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