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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND, SIERRA CLUB – MAUI GROUP, SURFRIDER FOUNDATION, AND WEST MAUI PRESERVATION ASSOCIATION,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

Civil Case No. 12-00198 SOM BMK

DEFENDANT COUNTY OF MAUI'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO WELLS 1 AND 2 AND MOTION TO STRIKE; CERTIFICATE OF SERVICE

Hearing: January 12, 2015, 9:45 a.m.
Judge: Susan Oki Mollway
Trial Date: April 7, 2015

Related to: Dkt No. 124, Defendant County of Maui's Motion for Partial Summary Judgment as to Wells 1 and 2

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I. INTRODUCTION

The County's Motion for Partial Summary Judgment as to Wells 1 and 2 ("Motion") is premised on a matter of law. Clean Water Act ("CWA") § 301(a) liability requires evidence of a point source discharge to navigable waters. Because flow from Wells 1 and 2 does not travel to or enter the ocean in a "discernible, confined and discrete" manner, there is no point source discharge from these wells to the ocean. Plaintiffs' Opposition incorrectly argues the Court's prior ruling on Wells 3 and 4 controls, and applying that ruling, flow from Wells 1 and 2 violates § 301(a).

The Court's prior ruling does not control because (1) it was clearly erroneous and its application would result in manifest injustice to the County, and (2) Wells 1 and 2 flow is factually distinct from Wells 3 and 4 flow. Contrary to CWA requirements, the thrust of the Court's prior ruling was not *how* pollutants from Wells 3 and 4 enter the ocean, but rather whether such pollutants enter the ocean at the submarine springs area. Adopting this approach, the Court imposed liability on the County.

Plaintiffs' expert agrees with the County that flow from Wells 1 and 2 enters the ocean over a wide expanse of coastline that may or may not include the submarine springs, with the amount of effluent injected into Wells 3 and 4 dictating the entry point of Wells 1 and 2 flow. Moreover, Plaintiffs' expert agrees

that flow from Wells 1 and 2 could enter the ocean at locations that have yet to be identified. As there is no credible evidence that flow from Wells 1 and 2 enters the ocean through a "discernible, confined and discrete" conveyance, Plaintiffs have failed to establish the requisite point source requirement, and the County is entitled to summary judgment as a matter of law.

II. THE LAW OF THE CASE DOCTRINE IS NOT APPLICABLE

A. The Court's Prior Decision Was Clearly Erroneous And Results In Manifest Injustice To The County

A point source discharge to navigable waters is fundamental to § 301(a) liability. 33 U.S.C. §§ 1311(a), 1362(12). By definition, a point source must be a "discernible, confined and discrete conveyance," with a conduit being identified as an example of such a conveyance. Id. at § 1362(14).

As Plaintiffs acknowledge, the law of the case doctrine does not apply when a prior decision is clearly erroneous and results in a manifest injustice.[1] Opp. at 5. In Haw. Wildlife Fund v. Cnty. of Maui, Civil No. 12-00198 SOM/BMK, 2014 WL 2451565 (D. Haw. May 30, 2014), the Court improperly eliminated the "discernible, confined and discrete conveyance" standard by ruling (1) "liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of *how* they get there"; (2) conduits are point sources but all conduits do

[1] Plaintiffs' reconsideration argument lacks merit. Opp. at 2 n.1. The County was under no legal obligation to file a request for reconsideration.

not need to be "confined and discrete conveyances"; (3) "groundwater acting as a conduit need not . . . be 'confined and discrete'"; and (4) because the Tracer Study shows 64% of effluent from Wells 3 and 4 enters the ocean through the submarine springs area, groundwater here "is consistent with being 'confined and discrete,' irrespective of its other geologic properties." Haw. Wildlife Fund, 2014 WL 2451565, at *16-18 (emphasis in original). With these holdings, the Court effectively nullified the meaning of point source.

The mandatory "discernible, confined and discrete conveyance" standard constrains a court's interpretation of a point source. Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 219 (2d Cir. 2009) (the "phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute."); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001) (the phrase cannot be ignored). This constraint deprives the Court of discretion to define an unconfined conduit as a point source. Haw. Wildlife Fund, 2014 WL 2451565, at *16; Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984). Accordingly, the Court's prior ruling is "clearly erroneous." Gonzalez v. Ariz., 677 F.3d 383, 389 n.4 (9th Cir. 2012).

