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)
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

Attorneys for Defendant
COUNTY OF MAUI

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

MEMORANDUM IN SUPPORT OF DEFENDANT COUNTY OF MAUI'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, STAY

TABLE OF CONTENTS

I. INTRODUCTION 1
II. BACKGROUND 2
A. Factual and Procedural History 2
B. CWA Authority 3
III. LEGAL STANDARD 5
IV. ANALYSIS 6
A. The Primary Jurisdiction Doctrine Applies Because the Question Before the Court Entails Fact-Specific Inquiries Requiring Technical Expertise 7
1. The Question Before the Court Requires Extensive Fact-Specific Inquiries 7
2. Agency Deference Is Appropriate Because the Factual Inquiries Will Require Technical Expertise 11
B. The Primary Jurisdiction Doctrine Applies Because the Question Before the Court Is Also Before the Agencies 14
C. There Is No Injury to Plaintiffs in Deferring to the Agencies 17
V. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Ass'n to Protect Hammersley, ELD and Totten Inlets v. Taylor Res., Inc.,
299 F.3d 1007 (9th Cir. 2002) 16

Clark v. Time Warner Cable,
523 F.3d 1110 (9th Cir. 2008) 11

Conn. Fund for the Env't v. Job Plating Co., Inc.,
623 F. Supp. 207 (D. Conn. 1985).....16

Crown Simpson Pulp Co. v. Costle,
445 U.S. 193 (1980).....19

Deltona Corp. v. Alexander,
682 F.2d 888 (11th Cir. 1982) 12

Far East Conference v. U.S.,
342 U.S. 570 (1952).....11

Friends of Santa Fe Cnty. v. LAC Minerals, Inc.,
892 F. Supp. 1333 (D.N.M. 1995).....15, 16

Headwaters, Inc. v. Talent Irrigation Dist.,
243 F.3d 526 (9th Cir. 2001) 4

Heliotrope Gen., Inc. v. Ford Motor Co.,
189 F.3d 971 (9th Cir. 1999) 5

Indus. Commc'n Sys. v. Pac. Tel. & Tel. Co.,
505 F.2d 152 (9th Cir. 1974) 6

Lyon v. Gila River Indian Cmty.,
626 F.3d 1059 (9th Cir. 2010) 11

McClellan Ecological Seepage Situation v. Weinberger,
707 F. Supp. 1182 (E.D. Cal. 1988) 4

Montgomery Envtl. Coal. Citizens Coordinating Comm. of Friendship Heights v. Wash. Suburban Sanitary Comm'n,
607 F.2d 378 (D.C. Cir. 1979).....14, 15, 16

N. Cal. River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007).....9, 10

Peters v. Lexington Ins. Co.,
836 F. Supp. 2d 1117 (D. Haw. 2011).....5

Rapanos v. U.S.,
547 U.S. 715 (2006).....4, 9, 10

Ryan v. Chemlawn Corp.,
935 F.2d 129 (7th Cir. 1991).....15

SCD RMA, LLC v. Farsighted Enter., Inc.,
591 F. Supp. 2d 1141 (D. Haw. 2008).....5

S.F. Baykeeper v. Cargill Salt Div.,
481 F.3d 700 (9th Cir. 2007).....16

Student Pub. Interest Research Group of N.J. v. Monsanto Co.,
600 F. Supp. 1479 (D.N.J. 1985).....16

Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.,
307 F.3d 775 (9th Cir. 2002).....6

Town of Norfolk and Town of Walpole v. U.S. Army Corps of Eng'rs,
968 F.2d 1438 (1st Cir. 1992).....12

