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COUNTY OF MAUI

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI`I

HAWAI`I WILDLIFE FUND, a Hawai`i non-profit corporation, SIERRA CLUB-MAUI GROUP, a non-profit corporation, SURFRIDER FOUNDATION, a non-profit corporation, and WEST MAUI PRESERVATION ASSOCIATION, a Hawai`i non-profit corporation, Plaintiffs, vs. COUNTY OF MAUI, Defendant.	CIVIL NO. CV 12-00198 SOM BMK **REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT COUNTY OF MAUI'S MOTION TO DISMISS FILED JULY 10, 2012; CERTIFICATE OF SERVICE** Hearing Date: July 31, 2012 Time: 9:45 AM Judge: Hon. Susan Oki Mollway Trial Date: None Set

REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT COUNTY OF MAUI'S MOTION TO DISMISS FILED JULY 10, 2012

I. INTRODUCTION

In this lawsuit, Plaintiffs seek to force Defendant County of Maui ("County") to not only apply for, but also "secure" or "obtain" an NPDES permit that neither the EPA nor the State Department of Health ("DOH") have seen fit to require. A

leading text on environmental law, quoted in Plaintiffs' opposition to the motion to dismiss, aptly describes the regulatory conundrum in which the County currently finds itself:

> Protection of underground water quality by national legislation is tentative, incomplete, and obscure. To the extent federal law reaches underground pollution, moreover, it is chaotic and duplicative, as if the subject is one that draws official attention sporadically and from a new regime that returns to "go" each time. The policy is one with half a dozen starts and no finishes; federal law here has a beginning and no ending. . . .
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> There is little doubt that discharges into groundwaters that eventually move into surface waters are prohibited under Section 301 of the [Clean Water]Act. EPA also has asserted that discharges into surface waters that require permits also must account for "associated" groundwater discharges. But in the Exxon lawsuit [Exxon Corp. v. Train, 554 F.2d 1310, 1319 (5th Cir. 1977)]testing the agency's groundwater authority the EPA disclaimed "jurisdiction and authority to regulate subsurface disposal directly," conceding that groundwater is not part of the "navigable waters" of the United States and thus that deep-well injection does not constitute the "discharge of a pollutant."
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> The consequence of this fine linedrawing on deep well injections is a policy that varies greatly depending upon the region or states involved. No two state or federal officials agree on whether a groundwater discharge might affect surface waters or whether deep well disposal is "associated" with surface water discharges. No two officials agree on a reading of Exxon and the scope of EPA authority remaining in its wake. And no two officials agree on what types of state permits approving deep well injections for NPDES purposes must be forwarded for EPA review or on the action EPA can take once it receives them.

(Rodgers, William H., Jr., 2 Envtl. L. (West) § 4:8 (updated July 2012)(bracketed reference added, footnotes omitted)) This Court should refrain from plunging into

these murky waters, at least until such time as the relevant facts become more clear and the EPA and DOH have made their regulatory conclusions based on those facts. As noted in County's moving papers, scientific studies that are currently underway may determine whether there is a direct hydrologic connection between County's Lahaina injection wells and the ocean, and if so, whether there is any harmful impact on the ocean as a result. While awaiting the results of those studies, the County has applied for § 401 water quality certification, a prerequisite to either renewal of its existing federal UIC permit or the issuance of an NPDES permit. Should the Court dismiss on ripeness or other grounds, the public is adequately protected, given the federal and state permits under which the facility is currently operating, and the upgrades required under the Consent Agreement entered into between the EPA and the County. Moreover, the Court would be entitled to rely on the regulating agencies' expertise in determining whether an NPDES permit is appropriate, but without their active involvement in the case, Plaintiffs cannot obtain complete relief, and the County is prevented from adequately defending itself.

Therefore, for the reasons set forth in County's moving papers and as further discussed below, County respectfully requests this Court to dismiss the only count remaining in Plaintiffs' complaint.[1]

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[1] After County filed its motion to dismiss, Plaintiffs elected to withdraw the second count of their complaint. (See opp. memo. at 29, n.6 and the stipulation of the parties filed herein.) Therefore, County's reply memorandum addresses only the first count of Plaintiffs' complaint, and the Court may disregard all arguments in County's moving papers addressing the second count of the complaint.