Applying the Court's earlier decision "would work a manifest injustice" to the County. Id. The Court found the County violated CWA § 301(a) by operating

Wells 3 and 4 without an NPDES permit, potentially exposing the County to several years' worth of penalties. See United States v. Jingles, 702 F.3d 494, 504 (9th Cir. 2012) ("identif[able] . . . real consequences" are a manifest injustice).

B. Different Facts Preclude Application Of The Court's Prior Opinion

Differences between where Wells 1 and 2 and Wells 3 and 4 enter the ocean militate against applying the Court's prior ruling to Wells 1 and 2. As the Court noted, "[t]he central finding of the Tracer Dye Study – and the centerpiece of Plaintiffs' case – is that '64% of the treated wastewater injected into wells [3 and 4] currently discharges from the submarine springs area' and into the ocean." Haw. Wildlife Fund, 2014 WL 2451565, at *16. Unlike Wells 3 and 4, there was no tracer study on Well 1 and even with two tracer studies, no dye from Well 2 was detected in the ocean. 56.1, ¶¶ 3-5; Declaration of E. John List, Ph.D., P.E. in support of the County's Opposition to Plaintiffs' Motion for Summary Judgment Re: Defendant's Liability for Unpermitted Discharges Into Wells 1 and 2 ("List Opp. Dec."), ¶ 28.[2] Because no dye was detected, the Tracer Study relied on modeling to determine where Well 2 flow might enter the ocean. See Declaration of Jean E. Moran, Ph.D. filed in support of Plaintiffs' Opposition ("Moran Opp.

[2] For the Court's convenience, a copy of the List Opp. Dec. is attached as Exhibit 1 to the Declaration of Colleen P. Doyle in support of the County's Reply Memorandum in support of Defendant's Motion for Partial Summary Judgment as to Wells 1 and 2 ("Doyle Rep. Dec.").

Dec."), ¶¶ 30, 31. Dr. Moran's conclusions regarding the Tracer Study modeling are consistent with the County's – both agree effluent injected into Wells 1 and 2 ultimately reaches *the ocean*. 56.1, ¶¶ 6-7; Moran Opp. Dec., ¶¶ 9, 24-27, 36, 47.

Effluent reaching *the ocean* is not synonymous with effluent reaching the submarine springs nor with a point source discharge. Suggestions by Plaintiffs that the Tracer Study shows flow from Wells 1 and 2 entering at the submarine springs "at all times" are inaccurate at best. Opp. at 15, 17 n.6, 18 n.8, 32. Dr. Moran never says this; she generally talks about effluent reaching the ocean. Moran Opp. Dec., ¶¶ 9, 24-27, 36, 47. Dr. Moran also agrees with the Tracer Study authors that Wells 1 and 2 flow likely enters the ocean in areas not identified in the Tracer Study. 56.1, ¶ 5; Moran Opp. Dec., ¶¶ 32, 54.

While the Tracer Study shows Wells 1 and 2 flow enters at the submarine springs in certain scenarios, entry is never limited just to this area. 56.1, ¶¶ 6-9, 11; List Opp. Dec., ¶¶ 14, 23. In fact, Wells 1 and 2 flow entered the ocean "somewhere else" than the springs during the Tracer Study, with "somewhere else" being approximately 0.8 mile north of the springs, across over 0.5 mile of coastline. Doyle Rep. Dec., Ex. 2, Deposition Transcript of Dr. Jean E. Moran ("Moran Tr.") at 51:12-52:2, 85:8-20;[3] 56.1, ¶ 11; List Opp. Dec., ¶¶ 14, 23.

[3] While Dr. Moran measured correctly, her conversion was incorrect. Doyle Rep. Dec., Ex. 2, Moran Tr. at 46:22-47:7. Per the scale, it converts to >0.5 mile.

As Dr. Moran recognizes, Well 3 and 4 flow determines where Well 1 and 2 flow enters the ocean. Moran Opp. Dec., ¶ 29. Dr. Moran acknowledged when Wells 3 and 4 are not operating, 67.5% of Well 2 flow appears at locations other than the springs. Doyle Rep. Dec., Ex. 2, Moran Tr. at 59:12-65:13, 66:11-23. Dr. Moran measured the entire Well 2 flow entry distance (*i.e.*, at the springs and elsewhere) as approximately 1.5 miles. Id. at 52:14-53:17.

