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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

HAWAII 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 OPPOSITION TO
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

Hearing: May 12, 2014, 1:30 p.m.

Judge: Susan Oki Mollway

Trial Date: Not yet determined

Related to: Dkt No. 72, Plaintiffs'
Motion for Partial Summary Judgment

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I. INTRODUCTION

Summary judgment is not appropriate here because there are factual disputes as to whether the County of Maui (“County”) requires a National Pollutant Discharge Elimination System (“NPDES”) permit for discharges from its Lahaina Wastewater Treatment Facility (“LWRF”). Plaintiffs present the question before the Court as a “straightforward, threshold question [of] whether the discharge of pollutants – regardless of quantity or environmental impact – into waters of the United States is authorized under an NPDES permit.” Motion for Partial Summary Judgment (“Plaintiffs’ Motion” or “MSJ”) at 5. Plaintiffs are wrong. Here, there is no discharge of pollutants into waters regulated under the Clean Water Act (“CWA”). Rather, the County’s underground injection control (“UIC”) wells discharge into groundwater, which the Environmental Protection Agency (“EPA”) is currently proposing to exclude from CWA jurisdiction. Yet even if discharges to regulated waters via groundwater fall within CWA jurisdiction, there is a genuine issue of material fact as to whether the County’s discharges require an NPDES permit. The County’s wells must have a direct and immediate hydrological connection to regulated waters, an inquiry that Plaintiffs did not consider. The County maintains there is no such direct and immediate connection. In addition, the discharge must “significantly affect the chemical, physical, and biological integrity” of the receiving waters. Plaintiffs speculate there may be

significant effects. This is insufficient to require an NPDES permit. Moreover, the County disagrees. Finally, even if there are significant effects, it is not clear the County's UIC wells are the source of those effects.

Plaintiffs also request that the Court determine the number of days the County allegedly violated the CWA. Such a finding concerns the amount of the penalty and should not be considered at this phase of the litigation where Plaintiffs are solely seeking a liability determination. Further, the County disputes Plaintiffs' allegation that the County violated the CWA every day it discharged to the wells.

In light of the above genuine issues of material fact, Plaintiffs' Motion should be denied.

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be denied if there is a "genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56 (c)); see also Fed. R. Civ. P. 56(a). "[D]isputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The evidence and any inferences drawn therefrom "must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, 369 U.S. 654, 655 (1962).

III. SUMMARY JUDGMENT IS NOT APPROPRIATE BECAUSE THE COUNTY DISPUTES PLAINTIFFS' ALLEGATION THAT IT DISCHARGES POLLUTANTS INTO NAVIGABLE WATERS

Plaintiffs allege the County is liable based on a four-part inquiry: “[T]o establish defendant’s ‘liability under the Clean Water Act,’ plaintiffs must prove only that defendant has ‘(1) discharged a pollutant . . . ; (2) into navigable waters. . . ; (3) from a point source . . . ; (4) without a discharge permit’ regardless of the effect of those discharges on the receiving waters.” MSJ at 16. This inquiry is appropriate when there is a direct discharge to navigable waters. Here, the inquiry is more complex. The County disputes Plaintiffs’ allegation that it discharged into navigable waters under EPA’s proposed exclusion of groundwater from CWA regulation. Even under EPA’s prior CWA interpretation, whereby groundwater hydrologically connected to navigable waters was regulated on a case-by-case basis, the connection is too attenuated to require an NPDES permit.

A. The County’s Discharges Do Not Require an NPDES Permit Because Groundwater Is Not a Navigable Water Under the CWA

The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas” without further clarification. 33 U.S.C. § 1362(7). In cases of statutory ambiguity, deference to the agency interpretation is merited. Chevron, USA Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”); see

also Wash., Dep't of Ecology v. U.S.E.P.A., 752 F.2d 1465, 1469 (9th Cir. 1985) (“When a statute is silent or unclear with respect to a particular issue, we must defer to the reasonable interpretation of the agency responsible for administering the statute. By leaving a gap in the statute, Congress implicitly has delegated policy-making authority to the agency.” (citing Chevron)). In determining the meaning of navigable waters, the Ninth Circuit concurs that agency deference is appropriate: “By not defining further the meaning of ‘waters of the United States,’ Congress implicitly delegated policy-making authority to the EPA and the Corps, the agencies charged with the CWA’s administration.” S.F. Baykeeper v. Cargill Salt Div., 481 F. 3d 700, 704 (9th Cir. 2007).