Waterkeeper Alliance v. U.S. E.P.A.,
399 F.3d 486 (2nd Cir. 2005).....8

STATUTES

33 U.S.C. § 1311(a).....3

33 U.S.C. § 1341(a)(1).....14

33 U.S.C. § 1342.....4

33 U.S.C. § 1342(b).....4

33 U.S.C. § 1342(d)(2).....5

33 U.S.C. § 1362(7) 3

33 U.S.C. § 1362(12) 3

33 U.S.C. § 1365.....16

H.R.S. § 91-14.....18

H.R.S. § 342D-12.....18

OTHER AUTHORITIES

40 C.F.R. § 124.10(a)(ii).....18

73 Fed. Reg. 70418 (Nov. 20, 2008) 8

48 Fed. Reg. 15662 (Apr. 12, 1983) 4

56 Fed. Reg. 64876 (Dec. 12, 1991).....4

63 Fed. Reg. 7858 (Feb. 17, 1998) 8

66 Fed. Reg. 2960 (Jan. 12, 2001).....8, 10, 12

Fed. R. Civ. P. 12(b) 5

Fed. R. Civ. P. 12(c).....5

Fed. R. Civ. P. 19(a)(1)(A) 17

Fed. R. Civ. P. 19(a)(1)(B) 17

H.A.R.§ 11-55-06(1).....5

H.A.R.§ 11-55-06(4) 5

H.A.R.§ 11-55-09(b).....18

H.A.R.§§ 11-55-09(c)(7)(B).....18

H.A.R.§ 11-55-13(a).....18

H.A.R.§ 11-55-13(c).....18

H.A.R.§ 11-55-13(d).....18

H.A.R. § 11-55-19(b).....12

H.A.R.§ 11-55-25.....5

H.A.R.§ 11-55-36.....18

I. INTRODUCTION

The County of Maui ("County") is renewing its request to dismiss or stay this action based on the doctrine of primary jurisdiction. In 2012, the Court denied the County's motion to dismiss because there was insufficient evidence to "demonstrate that the issues involved in this proceeding are within the jurisdiction of and presently under consideration by the EPA." Order Denying Motion to Dismiss at 10 ("2012 Order"). The Court concluded by noting that "[i]n rejecting the primary jurisdiction doctrine argument . . . , the court is not foreclosing the possibility that it may deem the doctrine applicable on a different record." Id.

The record is now different. When the Court made its earlier ruling, the County had not yet applied for a National Pollutant Discharge Elimination System ("NPDES") permit for discharges from its Lahaina Wastewater Treatment Facility ("Lahaina Facility"). The County has since applied, and the Hawaii Department of Health ("DOH") and the United States Environmental Protection Agency ("EPA") are currently considering the County's permit application.[1]

Plaintiffs'[2] sole claim is that the County needs an NPDES permit for discharges from its Lahaina Facility's underground injection control ("UIC")

[1] While the County disputes that a permit is required, it nonetheless submitted an application to allow the regulatory agencies charged with overseeing the NPDES program to evaluate and decide this critical permit issue.

[2] "Plaintiffs" are Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation, and West Maui Preservation Association.

wells. First Amended Complaint ("FAC") ¶ 64. Plaintiffs maintain that the County's UIC wells discharge to groundwater that is hydrologically connected to waters of the United States, violating the federal Clean Water Act ("CWA") and state law prohibitions against unpermitted discharge of pollutants into waters of the United States. Id. Contrary to Plaintiffs' allegations, the mere existence of a hydrological connection between groundwater and surface water does not automatically warrant issuance of an NPDES permit. Rather, any permit decision depends on a technical evaluation of the unique facts associated with the discharge.

In light of the County's pending permit application, and the expertise needed to conduct detailed fact-specific inquiries into whether an NPDES permit is required for discharges to groundwater that is hydrologically connected to surface water, the County respectfully renews its request that the Court dismiss this action on primary jurisdiction grounds, or in the alternative, grant a stay pending the agencies' final decision on the County's permit application.

II. BACKGROUND

A. Factual and Procedural History

The County has been discharging at its Lahaina Facility through UIC wells permitted by both DOH and EPA for more than twenty years. These permits place a host of restrictions on the County's UIC discharges to groundwater, including specific limitations on the quality of the material that can be injected into the wells.

Plaintiffs do not allege that the County has violated any terms or conditions of its UIC well permits.

