2015 WL 3903918
Only the Westlaw citation is currently available.
United States District Court,
D. Hawai'i.

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,
v.
COUNTY OF MAUI, Defendant.

Civil No. 12–00198 SOM/BMK. | Signed June 25, 2015.

Attorneys and Law Firms

David L. Henkin, Summer M. Kupau, EarthJustice Legal Defense Fund, Honolulu, HI, for Plaintiffs.

Colleen P. Doyle, Diana Pfeffer Martin, Stephanie C. Chen, Hunton & Williams LLP, Los Angeles, CA, Patrick K. Wong, Richelle M. Thomson, Thomas W. Kolbe, Department of the Corporation Counsel Maui, Wailuku, HI, for Defendant.

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.

SUSAN OKI MOLLWAY, Chief Judge.

I. INTRODUCTION.

***1** 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.

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, 106 S.Ct. 2548, 91 L.Ed.2d 265 (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).

***2** 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, 106 S.Ct. 1348, 89 L.Ed.2d 538 (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, 88 S.Ct. 1575, 20 L.Ed.2d 569 (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.

***3** 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, 92 S.Ct. 2294, 33 L.Ed.2d 222 (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).

***4** 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.' ").

***5** Under the Clear 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. 20926, 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.

***6** 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.

***7** 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.

***8** 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.

All Citations

Not Reported in F.Supp.3d, 2015 WL 3903918

Footnotes

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.

PATRICK K. WONG (5878)
Corporation Counsel
RICHELLE M. THOMSON (8965)
Deputy Corporation Counsel
COUNTY OF MAUI
200 South High Street
Wailuku, Maui, Hawaii 96793
Phone: 808•270•7740
Email: Richelle.Thomson@co.maui.hi.us

COLLEEN P. DOYLE (7209)
STEPHANIE CHEN (Admitted Pro Hac Vice)
HUNTON & WILLIAMS LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627
Phone: 213•532•2000
Fax: 213•532•2020
Email: doylec@hunton.com
schen@hunton.com

Attorneys for Defendant
COUNTY OF MAUI

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Due process mandates "fair notice" of applicable requirements. Fair notice demands "ascertainable certainty" before penalties can be assessed for alleged non-compliance. Because the County of Maui ("County") could not have known with "ascertainable certainty" that the injection of treated effluent into permitted underground injection control ("UIC") wells at its Lahaina Wastewater Reclamation Facility ("LWRF") required a Clean Water Act ("CWA") National Pollution Discharge Elimination System ("NPDES") permit, no penalties can be assessed for the County's failure to obtain an NPDES permit.

Prior to the Court's recent decisions in Hawai'i Wildlife Fund v. County of Maui, 24 F. Supp. 3d 980 (D. Haw. 2014) ("Haw. Wildlife Fund I") and Hawai'i Wildlife Fund v. County of Maui, Civil No. 12-00198 SOM/BMK, 2015 WL 328227 (D. Haw. Jan. 23, 2015) ("Haw. Wildlife Fund II"), the County had no notice it needed an NPDES permit, let alone "ascertainable certainty" that such a permit was required. There is nothing in the plain language of the CWA, the implementing regulations, agency statements, or direct authoritative communications to the County that provided notice of the permit requirement.

Rather, the agencies' conduct indicating an NPDES permit was not needed in this case is the hallmark of a lack of fair notice and support the County's reasonable belief that no such permit was necessary. As early as the 1970s

environmental review completed prior to LWRF construction, the United States Environmental Protection Agency ("EPA") and Hawaii Department of Health ("HDOH") understood the LWRF's treated effluent traveled through groundwater to the ocean. These agencies have been involved with LWRF permitting since operations commenced in 1982 and repeatedly indicated UIC permits could address any surface water quality concerns. Given the County lacked fair notice of the NPDES permit requirement, due process precludes any penalty assessment, and entitles the County to summary judgment as a matter of law.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there is "'no genuine issue as to any material fact.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)). The party bearing the burden of proof at trial−here, the Plaintiffs−has the burden of showing that a genuine dispute exists that precludes summary judgment. Id. That party must demonstrate through admissible evidence that a genuine dispute exists. First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-290 (1968) ("sufficient evidence supporting the claimed factual dispute [must] be shown . . . ."). Moreover, disputes over immaterial facts do not matter. "'[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" Cline v. Indus.. Maint. Eng'g & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000)

(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). As it is undisputed that the County lacked fair notice of the need for an NPDES permit, the County is entitled to summary judgment as a matter of law.

III. DUE PROCESS PROHIBITS ANY PENALTY ASSESSMENT BECAUSE THE COUNTY LACKED FAIR NOTICE IT NEEDED AN NPDES PERMIT

The Due Process clause of the U.S. Constitution requires "'fair notice of what conduct is prohibited before a sanction can be imposed.'" Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm'n, 142 F.3d 1179, 1182 (9th Cir. 1998) (quoting Newell v. Sauser, 79 F.3d 115, 117 (9th Cir. 1996) (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972))). A lack of fair notice bars the imposition of civil penalties. See Gen. Elec. Co. v. U.S. Envtl. Prot. Agency, 53 F.3d 1324, 1334 (D.C. Cir. 1995) (if "a regulated party is not 'on notice'. . . [it] may not be punished. EPA . . . may not hold [it] responsible in any way−either financially or in future enforcement proceedings . . . ."); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1336 (6th Cir. 1978) (to impose penalties the law "must . . . provide a constitutionally adequate warning" to regulated entities); Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 645, 649 (5th Cir. 1976) ("statutes and regulations which allow monetary penalties . . . must give . . . fair warning of the conduct it prohibits or requires . . . ."); United States v. Approximately 64,695 Pounds of Shark Fins (Shark Fins), 520 F.3d 976, 980 (9th

Cir. 2008) (sanctions without adequate notice violate due process); United States v. Hoechst Celanese Corp., 128 F.3d 216, 224 (4th Cir. 1997) (administrative sanctions require clear notice).

The fair notice requirement applies in CWA citizen suits. See Wis. Res. Prot. Council v. Flambeau Mining Co., 727 F.3d 700, 708 (7th Cir. 2013) (in citizen suit alleging failure to have an NPDES permit where agency said a different permit was sufficient, lack of fair notice prevented penalty assessment). See also Ass'n of Irritated Residents v. Fred Schakel Dairy, No. 1:05-cv-00707 OWW SMS, 2008 WL 850136, at *14 (E.D. Cal. Mar. 28, 2008) (fair notice in Clean Air Act citizen suit).

A. Fair Notice Requires Ascertainable Certainty

Fair notice requires that "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the [law] expects parties to conform." Gen. Elec., 53 F.3d at 1329 (quoting Diamond Roofing, 528 F.2d at 649).[1] In the Ninth Circuit, ascertainable certainty requires 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

[1] See also Dravo Corp. v. Occupational Safety & Health Review Comm'n, 613 F.2d 1227, 1232 (3rd Cir. 1980); In re Metro-East Mfg. Co., 655 F.2d 805, 811 (7th Cir. 1981); Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1005 (11th Cir. 1994) (all cite Diamond Roofing and apply the "ascertainable certainty" standard). Likewise, EPA has adopted the ascertainable certainty standard. See e.g., In re V-1 Oil Co., 8 E.A.D. 729, *15 (EAB 2000).

accordingly.'" Shark Fins, 520 F.3d at 980 (quoting Grayned, 408 U.S. at 108). See also Ass'n of Irritated Residents, 2008 WL 850136, at *14.

B. The County Did Not Have Ascertainable Certainty Of The NPDES Permit Requirement

Fair notice dictates that the need for an NPDES permit for the LWRF be found with "ascertainable certainty" in the plain language of the CWA statute or regulations, agency public statements, or authoritative agency communications directed to the County. See, e.g., Shark Fins, 520 F.3d at 980 (statute or regulation provides fair notice); Gen. Elec., 53 F.3d at 1329 (regulations and public statements provide fair notice); Wis. Res. Prot. Council, 727 F.3d at 708 (regulations and agency guidance provide fair notice); Hoechst Celanese, 128 F.3d 216, 228-29 ("authoritative[,]" "unequivocal[,]" and "definitive interpretation" "directly conveyed" by agency to defendant provides fair notice).

1. "Notice" From The CWA Statute And Regulations Suggests No NPDES Permit Is Required

Neither the CWA nor the regulations provided the County with ascertainable certainty of the NPDES permit requirement. See Shark Fins, 520 F.3d at 980-83 (fair notice comes from the statute or regulations). See also Gen. Elec., 53 F.3d at 1329 (fair notice determined "in the most obvious way of all: by reading the regulations."). In fact, the opposite is true. The plain language of each put the County "on notice" that wastewater disposal through a UIC well into groundwater does not require an NPDES permit as they both classify well injection into

groundwater as nonpoint sources of pollution.

The CWA prohibits the "discharge of any pollutant" unless authorized by an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source . . . ." Id. § 1362(12). Under the CWA, groundwater is not a "navigable water,"[2] and "point source" is defined as "any discernible, confined and discrete conveyance, including . . . any . . . well . . . ." Id. § 1362(14). Unlike point sources, nonpoint sources do not require an NPDES permit. Under the CWA, nonpoint sources include "pollution resulting from . . . the disposal of pollutants in wells . . . ." and "the movement, flow, or circulation of . . . ground waters . . . ." Id. § 1314(f)(2)(D), (F). Thus, while the CWA identifies a well as a point source requiring an NPDES permit, it further clarifies that injections into the well that travel through groundwater are nonpoint source pollution not requiring a permit.