II. ARGUMENT

A. Plaintiffs' Responses To County's Ripeness Argument Are Not Persuasive.

In its moving papers, the County pointed out that in considering whether a matter is ripe, the Court must (1) evaluate the fitness of the issues for judicial decision and (2) consider the hardship to the parties of withholding court consideration. County also noted that both aspects of the inquiry involve the exercise of judgment, rather than the application of hard and fast black-letter law. (Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977)) While case law may be instructive, the Court has wide discretion in deciding whether a case is ripe.

As for the fitness issue, Headwaters, Inc. v Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001), relied on by Plaintiffs, does not address the issue of ripeness, and the decision has been called into question by the U.S. Supreme Court's decision in Rapanos v. U.S., 547 U.S. 715, 726-727 (2006). Furthermore, County is not suggesting that this Court can never "entertain the type of claim set forth in plaintiffs' complaint" (Plaintiffs' opposition memorandum, hereafter "opp. memo.", at 15), but rather, that the Court should refrain from asserting jurisdiction over the controversy at this time, given on-going permitting actions and scientific studies designed to determine threshold factual issues.

Regarding the hardship issue, Plaintiffs argue that their complaint contains a discussion of "numerous studies" demonstrating harm to the environment from County's injection wells. (Opp. memo. at 14, citing to ¶¶ 46-58 of the complaint)

However, the complaint refers to only two studies. (Complaint, ¶ 46: "Two recent scientific studies . . .") Although no citations were provided, one is described as a 2009 UH study, and the other as a USGS study. (Id.)

As shown in the excerpts of the USGS study attached to County's Request for Judicial Notice filed May 9, 2012, hereafter, "Req. Jud. Not.," Ex. "F," the authors of the USGS study stated emphatically that their study did "not determine causes of macroalgal blooms." The 2009 UH study referenced in ¶ 46 of the complaint involved the artificial introduction of algae, suspended in cages at various points offshore of County's injection wells. (Id., ¶¶ 48, 49) Although not explained clearly, the complaint acknowledges that the $\delta^{15}N$ isotope found in the algae is evidence of nitrogen removal, or de-nitrification. (Id., p. 17, n.1) Neither study has established that the County's injection wells are causing algae blooms.

In short, the studies referenced in the complaint are neither "numerous" nor compelling evidence of imminent environmental harm. The seep study and other scientific investigations currently underway, by contrast, have not detected harmful bacteria to date, but may ultimately determine whether NPDES requirements are triggered. (Req. Jud. Not., Exs. "C", "D")[2]

Plaintiffs' concern that County's ripeness argument will lead to an "indefinite stay" (opp. memo. at p. 17) is also unfounded. The Court has the

[2] Defendant offered Exs. "C" and "D" pursuant to Rule 807, Fed. R. Evid. Plaintiffs moved to strike. See Plaintiffs' motion to strike Exs. "C" and "D" and the County's opposition thereto.

power to fashion a remedy that will limit the duration of any stay should the Court decide to impose one.

Plaintiffs also claim that EPA's current consideration of conditions for the County's existing federal permit does not support County's ripeness argument, on the theory that the Underground Injection Control ("UIC") Program of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f et seq., is designed to prevent pollution of drinking water supplies, while the goal of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., is to protect the Nation's waters. (Opp. memo. at 20) However, the EPA itself has conflated the requirements under the SDWA and the CWA by requiring the County to obtain a CWA § 401 water quality certification (Req. Jud. Not., Ex. "A", ¶ 25), indicating that the EPA is currently imposing requirements under the CWA in connection with the renewal of County's existing federal UIC permit issued under the SDWA[3].

Because DOH and the EPA are actively involved in permit proceedings (Req. Jud. Not., Ex. "A", ¶¶ 25, 26) and EPA has informed the press that scientific studies which may ultimately determine whether an NPDES permit is warranted or not are expected to be concluded by the end of the year (id., Ex. "C"), the Court should determine that the case is not ripe at this time.