Plaintiffs filed their operative FAC on August 9, 2012. Plaintiffs allege that the County's discharges to its UIC wells constitute an unpermitted discharge to surface waters via hydrologically-connected groundwaters in violation of the federal CWA and applicable state law. See FAC ¶ 64.

In 2012, the Court denied the County's primary jurisdiction motion because there was insufficient evidence the agencies were considering the need for an NPDES permit at the Lahaina Facility's wells. 2012 Order at 10. The Court invited the County to renew its motion in the event of changed facts. Id.

Subsequent to the Court's decision, the County submitted an NPDES permit application to DOH for its Lahaina Facility UIC well discharges. See Request for Judicial Notice ("RJN") ¶ 1, Ex. A (County NPDES Permit Application). DOH promptly forwarded the County's application to EPA. RJN ¶ 2, Ex. B (DOH letter dated Mar. 6, 2014). DOH and EPA are currently evaluating the County's application. Id.

B. CWA Authority

The CWA prohibits the unpermitted discharge of pollutants into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The term "navigable waters" is defined to mean "waters of the United States." Id. § 1362(7). "Waters of the United

States" has been interpreted to "include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Rapanos v. U.S., 547 U.S. 715, 732-33 (2006). "Waters of the United States" does not include groundwater. RJN ¶ 3, Ex. C (56 Fed. Reg. 64876, 67892 (Dec. 12, 1991)) ("the Act does not grant EPA authority to regulate pollution of groundwaters"); McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1193-94 (E.D. Cal. 1988) ("Congress did not intend to require NPDES permits for discharges of pollutants to isolated groundwater.") (vacated on other grounds).

The CWA allows the discharge of pollutants into navigable waters under an NPDES permit. 33 U.S.C. § 1342. "Given this statutory framework, the Ninth Circuit has stated that a defendant must obtain an NPDES permit when it '(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source.'" 2012 Order at 5 (citing Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001)).

As Hawaii obtained authority to issue NPDES permits on November 28, 1974,[3] DOH evaluates the data and makes the permitting decision in the first instance. EPA retains oversight authority. DOH is required to transmit NPDES

[3] See RJN ¶ 4, Ex. D (48 Fed. Reg. 15662 (Apr. 12, 1983)); 33 U.S.C. § 1342(b).

permit applications to EPA and EPA, in turn, provides DOH with notice of permit application deficiencies. H.A.R.§ 11-55-06(1), (4). EPA can prohibit DOH from issuing an NPDES permit until any EPA-noted deficiencies are addressed. H.A.R.§ 11-55-06(4). EPA also retains the right to veto any DOH-proposed NPDES permits. H.A.R.§ 11-55-25; 33 U.S.C. § 1342(d)(2).

III. LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure states that, "[a]fter the pleadings are closed – but early enough not to delay the trial – a party may move for judgment on the pleadings." Generally, in ruling on a Rule 12(c) motion, a court is limited to the pleadings. SCD RMA, LLC v. Farsighted Enter., Inc., 591 F. Supp. 2d 1141, 1144 (D. Haw. 2008). When the court relies on matters outside of the pleadings, it usually treats the motion as one for summary judgment. Id. at 1144-45 (citing Fed. R. Civ. P. 12(b)-(c)). "Courts have held, however, that when adjudicating a Rule 12(c) motion, courts may consider matters subject to judicial notice without converting the motion into one for summary judgment." Peters v. Lexington Ins. Co., 836 F. Supp. 2d 1117, 1120 (D. Haw. 2011) (citing Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 n. 18 (9th Cir. 1999) ("When considering a motion for judgment on the pleadings, this court may consider facts that are contained in materials of which the court may take judicial notice.") (internal quotation marks omitted)).

In its 2012 Order, the Court indicated that "[u]nder the primary jurisdiction doctrine, courts may stay proceedings when issues involved in the proceedings are within the jurisdiction of and under consideration by an administrative agency with extensive regulatory powers over the matter and the parties involved." Order Denying Motion to Dismiss at 8, citing Indus. Commc'n Sys. v. Pac. Tel. & Tel. Co., 505 F.2d 152, 156 (9th Cir. 1974) and Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc., 307 F.3d 775, 780 (9th Cir. 2002) ("[the primary jurisdiction doctrine] is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts.").