Unlike Wells 3 and 4, where the Tracer Study indicates the effluent from these wells enters the ocean in the vicinity of the submarine springs, where effluent from Wells 1 and 2 enters the ocean is not defined. Based on Tracer Study modeling, it could enter over more than two miles of coastline. 56.1, ¶¶ 9, 11; List Opp. Dec., ¶¶ 14, 23. Depending on the circumstances, it could be well outside the submarine springs. 56.1, ¶¶ 7, 11-12; List Opp. Dec., ¶¶ 14, 23, 38-40. Given these substantial differences, the Court's prior decision on Wells 3 and 4 is not controlling and should not dictate the outcome of the County's Motion.

III. THERE IS NO POINT SOURCE DISCHARGE FROM WELLS 1 AND 2 TO THE OCEAN

As Plaintiffs concede, there are two types of point source discharges, point source or direct discharges, and indirect discharges. Opp. at 6-7; Rapanos v. United States, 547 U.S. 715, 744 (2006). While the two types can be adopted in the alternative, both require a point source discharge into navigable waters. Rapanos, 547 U.S. at 744; 33 U.S.C. § 1362(12), (14).

A. The Indirect Discharge Rationale Does Not Apply

Indirect discharges involve serial point sources that ultimately discharge to navigable waters. As the Supreme Court explains in Rapanos, the indirect discharge rationale "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" Rapanos, 547 U.S. at 743 (internal citation and quotation marks omitted). Plaintiffs' claim that this language applies to the "point source" rationale is simply wrong. Opp. at 6. The three cases the Supreme Court cite following the discussion all involve sequential point source discharges. See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 101 (2004) (indirect discharge from a pump station through a canal into navigable waters); United States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005) (indirect discharge from an industrial facility toilet through a storm drain into navigable waters); and Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2d Cir. 1991) (rev'd on other grounds) (indirect discharge from landfill seepage through a culvert into navigable waters).

Plaintiffs' claim that the additional indirect discharge cases cited in Rapanos do not require serial point sources is also wrong. Opp. at 7. In Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005), a tunnel connected the shaft (original point source) to navigable waters. El Paso Gold Mines, 421 F.3d at 1136, 1146. Plaintiffs' attempt to distinguish El Paso Gold Mines based on the

porous nature of the tunnel fails as there is no requirement that a point source be watertight. Opp. at 8. See, e.g., 33 U.S.C. § 1362(14) (ditches, which are not watertight, are identified point sources).[4]

Plaintiffs' attempt to distinguish Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114 (2d. Cir. 1994) fails, too. Relying on the indirect discharge rationale, Concerned Area Residents identified sequential point sources as liquid manure from a farm vehicle traveled to a field, through a swale, a pipe, and a ditch into navigable waters. Concerned Area Residents, 34 F.3d at 118-119. In applying the direct discharge rationale, Concerned Area Residents identified both the vehicle and the field as directly discharging into navigable waters. Id. at 119. Moreover, Concerned Area Residents addressed a concentrated animal feeding operation ("CAFO"), which is itself an identified point source. 33 U.S.C. § 1362(14). Thus, the manure flowing across the field into navigable waters was a direct discharge from a point source, whether from the farm vehicle, field, or CAFO generally. See Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 955 (9th Cir. 2002) (interpreting Concerned Area Residents as finding CAFO fields point sources). The unique facts of Concerned Area Residents distinguish it from the present case.

[4] Similarly, municipal separate storm sewer systems (an identified point source) can be porous. See 40 C.F.R. § 122.26(b)(8) (systems include "curbs, gutters, ditches, man-made channels . . . . " which by their very nature, are porous).

As Dr. List explains, Wells 1 and 2 flow is broad and diffuse (*i.e.*, unconfined) as it enters and travels through groundwater and enters the ocean. 56.1, ¶¶ 6-9, 11-12; List. Opp. Dec., ¶¶ 18-20, 22-25. Thus, there is no continuous "discernible, defined and discrete" conveyance between the wells and the ocean.

B. The Direct Discharge Rationale Does Not Apply

1. Groundwater Is Not A Navigable Water

Plaintiffs erroneously cite the Court's prior ruling for the proposition that groundwater is a water of the United States. Opp. at 13. In finding that "[a]n unpermitted discharge into the groundwater, without more, does not constitute a violation of the Clean Water Act," the Court was clear – groundwater is not a water of the United States.[5] Haw. Wildlife Fund, 2014 WL 2451565, at *14.