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3 A CWA § 401 water quality certification is a required prerequisite for a federal NPDES permit authorizing a discharge into navigable waters. (CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1))

B. The Court May Defer To On-Going State And Federal Regulatory Actions.

Plaintiffs argue that the County need not await the outcome of the § 401 water quality certification process in order to obtain an NPDES permit. Plaintiffs claim that § 401 of the Clean Water Act (33 U.S.C. § 1341) applies only to federal permits, whereas DOH will issue any NPDES permit to the Lahaina facility. (Opp. memo., pp. 10-12) However, the regulatory demarcation line between state and federal authority in Lahaina, as well as elsewhere in Hawaii, is not so distinct. The EPA has issued a federal UIC permit to the County's Lahaina facility, which also has a state UIC permit. (Req. Jud. Not., Exhibit "A", ¶¶ 22, 27) The City and County of Honolulu operates its Sand Island wastewater treatment facility under an NPDES permit issued jointly by DOH and EPA. (See http://www.epa.gov/region9/water/npdes/pdf/sandislandfactsheet.pdf; see also http://www.epa.gov/region9/water/npdes/pdf/sandislandnpdespermit.pdf.)[4]

Whether EPA intends to protect ocean water quality through the County's existing federal UIC permit, or through a separate federal, state, or joint NPDES permit, is still under consideration. However, as noted in County's moving papers, after the Plaintiffs sent their Notice of Intent To Sue Letter, the EPA brought an enforcement action against the County to require a higher degree of disinfection, which would protect ocean water quality if it is ultimately determined

[4] San Francisco's Southwest Ocean Outfall also operates under a joint federal and state permit. See http://www.epa.gov/region9/water/npdes/pdf/ca/SF-Oceanside-order.pdf.

that treated wastewater mingles with groundwater that eventually seeps into the ocean. (See Req. Jud. Not., Ex. "A")

The County has no assurance that it would receive an NPDES permit before the § 401 water quality certification process is complete (and Plaintiffs have chosen not to join the agencies who could provide definitive information to the Court in this respect, EPA and DOH). Along with the ongoing tracer study and seep study, the § 401 water quality certification process is a fundamental information-gathering tool that will form the bases for the regulatory decisions made by the DOH and EPA, whether related to the County's UIC permits or to any potential NPDES permits issued by the state, the EPA, or both. While the County works with the EPA and DOH on the Clean Water Act § 401 water quality certification application, and while key studies are underway, this Court should give due deference to the agencies with primary jurisdiction, and allow them to complete their investigations.

Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1099 (S.D.N.Y. 1990), cited by Plaintiffs for the proposition that compliance with the Safe Drinking Water Act does not excuse compliance with the Clean Water Act, does not prevent the Court from deferring to on-going agency action in the instant case. In Hudson, the court held that a state of New York's department of environmental conservation could not unilaterally determine that the City of New York did not need a federal NPDES permit, thereby preempting enforcement of the federal Clean Water Act. (Id.) Bath Petroleum Storage, Inc. v. Sovas, 309 F.

Supp.2d 357, 368-71 (N.Y.N.Y. 1990), relied on by Plaintiffs, also involved a preemption argument. (Id.) In Bath, the court ruled that the Safe Drinking Water Act did not preempt the Clean Water Act, but expressly declined to rule on whether a state version of the NPDES permit was necessary under the facts alleged. Here, County is not arguing (as the defendants did in Hudson and Bath) that the Safe Drinking Water Act preempts the Clean Water Act. Rather, the County is asking this Court to determine that judicial intervention into the on-going regulatory process is not warranted at this time.

