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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 OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: DEFENDANT'S LIABILITY FOR UNPERMITTED DISCHARGES INTO WELLS 1 AND 2; CERTIFICATE OF SERVICE

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

Related to: Dkt No. 128, Plaintiffs' Motion for Summary Judgment

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I. INTRODUCTION

Plaintiffs' Motion for Summary Judgment Re: Defendant's Liability for Unpermitted Discharges Into Wells 1 and 2 ("Motion") seeks to impose liability on the County of Maui ("County") under Clean Water Act ("CWA") Section 301(a) because groundwater containing effluent from Wells 1 and 2 of the County's Lahaina Wastewater Reclamation Facility ("LWRF") reaches the ocean. Although § 301(a) liability requires proving four things: (1) the discharge or addition; (2) of pollutants; (3) to navigable waters; (4) from a point source, Plaintiffs disregard the point source requirement. To prove a point source, Plaintiffs must show effluent reaches the ocean through "discernible, confined and discrete conveyances." Following injection, effluent from Wells 1 and 2 travels through the subsurface in a broad and diffuse manner, entering the ocean anywhere over a half mile to more than two miles of coastline. As Plaintiffs provide no evidence of a point source discharge from Wells 1 and 2 to the ocean, and they cannot as a matter of law, the Court should deny Plaintiffs' Motion.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there is "no genuine dispute as to any material fact and . . . [a party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "[T]he movants for summary judgment [here, the Plaintiffs] . . . [bear] the burden of

providing sufficient evidence to establish a prima facie case . . . . " Wash. Physicians Serv. Ass'n v. Gregoire, 147 F.3d 1039, 1047-1048 (9th Cir. 1998). Summary judgment is properly granted against a party who fails to establish a prima facie case under the applicable law. Id.; see also Leisek v. Brightwood Corp., 278 F.3d 895, 900-901 (9th Cir. 2002) (on cross-motions for summary judgment, court properly granted summary judgment against plaintiff because he failed to establish unlawful employment practices); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134, 1141 (9th Cir. 2000) (summary judgment granted against plaintiffs who failed to prove "[a]n indispensable element of [its discriminatory intent] claim"). Because Plaintiffs cannot demonstrate a point source discharge conveying effluent through the subsurface to the ocean, they fail to establish a prima facie case of liability and their Motion should be denied as a matter of law.

III. THE COUNTY'S INJECTION OF EFFLUENT INTO WELLS 1 AND 2 DOES NOT VIOLATE THE CWA

A. Plaintiffs Lack Evidence Of A Point Source Discharge To The Ocean

1. Point Sources Must Discharge To Navigable Waters Through Discernible, Confined and Discrete Conveyances

Section 301(a) prohibits "the discharge of any pollutant" except in compliance with the CWA. 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

The County does not dispute that effluent injected into Wells 1 and 2 enters groundwater and eventually flows to and enters the ocean. In other words, Plaintiffs meet three of the four elements of the "discharge of any pollutant" definition, *i.e.*, "addition of any pollutant to navigable waters."

Plaintiffs' downfall is their failure to meet the last element, which unequivocally requires the discharge to navigable waters be "from any point source." Id. "Point source" is defined as "any discernible, confined and discrete conveyance" including "any pipe, ditch, channel, tunnel, conduit, well . . . . " Id. § 1362(14).

Point sources must be distinct (*i.e.*, readily identifiable) and contained. Dictionary definitions corroborate this. Webster's Dictionary defines "discern" as "to recognize or identify as separate and distinct"; "confine" as "to keep . . . within limits; to prevent . . . from going beyond a particular limit, area, etc."; and "discrete" as "constituting a separate entity; individually distinct . . . consisting of distinct or unconnected elements . . . . " Merriam-Webster, http://www.merriam-webster.com/dictionary (last visited Nov. 13, 2014). Similarly, case law requires point sources be channelized to meet the "discernible, confined and discrete conveyance" standard. See e.g., Ecological Rights Found. v. Pac. Gas and Elec. Co., 713 F.3d 502, 510 (9th Cir. 2013); Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 224 (2d Cir. 2009).

Point source determinations depend on *how* pollutants get to navigable waters, not the activity causing the contamination.[1] Tr. for Alaska v. Envtl. Prot. Agency, 749 F.2d 549, 558 (9th Cir. 1984) (point sources are *not* distinguished from nonpoint sources "by the kind of pollution they create or by the activity causing the pollution, *but rather by whether the pollution reaches the water through a confined, discrete conveyance*.") (emphasis added).

Plaintiffs selectively refer to the plurality opinion in Rapanos to support the proposition that § 301(a) is not limited to "the addition of any pollutants *directly* to navigable waters from any point source" but rather extends to "the addition of any pollutants *to* navigable waters." Mot. at 1, 11. Plaintiffs take this discussion out of context, omitting the Supreme Court's explanation of the two types of point source discharges triggering § 301(a) liability: (1) a point source discharge directly into navigable waters (direct discharge rationale); or (2) sequential point sources that convey pollutants from the initial point of discharge to navigable waters (indirect discharge rationale). See Rapanos v. United States, 547 U.S. 715, 743-744 (2006). Importantly, neither rationale eliminates the mandatory point source requirement.