IV. ANALYSIS

The County's NPDES permit application is currently pending before DOH and EPA. The question before the Court – whether an NPDES permit is required for UIC well discharges to groundwater that may ultimately discharge to "waters of the United States" – entails highly technical fact-specific inquiries. Courts tend to invoke the primary jurisdiction doctrine where, as here, a case involves a complex question that is also concurrently before the regulatory agency. In light of these circumstances, the Court should invoke the primary jurisdiction doctrine to allow the agencies to determine whether an NPDES permit is required at the County's Lahaina Facility.

A. The Primary Jurisdiction Doctrine Applies Because the Question Before the Court Entails Fact-Specific Inquiries Requiring Technical Expertise

The primary jurisdiction doctrine applies where, as here, the question before the court requires fact-specific inquiries that are best addressed by the agencies possessing specialized expertise in the subject matter.

1. The Question Before the Court Requires Extensive Fact-Specific Inquiries

At issue is whether the County needs an NPDES permit for UIC discharges to groundwater that *may* seep into the ocean. EPA and legal authority indicate that this entails a factual inquiry into whether a hydrological connection exists, and if so, the degree of connectivity and potential effects of such a connection.

EPA has unequivocally stated that whether a hydrologic connection exists between groundwater and surface water such that an NPDES permit is required is a fact-specific inquiry.

> Whether or not such a hydrological connections exists, and the need for a National Pollutant Discharge Elimination System (NPDES) permit for any given source is highly dependent on the facts and circumstances surrounding each permitting situation. A number of factors are relevant in evaluating the connection between ground water and surface water, such as geology, flow and slope. *A fact specific evaluation could support a determination that an NPDES permit is required or a determination that one is not required*.

RJN ¶ 5, Ex. E (EPA letter dated Feb. 13, 2012) (emphasis added); see also RJN ¶ 6, Ex. F (73 Fed. Reg. 70418, 70420 (Nov. 20, 2008) (citing approval in Waterkeeper Alliance v. U.S. E.P.A., 399 F.3d 486 (2nd Cir. 2005))) ("requirements limiting the discharge of pollutants to surface water via groundwater that has a direct hydrologic connection to surface water should be addressed on a site-specific basis.").

Even assuming a hydrological connection exists between the County's UIC well discharges to groundwater and surface water, further inquiry is needed to determine whether the degree of connection is sufficient so as to require an NPDES permit. According to EPA, there must be a *direct and immediate connection* between the groundwater and surface water.

> The time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site specific factors, such as geology, flow, and slope. . . .Thus, 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 ¶ 7, Ex. G (66 Fed. Reg. 2960, 3017 (Jan. 12, 2001)); see also RJN ¶ 8, Ex. H (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. However, EPA also believes that this use of NPDES permits is highly dependent on the facts surrounding each permitting situation.") (emphasis added); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007) ("There is also an underground hydraulic connection between the two bodies, so a change in the water level in one *immediately affects* the water level in the other.") (emphasis added).

Recent U.S. Supreme Court and Ninth Circuit case law makes clear that the reach of the CWA is determined on a case-specific basis that requires consideration of the impacts of any connection. 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 717 (internal quotation marks omitted). The existence of a hydrological connection does not necessarily satisfy the significant nexus test. Rather, 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 concurs. See RJN ¶ 7, Ex. G (66 Fed. Reg. at 3017) ("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.").

In Healdsburg, the Ninth Circuit further clarified that a water body not directly adjacent to a navigable waterway, is "regulable under the CWA only if there is a significant nexus between the [water body] and the navigable waterway." 496 F.3d at 1000. Applying the significant nexus test, the Ninth Circuit evaluated the physical, chemical, and biological impacts of a pond on a nearby river. 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. Chemical and biological impacts to the river were also present, evidenced by increased chloride levels and the reliance of wildlife on the pond and related ecosystem, respectively. Id. at 1000-01.