2. Groundwater Here Is Not A Point Source

Because point sources must be "discernible, confined and discrete conveyances," unless confined in something else (such as a tunnel or lava tube), unconfined groundwater is not a point source. See Chesapeake Bay Found. v. Severstal Sparrows Point LLC, 794 F. Supp. 2d 602, 619-620 (D.Md. 2011) ("Discharge from migrations of groundwater or soil runoff is . . . nonpoint source pollution."); Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) (pollutants from an underground tank that

[5] See also 40 C.F.R. §§ 122.2, 230.3(s); 33 C.F.R. § 328.3(a); S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007).

migrate through soil to groundwater to navigable water is not a point source discharge); Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1153 (9th Cir. 2010) (precipitation percolating through overburden and soils that reaches surface water is a nonpoint source); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 1359 (D.N.M. 1995) (shallow seeps with trace pollutants emerging through soil are nonpoint sources); United States v. ConAgra, Inc., No. CV 96-0134-S-LMB, 1997 WL 33545777, at *7 (D. Idaho Dec. 31, 1997) (groundwater must carry pollutants through something). As Dr. List explains, the groundwater here is unconfined. 56.1, ¶¶ 6-9, 11-12; List. Opp. Dec., ¶¶ 18-20, 22-25.

C. Plaintiffs' Authorities Do Not Address The Point Source Requirement

Cases Plaintiffs cite fail to support their argument that discharges via groundwater do not need to be confined and discrete point source(s) as all of their cases rely on McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988), *rev'd on other grounds*, 47 F.3d 325 (9th Cir. 1995).[6] In McClellan, the district court examined whether groundwater was a "water of the United States," not whether it was a point source. Id. at 1196; see also Martin v.

[6] See Opp. at 11. Wash. Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994); Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D.P.R. 2009); and Sierra Club v. Colo. Ref. Co., 838 F. Supp. 1428, 1433 (D. Colo. 1993) (all cite McClellan). Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-1320 (S.D. Iowa 1997) and Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179-1180 (D. Idaho 2001) (both cite Wash. Wilderness, which cites McClellan).

Kan. Bd. of Regents, Civ. A. No. 90-2265-0, 1991 WL 33602, at *10 (D. Kan. Feb. 19, 1991) (citing McClellan to support "[groundwater] naturally connected to surface waters constitute[s] 'navigable waters' . . . . "); Friends of Santa Fe Cnty., 892 F. Supp. at 1358 (citing McClellan as holding "hydrologically connected groundwaters are regulated waters of the United States."). These cases are inapposite to this case as they do not address the § 301(a) point source requirement.[7] District courts applying a point source analysis to the subsurface movement of pollutants have determined pollutant migration through soil and groundwater is insufficient to impose § 301(a) liability. Tri-Realty Co., 2013 WL 6164092, at *8; El Paso Gold Mines, 421 F.3d at 1140 n.4; Chesapeake Bay, 794 F. Supp. 2d at 619-620; Greater Yellowstone, 628 F.3d at 1153; ConAgra, 1997 WL 33545777, at *7.

Similarly, in none of the "direct hydrological connection" preambles Plaintiffs cite has EPA taken the position that indirect discharges of pollutants through groundwater do not need to be through subsurface point sources. Opp. at 12. Plaintiffs' reliance on EPA's 2001 proposed regulation preamble language (66 Fed. Reg. at 3,015-3,017) is particularly misleading; in the final regulation, not cited by Plaintiffs, EPA abandoned the position. See 68 Fed. Reg. 7,176, 7,216 (Feb. 12, 2003) ("EPA is rejecting establishing requirements related to discharges

[7] The decisions also incorrectly held that groundwater is a "water of the United States," which is incorrect as a matter of law. See supra at Section III.B.1.

to surface water that occur via ground water with a direct hydrologic connection.").[8]

EPA's "direct hydrological connection" preamble statements can be confusing. Often they are unclear which § 301(a) element, if any, are being discussed. However, EPA has not equated a "direct hydrological connection" with a "point source." Rather, EPA has stated that groundwater carrying pollutants to surface waters is nonpoint source pollution. See 68 Fed. Reg. 60,653, 60,655 (Oct. 23, 2003) ("[n]onpoint source pollution is caused by rainfall or snowmelt moving over and *through the ground* and carrying natural and human-made pollutants into . . . coastal waters, and ground water.") (emphasis added). There are simply no EPA statements interpreting the CWA to eliminate or modify the fundamental CWA point source requirement in support of Plaintiffs' argument.[9]

While EPA's position on a "direct hydrological connection" in the CWA context may be confusing, EPA's position on groundwater classification under the CWA is not. Since at least 1991, EPA has been unequivocal – groundwater is not a "waters of the United States," even if it has a direct hydrological connection to

[8] Excerpts of the Federal Registers referenced in this Section III.C. are attached to the accompanying Doyle Reply Declaration at Ex. 3 to 6.