Similarly, the regulations distinguish discharge of pollutants to navigable waters from disposal of pollutants into wells. See 40 C.F.R. § 122.50(a) ("When part of a discharger's process wastewater is not being discharged into waters of the United States . . . because it is disposed into a well . . . ."). They also identify "disposal methods" that are not a "discharge of a pollutant," such as "wastewater

[2] See 40 C.F.R. §§ 122.2, 230.3(s); 33 C.F.R. § 328.3(a); S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 705-06 (9th Cir. 2007); Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965-66 (7th Cir. 1994).

disposed of in a manner" via "underground injection." Id. § 122.21(j)(1)(viii)(E).

2. Decades Of Agency Statements Indicate An NPDES Permit Was Not Necessary

The plethora of agency public statements and actions did not give fair notice an NPDES permit was required. See Shark Fins, 520 F.3d at 980; Gen. Elec., 53 F.3d at 1329; Wis. Res. Prot. Council, 727 F.3d at 708; Hoechst Celanese, 128 F.3d 216, 228-29 (all identify agency statements or guidance as providing fair notice). Rather, as explained below and outlined in the Agency Chronology Timeline ("Timeline") attached as Appendix A to the Motion, the agency statements did the converse – they suggested an NPDES was not required.

a. EPA And HDOH Knew LWRF Effluent Reached The Ocean

When LWRF planning started in the 1970s, it was public knowledge that treated effluent would move through groundwater to the ocean. Defendant County of Maui's Rule 56.1 Separate Concise Statement of Undisputed Material Facts ("56.1"), ¶¶ 5, 6; Timeline, Appendix A. EPA and HDOH reiterated this multiple times in each subsequent decade. 56.1, ¶¶ 6-10; Timeline, Appendix A. As the Court noted "[t]he 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 . . . appears to be that effluent from the LWRF is reaching the ocean . . . ." Haw. Wildlife Fund I, 24 F. Supp. 3d at 1000. EPA and HDOH participated in these "studies and reports." 56.1, ¶¶ 8-10.

b. The County Reasonably Believed It Only Needed A UIC Permit

A reasonable person would have believed the County's compliance with its EPA and HDOH issued UIC permits was sufficient to address any surface water concerns and an NPDES permit was not required. In December 1974, EPA authorized Hawaii's NPDES permit program, making HDOH the lead agency to implement the program.[3] Since that time, HDOH has not issued a single NPDES permit for the over 5,600 UIC wells in Hawaii. 56.1, ¶ 12. This dearth of precedent contributed to the County's lack of "ascertainable certainty." See Gen. Elec., 53 F.3d at 1331 (The fact that "the agency has never imposed . . . a . . . permit requirement . . . ." is pertinent to the fair notice assessment).

EPA and HDOH NPDES regulations suggest a UIC permit can include provisions to protect surface waters. EPA's regulations require authorized states have legal authority "to issue permits to control the disposal of pollutants into wells" and "[a] program approved under . . . [the Safe Drinking Water Act] satisfies the requirement[] . . . ." 40 C.F.R. § 123.28. Similarly, HDOH regulations define an "NPDES permit" as "an authorization, license, or equivalent control document . . . ." Haw. Code R. § 11-55-01. HDOH's consideration of its UIC permit as an "equivalent control document" supports the County's understanding that no NPDES permit was needed. 56.1, ¶ 20.

[3] See 39 Fed. Reg. 43,759 (Dec. 18, 1974); Haw. Rev. Stat. § 342D-2.

In addition to knowing LWRF effluent reached the ocean, EPA and HDOH fully understood the facility's injection well usage. As HDOH lacks federal UIC program authorization, the LWRF UIC wells operate under both EPA and HDOH issued permits.[4] 56.1, ¶ 1. While making countless public statements as part of their permitting efforts−including public notice and comment on three EPA permits−neither agency interpreted the CWA to apply or informed the County of CWA violations.[5] 56.1, ¶¶ 2-3, 8-9, 13; Timeline, Appendix A. To the contrary, EPA's position was "surface water quality standards can be required in the UIC permit to protect ocean water quality." 56.1, ¶ 13; Timeline, Appendix A.[6]

The 1999 CWA Consent Decree between the County and EPA and HDOH, approved by this Court, further supports the County's understanding that its UIC permits were sufficient. The Consent Decree resulted from the agencies' allegations that spills associated with County wastewater operations (including the LWRF) violated the CWA because they resulted in the discharge of pollutants to navigable waters and "state waters" (which include groundwater)[7] without an NPDES permit. 56.1, ¶ 14. The County's "use of underground injection wells for

[4] See 42 U.S.C. § 1422; 40 C.F.R. § 145 *et seq*.

[5] Current EPA and HDOH permits are administratively continued. 56.1, ¶ 4.

[6] The County 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. After repeated follow up, on March 9, 2015, the County received some documents from EPA. It is the County's understanding that it should receive all documents by March 13, 2015.

[7] See Haw. Rev. Stat. § 342D-1(waters of the State include groundwater).

wastewater disposal[]" was noted in the Consent Decree. Id. Thus, even though the agencies' Consent Decree allegations included the same violation Plaintiffs allege here−discharge of wastewater into groundwater without an NPDES permit− no such allegation was made regarding the wells. Id. Objectives of the Consent Decree included (i) ensuring "the County continues to improve its efforts to come into and maintain compliance with the CWA" and (ii) furthering "the goals and objectives of the CWA . . . ." Id. Understanding the County's operations included wastewater injection and the LWRF treated effluent reached the ocean, the agencies sought this Court's approval of a consent decree designed to ensure CWA compliance while never raising the need for an NPDES permit for the wells. Id.; 56.1,¶¶ 5-9, 13, 16.

EPA's failure to raise the need for an NPDES permit occurred again in 2011, when it issued an administrative order directing the County to add ultraviolet treatment prior to injection of LWRF wastewater. 56.1, ¶ 16. Knowing LWRF effluent entered and traveled through "'unconfined groundwater . . . and flow[ed] seaward[,]'" and with the Tracer Study ongoing, EPA did not identify any NPDES permit concerns in the order. 56.1,¶¶ 5-10, 13, 16.

Despite enforcement actions directed at the concerns at issue here, neither EPA nor HDOH identified the need for an NPDES permit. Due process prevents penalizing the County for its failure to obtain a permit under these circumstances.

c. Recent Agency Actions Continue To Support A Lack Of Fair Notice

As recently as April 2014, HDOH indicated the County may not need an NPDES permit. 56.1, ¶ 20. Within months of the Court's denial of the County's motion to dismiss,[8] the County submitted an NPDES permit application. 56.1, ¶ 17. As part of its ongoing evaluation of the application, HDOH informed the County it was still (i) "in the process of determining if an NPDES permit is applicable . . . ."; (ii) evaluating whether LWRF operation "meets the definition of point source discharge to State surface waters[]"; and (iii) "actively considering the possibility of using a UIC permit to address pollution issues at Lahaina." 56.1, ¶ 20. At the same time, HDOH confirmed it was coordinating with EPA on the County's permit application, which EPA received from HDOH within six days of the County's submittal. 56.1, ¶¶ 18, 20. See also Haw. Code R. § 11-55-06.

After suggesting otherwise for decades, EPA relied on Haw. Wildlife Fund I in its January 2015 letter to HDOH commenting on the HDOH draft UIC permit, to support its statement that "the proposed State UIC permit conditions [which include surface water monitoring requirements] would not function as NPDES permit requirements, and are unlikely to achieve compliance with the Clean Water Act." 56.1, ¶ 21. EPA then notes the "lack of coordination between State and

[8] Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198 SOM/BMK, 2012 WL 3263093 (D. Haw. Aug. 8, 2012) [D.E. 34].

federal UIC and NPDES permitting requirements" and suggests the agencies coordinate going forward. Id. EPA's position, articulated only after the Court's ruling, is too little too late and does not negate reliance on HDOH's position. Fair notice cannot hinge on "which official responded [as t]he imposition of a serious penalty cannot rest on such fortuity." Rollins Envtl. Servs. (NJ) Inc. v. U.S. Envtl. Prot. Agency, 937 F.2d 649, 654 (D.C. Cir. 1991).

At the time of this submittal – more than two years since the County submitted its permit application and University of Hawaii issued its draft Tracer Study and more than three and a half years since Plaintiffs notified the agencies of their intent to proceed with this litigation – neither HDOH nor EPA have "directly informed [the County] . . . of the proper interpretation" of the CWA NPDES permit requirements applicable to the wells. Hoechst Celanese, 128 F.3d at 227; 56.1, ¶¶ 10, 15, 17. The agencies' lack of direct communication with the County is particularly telling given both knew LWRF treated effluent reached the ocean and both were actively involved in permitting the wells. 56.1, ¶¶ 1-10, 13; Timeline, Appendix A. By contrast, in Hoechst Celanese, when EPA became aware of alleged illegal activity, it sent a letter "explain[ing] carefully and in no uncertain terms" its interpretation, including an example of how the requirements applied to the facility. Hoechst Celanese, 128 F.3d at 227. Only after the facility received EPA's unequivocal interpretation did the Fourth Circuit find fair notice. Id. at 228.