[1] The County recognizes the Court's prior ruling holding "liability under the [CWA] is triggered when pollutants reach navigable water, regardless of *how* they get there . . . . " Haw. Wildlife Fund v. Cnty. of Maui, Civil No. 12-00198 SOM/BMK, 2014 WL 2451565, at *18 (D. Haw. May 30, 2014) (emphasis in original). The County respectfully disagrees.

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.'" Id. at 743 (internal citation and quotation marks omitted). Indirect discharges require NPDES permits if "pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between" the initial discharge and navigable water. Id.

The series of discrete conveyances creates the need for an NPDES permit. Plaintiffs' reference to Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 308-309 (9th Cir. 1993) illustrates this as the facility required an NPDES permit for the indirect discharge of acid mine drainage from a reservoir through a spillway and discharge valves into navigable waters.

Indirect discharge cases cited by the Supreme Court in Rapanos also demonstrate the need for serial point sources from initial discharge to navigable waters. See Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141(10th Cir. 2005) (permit required for discharge from a mineshaft through a tunnel to navigable waters); United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) (permit required for discharge from a chemical facility through a municipal storm sewer into navigable waters); South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 104 (2004) (permit required for discharge from a pump station through a canal into navigable waters); United

States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005) (permit required for discharge from an industrial facility toilet through a storm drain into navigable waters); Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2d Cir. 1991) (permit required for discharge of landfill seepage through a culvert into navigable waters) (rev'd on other grounds); Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994) (permit required for discharge from farm vehicles through a swale, pipe and ditch into navigable waters).

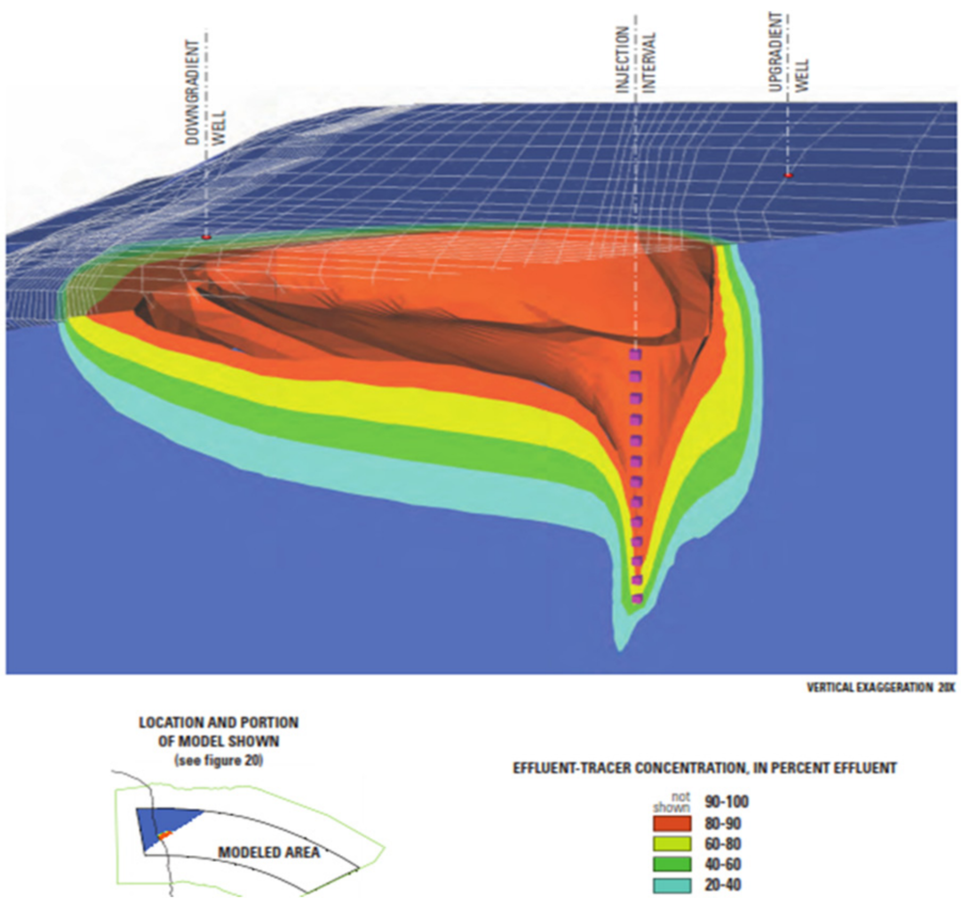
2. Broad And Diffuse Effluent Flow Is Not A Point Source Discharge

As Plaintiffs explain, effluent from Wells 1 and 2 enters "directly into groundwater located beneath the facility. . . . The groundwater . . . then conveys the pollutants to the ocean." Mot. at 11. Because groundwater is not a navigable water,[2] the facts here do not fit the direct discharge rationale.