Thus, if a connection is found to exist, two highly technical fact-specific inquiries must be resolved before a decision can be made on whether the County's UIC permitted discharge requires an NPDES permit: (1) whether a direct and immediate hydrological connection exists between the Lahaina Facility's UIC groundwater discharges and coastal waters, and if so, (2) whether there are

significant physical, chemical and biological impacts as a result of the connection to warrant issuance of an NPDES permit.

2. Agency Deference Is Appropriate Because the Factual Inquiries Will Require Technical Expertise

Here, where highly technical factual inquiries must be made to determine whether the County needs an NPDES permit, agency expertise merits deference.

Deference is warranted when courts are confronted with factual inquiries requiring the specialized expertise typically possessed by the agencies. "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Far East Conference v. U.S., 342 U.S. 570, 574 (1952) (dismissing case when Maritime Board should have made the decision in the first instance); see also Lyon v. Gila River Indian Cmty., 626 F.3d 1059, 1075 (9th Cir. 2010) (district court should have dismissed on primary jurisdiction grounds as the Bureau of Indian Affairs was currently reviewing whether a road was an "Indian Reservation Road," which was "a particularly complicated issue that Congress has committed to a regulatory agency.") (internal citations omitted); Clark v. Time Warner Cable, 523 F.3d 1110, 1115-16 (9th Cir. 2008) (district court's dismissal of a claim based on primary jurisdiction was appropriate when the court's decision could have jeopardized the uniform administration of the FCC's regulatory scheme).

The determination as to whether a permit is required here will require specialized expertise. As EPA explained:

> The determination of whether a discharge to ground water in a specific case constitutes an illegal discharge to waters of the U.S. if unpermitted is a fact specific one. The general jurisdictional determination by EPA that such discharges can be subject to regulation under the CWA is a determination that involves an ecological judgment about the relationship between surface waters and ground waters.

RJN ¶ 7, Ex. G (66 Fed. Reg. at 3017); see also RJN ¶ 5, Ex. E (EPA letter dated Feb. 13, 2012); Town of Norfolk and Town of Walpole v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1451 (1st Cir. 1992) (holding that since a determination about whether a permit was required "ultimately involves an ecological judgment about the relationship between surface waters and groundwaters, it should be left in the first instance to the discretion of the EPA and the Corps."); Deltona Corp. v. Alexander, 682 F.2d 888, 893-94 (11th Cir. 1982) (affirming the district court's deference to the agency regarding a wetlands permit because "[e]ven appellant concedes that the decision will require extensive expert testimony . . . ; committing this determination to the Corps in the first instance permits complete development of the factual record [and] utilizes the agency's expertise in this technical area . . . ").

When issuing an NPDES permit, DOH must prepare an "explicit verification" that the discharge authorized under the permit does "not violate

applicable water quality standards." H.A.R. § 11-55-19(b). Water quality standards ensure that an NPDES permit is protective of the water quality goals (*e.g.*, fish and wild life protection, and recreational use) of the receiving water. RJN ¶ 9, Ex. I (EPA NPDES Permit Writers' Manual, 6-1). Determining applicable water quality standards entails a characterization of the quality of the material being discharged as well as the receiving waters. Id. at 6-2. Developing an NPDES permit for the Lahaina Facility UIC well discharges (if one is necessary) requires data on the concentrations of constituents injected into and exiting the UIC wells, as well as the concentrations of these constituents both in groundwater and at the point of discharge to the coastal waters.

Multiple studies, many of which are underway or have been completed, are needed to develop this data. These studies include: (i) a Seep Study conducted by DOH to evaluate water quality entering the ocean, (ii) a Tracer Study conducted by the University of Hawaii to determine whether discharges from the Lahaina Facility reach the ocean, (iii) an Effluent Water Quality Study conducted by the County to characterize the material injected into its UIC wells, and (iv) collection of groundwater and ocean background water quality data. RJN ¶ 10, Ex. J (County letter dated Mar. 27, 2012 and Applicable Monitoring and Assessment Plan

("AMAP"), 5, Figure 1).[4] DOH will not be able to determine if an NPDES permit is necessary, and if so, the terms of the permit, until these studies are complete. DOH is currently evaluating the County's AMAP submittal. RJN ¶ 2, Ex. B (DOH letter dated Mar. 6, 2014) (The "proposed AMAP [is] still under review.").