[9] Even the preamble Plaintiffs cite for the proposition that factual circumstances determine when groundwater with a direct hydrological connection to surface water may need an NPDES permit (Opp. at 31) is silent on the issue of point source.

surface water. 56 Fed. Reg. at 64,876, 64,892 (Dec. 12, 1991); 79 Fed. Reg. 22,188, 22,218 (April 21, 2014).

IV. DR. MORAN'S NEW OPINIONS SHOULD BE STRICKEN

Dr. Moran had three chances to state her full opinions – an October 2014 expert report, a November 2014 declaration supporting Plaintiffs' Summary Judgment Motion, and a December 2014 supplemental report. Nonetheless, she improperly waited until her declaration accompanying Plaintiffs' Opposition to articulate new "mass effluent" opinions. Dr. Moran's new opinions are: (1) Tracer Study Figure 4-39 cannot be used to characterize effluent mass from Well 2; and (2) Tracer Study Figure 5-19 provides mass effluent information on Well 2 flow entering the ocean near the submarine springs. Moran Opp. Dec., ¶¶ 30-31.

Plaintiffs' untimely attempt to assert new expert opinions after the Court imposed disclosure deadline is impermissible and should be stricken. See Plumley v. Mockett, 836 F. Supp. 2d 1053, 1064 (C.D. Cal. 2010) (after the disclosure deadline, an expert cannot assert new opinions in a summary judgment motion).

Dr. Moran's new opinions are neither justified nor harmless. Fed. R. Civ. P. 37(c)(1). The modeling reflected in Figure 5-19 comes from the Tracer Study. Doyle Rep. Dec., Ex. 7 (Final Tracer Study) at 5-18, 5-46. As the Tracer Study was a cornerstone of Dr. Moran's October 2014 expert report (56.1, ¶ 12), it was clearly available prior to her Opposition declaration. See Reinsdorf v. Skechers

U.S.A., 922 F. Supp. 2d 866, 881 (C.D. Cal. 2013) (new information permissible only where previously unavailable).

Dr. Moran's new opinions severely prejudice the County. Figure 4-39 is central to the County's argument that Wells 1 and 2 flow is not a point source discharge because flow enters the ocean over roughly two miles of coastline. 56.1, ¶¶ 1-3, 7, 11; List Opp. Dec., ¶¶ 14, 22-23. Dr. Moran's new opinions attempt to dispute this by belatedly focusing on Figure 5-19.

Dr. Moran's new reliance on Figure 5-19 also contradicts her declaration supporting Plaintiffs' Motion for Summary Judgment ("Moran Nov. Dec."). Previously, Dr. Moran relied on Figure 4-39(b) to support her opinion that Tracer Study modeling shows the majority of Well 2 flow discharging at the submarine springs. Moran Nov. Dec., ¶ 30. Dr. Moran now disputes that Figure 4-39 characterizes Well 2 flow. Moran Opp. Dec., ¶ 30.

As they are untimely and prejudicial, Dr. Moran's new opinions, including her references to Figure 5-19, should be stricken. Plumley, 836 F. Supp. 2d at 1064 (without explanation of harmlessness or substantial justification, new opinion stricken). Likewise, Plaintiffs' reliance on them to support their new argument that effluent from Wells 1 and 2 appears at the springs "all the time" regardless of how the wells operate should be disregarded. Opp. at 15, 17 n.6, 18 n.8, 32.

V. DR. LIST'S EXPERT REPORT IS ADMISSIBLE

Plaintiffs and the County filed cross summary judgment motions. The Doyle Declaration accompanying the County's Motion verified Dr. List's signed expert report ("List Report") as a true and correct copy. The List Report bears Dr. List's professional engineering seal confirming his qualifications and compliance with the professional engineers' Code of Professional Conduct. Cal. Bus. & Prof. Code §§ 6762, 6764. Dr. List authenticated his report in his declaration supporting the County's Opposition to Plaintiffs' Motion. List Opp. Dec., ¶ 2.