The indirect rationale also does not apply given the broad and diffuse manner effluent enters and travels through the groundwater, and the mixture of groundwater and effluent enters the ocean. Upon injection into Wells 1 and 2, effluent immediately disperses, entering groundwater through about a 100 foot

[2] Groundwater is not a "waters of the United States" as a matter of law. See 40 C.F.R. §§ 122.2, 230.3(s), 33 C.F.R. § 328.3(a); 56 Fed. Reg. 64876, 64892 (Dec. 12, 1991); S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007) ("[D]eference is required, even in this citizen suit."); Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (regardless of hydrologic connection, groundwater is not a water of the U.S.).

opening in each well. Defendant County of Maui's Response to Plaintiffs' Rule 56.1 Concise Statement ("56.1 Resp."), ¶ 11. The effluent then rises up, dispersing further, both laterally and vertically. 56.1 Resp., ¶ 11. Moving through the subsurface, the groundwater/effluent mixture spreads out, mixing with pollutants from other sources. 56.1 Resp., ¶ 12. Flow from Wells 1 and 2 enters the coastline over a broad expanse ranging from more than 0.5 mile to more than two miles. 56.1 Resp., ¶¶ 16-17. Movement of effluent from injection toward the ocean is illustrated below.[3] 56.1 Resp., ¶ 12.



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[3] This figure comes from a study relied upon by Dr. Moran. Moran Dec., Ex. 7, Fig. 5, at 7.

As a matter of law, the dispersed Well 1 and 2 groundwater/effluent mixture cannot meet the "discernible, confined and discrete conveyance" point source requirement as it moves through the aquifer and enters the ocean. 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 not point source pollution, however, but nonpoint source pollution . . . . The Complaint thus alleges nonpoint source discharges, not point source discharges. There is no basis for a citizen suit for nonpoint source discharges under the CWA.") (internal citation omitted); Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at * 8 (E.D. Pa. Nov. 21, 2013) ("the diffuse downgradient migration of pollutants . . . through . . . groundwater . . . is nonpoint source pollution . . . ."); El Paso Gold Mines, 421 F.3d at 1140 n.4 ("Groundwater seepage . . . through fractured rock would be nonpoint source pollution . . . not subject to NPDES permitting."). See also, 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); United States v. ConAgra, Inc., No. CV 96-0134-S-LMB, 1997 WL 33545777, * 7 (D. Idaho Dec. 31, 1997) (groundwater is not a point source; it must carry pollutants through something, *e.g.*, french drains); Mary Cristina Wood, Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 Harv. Envtl. L. Rev. 569, 620

(1988) (percolating groundwater is not a point source discharge despite pollutants entering navigable waters).

a. ***Injection Into The Wells Is Not A Point Source Discharge To The Ocean***

Plaintiffs' identification of the wells as a point source is not sufficient to impose § 301(a) liability because it fails to account for the movement of pollutants from the wells to the ocean. Mot. at 23-24. Plaintiffs are correct, a "well" is among the CWA's identified "discernible, confined and discrete conveyances." 33 U.S.C. § 1362(14). Plaintiffs omit the CWA identifies "disposal of pollutants in wells" and the "movement [or] flow [of] groundwater" as types of nonpoint source pollution. 33 U.S.C. §§ 1314(f)(2)(D) & (F). Consistent with the CWA, Hawaii identifies LWRF effluent and groundwater as nonpoint sources. 56.1 Resp., ¶ 25.

Focusing on *how* pollutants enter navigable water reconciles these facially inconsistent sections. United States v. Turkette, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided and internal inconsistencies in the statute must be dealt with."). Pollutants originating from a well reaching navigable waters through another discernible, confined and discrete conveyance is a point source discharge. Rapanos, 547 U.S. at 743-744. Pollutants originating from a well reaching navigable waters through unconfined means, such as the groundwater between the LWRF and the ocean, are not. See Tr. for Alaska, 749 F.2d at 558 (point source determinations depend on how pollutants get to navigable waters).

b. *There Is No "Functionally Equivalent" Discharge*

As a matter of law, Well 1 and 2 injection into groundwater with groundwater acting as a "conduit" to the ocean is not functionally equivalent to an ocean discharge. Mot. at 1, 11, 23. There are two types of point source discharges; both require discharge to navigable water through "discernible, confined and discrete conveyances." See El Paso Gold Mines, Inc., 421 F.3d at 1146 n6 ("We stress . . . the combination of the . . . shaft, a point source, and the . . . Tunnel, another point source . . . establishes the connection to a navigable stream. This system . . . distinguishes our case from the migration . . . cases."); *supra* at Section III.A.1. Here, unconfined groundwater enters the ocean over a wide expanse of coastline (estimated anywhere between > 0.5 to > 2.0 miles), eliminating any suggestion of equivalency to a "discernible, confined or discrete conveyance." 56.1 Resp., ¶¶ 16-17.

B. Plaintiffs' Two-Part Liability Test Is Wrong

Referencing a "two-part" test, Plaintiffs claim tracking pollutants from Wells 1 and 2 to the ocean is sufficient to demonstrate liability. Mot. at 1, 2, 12. ("First, Plaintiffs 'must show that pollutants can be *directly traced* from the injection wells to the ocean' . . . . Second, 'Plaintiffs must show that the level of pollutants emerging into navigable-in-fact water is more than *de minimis*.'") (citing

Haw. Wildlife Fund, 2014 WL 2451565, at *13 (emphasis in original)). Plaintiffs are wrong as a matter of law.

