notice summary judgment ruling prior to receipt of actual notice). Given these facts, where EPA maintained for 20+ years that a UIC permit was sufficient and then needed the Tracer Study and another five years before articulating an NPDES permit position, and HDOH, the authorized permitting authority, has yet to take a final position but to date has only required a UIC permit, the County could not reasonably have known an NPDES permit was required. Accordingly, the County is entitled to summary judgment as a matter of law.

VI. CONCLUSION

Due process mandates summary judgment here because the County could not reasonably have known with "ascertainable certainty" that an NPDES permit was required.

DATED: May 13, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.5(e), I certify that the foregoing brief is set in a proportionately spaced 14-point font (Times New Roman) and contains 4,236 words, exclusive of the caption, tables, and signature block. I have relied upon Microsoft Word to determine the word count.

DATED: May 13, 2015

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