EPA is currently undergoing a rulemaking to clarify the meaning of navigable waters under the CWA (“Proposed Rule”). The Proposed Rule unequivocally excludes groundwater from CWA jurisdiction: “The following are not ‘waters of the United States’ . . . Groundwater, including groundwater drained through subsurface drainage systems” See Request for Judicial Notice (“RJN”) ¶ 1, Ex. 21 (79 Fed. Reg. 22,188, 22,263 (Apr. 21, 2014)). Further emphasizing the groundwater exclusion, waters not traditionally considered navigable waters are classified as “other waters.” “[O]ther waters” are evaluated “[o]n a case-specific basis” to determine if they have a significant nexus to regulated waters. Id. at 22,263. However, EPA explains that “[w]aters and

features that are determined to be excluded . . . will not be jurisdictional under any of the categories in the proposed rule . . . even if they would otherwise satisfy the regulatory definition.” *Id.* at 22,193. Groundwater is therefore excluded *even if* it has a significant nexus to regulated waters. Instead, groundwater may serve as a conduit between “other waters” and navigable waters, but itself is not regulated. *See, e.g., id.* at 22,248 (“The hydrologic connectivity of ‘other waters’ to downstream waters occurs on a gradient and can include waters that have groundwater or occasional surface water connections . . .”).

As noted by Plaintiffs, “the County does not discharge wastewater directly into the ocean.” MSJ at 18. Rather, the County’s UIC wells “discharge directly into groundwater located beneath the facility.”¹ *Id.* Regardless of any hydrological connection to navigable waters, under EPA’s Proposed Rule, this groundwater is excluded from CWA jurisdiction. Accordingly, the Court should deny Plaintiffs’ Motion and dismiss this suit.

B. Even If Groundwater Hydrologically Connected to Navigable Waters May Be Regulated, a Genuine Issue of Material Fact Exists As to Whether the Connection Here Is Sufficient to Require an NPDES Permit

Prior to EPA’s Proposed Rule categorically excluding groundwater, groundwater hydrologically connected to navigable waters could be regulated

¹ The County’s UIC wells operate pursuant to UIC permits issued by the State of Hawaii and EPA. These same agencies would be responsible for issuing a NPDES permit for the County’s UIC wells, if a permit is required.

under the CWA on a case-by-case basis. As noted by the Court, “[w]hether a discharge of wastewater into an injection well qualifies as a discharge of pollutants into navigable waters depends on the circumstances.” Hawai’i Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2012 WL 3263093, at *2 (D. Haw. Aug. 8, 2012). In such cases, regulated discharges must have a direct and immediate connection to navigable waters and significant effects on the receiving navigable waters, a fact recognized by Plaintiffs.² Even under this prior interpretation of the CWA, the attenuated connection between the County’s UIC wells and navigable waters does not warrant issuance of an NPDES permit.

1. A Genuine Issue of Material Fact Exists As to Whether There is a Direct and Immediate Hydrological Connection Between the County’s UIC Wells and Navigable Waters

As an initial step, a direct and immediate hydrological connection must exist between discharges to the County’s UIC wells and navigable waters. Plaintiffs improperly assume a connection without consideration of whether the connection is direct and immediate.

² Despite referring to the inquiry before the Court as a “straightforward, threshold question,” Plaintiffs acknowledge that whether a discharge into injection wells falls under the CWA “depends on the circumstances” and requires consideration of whether the discharge has a significant effect on “the chemical, physical, and biological integrity” of the receiving waters. MSJ at 5, 19, 20.

a. ***An NPDES Permit May Be Required for Discharges to Groundwater Only When There Is a Direct and Immediate Hydrological Connection***

A hydrological connection between groundwater and navigable waters alone is insufficient to require an NPDES permit. Rather, the connection must be direct and immediate.

... EPA is proposing to make clear that *a* general hydrologic connection between *all* waters is not sufficient to subject the owner or operator of a point source to liability under the Clean Water Act. Instead, consistent with the case law, there must be information indicating that there is a “direct” hydrologic connection to the surface water at issue.