1. Groundwater Containing Pollutants Entering The Ocean Is Not Sufficient To Impose CWA Liability

Simplified, Plaintiffs' "test" is whether groundwater containing pollutants from Wells 1 and 2 enters the ocean. The County does not dispute "the basic scientific principle that water flows downhill" or that effluent from LWRF wells reaches the ocean, but this is not sufficient to impose liability. Mot. at 16. CWA § 301(a) liability requires a point source discharge. 33 U.S.C. §§ 1311(a), 1362(2). See e.g., Tri-Realty Co., 2013 WL 6164092, at *7-8; Chesapeake Bay Found., 794. F. Supp. 2d. at 619-620.

Applying Plaintiffs' test leads to absurd results. Resorts, septic tanks, golf courses, and agricultural businesses among others would need NPDES permits as nutrient pollutants migrate to groundwater from these sources. See United States v. Tatoyan, 474 F.3d 1174, 1181 (9th Cir. 2007) ("Statutes should be read to avoid such absurd results."); Ecological Rights Found., 713 F.3d at 513 ("absurd" to expand point source so broadly that it can subject everyday items such as utility poles, bike racks, traffic lights and stop signs to CWA requirements).

Moreover, the second prong of Plaintiffs' test, showing the "level of pollutants emerging into navigable-in-fact waters is more than *de minimis,*" is not relevant as a matter of law. Mot. at 1-2, 12. The CWA imposes strict liability,

"categorically" prohibiting the point source discharge of any pollutant absent an NPDES permit. Mot. at 6, 20, 24 (citing Comm. to Save Mokelumne River, 13 F.3d at 309 ("[T]he Act categorically prohibits any discharge of a pollutant from a point source without a[n] [NPDES] permit.")). This prohibition eliminates any relevancy of pollutant concentration in determining liability.

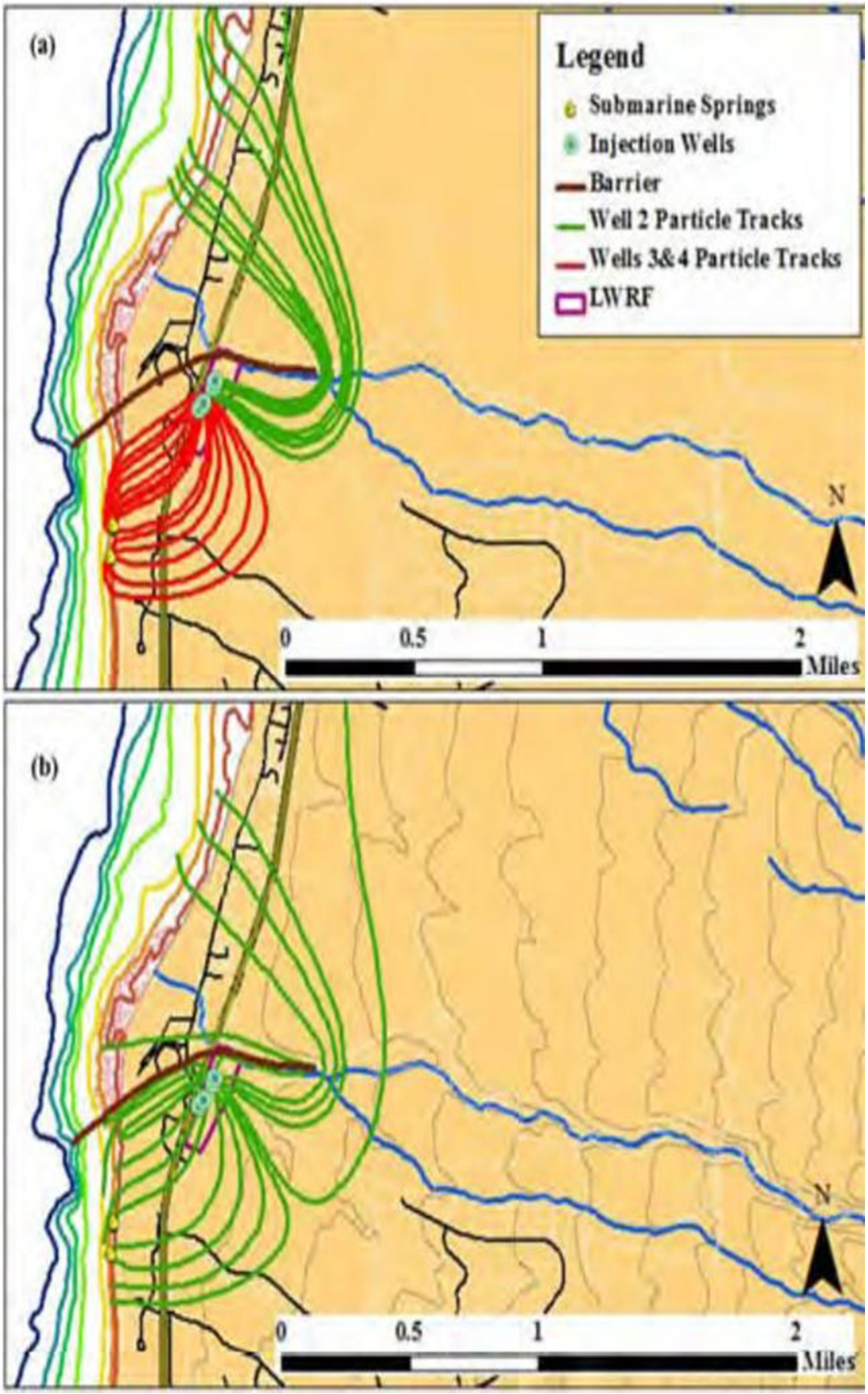
2. Dr. Moran's Opinions Do Not Support A Point Source Discharge From Wells 1 And 2 To The Ocean