In 2010, Federal Rule of Civil Procedure ("FRCP") Rule 56 was amended to allow the "common procedure . . . developed in . . . cases or found in many local rules" of using "familiar record materials commonly relied upon" to support summary judgment motions. Fed. R. Civ. P. 56 Committee Notes (2010). The rule permits a party to cite "particular parts of materials in the record, including . . . documents . . . or other materials." Fed. R. Civ. P. 56(c)(1)(A). FRCP 56 is consistent with Hawai'i District Court Local Rules, allowing "other document[s] that support[] the party's interpretation of the material fact." L.R. 56.1(c).

Plaintiffs cite pre-2010 case law and ignore FRCP 56(c)(1)(A) in their request to strike the List Report.[10] Plaintiffs also fail to explain that courts applying amended FRCP 56(c) allow materials other than sworn affidavits. In

[10] Although Harris v. Extendicare Homes, Inc., 829 F. Supp. 2d 1023 (W.D. Wash. 2011) post-dates the 2010 amendment, it relies on pre-2010 case law.

McCollum v. UPS Ground Freight Inc., No. CV11-0961-PHX-DGC, 2012 WL 3758837 (D. Ariz. Aug. 30, 2012), a court within the 9th Circuit held "Rule 56(c) simply requires that a party making a factual assertion . . . 'cite[] to particular parts of materials in the record, including . . . documents . . . or other materials.'" Id. at *4 (citing Fed. R. Civ. P. 56(c)(1)(A)). Likewise, in Cent. Weber Sewer Improvement Dist., No. 1:12-CV-166 TS, 2014 WL 495152, at *8 (D. Utah Feb. 6, 2014), the court admitted expert reports attached to other declarations, as was done with the County's Motion.

Following Plaintiffs' "logic" that only sworn declarations can support summary judgment motions would have precluded the County from filing a motion. The summary judgment deadline was November 5, 2014. All the County had at that point was Dr. Moran's October 2014 export report. Had the County been forced to wait for Dr. Moran's November 2014 declaration to memorialize her opinions, the County would have had none of her opinions for its Motion.[11] Plaintiffs' request to strike the List Report, unaccompanied by any claim of prejudice, is gamesmanship. It "wastes" the Court's time and should be ignored.

[11] The County relied on the opinions in Dr. Moran's report for their Motion. See 56.1, ¶¶ 8, 12, 20; Mot. at 11-14.

Shuffle Master, Inc. v. MP Games LLC, 553 F. Supp. 2d 1202, 1210 (D. Nev 2008) (with no authentication concern, attempts to strike "waste" court time).[12]

Trial judges have broad discretion to admit expert reports. See, e.g., Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996) (internal citations omitted); Merrill Lynch, 2005 WL 832050, at *8 (in bench trials, court "loth to exclude expert testimony . . . ."). Consistent with this discretion and FRCP 56(c)(1)(A), the County respectfully requests the List Report be admitted.

VI. CONCLUSION

Because Plaintiffs have not, and cannot, demonstrate a point source discharge from Wells 1 and 2 through groundwater into the ocean, the County's Motion should be granted.

DATED: December 29, 2014

By: /s/ Colleen P. Doyle
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COUNTY OF MAUI

[12] The List Report was served November 5, 2014. Doyle Rep. Dec., ¶ 5. Although Plaintiffs had nearly two months to depose Dr. List, they chose to wait until the cross motions for summary judgment were briefed and heard. Id. Although none was claimed, any conceivable prejudice will be cured once Dr. List is deposed. See Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., No. 02 Civ. 7689(HB), 2005 WL 832050, at *8 (S.D.N.Y. Apr. 12, 2005).

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.5(e), I certify that the foregoing reply brief is set in a proportionally spaced 14-point font (Times New Roman) and contains 4,209 words, exclusive of the caption, tables, and signature block. I have relied upon Microsoft Word to determine the word count.

Pursuant to Local Rule 37.1(a), I certify that the Parties met and conferred in good faith regarding the County's request to strike paragraphs 30 and 31 of the Declaration of Jean E. Moran, Ph.D. filed in support of Plaintiffs' Opposition to the County's Motion for Partial Summary Judgment as to Wells 1 and 2.

Dated: December 29, 2014

By: /s/ Colleen P. Doyle
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COUNTY OF MAUI