RJN ¶ 2, Ex. 22 (66 Fed. Reg. 2960, 3017 (Jan. 12, 2001)); see also RJN ¶ 3, Ex. 23 (63 Fed. Reg. 7858, 7881 (Feb. 17, 1998)) (“EPA interprets the CWA’s NPDES permitting program to regulate discharges to surface water via groundwater where there is a *direct and immediate hydrologic connection* . . . between the groundwater and the surface water.”) (emphasis added). EPA affirmed the need for a case-specific inquiry into the connection as recently as January 2012. RJN ¶ 4, Ex. 24 (EPA letter dated Feb. 13, 2012).

Various courts, including the Ninth Circuit, have followed EPA’s interpretation. See N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007) (finding a hydrological connection between a pond and nearby river where “a change in the water level in one *immediately affects* the water level in the

other.”) (emphasis added); Greater Yellowstone Coal. v. Larson, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) (affirming EPA’s finding of no direct discharge because of the significant time and distance required for pollutants to travel to surface water via groundwater); Ass’n Concerned Over Res. And Nature, Inc. v. Tenn. Aluminum Processors, No. 1:10-0084 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) (“[O]f those courts that find that CWA jurisdiction applies to groundwater, the groundwater must have a direct hydrologic connection to surface waters that are waters of the United States.”) (footnotes omitted).

b. *The Connection Between the County’s UIC Wells and Navigable Waters Is Not Direct and Immediate*

Any connection that may exist between the County’s UIC wells and navigable waters is not direct and immediate. The spatial and temporal distance between the wells and navigable waters is too great to be direct and immediate. Moreover, the discharged water is transformed as it moves from the wells through groundwater to navigable waters, precluding any finding of a “direct” connection.

A 2013 Lahaina Groundwater Tracer Study (“Tracer Study”) found that treated water (“effluent”) discharged from the County’s UIC wells mixes with groundwater and is transported to the near-shore waters off of Kahekili Beach, approximately 0.5 miles southwest of the LWRF. Paulsen Dec., ¶¶ 11, 25. The Tracer Study identified the area of discharge as two small and adjacent clusters of submarine springs or seeps as well as a diffuse discharge. Id. at ¶ 12. On average,

the groundwater-effluent mixture took between 14 to 16 months to reach the seeps.

Id. at ¶ 25.

Due to this spatial and temporal distance, effluent entering the UIC wells reaches navigable waters in an altered state. The Tracer Study found a “significant loss of nitrogen” caused by reactions occurring as the groundwater-effluent mixture travels away from the wells. Id. at ¶ 26. Mean concentrations of total nitrogen decreased roughly fivefold as the UIC discharge combines with groundwater and travels to the near-shore waters off of Kahekili Beach. Id. at ¶ 27. Phosphorus, on the other hand, is “enriched” during transport, with mean concentrations increasing roughly 2.7-fold between injection into the UIC well and discharge at the seeps. Id. at ¶¶ 26-27. As discussed below, these changes do not significantly affect the near-shore waters off of Kahekili Beach. However, these alterations demonstrate that the injected effluent has different chemical properties from the groundwater-effluent mixture discharged from the seeps. Hence, it is not the same material, eliminating any claim of a “direct” discharge.

The agencies agree there is an “indirect” connection between the County’s UIC wells and navigable waters: “it appears the facility’s injected treated effluent will directly enter State groundwater and *indirectly* enters the Pacific Ocean” RJN ¶ 5, Ex. 25 (DOH Letter dated Feb. 8, 2011) (emphasis added). Given the significant time and distance required for the discharge to reach navigable waters,

alteration of the groundwater/effluent mixture, and the agencies' own finding, the connection between the County's UIC wells and navigable waters is not direct and immediate. Accordingly, Plaintiffs' Motion should be denied.

2. A Genuine Issue of Material Fact Exists As to Whether There Is a Significant Nexus to Navigable Waters

In addition to a direct and immediate hydrological connection, the County's discharges to groundwater must "significantly affect the chemical, physical, and biological integrity" of navigable waters. Rapanos v. U.S., 547 U.S. 715, 780 (2006). Plaintiffs allege the discharges "*can* have a significant effect" on navigable waters. MSJ at 22, fn. 3 (emphasis added). This is insufficient to bring the discharges under CWA jurisdiction. Moreover, the County disputes that its discharges result in significant effects to navigable waters.

a. Any Effects from the Connection Must Be Significant

In Rapanos, the Supreme Court issued a 4-4-1 plurality opinion on the scope of the CWA's jurisdiction over wetlands, with a "significant nexus" test described in Justice Kennedy's opinion. The significant nexus test is the "controlling rule of law" in the Ninth Circuit. Healdsburg, 496 F.3d at 999-1000. A significant nexus exists if a water body "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Rapanos, 547 U.S. at 780. "[S]peculative or insubstantial [impacts] fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Id. The

existence of a hydrological connection does not necessarily satisfy the significant nexus test. As Justice Kennedy explained, a “mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.” Id. at 784-85.