With no Well 1 tracer study and results from two tracer studies reaching no conclusion on where Well 2 flow enters the ocean, Plaintiffs rely on Dr. Moran's opinion to trace effluent from the wells to the springs. Mot. at 16-19; Declaration of Jean E. Moran, Ph.D. ("Moran Dec."), ¶ 10. Dr. Moran's opinions rely on the Tracer Study and a 2009 Hunt and Rosa USGS Report ("USGS Report"). Moran Dec., ¶¶ 19, 27-35, 38, Pl. MSJ Ex. 2, (Final Tracer Study); Ex. 7, (USGS Report).

Dr. Moran opines (1) as Wells 1 and 2 follow a similar flow path as Wells 3 and 4, flow from Wells 1 and 2 enters the ocean in similar timeframes and concentrations as Wells 3 and 4; and (2) if Wells 1 and 2 receive $\geq$ 50% of LWRF effluent, it emerges at the submarine springs. Moran Dec., ¶¶ 26, 30, 32-34, 36. Dr. Moran's opinions are insufficient as a matter of law to demonstrate a point source discharge. Rather, Dr. Moran's opinions and testimony support the County's position that flow from Wells 1 and 2 is a nonpoint source as it diffusely enters the ocean over a broad expanse of coastline.

Because no dye was detected from Well 2 in the ocean, the Tracer Study modeled Well 2 flow under two distinct scenarios: (1) Wells 3 and 4 operating at actual rates; and (2) Wells 3 and 4 not operating at all, *i.e.*, assuming all flow goes to Well 2. 56.1 Resp., ¶ 15. The second scenario – Well 2 receiving all effluent – has never occurred. 56.1 Resp., ¶ 15.

Tracer Study Figure 4-39, reproduced below, illustrates both modeled scenarios. See Declaration of E. John List, Ph.D, P.E. ("List Dec"), Ex. 3, Final Tracer Study at 4-90. The top figure (4-39(a)) represents actual operating conditions, and shows model results of where effluent enters the ocean with Well 2 flow depicted in green lines, and Wells 3 and 4 flow depicted in red lines. The bottom figure (4-39(b)) represents modeling of the hypothetical scenario when all effluent is injected into Well 2 (represented in all green lines).


(a)
Legend
Submarine Springs
Injection Wells
Barrier
Well 2 Particle Tracks
Wells 3&4 Particle Tracks
LWRF
N
0
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a. *<u>When Wells 3 And 4 Receive The Majority Of Effluent, Wells 1 And 2 Flow Enters The Ocean North Of The Springs</u>*

As Plaintiffs acknowledge, Figure 4-39(a) shows that when Wells 3 and 4 receive the majority of the effluent, Well 2 flow is initially diverted east, and then moves northwesterly to the ocean (*i.e.*, no Well 2 flow reaches the springs). Mot. at 17. As the Tracer Study explains, Wells 3 and 4 flow pushes Well 2 flow away from the submarine springs. 56.1 Resp., ¶ 19. "The displacement significantly lengthens the travel path this dye takes, and increases its dispersion." List Dec., Ex. 3, Final Tracer Study at ES-21. Dr. Moran acknowledges the impact flow from Wells 3 and 4 have on Well 2 flow, saying "[t]he somewhat longer modeled travel time[] . . . is likely related mainly to transport to other discharge points . . . ." Moran Dec., ¶ 34. During her deposition, Dr. Moran agreed that when Wells 3 and 4 receive the majority of effluent (as they did during the Tracer Study), flow from Wells 1 and 2 does not enter the ocean at the submarine springs, but rather, enters the ocean "somewhere else." Declaration of Colleen P. Doyle ("Doyle Dec."), Ex. 12, Deposition Transcript of Dr. Jean E. Moran ("Moran Tr.") at 85:8-20.