Not only did HDOH and EPA fail to communicate their CWA interpretations to the County, it appears EPA intentionally avoided providing any interpretation. The CWA nonpoint source provisions require EPA approved watershed management programs to identify and manage nonpoint source pollution. 33 U.S.C. § 1319(b). While the December 2012 Wakikuli-Honokowai Watershed Management Plan (applicable to West Maui) identified the LWRF "as a high priority nutrient generation hot spot," the plan's author, in conjunction with EPA, "agreed that the plan would avoid using any language suggesting whether the LWRF is or is not a 'point source' within the meaning of the federal Clean Water Act." Declaration of Andrew P. Hood, ¶¶ 6-7 [D.E. 139-2]. Despite this intent, the plan explicitly identifies LWRF effluent as nonpoint source pollution. 56.1, ¶ 19. Given the plan was prepared to comply with CWA nonpoint source requirements, the County reasonably believed the unambiguous plan designation.

The County can only speculate as to why EPA purposefully avoided providing an authoritative interpretation. Nonetheless, EPA's avoidance exemplifies an absence of fair notice. See Rollins, 937 F.2d at 653 ("Ambiguity may be in the eye of the beholder. But here EPA's misleading imprecision, not [the County's] lack of acuity" is the cause of the lack of clarity); Diamond Roofing, 528 F.2d at 649 (The regulatory agencies "[have] the responsibility to state with ascertainable certainty what is [required] . . . .").

3. The County Did Not Have Fair Notice Of The Court's CWA Interpretation

The Court identified two grounds for finding the County liable for the discharge of pollutants into navigable waters from a point source without an NPDES permit: (i) groundwater is itself a "point source" and (ii) the "conduit theory," where groundwater acts as a conduit indirectly conveying treated effluent from the UIC well point source to navigable waters. See Haw. Wildlife Fund I, 24 F. Supp. 3d at 999; Haw. Wildlife Fund II, 2015 WL 328227, at *4, 5. While the County respectfully disagrees with the Court's holdings, even if accepted, for the reasons outlined below, the County could not have understood with "ascertainable certainty" that an NPDES permit was required before the ruling, precluding civil penalties for the County's failure to obtain such a permit.

a. There Is No Precedent For The Conduit Theory

As the Court acknowledged, there is no precedent for its conduit theory. See Haw. Wildlife Fund I, 24 F. Supp. 3d at 996 ("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 . . . ."). Moreover, in establishing the theory, the Court redefined "conduit," expanding it beyond the statutory limit of a "discernible, confined, or discrete conveyance." See Haw. Wildlife Fund I, 24 F. Supp. 3d at 999 ("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.'"). Further, contrary to Supreme Court precedent, the Court found that an indirect discharge did not need to reach navigable water via a point source.[9] See Haw. Wildlife Fund II, 2015 WL 328227, at *5 ("[t]he statutory language at issue includes no suggestion that a pollutant taking an indirect path from a well to the ocean must pass through [another point source]."). While the Ninth Circuit in Trs. for Alaska v. Envtl. Prot. Agency, 749 F.2d 549, 558 (9th Cir. 1984) said *how* pollutants enter navigable waters distinguishes point source and nonpoint source pollution, under the Court's "conduit theory," it is irrelevant. See Haw. Wildlife Fund I, 24 F. Supp. 3d at 1000 ("liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of *how* they get there") (emphasis in original).

Given the Court could not identify support for its theory, the County "acting in good faith would [not reasonably] be able to identify, with 'ascertainable certainty,' the standards with which . . . [it was] expected . . . to conform." United States v. Chrysler Corp., 158 F.3d 1350, 1355 (D.C. Cir. 1998) (internal citation and quotation marks omitted).

[9] In Rapanos v. United States, 547 U.S. 715, 743 (2006), the Supreme Court explained that "pollutants discharged from a point source do not [need to] emit 'directly into' covered waters, but pass 'through conveyances' in between[]" the initial point source and navigable water.

b. Diffuse Groundwater Is The Opposite Of A Discernible, Confined And Discrete Conveyance

The County could not have had ascertainable certainty of the Court's expansion of "point source" to include the diffuse and unconfined groundwater below Maui. See Haw. Wildlife Fund I, 24 F. Supp. 3d at 999. Relying on the Final Tracer Study finding that more than 50% of the LWRF effluent reached the ocean, the Court concluded groundwater was a point source. Haw. Wildlife Fund I, 24 F. Supp. 3d at 999 ("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."). Even if the Court's reliance is correct, which the County disputes, the County had no notice of the volume of wells 3 and 4 effluent alleged to be discharging at the submarine springs until the Final Tracer Study report was published in June 2013.[10] 56.1, ¶ 10.

Moreover, neither EPA nor HDOH have interpreted "point source" to include groundwater. Rather, agency statements are contrary, suggesting groundwater is nonpoint source pollution. See 68 Fed Reg. 60,653, 60,655 (Oct. 23, 2003) (EPA explaining "[n]onpoint source pollution is caused by rainfall or

[10] See Expert Report of Ericson John List, Ph.D., P.E. (October 30, 2014) at 31-35 [D.E. 137-2] and Declaration of E. John List, Ph.D., P.E. (December 19, 2014) at ¶¶ 42-49 [D.E. 137-1] for a discussion of the significant uncertainties with the June 2013 Final Tracer Study estimates of the percentage of effluent discharging at seeps. The November 2012 Interim Final Tracer Study contains no such discussion. 56.1, ¶ 11.

snowmelt moving over and through the ground and carrying natural and human-made pollutants into lakes, rivers, streams, wetlands, estuaries, other coastal waters . . . ."); 56.1, ¶ 22 (HDOH identifies groundwater as nonpoint source pollution).

As the Ninth Circuit has recognized, "in the absence of any guidance from EPA," a "tangible identifiable thing" is not a "point source" unless it is identified in the CWA or is "constructed for the express purpose of storing pollutants or moving them from one place to another . . . ." Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 509-510 (9th Cir. 2013) (internal citation and quotation marks omitted). "[G]iven its natural physical attributes, [groundwater] cannot fairly be described as a 'discernible, confined and discrete conveyance.'" Tri-Realty Co., v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) ("the diffuse downgradient migration of pollutants . . . through . . . groundwater . . . is nonpoint source pollution . . . ."). See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001) ("it is one thing to give [the] word[s discernible, confined and discrete] limited effect and quite another to give it no effect whatever."). The County could not understand with "ascertainable certainty" that groundwater could itself be a point source and "[t]o strain the plain and natural meaning of [point source] . . . is to delay the day when the [requirement] . . . will be written in clear and concise language so that [regulated entities] will be better able to understand and observe

them." Diamond Roofing, 528 F.2d at 650.

IV. CONCLUSION

Due process mandates "fair notice" with "ascertainable certainty" of the prohibited or required conduct before penalties can be imposed for alleged non-compliance with applicable CWA requirements. There is nothing in the plain language of the CWA, the NPDES regulations, agency statements, or direct authoritative communications to the County that provided *any* notice an NPDES permit was required for the wells. Rather, the agency actions here suggesting an NPDES permit was not needed highlights the absence of fair notice. Accordingly, no penalties can be assessed for the County's failure to obtain an NPDES permit and the County is entitled to Summary Judgment as a matter of law.

DATED: March 10, 2015

By: /s/ Colleen P. Doyle
HUNTON & WILLIAMS LLP
Attorneys for Defendant
COUNTY OF MAUI

CHRONOLOGY IN SUPPORT OF DEFENDANT COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE[11]

Date	Fact	Document	Request for Judicial Notice ("RJN") or Chen Declaration ("Chen Dec.)
Oct. 1972	The University of Hawaii ("UOH") requests field testing to determine fate of effluent into adjacent coastal waters.	UOH letter to Hawaii Department of Health ("HDOH") attached to Final Environmental Impact Statement for the Construction of Lahaina Wastewater Reclamation Facility ("LWRF")	RJN ¶ 6, Ex. 34.
Feb. 1973	Park Engineering confirms that effluent would "eventually reach the ocean some distance from the shore."	Public meeting transcript attached to EIS for Construction of LWRF	RJN ¶ 6, Ex. 34.
Dec. 1982	The Hawaii Department of Land and Natural Resources ("DLNR") requests EIS include effects of LWRF expansion on aquatic environments.	DLNR letter to the County of Maui ("County")	RJN ¶ 1, Ex. 1.
Feb. 1983	UOH asks Mayor Tavares if coastal waters will be monitored for increased pollutant levels	UOH letter to the County (cc to HDOH Office of Environmental Quality Control ("OEQC"))	RJN ¶ 2, Ex. 22.
Jan. 1991	"Key materials with the potential for nonpoint source pollution include . . . treated sewage effluent . . .These chemicals can leach to groundwaters . . . with subsequent discharge into the ocean. Injection well . . .wastes are introduced directly into the water table."	*An Assessment of Nonpoint Source Pollution of The Marine Environment Off Kaanapali, Maui, Hawaii* by Steve Dollar (UOH) submitted to HDOH.	RJN ¶ 6, Ex. 35.
Sept. 1991	"This [LWRF] effluent, via gravity and the pressure from up-gradient groundwater, flows toward the ocean . . . . The	*Lahaina Wastewater Reclamation Facility Stage 1*	RJN ¶ 6, Ex. 36.

[11] See Declaration of Stephanie Chen in support of Defendant County of Maui's Motion for Summary Judgment Based on Lack of Fair Notice, ¶ 8.