EPA’s Proposed Rule seeks to align the definition of navigable waters with Rapanos. RJN ¶ 1, Ex. 21 (79 Fed. Reg. at 22,213, 22,261). Agreeing with Justice Kennedy that a “mere hydrologic connection” is insufficient, “[t]he proposed definition recognizes that not all waters have this requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional.” Id. at 22,195, 22,213. By rule, “[o]n a case-specific basis, other waters” must have a significant nexus to navigable waters, meaning the water “significantly affects the chemical, physical, or biological integrity” of the navigable water. Id. at 22,263. Recognizing that even Rapanos “resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA,” the Proposed Rule aims to “minimiz[e] the number of case-specific determinations.” Id. at 22,188. Accordingly, the Proposed Rule limits the significant nexus test to “other waters” and does not apply to excluded waters such as groundwater. Under

both the Proposed Rule and EPA's prior reading of the CWA, a water body not clearly regulated must have a significant nexus to navigable waters.

i. ***Cases Cited by Plaintiffs Do Not Accurately Portray the Law***

Prior to Rapanos, courts were split about the reach of the CWA, including whether it encompassed groundwater. To support their allegation that the County's discharge "warrants protection as a navigable water," Plaintiffs cite a number of cases holding that groundwater adversely affecting navigable waters is subject to the CWA. MSJ at 21 (internal quotation marks and citations omitted). Plaintiffs ignore the discussion in each of these cases concerning the division among courts. Tenn. Aluminum Processors, 2011 WL 1357690, at *16 (M. ("Courts differ on whether groundwater is regulated under the CWA."); Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D. P.R. 2009) ("There is, in fact, a split among courts"); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001) ("The courts are split, however, on the issue of whether the discharge of pollutants into groundwater which find their way into and affect the waters of the United States are subject to CWA regulation."); Wash. Wilderness Coal. V. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("[Courts] are split, however, on the present question of whether tributary groundwater, which is naturally connected to surface water, is subject to CWA regulation."); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319

(S.D. Iowa 1997) (“Whether the legal concept of navigable waters includes groundwaters connected to surface waters is an unresolved question.”) (citations omitted); Sierra Club v. Colorado Ref. Co., 838 F. Supp. 1428, 1433 (D. Colo. 1993) (“In sum, case law conflicts as to whether ‘navigable waters’ in the Clean Water Act encompass groundwater.”).

Plaintiffs also ignore the multitude of decisions that found the CWA does *not* extend to groundwater. See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.”); Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1318 (D. Or. 1997) (“[T]he law as written, as intended by Congress . . . does not regulate even hydrologically-connected groundwater.”).

Post-Rapanos cases cited by Plaintiffs recognized the role of the significant nexus test. Despite Plaintiffs’ inference, Healdsburg did not find “as a matter of law, the groundwater into which defendant’s injection wells discharge ‘warrants protection as a “navigable water” under the [Clean Water Act].’” MSJ at 21. Rather, the Ninth Circuit applied the significant nexus test to find that a pond with groundwater and occasional surface water connections “significantly affects the physical, biological and chemical integrity of the [nearby] Russian River, and

ultimately warrants protection [of the pond] as a ‘navigable water’ under the CWA.” Healdsburg, 496 F. 3d at 1001. Consistent with the Proposed Rule, where groundwater may be a conduit between “other waters” and navigable waters, the Ninth Circuit explained that an underground hydraulic connection established a “physical connection[]” because of the immediate effect of the pond on the river. Healdsburg, 496 F.3d at 1000; RJN ¶ 1, Ex. 21 (79 Fed. Reg. at 22,248). Chemical and biological effects on the river were also present. Healdsburg at 1000-01.