Based on her own measurements, "somewhere else" is approximately 0.8 mile north of the springs, across over 0.5 mile of coastline. Id. at 51:12-52:2.[4]

b. ***When Wells 1 And 2 Receive The Majority Of Effluent, Flow Enters The Ocean Along The Coastline Spanning North And South Of The Springs***

Dr. Moran references Tracer Study Figure 4-39(b) (depicting all effluent going to Well 2) to support her opinion that flow from Wells 1 and 2 comes out at the submarine springs if these wells receive the "majority" of effluent. Moran Dec., ¶ 30. The County does not dispute that Figure 4-39(b) shows effluent emerging at the submarine springs. However, that is not a complete explanation of the figure. Rather, Figure 4-39(b) shows that with only Well 2 operating, Well 2 flow enters the ocean over approximately two miles of coastline extending north and south of the submarine springs. 56.1 Resp., ¶ 17. During her deposition, Dr. Moran agreed that while "a good amount of the flow [from Wells 1 and 2] is at the

[4] While Dr. Moran correctly measured "between an inch and an inch-and-a-quarter" along the coastline, her conversion to "a little more than one mile," was incorrect. Doyle Dec., Ex. 12, Moran Tr. at 46:22-47:7. Per the scale, Dr. Moran's measurement converts to over 0.5 mile, which is consistent with Dr. List's measurement of approximately 0.7 mile. 56.1 Resp., ¶ 16. Dr. Moran did not include the northernmost particle track going off Figure 4-39(b) in her measurement. Additionally, Dr. Moran stated that because "Wells 1 and 2 are in the same hydrogeologic regime," she would "expect the character – the general character of the flow, the general direction of the flow, the general rate of the flow to be similar from Well 1 as it is from Well 2." Doyle Dec., Ex. 12, Moran Tr. at 78:8-15.

seep[s] . . there are other flow pathways" or locations where Wells 1 and 2 flow enters the ocean. Doyle Dec., Ex. 12, Moran Tr. at 178:21-179:5.

Dr. Moran clarified that with Wells 3 and 4 off, she anticipated that 32.5% of Well 2 flow would appear at the springs. Doyle Dec., Ex. 12, Moran Tr. at 59:12-65:13. In other words, 67.5% of Well 2 flow would appear elsewhere. Id. at 66:11-23. Dr. Moran measured the entire distance of Well 2 flow (*i.e.*, at the springs and both north and south of the springs) as approximately 1.5 miles.[5]

Dr. Moran premises her opinion on Wells 1 and 2 receiving the "majority" of the flow. However, her opinion does not take into account the fact that Wells 3 and 4 were operating at all relevant times and that during 80 of the 94 months at issue (*i.e.*, greater than 85% of the time), Wells 3 and 4 received more than 50% of the flow. 56.1 Resp., ¶¶ 22, 24.

Cherry picking discrete timeframes of $\geq$ 50% effluent injection into Wells 1 and 2 also does not support Dr. Moran's opinion. Mot. at 18-19; Moran Dec., ¶ 37-38; Declaration of David L. Henkin, ¶¶ 30-31. As the LWRF continually operates, monthly rolling averages need to be used when estimating the percentage of flow from a well to the ocean. 56.1 Resp., ¶ 21. Static calculations, focused on injection rates in any discrete time period, do not provide an accurate estimate of

[5] Dr. Moran's measurement did not include the northernmost particle track going off Figure 4-39(b). Doyle Dec., Ex. 12, Moran Tr. at 52:14-53:17. This exclusion explains the difference between Dr. Moran's measurement and Dr. List's more than 2.0 mile measurement. 56.1 Resp., ¶ 17.

the fraction of effluent entering the ocean in that time period. 56.1 Resp., ¶ 21; List Dec., ¶ 32.

Dr. Moran estimates the mean travel time from the LWRF to the ocean is about ten months. Moran Dec., ¶ 38. Dr. Moran relies on the ten month delay in flow arrival to support her opinion that the 2009 USGS Report discussing data collected in May 2008 is representative of effluent injected in 2006 and 2007. Moran Dec., ¶¶ 35-38; Mot. at 18-19.

The earliest the Tracer Study detected initial dye concentrations was three months. 56.1 Resp., ¶ 13. Between January 2006 and November 15, 2014, using a ten month rolling average, 54% is the highest percentage of effluent injected into Wells 1 and 2 (December 2006).[6] 56.1 Resp., ¶ 22. During this same period, 72% is the highest three month rolling average (September 2014). 56.1 Resp., ¶ 22.

As Dr. List's modeling illustrates, regardless of whether Wells 1 and 2 receive 54% or 72% of the effluent (*i.e.*, the highest ten month and three month rolling averages respectively), flow from Wells 1 and 2 diffusely enters the ocean along the coastline outside of the submarine springs. 56.1 Resp., ¶¶ 14, 23.

[6] The County references 2006 data because that is what Dr. Moran relied upon. Moran Dec., ¶¶ 35-38; Mot. at 18-19. The County does not concede that 2006 data is within the relevant time period. Rather, as Plaintiffs note, the statute of limitations began to run February 15, 2007. Pl. MSJ at 10 n1.

c. ***With All Wells Receiving Effluent, Flow Enters The Ocean Along Roughly Two Miles Of Coastline***

As illustrated in Figures 4-39(a) and (b), Tracer Study modeling demonstrates that regardless of which wells operate, effluent reaches the coastline over roughly a two mile expanse. 56.1 Resp., ¶¶ 16-17. Dr. Moran concurs – with all wells running, flow enters the ocean at the seeps as well as other locations. Doyle Dec., Ex. 12, Moran Tr. at 83:13-84:7. Moreover, the Tracer Study, the 2009 USGS Report and Dr. Moran all recognize that flow from the LWRF could enter the ocean other places not documented in either study. 56.1 Resp., ¶18.