Other authorities relied on by Plaintiff are not determinative, either. U.S. v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987) held that courts may route certain threshold decisions to the agency charged with primary responsibility for the activity. The issue before the court in Cal. Sportfishing Prot. Alliance v. City of W. Sacramento, 905 F. Supp. 792, 807 n.21 (E.D. Cal. 1995) was whether prior state enforcement actions barred plaintiffs from obtaining monetary penalties. The court's statement that the primary jurisdiction doctrine "has no application here because Congress has expressly set forth the ground rules for citizen suits and only bars penalty actions in specified circumstances" does not prevent this Court from deferring to federal and state regulatory bodies on threshold issues in the instant action. (See Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1349–50 (D.N.M.1995) [primary jurisdiction doctrine applies to citizen suit under CWA where, to decide case, court would have to address issues already decided by state agency])

Likewise, Illinois Pub. Interest Research Group v. PMC Inc., 835 F. Supp. 1070, 1076 (N.D. Ill. 1993) is not particularly helpful. There, the court held that the doctrine of primary jurisdiction was inapplicable because the question before the court was the enforcement of existing discharge standards. That is not the case here. Further, Sierra Club v. Tri-State Generation and Transmission Ass'n, Inc., 173 F.R.D. 275, 284 (D. Colo. 1997) is not dispositive, in that the court concluded that it did not have to consider issues within the special competence of any agency to determine whether defendants in that action had violated existing Clean Air Act and CAQC standards, limitations, or orders. Here, by contrast, EPA and DOH are in the process of deciding what standards or limitations should be imposed on the County in the course of the renewal of the Lahaina facility's existing state and federal UIC permits.

As noted in Wilson v. Amoco Corp., 989 F. Supp. 1159 (D. Wyo. 1998), the doctrine of primary jurisdiction is "a malleable concept requiring application only when warranted by the particular facts of the case." Wilson enumerates factors that a court may find helpful in determining whether the doctrine applies, including (1) whether the Court is being called on to decide factual issues not within the conventional experience of judges; (2) whether the Defendants could be subjected to conflicting orders of both the Court and the administrative agency; (3) whether relevant agency proceedings have actually been initiated; (4) whether the agency has demonstrated diligence in resolving the issue or has instead allowed the issue to languish; and (5) whether the Court can fashion the relief requested.

Here, the on-going scientific studies are addressing issues that are more within the realm of agency expertise than the Court's, the agencies' ultimate conclusions may clash with any findings made by the Court, the agency proceedings are underway, the EPA expects the studies to be concluded by the end of the year, and the Plaintiffs cannot force the County to "obtain" or "secure" an NPDES permit through this lawsuit if the agencies are unwilling to issue one. Therefore, the Court has the discretion to defer to the agencies' expertise.

C. This Court Is Entitled To View The EPA's Enforcement Action As The Equivalent Of A Court Action.

Plaintiffs rely on Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987) for the proposition that an EPA administrative enforcement action does not bar the prosecution of a citizens' suit. The Ninth Circuit's opinion actually held that a citizen suit was "not precluded by a nonjudicial enforcement action" by the state of California's Regional Water Quality Control Board. Id. Here, the enforcement action was brought by the EPA itself.

The legislative history of 33 U.S.C. § 1365(b) supports a broader reading of the statute than that advocated by the Plaintiffs. The 1972 Senate Report indicated that courts should evaluate the adequacy of the agency's enforcement actions in reaching a decision about whether to permit a citizen suit:

> It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such a case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the

> other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.

(Senate Report No. 92-414, 92d Congress, 2d Session, 1972 U.S.Cong. and Ad.News, 3668, 3746. See also Baughman v. Bradford Coal Co., 592 F.2d 215 (3d Cir. 1979), cert. den., 441 U.S. 961 (1979); Student Public Interest Research Group, Inc. v. Fritzsche, Dodge, and Olcott, 759 F.2d 1131 (3d Cir. 1985) [under certain circumstances an agency enforcement action can be considered the functional equivalent of an "action in a court."]) The Court has considerable latitude to consider the effect of the EPA's diligent enforcement.

D. EPA And DOH Are Indispensable Parties.

Indeed, the relief sought by Plaintiffs cannot be obtained without the active participation of the EPA and DOH. Although Plaintiffs claim that County's indispensable parties argument is "frivolous," citing to Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002), crucial facts in Hammersley differ from those currently before the Court.