Given the extensive technical expertise required to make an NPDES permitting decision, deference to the agencies is warranted here.

B. The Primary Jurisdiction Doctrine Applies Because the Question Before the Court Is Also Before the Agencies

The primary jurisdiction doctrine enables courts to defer to the expertise of an administrative agency when the court and agency possess concurrent jurisdiction. DOH and EPA are presently considering the County's NPDES permit application. In cases such as this, where a permit application is pending, courts typically invoke the primary jurisdiction doctrine and defer to the agency.

In Montgomery Environmental Coalition Citizens Coordinating Committee of Friendship Heights v. Washington Suburban Sanitary Commission, 607 F.2d 378 (D.C. Cir. 1979), administrative proceedings related to issuance of an NPDES permit were pending before EPA and the D.C. Circuit. The court explained that

[4] DOH initially required the County to submit an AMAP in response to EPA's request for a CWA 401 certification. RJN ¶ 10, Ex. J (County letter dated Mar. 27, 2012 and AMAP). A CWA 401 certification is required when a federal permit is needed for an activity that "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). EPA required the 401 certification as part of its re-issuance of the County's UIC well permit. RJN ¶ 11, Ex. K (DOH letter dated Feb. 8, 2011).

invoking the primary jurisdiction doctrine can serve dual purposes: " . . . allowing the agency to bring its expertise to bear before the court reaches a final decision, or, in some cases, avoiding the need for a final decision by the courts altogether." Id. at 381. The court held that "orderly administration and appropriate regard for Congress' clear intention to give EPA a substantial initial role" in the permit decision supported withholding jurisdiction until EPA completed its process. Id.

Similarly, in Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995), the court invoked the primary jurisdiction doctrine because the state agency had already issued an order regarding permitted discharges and continued to exercise regulatory oversight. The court cited a number of factors for deferring to the agency, including its concern that a court order could contradict the agency's decision, "subject[ing] Defendants to conflicting obligations," and the fact that the plaintiffs sought the same relief in the litigation as they had sought in the administrative process. Id. at 1350. Other factors cited by the court included whether the court was "called upon to decide factual issues not within the conventional experience of judges[;] whether relevant agency proceedings have actually been initiated[; and] whether the agency has demonstrated diligence in resolving the issue." Id. at 1349-50; see also Ryan v. Chemlawn Corp., 935 F.2d 129, 131 (7th Cir. 1991) (citing consistency and

uniformity in development of the law, the agencies' "uniquely qualified" expertise, and judicial economy as reasons for invoking the primary jurisdiction doctrine).

In contrast, the primary jurisdiction doctrine is rarely invoked when a court is asked to determine whether a defendant has violated an *existing* permit. See Conn. Fund for the Env't v. Job Plating Co., Inc., 623 F. Supp. 207, 215 (D. Conn. 1985) (distinguishing Montgomery, "the NPDES permit already has been issued by [the state agency] and the plaintiffs seek only its enforcement in this action."); Student Pub. Interest Research Group of N.J. v. Monsanto Co., 600 F. Supp. 1479, 1483 (D.N.J. 1985) (distinguishing Montgomery, "the permit has already been issued, and the plaintiffs merely seek to enforce it."). Similarly, courts rarely invoke the primary jurisdiction doctrine when the agencies have chosen *not* to grant a permit. See S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007) ("The purpose of the citizen suit provision of the CWA, 33 U.S.C. § 1365, is to permit citizens to enforce the Clean Water Act when the responsible agencies fail or refuse to do so."); Ass'n to Protect Hammersley, ELD and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1014 (9th Cir. 2002) (" . . . it is the government agency's alleged failure to act that 'brings the citizen suit into play.'") (internal citations omitted).