Date	Fact	Document	Request for Judicial Notice ("RJN") or Chen Declaration ("Chen Dec.)
	top of this [conical] plume is displaced seaward . . . . Several factors control where the effluent enters the ocean . . . . the flow probably enters the ocean with the fresh groundwater."	*Design: Environmental Assessment and Negative Declaration* by Brown & Caldwell Consultants submitted to HDOH OEQC	
May 1992	HDOH informs the County that HDOH and the United States Protection Agency ("EPA") are investigating relationship between algae blooms and wells. "[If] the algae problem is attributed to the operation of the injection wells, a critical issue will focus over the compliance requirements of the Clean Water Act ["CWA"]. If this is realized, the issues of effluent reuse and alternate forms of effluent disposal must be pursued."	HDOH letter to the County	RJN ¶ 1, Ex. 3.
May 1992	Mayor Linda Lingle informs County Council about HDOH and EPA efforts "to determine the effects of effluence injection on nearshore waters . . . . "	Mayor Lingle's letter to County Council (cc EPA and HDOH)	RJN ¶ 1, Ex. 4.
Aug. 1992	EPA acknowledges stormwater runoff to navigable waters requires NPDES permit but only requires that underground injection control ("UIC") permit include ocean monitoring if effluent from wells reaches surface water.	EPA letter to the County (cc HDOH)	RJN ¶ 1, Ex. 5.
June 1993	"[A]l1 of the nutrient at the LWRF is applied at a continuous point source and essentially all may be estimated to be released into offshore waters . . . . The pathway for migration of the effluent from the injection wells into coastal waters is via subsurface transport . . . . Several factors may control where the LWRF effluent enters the ocean."	*Preliminary Assessment of Possible Anthropogenic Nutrient Sources in the Lahaina District of Maui* prepared by Tetra Tech, Inc. for EPA, HDOH, and the County	RJN ¶ 6, Ex. 37.
Oct. 1993	HDOH discusses groundwater sampling to determine where LWRF effluent plume discharges offshore.	HDOH internal memo	RJN ¶ 1, Ex. 6.

Date	Fact	Document	Request for Judicial Notice ("RJN") or Chen Declaration ("Chen Dec.)
Mar. 1994	EPA requests "[a]ny information available on tidal fluctuations and their effect on pressure or fluid levels in the current injection wells at the Lahaina WWRF" as part of the County's UIC permit application.	EPA letter to the County (cc HDOH)	RJN ¶ 1, Ex. 7.
Oct. 1994	HDOH supports additional injection wells even though "[a]dditional wastewater injection would increase nutrient loads to the groundwater and subsequently to the ocean . . . all experts agree that the wastewater does enter the ocean." HDOH recommends switching to composite sampling from grab samples "as per NPDES."	HDOH letter to EPA (cc the County)	RJN ¶ 1, Ex. 8.
Jan. 1995	"If a hydrologic nexus is proved between the injection wells and the ocean, surface water quality standards can be required in the UIC permit to protect ocean water quality."	Final Responsiveness Summary For Public Comment on EPA UIC Draft Permit No. HI595001	RJN ¶ 7, Ex. 38.
Dec. 1995	EPA acknowledges that more injection wells would cause "additional impact to the affected aquifer."	EPA letter to the County attaching EPA Statement of Basis for revised UIC permit.	RJN ¶ 1, Ex. 10.
May 1996	"If a hydrologic nexus is proved between the injection wells and the ocean, surface water quality standards can be required in the UIC permit to protect ocean water quality."	Responsiveness Summary to Comments Received by March 31, 1996 on EPA UIC Permit No. HI596001	RJN ¶ 7, Ex. 39.
June 1999	"EPA agrees that the LWRF injectate eventually migrates into coastal waters."	EPA Response to Comments on Modifications to LWRF UIC Permit HI5196001 (cc to HDOH)	RJN ¶ 1, Ex. 12.
Nov. 1999	Judge Mollway enters a Consent Decree ("CD") between the United States and the County after EPA and HDOH alleged that wastewater from spills at the County's	CD between the United States and the County	Chen Dec., ¶ 2, Ex. 46.

APPENDIX A

Date	Fact	Document	Request for Judicial Notice ("RJN") or Chen Declaration ("Chen Dec.)
	facilities, including LWRF, was reaching navigable waters without an NPDES permit. Although UIC wells are discussed in the CD and compliance with the CWA is the primary objective of the CD, the agencies did not allege that the UIC wells were in violation of the CWA nor did the CD require the County to apply for an NPDES permit.		
May 2007	EPA requests "the suspected path and direction of the injectate plume" and the "basis of why [the County] believe[s] that the injectate takes this path."	EPA letter to the County in response to the County's request to increase total Nitrogen limit in UIC permit (cc to HDOH)	RJN ¶ 1, Ex. 14.
July 2007	The County informs EPA in response to its May 2007 letter that the "suspected path of the injectate plume from the Lahaina WWRF is believed to be towards the ocean in a southwesterly path."	The County's response letter to EPA May 2007 letter	RJN ¶ 2, Ex. 23.
Sept. 2008	"[R]ecent scientific studies have provided evidence that the injection well plumes are percolating up into the near-shore waters . . . . "	DLNR letter to EPA on the County's UIC permit renewal application (cc to HDOH)	RJN ¶ 1, Ex. 16.
Nov. 2008	"Injection of treated wastewater effluent at the wells is expected to form a plume within the aquifer, extending from the wells to the coast . . . . the effluent plume travels with ground water to the coastal water and contributes to nitrogen loading in the near coastal environment."	EPA Statement of Basis for UIC Permit HI5071003	RJN ¶ 7, Ex. 40.
2009	"Once injected into the aquifer, effluent spreads out and flows to the coast, typically in a horseshoe-shaped plume embedded in the regional groundwater flow from uplands to the sea."	*A Multitracer Approach to Detecting Wastewater Plumes from Municipal Injection Wells in Nearshore Marine Waters at Kihei and Lahaina, Maui, Hawaii,* USGS Report 2009-	RJN ¶ 4, Ex. 26.

APPENDIX A

Date	Fact	Document	Request for Judicial Notice ("RJN") or Chen Declaration ("Chen Dec.)
		5253, prepared with HDOH	
Oct. 2010	EPA states "there is already substantial scientific evidence that injected effluent from the LWRF is emerging from these seeps."	EPA letter to the County (cc HDOH)	RJN ¶ 1, Ex. 17.
Nov. 2010	HDOH contracts with Department of the Army for tracer study "to confirm the locations of the emerging discharge of injected effluent into the coastal marine waters . . . . "	*Planning Assistance to States Agreement* between Department of the Army and HDOH	RJN ¶ 7, Ex. 41.
Feb. 2012	"Researchers have now verified . . . wastewater from the Lahaina sewage treatment plant . . . is reaching coastal waters." "[David] Albright [manager of the groundwater and UIC program for EPA Region IX] would not say whether the EPA would now be requiring the county to obtain an NPDES permit for the injection wells. 'The detection of fluorescein confirms that there's a connection [between wells and ocean],' he said. 'But is that a trigger for an NPDES permit? I'd say it's too early to say. We need to get a sense of travel time, a sense of what is being discharged. That will be important, and that monitoring is only now starting to occur.'"	*Lahaina Injection Wells Release Wastewater to Coast, Tests Find*, Environment Hawaii, Volume 22, Number 8.	Chen Dec., ¶ 5, Ex. 49.
Apr. 2012	"The injection wells do have a permit from the EPA, which expired but was administratively extended, [David] Albright [manager of groundwater office for EPA's Pacific Southwest Region] said. The permit the lawsuit is seeking hasn't been a requirement for the county, he said."	*Groups Suing County, Allege Lahaina Plant Damaging Reef*, Maui News.	Chen Dec., ¶ 6, Ex. 50.
May 2012	"The scope of this project is to conduct a tracer study to confirm the locations of the emerging discharge of injected effluent into the coastal marine waters . . . . "	U.S. Army Corps of Engineers Project Management Plan for LWRF Tracer Study (sponsored	RJN ¶ 7, Ex. 42.

Date	Fact	Document	Request for Judicial Notice ("RJN") or Chen Declaration ("Chen Dec.)
		by HDOH and signed by EPA)	
May 2012	"David Albright, manager of the groundwater and underground injection control program for the EPA's Region IX in San Francisco, said earlier this year that it was too soon to determine whether the dye test results were enough to trigger a NPDES permit."	Environment Hawaii, Volume 22, No. II.	Chen Dec., ¶ 7, Ex. 51.
Dec. 2012	EPA press release confirming the detection of fluorescein dye at the coastal seeps.	*Preliminary Results from Investigation of injection wells at Lahaina Wastewater Facility*.	RJN ¶ 7, Ex. 43.
Apr. 2014	"[H]DOH is actively considering the possibility of using a UIC permit to address pollution issues at Lahaina . . . [H]DOH has never issued NPDES permits for their discharges to the UIC wells . . . [H]DOH is in the process of determining if an NPDES permit is applicable for this facility. [H]DOH is evaluating additional data to determine if the discharge meets the definition of point source discharge to State surface waters."	HDOH letter to the County	RJN ¶ 1, Ex. 19.
Oct. 2014	"[H]DOH has not completed the review of the [County's] NPDES application and has not to date required [the County] to take any specific corrective action to address the pollutants emitted at the seeps . . . . [H]DOH has decided to issue a UIC permit to [the County] that will limit the volume of wastewater injected through the injection wells . . . . [and] requires continued monitoring so [H]DOH can determine in the future whether additional control measures are needed to protect coastal waters."	HDOH Permit Rationale for UIC permit	RJN ¶ 5, Ex. 33.