The other post-Rapanos decisions cited by Plaintiffs similarly required factual inquiries into the degree of connectivity and effects on receiving waters. In Tennessee Aluminum, the court explained that “groundwater must have a direct hydrologic connection to surface waters” to be regulated under the CWA. 2011 WL 1357690, at *17. The court denied defendants’ motion to dismiss because factual inquiries into the connection were required. Id. at 18. In Hernandez, following the First Circuit’s reasoning in Town of Norfolk v. U.S. Army Corp of Engr’s, 968 F 2d 1438 (1st Cir. 1992) where an “ecological judgment” concerning a groundwater and surface water connection was required, the court held “there is a factual determination to be made as to the relationship between the groundwater . . . and the surface waters . . . , which may lead the fact finder to conclude that contamination of the groundwater has an adverse impact on waters of the United States.” 599 F. Supp. 2d at 179, 181.

b. *The Effects Here Are Insufficient to Find a Significant Nexus to Navigable Waters*

Even under EPA's prior interpretation of the CWA, the connection between the County's wells and surface water is insufficient to require an NPDES permit. Moreover, Plaintiffs do not ask the Court to find there are significant effects. Rather, Plaintiffs ask the Court to grant summary judgment because the groundwater into which the County's UIC wells discharge "*can* have a substantial effect" on the receiving waters. MSJ at 22, fn. 3 (emphasis added). This is insufficient. Though EPA proposes to exclude groundwater as a navigable water, under its prior CWA interpretation, the County's discharges will "possess the requisite nexus . . . [only if they] significantly affect the chemical, physical, and biological integrity" of the receiving navigable waters. Rapanos, 547 U.S. at 717. The County disputes any allegation by Plaintiffs that a significant nexus exists.

Plaintiffs' expert, Dr. Adina Paytan, maintains that discharges from the seeps have an adverse impact on chemical and physical characteristics of the near-shore waters off of Kahekili Beach. See Declaration of Adina Paytan, Ph.D. ("Paytan Declaration") at ¶ 5 ("the continuous discharge from these seeps substantially alters the chemical and physical characteristics of the receiving ocean waters"). Plaintiffs' expert, Dr. Jennifer Smith, maintains that the discharge is negatively impacting the coral reef off of Kahekili Beach. Declaration of Jennifer E. Smith, Ph.D. ("Smith Declaration") at ¶ 39 ("the groundwater discharging

through the nearshore seeps at Kahekili has a profound effect on the biological integrity of the marine environment, including the coral reef ecosystem”), ¶ 40 (“the substantial quantities of LWRF effluent that are discharging from the nearshore seeps with natural groundwater are having a significant, adverse effect on Kahekili’s coral reefs.”)

The County’s experts disagree. Dr. Paulsen maintains the discharges at the seeps do not “significantly affect the chemical, physical, and biological integrity of the near-shore waters off of Kahekili Beach.” Paulsen Dec., ¶ 51. Similarly, Dr. Dollar believes “the coral reef in the near-shore waters off of Kahekili Beach is healthy, evidencing the fact that discharges from the NSG [North Seep Group] and SSG [South Seep Group] do not significantly affect the biological integrity of the nears-shore waters off of Kahekili Beach.” Declaration of Steven Dollar, Ph. D., in Support of the County of Maui’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment (“Dollar Declaration”), ¶ 58.

To support their allegations of significant effects, Plaintiffs’ experts rely on sampling data collected from piezometers located in the seeps (allowing collection of samples of seep material, with minimal or no mixing with ocean water). Dollar Dec., ¶ 14. Drs. Paulsen and Dollar assert that is inappropriate to rely on this seep data to demonstrate any significant effects because measurements at the seeps fail to account for mixing of the seep discharge with ocean water. Paulsen Dec., ¶¶ 23,

38; Dollar Dec., ¶ 12-13. Mixing throughout the ocean water column occurs as the seep discharge enters the ocean. Paulsen Dec., ¶¶ 34-37; Dollar Dec., ¶ 13.

Winds, currents, tides, and waves further disperse the discharge from the seeps, transporting the discharge away from the seep areas. Paulsen Dec., ¶¶ 35, 40; Dollar Dec., ¶ 13. Accounting for mixing, the discharges at the seeps do not significantly affect the chemical, physical, and biological integrity of near-shore waters off of Kahekili Beach. Paulsen Dec., ¶¶ 22, 41; Dollar Dec., ¶¶ 10, 12-13.