In Hammersley, a citizens' group sued a shellfish harvesting business, alleging that the operation required an NPDES permit. The state regulatory authority had determined that the operation did not need an NPDES permit. Id. at 1011. The defendant claimed that the state regulatory agency was a necessary party under Rule 19(a), Fed.R.Civ.P. (Id. at 1013-1014) The court determined otherwise, finding that it could afford "complete relief" in the agency's absence. (Id. at 1014-1015)

The court reasoned that if the plaintiff's suit were successful, the defendant could "be ordered to terminate operations unless it obtains a permit, a form of relief that is available irrespective of [the agency's] participation." The court also suggested that the agency might grant the permit, based on a representation from the agency "in supplemental briefing" that it would issue a permit if the court found the mussel-raft operations to be discharging "pollutants from a point source." (Id. at 1015, n.6) If despite this representation, the agency did not issue the permit, the court concluded, the defendant "would have to pull in the ropes and dock the rafts," complying with the Clean Water Act by shutting down all operations. (Id. at 1015)

Here, by contrast, DOH has not issued any advice to the Court about its intentions, and the option of shutting down essential wastewater treatment is not available to the County. The injection wells at issue are an integral part of the County's existing state and federal permits for the operation of its facility. (See Req. Jud. Not., Ex. "A", ¶¶ 15, 17–22) The Lahaina facility's federal permit expressly forbids the County to "abandon" its injection wells, if doing so will "adversely affect the health of persons." (See id., ¶ 23)

The Lahaina facility receives and treats an average of five million gallons of residential, commercial, and industrial wastewater per day. (See id., ¶ 16). If the facility were required to shut down its injection wells, it would be in violation of its existing federal permit. (See id., ¶¶ 15, 17–22) If the entire facility were shut

down, the West side of Maui would be plunged into an immediate public health crisis of staggering proportions.

Unlike the situation in Hammersley, should this Court ultimately rule in Plaintiffs' favor, the County could not simply cease operating its Lahaina facility. Furthermore, without the active participation of DOH and/or the EPA, the Court has no means to compel the County to "secure" or "obtain" an NPDES permit, the relief sought by Plaintiffs. Therefore, unlike the court in Hammersley, this Court cannot afford Plaintiffs the complete relief sought in the complaint without the active participation of EPA and DOH. Moreover, as shown by the controversy over the admissibility of certain hearsay statements by EPA officials who are beyond the Court's subpoena power, the absence of EPA and DOH from this lawsuit hampers the County's ability to defend itself.

III. CONCLUSION

Nothing in Plaintiffs' opposition to County's motion to dismiss prevents this Court from declining to accept jurisdiction over the case at this time. Scientific studies that are currently underway may determine whether there is a direct hydrologic connection between County's Lahaina injection wells and the ocean, and if so, whether there is any harmful impact on the ocean as a result. These are threshold factual issues that Plaintiffs must establish in order to prevail in the instant suit. County has applied for § 401 water quality certification, a prerequisite to either renewal of its existing federal UIC permit or the issuance of an NPDES permit. Should the Court dismiss on ripeness or other grounds, the

public is adequately protected, given the federal and state permits under which the facility is currently operating, the regulators' consideration of what terms to include in renewed permits, and the upgrades required under the Consent Agreement recently entered into between the EPA and the County. If the Court decides that a stay is appropriate, the stay need not be indefinite; the Court has latitude in fashioning a remedy that is appropriate to the particular facts of the instant case.

Furthermore, the Court would be entitled to rely on the regulating agencies' expertise in determining whether an NPDES permit is appropriate. However, without the agencies' active involvement in the case, Plaintiffs cannot obtain complete relief, because only the agencies can issue NPDES permits.

Therefore, for the reasons stated above and in County's moving papers, Defendant County of Maui respectfully requests that this Court grant its motion to dismiss.

DATED: Wailuku, Maui, Hawaii, July 17, 2012.

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By /s/ Jane E. Lovell
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