Bottom-line: Dr. Moran agrees (i) when Wells 3 and 4 receive the majority of the flow, Well 2 flow enters the ocean north of the springs; (ii) when Wells 1 and 2 receive the majority of the flow, Well 1 and 2 flow enters the ocean at the springs as well as outside the springs; (iii) regardless of majority flow, when all wells are operating, flow enters the ocean across an expanse of roughly two miles; and (iv) Well 1 and 2 flow could enter the ocean at other unknown locations.[7] Because *how* effluent flows is critical to point source identification, Dr. Moran's opinions do not provide evidence of a point source discharge from the wells to the ocean. See Tr. for Alaska, 749 F.2d at 558.

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[7] While the County disputes Dr. Moran's alleged "fast path" from the LWRF to the ocean (see 56.1 Resp., ¶ 20), the County maintains that such "fast path" is not relevant to determining where flow from Wells 1 and 2 enters the ocean.

C. Plaintiffs Ignore Successful CWA Nonpoint Source Programs

1. The CWA Addresses Nonpoint Source Discharges

Plaintiffs' reliance on Envtl. Prot. Agency v. Cal. *ex rel*. State Water Res. Control Bd., 426 U.S. 200 (1976) to support their position that NPDES permits are the CWA's mechanism to control water pollution is misplaced. Mot. at 7, 24. Plaintiffs' view is tantamount to saying the CWA only addresses point source pollution. Such a position is misleading and incorrect.[8] See e.g., Pronsolino v. Nastri, 291 F.3d 1123, 1128-29, 1137-38 (9th Cir. 2002) (various provisions of the CWA apply to nonpoint sources); El Paso Gold Mines, 421 F.3d at 1140 n.4 ("The CWA also regulates nonpoint source[s].").

When enacting the CWA in 1972, Congress included nonpoint source pollution controls. See 33 U.S.C. § 1288 (state wastewater treatment plans must control nonpoint source pollution); 33 U.S.C. § 1313(d), (development of point and

[8] Congress has consistently maintained that the NPDES program is not the only means to control water pollution. See e.g., 131 Cong. Rec. 15301 (1985), 1985 WL 707456 ("nonpoint source management programs . . . will target critical areas, identify the sources of nonpoint source pollution, identify the best management practices that are available to abate the pollution, and set timetables for program implementation."); 133 Cong. Rec. 983 (1987), 1987 WL 928356 ("Over the years . . . new information has indicated that nonpoint sources contribute up to 50 percent of the water pollution in some States. Thus, the conferees establish a new national policy to develop and implement programs for controlling nonpoint sources of pollution."); 133 Cong. Rec. 1260 (1987), 1987 WL 928615 (CWA nonpoint pollution control programs are "addition[s] to the Clean Water Act and not a substitute for the point source programs already in place under the act. . . . ").

nonpoint source total maximum daily loads for water bodies failing to meet water quality standards); 33 U.S.C. § 1314(f) (a nonpoint source pollution framework, including nonpoint source categories such as groundwater and well disposal).

In 1987, eleven years after Envtl. Prot. Agency, Congress definitively spoke, leaving no ambiguity that the CWA addresses both point and nonpoint source pollution. Congress amended its CWA Declaration of Goals and Policy, adding "[i]t is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). Simultaneously, Congress added more federal oversight, requiring EPA approve state programs identifying nonpoint sources of pollution and plans to control them. 33 U.S.C. § 1329. When approving Hawaii's Plan, EPA commended the "integrated" and "effective and dynamic state nonpoint source control program." 56.1 Resp., ¶ 26.

2. LWRF Effluent Is Nonpoint Source Pollution

Lacking a statutory or regulatory definition, nonpoint source "includes all water quality problems not subject to § 402 [NPDES permits]." Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166 (D.C. Cir. 1982). Nonpoint sources arise from "many dispersed activities over large areas." Ecological Rights Found., 713 F.3d at 508 (citing League of Wilderness Defenders v. Forsgren, 309 F.3d 1181,

1184 (9th Cir. 2002); Oregon Natural Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 785 (9th Cir. 2008)). While it may be difficult in some cases, nonpoint source pollution is "traceable to nonpoint sources." Pronsolino, 291 F.3d at 1126; see also Cordiano, 575 F.3d at 223-224 (berm containing lead that could leach to wetlands is a nonpoint source of pollution).