Both Drs. Paulsen and Dollar dispute Plaintiffs' experts' opinions that seep discharge adversely affects nutrient concentrations, pH, temperature, dissolved oxygen content, or salinity in the near-shore waters off of Kahekili Beach. Paulsen Dec., ¶¶ 22, 23, 44, 46, 48-49; Dollar Dec., ¶¶ 17-20. As Dr. Dollar explains, concentrations of nutrients in the water columns of the seeps are similar to concentrations at the various control locations measured by the Hawaii Department of Health. Dollar Dec., ¶ 17. As Dr. Paulsen explains, the concentrations of nutrients measured at the seeps are similar to concentrations calculated at other West Maui locations. Paulsen Dec., ¶¶ 31, 42. These similarities hold true for measurements of pH, temperature, dissolved oxygen content, and salinity. Paulsen Dec., ¶¶ 44, 46, 48-49; Dollar Dec., ¶¶ 18-20. Any effects of the seep discharge are therefore attenuated, particularly given the small area of the seeps compared to

the entire reef. Paulsen Dec., ¶ 14 (“the reef is more than 200,000 times the total area of the individually measured seeps”), ¶ 39.

Dr. Smith relies heavily on the $\delta^{15}\text{N}$ concentrations measured at the seeps to support her opinion that seep discharges are adversely impacting the near-shore waters off of Kahekili Beach. Smith Dec. ¶¶ 15-22. However, as both Drs. Paulsen and Dollar explain, $\delta^{15}\text{N}$ concentrations are not relevant in evaluating the significant chemical, physical, and biological effects of seep discharges. Paulsen Dec., ¶ 28; Dollar Dec., ¶¶ 52-54. There are two stable isotopes of nitrogen: ^{14}N and ^{15}N . Dollar Dec., ¶ 52. The $\delta^{15}\text{N}$ value simply reflects the ratio between the two isotopes. Paulsen Dec., ¶ 28; Dollar Dec., ¶ 52. All nitrogen compounds contain both isotopes, with the concentrations varying depending on the material being analyzed. Dollar Dec., ¶¶ 52, 54. For example, the $\delta^{15}\text{N}$ value of fertilizer is low, while the $\delta^{15}\text{N}$ value of sewage is high. Id. Thus, the $\delta^{15}\text{N}$ value measured at the seeps simply confirms that some portion of the discharge is derived from effluent – a fact upon which all four experts agree. If anything, the $\delta^{15}\text{N}$ value measured at the seeps confirms the efficacy of the treatment occurring at the LWRF. Paulsen Dec., ¶ 28. Contrary to any suggestion by Dr. Smith, a high $\delta^{15}\text{N}$ value does not necessarily reflect any adverse environmental impact. Paulsen Dec., ¶ 28; Dollar Dec., ¶ 54.

Dr. Dollar's inspection of the reef on April 4, 2014 confirms that discharges at the seeps have not significantly affected the health of the reef. As Dr. Dollar explains, the LWRF has been operating for approximately 37 years, with no progressive decrease in discharge volume. Dollar Dec., ¶¶ 11, 41. Any adverse effects from this long-term operation would be evident as a gradient over the reef – with areas of the reef closest to the seeps being in worse condition than areas at a greater distance. Dollar Dec., ¶ 47. Dr. Dollar's recent inspection confirms that “all reef areas appeared essentially pristine, i.e., no observed bleached, diseased, or otherwise stressed corals.” Dollar Dec., ¶ 44. Exhibits accompanying Dr. Dollar's Declaration, including April 2014 photos, corroborate his statements – the coral and other marine life are flourishing. Dollar Dec., Ex. 4, 6-12.

Dr. Dollar's inspection also illustrates the inaccuracies in Dr. Smith's statements suggesting “fleshy seaweeds” are dominant and overtaking the reef. Smith Dec., ¶ 13; Dollar Dec., ¶ 46 (There are “no areas of substantial growth of macro-algae in response to the discharge from the seeps. While numerous species of marine algae were observed on the reef, all of these plants were small in size and rare in abundance.”). Dr. Dollar's observations were confirmed by recent (2012) studies in the area. Dollar Dec., ¶ 46. Contrary to Dr. Smith's assertions (Smith Dec., ¶ 22), the nutrient input threat is nothing more than theoretical.