APPENDIX A

DAVID L. HENKIN #6876
SUMMER KUPAU-ODO #8157
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai‘i 96813
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: dhenkin@earthjustice.org
skupau@earthjustice.org

Attorneys for Plaintiffs

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 PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE; CERTIFICATE OF SERVICE Hearing: Date: May 27, 2015 Time: 9:45 a.m. Judge: Hon. Susan Oki Mollway Trial Date (Penalties): August 11, 2015 Related to ECF 172

PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Page(s)

FEDERAL CASES (CONTINUED)

FEDERAL STATUTES

Page(s)

FEDERAL STATUTES (CONTINUED)

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

FEDERAL RULES OF CIVIL PROCEDURE

LOCAL RULE

I. INTRODUCTION

As this Court recently observed, Defendant County of Maui faces substantial civil penalties "because it has violated the Clean Water Act." Order Denying Motion for Certification for Interlocutory Appeal and Denying Motion to Stay Proceedings (ECF184) at 5-6. Defendant now seeks to avoid responsibility for its actions, alleging the assessment of any civil penalty would violate due process. In bringing its motion, Defendant ignores binding Ninth Circuit precedent that, "[i]f a district court finds a [Clean Water Act] violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory." Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 1001 (9th Cir. 2000). While the Court has discretion to consider Defendant's equitable claims at the time the Court determines the appropriate amount of civil penalty to impose, it may not decline to impose any penalty at all, as Defendant requests.

Defendant's motion is grounded on the counterfactual claim that, until this Court entered partial summary judgment in May 2014, Defendant had no notice its unpermitted discharges from the Lahaina Wastewater Reclamation Facility ("LWRF") injection wells might subject it to penalties for violating the Clean Water Act. The Court should reject Defendant's invitation to enter "Superman Comics' Bizarro world, where reality is turned upside down." Natural Resources Defense Council, Inc. v. Daley, 209 F.3d 747, 754 (D.C. Cir. 2000). As Defendant

knows full well, for many years before this Court held Defendant's unpermitted use of the LWRF injection wells violated the Clean Water Act, Plaintiffs and other concerned Maui residents had warned Defendant about the illegality of its conduct and that its continued refusal to secure and comply with the required National Pollutant Discharge Elimination System ("NPDES") permit exposed Defendant to significant civil penalties. Plaintiffs' warnings were echoed by the Environmental Protection Agency ("EPA"), the federal agency charged with administering the Clean Water Act, which issued an order over five years ago putting Defendant on notice that its discharges from the LWRF injection wells might subject it to Clean Water Act liability.

Even if Defendant could justify burying its head in the sand and ignoring these repeated warnings prior to receiving Plaintiffs' notice of intent to sue on June 28, 2011, that letter provided Defendant the full measure of the statutorily required notice of its Clean Water Act violations. Congress expressly authorized concerned citizens like Plaintiffs who have complied with the notice requirement to bring suit to enforce the Clean Water Act, including the mandatory imposition of civil penalties once violations have been established. Binding Ninth Circuit precedent holds that, even where regulatory agencies have expressly notified a polluter that no NPDES permit is required for its discharges (which did not occur here), the polluter is not shielded from liability, and federal courts "must honor the Act's

express provisions authorizing citizen suits." Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1012 (9th Cir. 2002).

After receiving each of these numerous warnings, Defendant opted to take a gamble and to continue discharging wastewater from the LWRF injection wells without securing NPDES permit coverage or altering its behavior to avoid violating the Clean Water Act. Defendant continued its illegal conduct even after this Court issued an order denying Defendant's motion to dismiss in August 2012, leaving no doubt that the Court would hold Defendant liable if Plaintiffs could establish that effluent from the LWRF injection wells reaches the ocean (a fact Defendant concedes it has known for decades). Having gambled that it could get away with continued discharges from the LWRF injection wells without an NPDES permit and lost, Defendant may not now shirk responsibility for its illegal conduct.

Finally, Defendant's motion ignores that its illegal discharges are ongoing, subjecting Defendant to additional civil penalties each day Defendant discharges wastewater from the LWRF wells without the required NPDES permit. Assuming for the sake of argument that fair notice is relevant to citizen suits and that Defendant lacked adequate notice prior to this Court's initial summary judgment order, there have been hundreds of days of unpermitted discharges from the LWRF

injection wells in the year since this Court ruled. Defendant articulates no basis for this Court to decline to impose civil penalties for these violations.

II. CIVIL PENALTIES ARE MANDATORY

Defendant's motion ignores binding Ninth Circuit precedent that, "[i]f a district court finds a [Clean Water Act] violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory." Natural Resources Defense Council, 236 F.3d at 1001; see also Leslie Salt Co. v. United States, 55 F3d. 1388, 1397 (9th Cir.), cert. denied, 516 U.S. 955 (1995). The Act's penalty provisions are couched in mandatory language, stating that any person who violates the Act "shall be subject to a civil penalty not to exceed $25,000 per day." 33 U.S.C. § 1319(d) (emphasis added).[1] As the Ninth Circuit has explained, "[i]f Congress had intended civil penalties under section 309(d) to be discretionary, it would have used the word 'may' instead of 'shall be subject to.'" Leslie Salt Co., 55 F3d. at 1397.

Defendant's protestations it did not know that its unpermitted use of the LWRF injection wells was illegal similarly ignores that the Clean Water Act imposes strict liability. Committee To Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993). Thus, even if Defendant could establish it had no prior notice of the illegality of its conduct (a claim Plaintiffs

[1] The maximum daily penalty per violation has been adjusted for inflation and is $37,500 for violations after January 12, 2009. See 40 C.F.R. § 19.4.

vigorously dispute), such a showing would provide no shield to Clean Water Act liability. As this Court has previously held, "[t]he fact that a violator is 'without fault' in committing violations of the Clean Water Act does not absolve the violator from penalties … ." Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1392 (D. Haw. 1993).

While imposition of a civil penalty for Defendant's Clean Water Act violations is mandatory, this Court retains "broad discretion to set a penalty commensurate with the defendant's culpability." Leslie Salt Co., 55 F3d. at 1397; see also Hawaii's Thousand Friends, 821 F. Supp. at 1392. To determine the appropriate civil penalty, the statute instructs this Court "to consider the following factors: (1) the seriousness of the violation(s); (2) the economic benefit, if any, derived from the violations; (3) the history of violations; (4) the good faith efforts, if any, to comply with the CWA; (5) the economic impact of the penalty on the defendants; and (6) any other factor that justice requires." Center for Biological Diversity v. Marina Point Development Associates, 434 F. Supp. 2d 789, 798 (C.D. Cal. 2006) (citing 33 U.S.C. § 1319(d)). At the trial on civil penalties, which is set for August 11, 2015, Defendant will have ample opportunity to advocate for a reduction of the civil penalty amount based on the allegations set forth in its motion. See First Amended Rule 16 Scheduling Order on Penalties (ECF 120-1) ¶

1.[2] Having found Defendant in violation of the Clean Water Act, however, this Court may not decline to impose any civil penalty at all, as Defendant requests.

III. HAVING RECEIVED THE STATUTORILY REQUIRED NOTICE FOR THIS CITIZEN SUIT, DEFENDANT MAY NOT EVADE CIVIL PENALTIES BY CLAIMING A LACK OF FAIR NOTICE

With two exceptions, which Plaintiffs will address below, the cases on which Defendant relies to argue against the imposition of civil penalties do not involve citizen suits. This is significant because, as this Court has repeatedly affirmed, "[b]oth 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." Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1402 (D. Haw. 1995); see Save Our Bays and Beaches v. City and County of Honolulu, 904 F. Supp. 1098, 1125 (D. Haw. 1994) (same); see also Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987) ("legislative history indicates … that citizen suits should be handled liberally, because they perform an important public function"). Congress provided for citizen enforcement of the Clean Water Act specifically to address situations where, for whatever reason, federal and state regulators do not take action to compel polluters' compliance with

[2] As discussed below, Plaintiffs dispute Defendant's claim that, prior to this Court's grant of partial summary judgment with respect to LWRF wells 3 and 4, Defendant lacked fair notice that it was violating the Clean Water Act. At trial, the Court will have the opportunity to resolve the parties' factual disputes.

the Act's requirements. See 33 U.S.C. § 1365(b)(1)(B). In such cases, "Congress … empowered citizens to pursue enforcement of the Clean Water Act when all procedural requirements [are] satisfied." Association to Protect Hammersley, 299 F.3d at 1012.

Congress authorizes citizens to file Clean Water Act enforcement actions "sixty days after the plaintiff has given notice of the alleged violation to ... any alleged violator of the standard, limitation, or order." 33 U.S.C. § 1365(b). The notice requirement is detailed in the Act's implementing regulations at 40 C.F.R. § 135.3. First, "[n]otice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated." 40 C.F.R. § 135.3(a). Second, the notice must describe "the activity alleged to constitute a violation." Id. The location of the alleged violation and the person or persons responsible for the violation must be specified, as well as the date or dates of the violation. Id. Finally, the contact information of the person giving notice and that person's legal counsel, if any, must be included. Id. § 135.3(c).