The multiple sources of nutrient pollutants in the roughly 0.5 mile stretch of groundwater between the LWRF and the ocean supports classification of the groundwater as a nonpoint source (*i.e.*, many dispersed activities over a large area). The USGS Report indicates LWRF injection occurs "within a larger shoreward regional flux of groundwater carrying background nutrients and fertilizer-enriched nutrients that in some areas are comparable to concentrations in [LWRF] wastewater." 56.1 Resp., ¶ 12. The report also acknowledges the "long-standing concern" of land-derived nutrients to coastal waters including "stormwater runoff, sewage effluents (injected, septic, cesspool, leaking sewer lines, and spills at transfer stations), agricultural and urban fertilizers, and nonpoint background sources . . . . " 56.1 Resp., ¶ 12. Likewise, the Tracer Study recognizes other pollutant sources are "an important coastal nutrient source" that were not quantified in the study. 56.1 Resp., ¶ 12.

Hawaii's identification of both LWRF effluent and groundwater as nonpoint sources of pollution corroborate that flow from Wells 1 and 2 is a nonpoint source.

56.1 Resp., ¶ 25. Moreover, Hawaii's EPA approved "effective" and "dynamic" nonpoint source program works. 56.1, Resp., ¶ 26. Kahekili Beach meets all state nutrient water quality criteria. 56.1 Resp., ¶ 26.

3. LWRF Effluent Does Not Cause Adverse Effects

Claiming effluent from Wells 1 and 2 reaches the submarine springs, Plaintiffs imply the effluent adversely affects the "properties of water near the seeps" in five ways: (1) elevated levels of nutrients; (2) higher acidity; (3) lower salinity; (4) lower dissolved oxygen; and (5) higher temperature. Mot. at 21-23; Moran Dec., ¶ 28.[9, 10] The County disputes any such implication.

Dr. List illustrates the absence of any adverse effect from LWRF effluent on the near-shore waters off Kahekili Beach. Dr. List's analysis takes into account geothermal activity as well as Tracer Study and January 2012 to July 2014 Hawaii

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[9] This Section responds to Plaintiffs' suggestion that LWRF effluent "significantly affects" reef health. Mot. at 22. Neither Plaintiffs' discussion nor this response is dispositive to Plaintiffs' Motion. <u>See</u> <u>Haw. Wildlife Fund</u>, 2014 WL 2451565, at * 12, 18-19.

[10] The County assumes Dr. Moran's references to 65% of effluent reaching the submarine springs pertains to Tracer Study references to 64% of the material existing the submarine springs being composed of LWRF effluent. Moran Dec., ¶¶ 9, 28. The County disputes any such determination because of the "significant uncertainties" associated with the Tracer Study calculations. List Dec., ¶¶ 45-49. The Tracer Study (1) failed to account for seasonal variability; (2) relied on dye concentrations measured at less than 1% of the springs; and (3) discarded half of the calculated data sets because they yielded unrealistic results (*i.e.*, > 100% or < 0%) and instead relied on data sets where the calculated percentage effluent ranged from 12% to 96%. <u>Id.</u>

Department of Health ("HDOH") submarine spring sampling data in evaluating each of the five parameters Plaintiffs reference as briefly summarized below.

Elevated nutrients: EPA's acceptance of Hawaii's 2014 Water Quality Monitoring and Assessment Report showing Kahekili Beach meets all nutrient water quality criteria confirms nutrients are not a concern. List Dec., ¶ 58.

Higher acidity: Tracer Study results measured the average pH within the submarine springs as 7.5. This level is consistent with Hawaii water quality criteria which recognizes that when groundwater enters coastal waters (as it does here), it "may depress the pH to a minimum level of 7.0." H.A.R. § 11-54-6(a)(3). List Dec., ¶ 59.

Lower salinity: Because the salinity of groundwater is consistently less than ocean water, the lower salinity measured within the springs is a natural phenomenon from groundwater infiltration and is not attributable to LWRF effluent. List Dec., ¶ 60.

Lower dissolved oxygen ("DO"): While it is natural that DO content of material traveling through the subsurface will go down as bacteria consume the oxygen, based on HDOH data (the only available DO data) the difference in DO content of LWRF effluent (6.9 ± 0.3 mg/l) and material within the springs (6.07-6.87 ± 0.35) is not significant. List Dec., ¶¶ 61-62.

Higher Temperature: Documented geothermal activity in West Maui constitutes approximately 11% of the water within the springs. List Dec., ¶ 57. While the Tracer Study does not address the implications of this natural phenomenon, geothermal activity, not LWRF effluent, accounts for the temperature measured within the springs. List Dec., ¶ 63.

IV. CONCLUSION

To succeed on a CWA § 301(a) claim, Plaintiffs must prove a "discernible, confined and discrete" point source discharge as effluent from Wells 1 and 2 moves through the subsurface and enters the ocean. Plaintiffs fail to meet their burden as they provide no such evidence. Given the broad and diffuse manner effluent from Wells 1 and 2 enters and travels through the subsurface, and the over half to more than two mile range of coastline where flow from Wells 1 and 2 could enter the ocean, Plaintiffs cannot demonstrate a point source discharge as a matter of law. Because Plaintiffs did not and cannot demonstrate the required point source discharge to navigable waters, the Court should deny Plaintiffs' Motion.

DATED: December 22, 2014

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