In their opposition to the County's 2012 Motion to Dismiss, Plaintiffs sought to distinguish Montgomery and Santa Fe County, stating that here, neither EPA nor

DOH had issued or ordered the County to obtain a permit, and "there is no pending NPDES proceeding that will address plaintiff's claims." Opposition to Defendant's Motion to Dismiss at 25-26. The circumstances have since changed. The County's permit application is now pending with the agencies. The agencies' decision will result in "a determination whether defendant is discharging pollutants to navigable waters from a point source and thus needs an NPDES permit in the first place . . . ." Id. at 25. Given that the administrative process is underway, an agency decision may make a court order moot, or, should this litigation proceed, a court order could subject the County to conflicting obligations. The Court should invoke the primary jurisdiction doctrine to allow the agencies the opportunity to determine whether a permit is needed.[5]

C. There Is No Injury to Plaintiffs in Deferring to the Agencies

Plaintiffs' sole claim is that the County is allegedly discharging pollutants to groundwater that is hydrologically connected to waters of the U.S. without a permit. FAC ¶ 64. Plaintiffs maintain that this alleged violation will continue until a permit is issued. Id. ¶ 65. Accordingly, Plaintiffs' Prayer for Relief seeks an injunction requiring the County to "immediately . . . apply for and comply with the terms of an NPDES permit . . . ." Id., Prayer for Relief, ¶ 2. As the County

[5] Given that the County's NPDES permit application is currently under review by the agencies, pending the outcome of this Motion, the County reserves its right to renew its request to add DOH and/or EPA as necessary or indispensable parties pursuant to Fed. R. Civ. P. 19(a)(1)(A), (B).

already submitted a permit application, Plaintiffs' goals in this litigation have been achieved and this case should therefore be dismissed. RJN ¶ 1, Ex. A (County NPDES permit application).

Plaintiffs suffer no injury if the Court stays or dismisses this matter while the agencies evaluate the County's permit application because Plaintiffs have multiple opportunities to participate throughout the NPDES permitting process. First, Plaintiffs will have the opportunity to comment on DOH's tentative determination of whether an NPDES permit is required. H.A.R.§ 11-55-09(b) (requiring a minimum 30-day comment period on tentative permit application determinations). Additionally, Plaintiffs can request a public hearing on DOH's tentative determination. H.A.R.§ 11-55-13(a). Plaintiffs are also entitled to receive a copy of the draft permit, provide written comments on the draft, and request a public hearing on the draft permit. H.A.R.§§ 11-55-09(c)(7)(B), 11-55-13(a), (d); 40 C.F.R. § 124.10(a)(ii). DOH is required to hold a hearing on both its tentative determination and the draft permit if "there is a significant public interest," and any "[i]nstances of doubt [as to a significant public interest] should be resolved in favor of holding the hearing." H.A.R.§ 11-55-13(c). Should Plaintiffs disagree with any decisions DOH makes with respect to the permit, they can appeal DOH's action to circuit court. H.R.S.§§ 342D-12, 91-14; H.A.R.§ 11-55-36. In the unlikely event EPA objects to or vetoes issuance of the permit, Plaintiffs can appeal EPA's action

directly to the Ninth Circuit. Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196-97 (1980).

V. CONCLUSION

The primary jurisdiction doctrine is available and appropriate here. DOH and EPA are currently reviewing the County's NPDES permit application, which, if issued, is the very relief Plaintiffs seek to obtain from this litigation and likely will obviate the need for the Court to make a decision. Allowing the agencies to decide whether a permit is required ensures their expertise is utilized in evaluating these highly technical, case-specific facts. Agency deference principles encourage the Court to allow the agencies to make this initial determination. In addition, Plaintiffs suffer no injury should the Court invoke the primary jurisdiction doctrine as they have multiple opportunities to participate in the NPDES permitting process. Accordingly, the County respectfully requests that the Court dismiss this action on primary jurisdiction grounds, or in the alternative, grant a stay pending the agencies' final decision regarding the County's NPDES permit application.

DATED: March 17, 2014

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