The Ninth Circuit has held that "[t]he key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." Community Ass'n for Restoration of

the Env't v. Henry Bosma Dairy, 305 F.3d 943, 951 (9th Cir. 2002). "Notice is sufficient if it is reasonably specific and if it gives 'the accused company the opportunity to correct the problem.'" Waterkeepers Northern California v. AG Industrial Mfg., Inc., 375 F.3d 913, 917 (9th Cir. 2004) (quoting San Francisco BayKeeper v. Tosco Corp., 309 F.3d 1153, 1158 (9th Cir. 2002)).

There is no dispute that, in June 2011, Plaintiffs served on Defendant a letter that provided detailed notice regarding both Defendant's violations of the Clean Water Act's NPDES permit requirements at the LWRF and the substantial civil penalties Defendant faces for those violations. See Plfs' Exh. 6: Plfs' Notice Letter; see also Plfs' Exh. 7: Answer (ECF 41) ¶ 9; Plfs' Exh. 8: Def's Concise Statement (ECF 173) ¶ 15. Plaintiffs' notice letter cited many of the same cases on which this Court subsequently relied to find Defendant in violation of the Clean Water Act. Plfs' Notice Letter at 10-11.[3] Because Plaintiffs had hoped to convince Defendant voluntarily to comply with the Act, they provided far longer than the statutorily required sixty days' advance notice, serving their notice letter nearly ten months before filing suit. See Plfs' Exh. 3 at 2. Defendant, therefore,

[3] As discussed in Part V, infra, even prior to sending their notice letter, Plaintiffs and other concerned Maui residents had provided Defendant with citations to cases holding that unpermitted point source discharges that reach navigable waters via groundwater violate the Clean Water Act. Defendant cannot credibly claim to have been ignorant of this case law prior to this Court's summary judgment orders.

had both ample notice of its illegal conduct and far longer than the statute mandates to bring its conduct into conformity with its Clean Water Act obligations.

Having received the notice that Congress required before citizens can bring suit for Clean Water Act violations, Defendant cannot now claim inadequate notice for purposes of avoiding the civil penalties that Congress mandated once violations are found. In its moving papers, Defendant cites Association of Irritated Residents v. Fred Schakel Dairy, 2008 WL 850136 (E.D. Cal. Mar. 28, 2008), for the proposition that "[t]he fair notice requirement applies in [Clean Water Act] citizen suits." Def's Memo. (ECF 172-1) at 4. In fact, that case cuts the other way.

The question presented in Association of Irritated Residents, was whether the defendant dairy lacked fair notice, precluding a citizen suit to enforce the Clean Air Act, because the state and federal regulatory agencies had not established standards for determining whether the dairy emits more than ten tons of methane per year, the regulatory threshold that triggered the requirement to "obtain a Maximum Available Control Technology ('MACT') determination for methanol emissions prior to initiating construction." 2008 WL 850136, at *1; see also id. at *14. While the court did consider – and reject – a fair notice claim, the court's closing remarks make clear it seriously questioned the doctrine's relevance to citizen suits. See id. at *16. The court observed, "A further inquiry remains which

has not been fully briefed: Does the Fair Notice doctrine even apply in this type of challenge?" Id. After all, the court noted:

> even if the EPA or the [state Air Pollution Control] District published emission factors, the EPA and the District do not have the exclusive authority under the [Clean Air Act] to determine if a party is in violation of 112(g)(2)(B), and a party could bring a suit in federal court … finding that a MACT determination is required, even though the District found it was not required.

Id.

Significantly, while the parties were litigating Association of Irritated Residents, the state Air Pollution Control District made a formal determination that the defendant dairy "did not emit more than ten tons per year of methanol and therefore no MACT determination was necessary under CAA § 112(g)(2)(B)." Id. at *1; see also id. at *4-6. The court rejected the defendant dairy's claim that the agency's finding rendered the citizen suit moot. Relying on the Ninth Circuit's decision in Association to Protect Hammersley, the court held that "a citizen suit may be brought where a state agency, here, the District, has determined that … no MACT determination is required under CAA § 112(g)(2)(B)." Id. at *7.

Association to Protect Hammersley makes clear that, in the Ninth Circuit, even if an agency with regulatory authority to implement the Clean Water Act unambiguously and expressly states that "NPDES permits are not required" and refuses to "accept [or] process an NPDES permit application," citizens still may

proceed with a lawsuit to enforce the Clean Water Act's requirements. The Ninth Circuit held:

> Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act.

299 F.3d at 1012. The court further held that neither the EPA nor authorized state regulatory agencies have the "statutory or common law right to veto environmental review sought by a citizen who otherwise has complied with the Act." Id.

Accordingly, even had EPA or the Hawai'i Department of Health ("HDOH") expressly, unequivocally and formally told Defendant that discharges from the LWRF injection wells of pollutants that reach the ocean through groundwater do not require an NPDES permit, binding Ninth Circuit case law establishes that this Court "must honor the Act's express provisions authorizing citizen suits" where, as here, all "procedural requirements are met." Id. If those facts existed in this case (and, as discussed below, they do not), Association to Protect Hammersley would mandate a different outcome than Wisconsin Res. Prot. Council v. Flambeau Min. Co., 727 F.3d 700 (7th Cir. 2013), the other citizen suit case on which Defendant relies to argue against the imposition of civil penalties.

In Wisconsin Res. Prot. Council, the EPA had delegated to the Wisconsin Department of Natural Resources ("WDNR") authority to administer the NPDES

program within that state. 727 F.3d at 702-03. The defendant mining company "was told by the WDNR that its mining permit constituted a valid [Wisconsin Pollutant Discharge Elimination System (WPDES)] permit," the state version of an NPDES permit. Id. at 711. Accordingly, the sole issue in that case was whether the Clean Water Act's "permit shield" applies, precluding a finding of liability "where the permitting authority issues a facially valid NPDES permit and the permit holder lacks notice of the permit's (potential) invalidity." Id.; see also 33 U.S.C. § 1342(k). The Seventh Circuit held that, under such circumstances, "the permit shield applies, [the defendant] is deemed to be in compliance with the [Clean Water Act], and summary judgment should have been granted for [the defendant." 727 F.3d at 711; see also id. at 702 (reversing district court's judgment).

As discussed, the Ninth Circuit, whose decisions bind this Court, reached a contrary conclusion, holding that an authorized state agency's decision "that an NPDES permit is not needed warrants consideration but does not divest the federal courts of jurisdiction." Association to Protect Hammersley, 299 F.3d at 1012. Since Plaintiffs complied fully with the Clean Water Act's notice requirements, EPA and HDOH "have no statutory or common law right to veto environmental review sought by a citizen." Id.

IV. NEITHER EPA NOR HDOH EVER INFORMED DEFENDANT THAT THE LWRF DISCHARGES COMPLY WITH THE CLEAN WATER ACT

This Court need not dwell on the apparent disagreement between the Seventh and Ninth Circuits. Not only is this Court bound by the Ninth Circuit's holding that regulatory agencies' statements cannot bar citizen enforcement, but the factual predicate for the Seventh Circuit's application of the Fair Notice doctrine is not present here. Simply put, neither EPA nor HDOH ever told Defendant that its underground injection control ("UIC") permits satisfied the Clean Water Act's NPDES permit requirement.

In Wisconsin Res. Prot. Council, the defendant mining company's operations previously were covered by a state-issued NPDES permit. 727 F.3d at 704. The only reason that, at the time of suit, the defendant no longer had a state-issued NPDES permit was because the state agency had instructed that it was no longer needed. Id. at 704-05. Accordingly, the defendant "knew that it needed a WPDES permit but was informed by the WDNR that its mining permit would serve as a WPDES permit …, and the WDNR sua sponte terminated [the defendant's] separate WPDES permit." Id. at 710. Because the state agency charged with implementation of the Clean Water Act expressly told the defendant "that its mining permit constituted a valid WPDES permit," the Seventh Circuit concluded that "the permit shield applies" and the defendant "is deemed to be in compliance with the [Clean Water Act]." Id. at 711.

In contrast, Defendant here does not claim it ever received official agency notification from EPA or HDOH that, despite their lack of NPDES permit coverage, discharges from the LWRF injection wells nonetheless comply with the Clean Water Act. Defendant concedes that "neither HDOH nor EPA have 'directly informed [the County] … of the proper interpretation' of the [Clean Water Act] NPDES permit requirements applicable to the wells." Def's Memo. at 12 (citation omitted; brackets and ellipses in Defendant's memorandum). Accordingly, Defendant alleges merely that past agency statements "suggested an NPDES [permit] was not required," id. at 7 (emphasis added), and points to agency statements it claims "indicated the County may not need an NPDES permit." Id. at 11 (emphasis added). The equivocal agency statements Defendant cites are a far cry from the official, definitive pronouncements that compelled the Seventh Circuit to invoke the Clean Water Act's permit shield on due process grounds.