Whether the discharge from the LWRF UIC wells has a significant effect on the near-shore waters off of Kahekili Beach is an essential inquiry in this case. The County's experts and Plaintiffs' experts disagree – the County's maintains it does not, and Plaintiffs' say it may. Given these conflicting opinions, there is a genuine dispute of material fact and Plaintiffs' Motion should be denied.

C. Even If There Are Significant Effects on Navigable Waters, a Genuine Issue of Material Fact Exists As to Whether the County's UIC Wells Are the Source of Those Effects

As outlined above, the County disputes that any discharge at the seeps significantly affects the chemical, physical, and biological integrity of the near-shore waters off of Kahekili Beach. Nonetheless, “[t]here are multiple sources of nutrients entering the West Maui near-shore waters in addition to effluent from the LWRF. Any evaluation of the effects of nutrients on the chemical, physical, and biological integrity of the near shore waters off of Kahekili Beach should consider these additional sources.” Paulsen Dec., ¶ 20. Cesspools, septic tank systems, golf courses, fertilizers, and urban runoff are all examples of additional sources. Paulsen Dec., ¶ 29.

Terrestrial or surface waters draining to the ocean may be a significant source of nutrients to the near-shore waters of West Maui's coastline. Paulsen Dec., ¶ 32. For example, based on sampling from the Tracer Study, mean nitrogen concentrations of terrestrial water samples were twice as high as concentrations at

the seeps. Furthermore, because the concentration of nutrients in the near-shore waters off of Kahekili Beach are similar to the nutrient concentrations along the West Maui coastline, it is not possible to determine which nutrient source(s), if any, are responsible for any significant effect. Paulsen Dec., ¶ 31. Neither the Smith nor Paytan Declarations acknowledge these additional sources. Paulsen Dec., ¶ 33. The Tracer Study acknowledged them, but failed to consider them. Paulsen Dec., ¶ 33, Ex. 17 (Final Report 3-8) (“We note that earlier studies identified surface runoff as an important coastal nutrient source (Tetra Tech, 1993). Our study did not quantify these inputs.”).

Without consideration of these additional sources of nutrients known to discharge to coastal waters, there is a genuine dispute of material fact as to whether the discharges from the County’s UIC wells are the cause of any significant effects in the near-shore waters off of Kahekili Beach. Accordingly, Plaintiff’s Motion should be denied.

IV. PLAINTIFFS’ ALLEGATIONS REGARDING THE NUMBER OF DAYS OF ALLEGED VIOLATIONS ARE IRRELEVANT TO DETERMINING LIABILITY

Plaintiffs state that “this Court need not resolve the parties’ disputes about the seriousness of defendant’s violations, which are relevant only to the ‘amount of [the] civil penalty’ defendant should pay, not its liability.” MSJ at 2 (citing 33 U.S.C. §1319(d)). Yet Plaintiffs ask the Court to find that the County violated the

CWA “every day that it has discharged wastewater into Injection Wells 3 or 4 and that those violations will continue until defendant obtains and complies with an NPDES permit for such discharges.” Id. at 2-3. Despite Plaintiffs’ attempt to portray this as a question of liability, the number of days of alleged violations directly concerns the “amount of [the] civil penalty.”

There is no need for the Court to make this determination now. The CWA provides that a civil penalty finding requires a consideration of various factors:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. §1319(d) (footnote omitted). Because there has been only limited discovery in this matter, the information required to make these factual determinations is not yet available. Moreover, a ruling concerning the penalty is premature until there is a finding of liability. Furthermore, the County disputes Plaintiffs’ allegation that the County violated the CWA every day it discharged to the County’s wells. The Court should therefore defer its determination concerning the amount of any penalty at this time.

V. CONCLUSION

Plaintiffs allege “the undisputed facts in this case compel a finding that defendant’s discharges of pollutants . . . have violated, and continue to violate, the Clean Water Act.” MSJ at 26. The County disputes this. Plaintiffs’ Motion should be denied because there are genuine issues of material fact as to whether groundwater is regulated under the CWA. Even if groundwater may be regulated under certain circumstances, genuine issues of material fact exist as to whether there is a direct and immediate hydrological connection between the County’s UIC wells and navigable waters, and if so, whether the nexus is sufficient to fall within the jurisdiction of the CWA. Finally, there are genuine issues of material fact as to whether the County violated the CWA every day it discharged to the UIC wells. Given these genuine issues of material fact, summary judgment should be denied.

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