Far from making a definitive, affirmative statement that the LWRF's UIC permits satisfy Defendant's obligation to secure and comply with an NPDES permit, HDOH has stated merely that it "is considering" whether to treat the UIC permit as an "equivalent control document." Plfs' Exh. 9: Apr. 22, 2014 HDOH Letter at 3. It did not make this noncommittal statement until this lawsuit was already two years old. Furthermore, in the year since HDOH made that statement, it has yet to reach a decision. See Plfs' Exh. 10: Mar. 6, 2014 HDOH Letter at 2

(stating HDOH would notify Defendant "once a decision is made"). Recent correspondence from EPA indicates that the ultimate conclusion will find that the LWRF's UIC permit conditions "would not function as NPDES permit requirements, and are unlikely to achieve compliance with the Clean Water Act." Plfs' Exh. 11: Jan. 15, 2015 EPA Letter at 1. Consequently, unlike the defendant in Wisconsin Resources Protection Council, which "did not have notice that its permit might not be a valid WPDES permit," Defendant here knew that the outcome of HDOH's deliberations over the adequacy of the LWRF's UIC permit to serve as an NPDES permit was highly uncertain, precluding any reasonable reliance on the UIC permit to satisfy Defendant's Clean Water Act obligations. 727 F.3d at 708 (emphasis added).

The record is equally clear that neither HDOH nor EPA has ever affirmatively stated that Defendant does not need an NPDES permit for the LWRF injection well discharges, distinguishing this case from both Wisconsin Res. Prot. Council and Association to Protect Hammersley. See, e.g., Mar. 6, 2014 HDOH Letter at 1 (HDOH "has not made a tentative or preliminary determination on [Defendant's] NPDES application"); Apr. 22, 2014 HDOH Letter at 4 (HDOH still evaluating whether an NPDES permit is required); cf. Oregon State Pub. Interest Research Grp., Inc. v. Pac. Coast Seafoods Co., 361 F. Supp. 2d 1232, 1243 (D. Or. 2005) (stipulated consent order ("SCO") did not trigger Clean Water Act's

permit shield where "[n]othing in the federal or state statutes provides that a state-issued SCO is the equivalent of an NPDES permit"). Far from supporting Defendant's alleged belief that "the County's compliance with its EPA and HDOH issued UIC permits was sufficient" to satisfy the Clean Water Act, Def's Memo at 8, every UIC permit HDOH has issued for the LWRF injection wells has noted Defendant's obligation to comply with the Clean Water Act's NPDES permit requirements and the associated regulations set forth in Hawai'i Administrative Rules chapter 11-55. See Plfs' Exh. 12: 1986 HDOH UIC Permit at COM002106, COM002109-10; Plfs' Exh. 13: 1992 HDOH UIC Permit at COM002193, COM002197-98; Plfs' Exh. 14: 1996 HDOH UIC Permit at COM002321, COM002324-25; Plfs' Exh. 15: 2000 HDOH UIC Permit at COM002614, COM002619-20; Plfs' Exh. 16: 2004 HDOH UIC Permit at COM002556, COM002561-62.[4] EPA's UIC permit for the LWRF similarly put Defendant on notice that compliance with the permit's terms "does not constitute a defense to any action brought under … any other common or statutory law," such as the Clean Water Act. Plfs' Exh. 18: 1996 EPA UIC Permit at COM003771; Plfs' Exh. 19: 1995 EPA UIC Permit at COM004064.[5]

[4] HDOH issued the most recent UIC permit for the LWRF in 2004. HDOH has administratively extended this permit until September 28, 2015. See Plfs' Exh. 17: HDOH Permit Rationale at 2; see, e.g., Def's Exh. 20.

[5] EPA issued the most recent federal UIC permit for the LWRF in 1996. EPA has administratively extended this permit indefinitely. See Def's Exh. 13. In

Written warnings Defendant received over the years from both EPA and HDOH further put Defendant on notice that discharges from the LWRF injection wells might violate the Clean Water Act. See General Elec. Co. v. U.S. Envtl. Prot. Agency, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("agency's pre-violation contact with the regulated party" can provide adequate notice).[6] In 1992, HDOH warned Defendant that, if use of the LWRF injection wells were linked to pollution emerging in the ocean off West Maui, "a critical issue will focus over the compliance requirements of the Clean Water Act." Plfs' Exh. 21: May 15, 1992 HDOH Letter at COM002259.

More recently, in January 2010, EPA ordered Defendant to conduct sampling, monitoring and reporting necessary "to determine whether [Defendant] is in violation of the requirements of the [Clean Water] Act." Plfs' Exh. 22: Jan. 27, 2010 EPA Letter at COM003144. Noting the "substantial evidence that injected effluent from the Lahaina Wastewater Reclamation Facility (LWRF) is emerging from submarine springs into the coastal water around Kahekili Beach

---

2008, EPA issued a draft UIC permit with the identical provision. See Plfs' Exh. 20: 2008 EPA Draft UIC Permit at COM003369.

[6] Defendant fails to explain the relevance of the many internal agency emails and memoranda it cites in its moving papers and in the two supplements (ECF 190 and 194) it filed without leave of court. See Local Rule 7.4 ("No further or supplemental briefing shall be submitted without leave of court"). Internal agency documents that Defendant did not see before it reviewed the responses to its recent Freedom of Information Act Request clearly had no bearing on Defendant's prior understanding of its potential liability for Clean Water Act penalties.

Park along the Kaanapali coast-line," EPA's letter made clear that these discharges potentially violate the Clean Water Act. Id. Significantly, EPA issued this order "pursuant to section 308(a) of the Clean Water Act." Id. By invoking this section, which applies only to "the owner or operator of [a] point source," EPA put Defendant on notice that EPA considered the LWRF injection wells to be point sources that might trigger NPDES permit requirements. 33 U.S.C. § 1318(a)(A).

In March 2010, EPA followed up with an order requiring Defendant to secure a water quality certification from the State of Hawai'i pursuant to section 401 of the Clean Water Act. See Plfs' Exh. 23: Mar. 10, 2010 EPA Letter at COM003125. EPA explained that it was requiring the certification based on its determination that "operation of the [LWRF] may result in a discharge into navigable waters." Id. at COM003126. EPA specified that, among other things, the state would have to certify that continued use of the LWRF will not violate "the applicable provisions of [Clean Water Act] section 1311," which prohibit unpermitted discharges from point sources. Id. at COM003125; see also 33 U.S.C. § 1311(a). Defendant, therefore, was clearly on notice of potential liability for Clean Water Act violations due to operation of the LWRF injection wells.

V. LONG BEFORE THIS COURT ISSUED ITS SUMMARY JUDGMENT ORDERS, DEFENDANT HAD AMPLE NOTICE OF ITS POTENTIAL LIABILITY FOR UNPERMITTED DISCHARGES FROM THE LWRF INJECTION WELLS

Having received numerous warnings over the years from both EPA and HDOH, Defendant cannot credibly claim that it was unaware of its potential liability for Clean Water Act violations until this Court issued its initial summary judgment order in May of 2014.[7] Defendant acknowledges, as it must, that the Clean Water Act's plain language "identifies a well as a point source requiring an NPDES permit." Def's Memo. at 6; see also 33 U.S.C. § 1362(14); United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008) ("Shark Fins") (plain language of statute provides fair notice). It claims, nonetheless, that it had no way to know that the LWRF's injection wells, which discharge to the ocean via groundwater, might require an NPDES permit.[8]

[7] Defendant seeks to use its latest motion as yet another opportunity to express its disagreement with this Court's rulings that the Clean Water Act requires NPDES permit coverage for the LWRF injection well discharges, rehashing arguments this Court previously considered and rejected. Plaintiffs will resist the temptation to refute every point and instead will focus on debunking Defendant's claim it had no notice of its potential liability for violating the Act.

[8] Defendant reads far too much into the Clean Water Act provision calling for EPA to share information about controlling pollution resulting from the disposal of pollutants in wells and from groundwater movement. See Def's Memo. at 6 (citing 33 U.S.C. § 1314(f)(2)(D), (F)). That pollution resulting from these sources is sometimes deemed nonpoint does not mean that, as a matter of law, it never constitutes point source pollution. See South Fla. Water Management Dist. v. Miccosukee Tribe, 541 U.S. 95, 106 (2004) ("§ 1314(f)(2)(F) does not explicitly

Defendant ignores EPA's longstanding, official statements that interpreting the Clean Water Act to "exclud[e] regulation of point source discharges to the waters of the U.S. which occur via ground water would… be inconsistent with the overall Congressional goals expressed in the statute." 66 Fed. Reg. 2960, 3015-16 (Jan. 12, 2001). In consideration of the statute's "purpose of protecting surface waters and their uses," EPA has repeatedly affirmed:

> the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters 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.

---

exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition").

Similarly, neither of the regulations Defendant cites support its claim that the disposal of pollutants into wells never constitutes a regulated point source discharge. See Def's Memo. at 6-7 (citing 40 C.F.R. §§ 122.21(j)(1)(viii)(E), 122.50(a)). 40 C.F.R. § 122.50(a) simply provides instructions on how to address situations where the disposal of wastewater into a well avoids "discharge[s] into waters of the United States," which even Defendant acknowledges is not the case here. 40 C.F.R. § 122.21(j)(1)(viii)(E) does not distinguish between point and nonpoint source pollution at all; rather, it distinguishes between "outfalls" and "other discharge or disposal methods" at publicly owned treatment works. Id.

Given that the Clean Water Act expressly defines the term "point source" to include "any … well … from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), Defendant's interpretation of the Act and its implementing regulations as providing that pollution from wells can never constitute point source pollution would result in an impermissible absurdity. See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1036 (9th Cir. 2013) (courts should avoid statutory interpretation that leads to absurd results or renders provision meaningless).

56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991); see also 66 Fed. Reg. at 3,017 ("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"); 63 Fed. Reg. 7,858, 7,878 (Feb. 17, 1998) (Clean Water Act "regulate[s] releases of [pollutants] to groundwater [if] there is a direct hydrological connection between a point source and surface waters of the United States through such groundwater"). As Defendant acknowledges, such official agency statements and guidance provide fair notice of Defendant's potential liability for unpermitted LWRF discharges. See Def's Memo. at 7; see also Shark Fins, 520 F.3d at 982-83 (agency explanation of regulations provides fair notice).

Defendant's claim that this Court's rulings on liability came like a bolt from the blue similarly ignores that numerous courts, including district courts in the Ninth Circuit, have long held that the Clean Water Act governs discharges to groundwater that reach surface waters. See, e.g., Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 181 (D. Puerto Rico 2009) ("the [Clean Water Act] extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180-81 (D. Idaho 2001) ("the [Clean Water Act] regulates discharges from the Grand View Dairy into the groundwater

where there exists a hydrological connection with Walker and/or Butler Springs, and such discharges can be traced from their source to those springs"); Washington Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("since the goal of the [Clean Water Act] 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"); 66 Fed. Reg. at 3017 n.1 (listing additional cases). While this Court acknowledged the lack of "controlling appellate law" on this topic, that is a far cry from saying that no court previously held that unpermitted discharges similar to Defendant's violate the Clean Water Act. Def's Memo. at 14 (quoting May 2014 Order (ECF 113) at 35); see also May 2014 Order at 32-33 (citing supporting cases). Had Defendant bothered to read the case law on discharges to groundwater, it would have been well aware of its potential exposure to Clean Water Act liability and associated penalties.[9]

Defendant cannot claim that it lacked notice of this case law. As discussed in Part III, supra, ten months before filing suit, Plaintiffs served a notice letter on Defendant that cited many of these cases. Prior to that, in 2010, several concerned Maui organizations, including some of the plaintiffs in this lawsuit, appealed to the Maui Planning Commission a decision to allow the Department of Environmental

[9] While some courts have come out the other way, polluters like Defendant may not shirk responsibility for their Clean Water Act violations merely because there is a split in authority.

Management to build two new injection wells at the Wailuku-Kahului Wastewater Reclamation Facility. Bernard Decl. ¶ 9. In that appeal, the community groups presented claims similar to those this Court adjudicated, arguing that discharges from injection wells into groundwater that conveys pollutants to the ocean require NPDES permit coverage and that the failure to secure such coverage violates the Clean Water Act. Id. The groups cited many of the same cases on which this Court subsequently relied to conclude that indirect discharges to "waters of the US" are subject to the Clean Water Act's requirements. See Plfs' Exh. 5: April 15, 2010 Prehearing Brief at HWF001375. Defendant can hardly claim ignorance of this case law, particularly since the deputy corporation counsel representing Defendant in the Planning Commission Appeal was Jane Lovell, the same attorney who represented the County in the early phases of this lawsuit. See id. at HWF001385; Def's Answer at 11.

In addition to the foregoing, for years before Plaintiffs filed suit, concerned Maui residents, including several of the plaintiff groups, met repeatedly with Defendant's representatives, including the current and former Mayor, to warn Defendant of the illegality of the LWRF's unpermitted discharges and Defendant's exposure to significant civil penalties and to urge Defendant to secure NPDES permit coverage to bring the LWRF's operations into compliance with the Clean Water Act. Bernard Decl. ¶¶ 2-8; De Naie Decl. ¶¶ 2-7; Plfs' Exhs. 1-4.

Defendant had abundant notice that, in operating the LWRF injection wells without NPDES permit coverage, it ran the risk of Clean Water Act liability and that there were several citizen groups ready to hold Defendant to account.

Defendant's argument that it lacked notice prior to this Court's first ruling on liability in May 2014 also ignores this Court's denial of Defendant's motion to dismiss nearly two years earlier, in August 2012. By its very nature, a ruling on a motion to dismiss provides great clarity regarding the set of facts that a court determines "state[s] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In denying Defendant's motion, this Court stated that "[w]hether a discharge of wastewater into an injection well qualifies as a discharge of pollutants into navigable waters depends on the circumstances." Order Denying Motion to Dismiss (ECF 34) at 6. The Court went on to hold that Plaintiffs' allegations that Defendant's "discharge of wastewater into the injection wells causes pollutants to flow into the ocean" were adequate to state a claim that Defendant was violating the Clean Water Act. Id. at 13. Given Defendant's concession that it has been "public knowledge" since the 1970s that "treated effluent [from the LWRF injection wells] would move through groundwater to the ocean," Defendant has no

possible basis for claiming this Court's subsequent rulings on liability took Defendant by surprise. Def's Memo. at 7.[10]

VI. EVEN UNDER DEFENDANT'S VIEW OF THE FACTS AND THE LAW, DEFENDANT IS SUBJECT TO CIVIL PENALTIES FOR ITS ONGOING VIOLATIONS SUBSEQUENT TO THIS COURT'S DECISIONS REGARDING LIABILITY

As discussed above, binding Ninth Circuit precedent precludes application of the Fair Notice doctrine in the context of this citizen suit. Moreover, even if the doctrine did apply, the evidence abundantly demonstrates that Defendant had ample notice of its potential Clean Water Act liability years before Plaintiffs filed suit.

Assuming for the sake of argument that Defendant's view of the facts and the law were correct, this Court should still conclude that Defendant is liable for civil penalties and deny its motion. Defendant's motion hinges on the argument that, before this Court's decisions regarding liability, "the County has no notice it needed an NPDES permit, let alone 'ascertainable certainty' that such a permit was

[10] Defendant notes that, "[w]ithin months of the Court's denial of the County's motion to dismiss, the County submitted an NPDES permit application." Def's Memo. at 11. While Plaintiffs contend that Defendant's NPDES permit application was fundamentally flawed (and, thus, does not constitute a good faith effort to comply with the law), the fact that Defendant understood the need to go through the motions of securing an NPDES permit for the LWRF cannot be squared with its claim that it lacked notice of the law's requirements prior to this Court's rulings on liability. See Plfs' Exh. 24: Def's NPDES Permit Application (providing no information about discharges).

required." Def's Memo. at 1. Even if true (which Plaintiffs vigorously dispute), there can be no question that, following this Court's ruling in May 2014 that Defendant's unpermitted discharges from LWRF wells 3 and 4 violate the Clean Water Act, Defendant knew with "ascertainable certainty" – indeed, with absolute certainty – that it needed an NPDES permit. See id. at 14 (citing May 2014 Order).

By the time this Court hears Defendant's motion on May 27, 2015, a few days short of a year will have passed since Defendant claims it first had notice of its Clean Water Act violations, during which time Defendant has continued to violate the Act on a daily basis. See, e.g., Plfs' Exh. 25: LWRF Injection Flow Data (Aug. 1 to Nov. 15, 2014). Defendant presents no argument to justify shielding Defendant from responsibility for these ongoing violations, which trigger mandatory civil penalties.

VII. CONCLUSION

To ensure the Clean Water Act's goals would be accomplished even when EPA and state regulatory agencies fail to act, Congress authorized citizens to bring suit to enforce the statute's requirements. Far from constituting an exceptional circumstance that warrants relieving Defendant of responsibility for its illegal conduct, the inaction by EPA and HDOH to which Defendant points in its moving papers is the norm for citizen suits. Indeed, Congress made the absence of diligent

prosecution by federal and state regulators a condition precedent for citizens to file suit.

The only exceptional circumstances in this case are the abundant notice Defendant received of the illegality of its unpermitted discharges from the LWRF and of its exposure to significant civil penalties should Defendant fail to bring its conduct into conformity with the Clean Water Act's requirements. Not only did Plaintiffs provide Defendant with the statutorily mandated notice of their intent to sue far in advance of seeking this Court's assistance, but, for years prior to that, Plaintiffs and others repeatedly warned Defendant of the consequences of failing to secure NPDES permit coverage for the LWRF injection wells. During that same period, EPA issued several orders clearly putting Defendant on notice that the LWRF discharges might run afoul of the law. Rather than heed those warnings, Defendant chose to stick its head in the sand. Such willful ignorance provides no shield against the imposition of mandatory civil penalties.

Dated: Honolulu, Hawai‘i, May 6, 2015.

EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai‘i 96813

/s/ David L. Henkin
David L. Henkin
Attorneys for Plaintiffs

PATRICK K. WONG (5878)
Corporation Counsel
RICHELLE M. THOMSON (8965)
Deputy Corporation Counsel
COUNTY OF MAUI
200 South High Street
Wailuku, Maui, Hawaii 96793
Phone: 808•270•7740
Email: Richelle.Thomson@co.maui.hi.us

COLLEEN P. DOYLE (7209)
STEPHANIE CHEN (Admitted Pro Hac Vice)
HUNTON & WILLIAMS LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627
Phone: 213•532•2000
Fax: 213•532•2020
Email: doylec@hunton.com
schen@hunton.com

Attorneys for Defendant
COUNTY OF MAUI

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

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

By: /s/ Colleen P. Doyle
HUNTON & WILLIAMS LLP
Attorneys for Defendant
COUNTY OF MAUI

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

By: /s/ Colleen P. Doyle
HUNTON & WILLIAMS LLP
Attorneys for Defendant
COUNTY OF MAUI