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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, v. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM BMK PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS; DECLARATION OF DAVID L. HENKIN; EXHIBIT “A;” CERTIFICATE OF SERVICE

PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

Two years ago, plaintiffs Hawai'i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association (collectively, "the Citizens") filed this Clean Water Act citizen suit, seeking to put an end to defendant County of Maui's ongoing, illegal discharges of wastewater from injection wells at its Lahaina Wastewater Reclamation Facility ("LWRF"), through groundwater, and into the nearshore waters of West Maui. A year ago, the parties agreed, and this Court ordered, that, if the parties were unable to resolve this case by settlement, they would file dispositive motions no later than March 17, 2014. Now that, consistent with the agreed-upon schedule, the Citizens' motion for partial summary judgment is before the Court, Defendant resurrects an argument it raised early in this case, asking the Court to invoke the doctrine of primary jurisdiction and deny the Citizens a prompt ruling on the merits of their claim that Defendant has violated and is violating the Clean Water Act by discharging, without the required National Pollutant Discharge Elimination System ("NPDES") permit, wastewater and other pollutants from LWRF Injection Wells 3 and 4 into groundwater that has a hydrologic connection to the Pacific Ocean and that significantly affects the chemical, physical, and biological integrity of the receiving waters at Kahekili.

In August 2012, this Court held the primary jurisdiction doctrine inapplicable to this case, and no intervening developments justify a different

outcome now. Then, as now, there is no apparent movement at either state or federal level to address Defendant's illegal discharges. Rather, Defendant provides evidence of, "[a]t most, … a possible decision relating to an NPDES permit," which this Court previously – and correctly – determined did not justify a stay under the primary jurisdiction doctrine. Order Denying Motion to Dismiss (Dkt. No. 34) at 10; see infra Parts II and V.

In considering Defendant's motion, this Court must bear in mind that the Citizens come before the Court under a citizen suit provision that Congress fashioned to "empower[] citizens to pursue enforcement of the Clean Water Act." Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1012 (9th Cir. 2002); see infra Part III. Courts nationwide have stressed that "[t]he primary jurisdiction doctrine should be applied sparingly to citizen suits; otherwise, delay by the agency could frustrate the congressional intent of broadened enforcement that underlies citizen suit provisions." Sierra Club v. El Paso Gold Mines, Inc., 198 F. Supp. 2d 1265, 1269 (D. Colo. 2002), rev'd on other grounds, 421 F.3d 1133 (10th Cir. 2005); see also id. at 1269-70 (citing cases). Indeed, some courts have held that "[t]his doctrine has no application" in Clean Water Act citizen suits. California Sportfishing Prot. Alliance v. City of W. Sacramento, 905 F. Supp. 792, 807 n.21 (E.D. Cal. 1995).

The question whether Defendant's unpermitted discharges violate the Clean Water Act is straightforward, and this Court is perfectly capable of resolving it,

applying the legal framework the Court articulated when it denied Defendant's earlier motion to dismiss. See infra Part IV. By the time this Court hears Defendant's motion on May 12, 2014, the Court will have before it all the legal arguments and facts necessary to adjudicate Defendant's liability via the Citizens' motion for partial summary judgment, which the Court will hear at the same time. Under these circumstances, yielding primary jurisdiction to the regulatory agencies is particularly unwarranted. Moreover, granting Defendant's request for a stay or dismissal would cause extreme prejudice to the Citizens, depriving them, indefinitely, of relief from Defendant's illegal discharges and potentially barring the Citizens from holding Defendant to account for years of damage to West Maui's fragile coral reefs. See infra Part VI.

For the reasons set forth herein, the Citizens respectfully ask this Court to deny Defendant's motion and to proceed with resolving the parties' disputes about Defendant's Clean Water Act violations without further delay.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is the owner and operator of the LWRF, which uses four injection wells to dispose of wastewater. Answer (Dkt. No. 41) ¶¶ 2, 16, 21. On average, Defendant disposes of three to five million gallons of wastewater per day into these injection wells. Id. ¶ 22. Defendant does not have an NPDES permit for its discharges from the LWRF injection wells. Id. ¶¶ 2, 12, 31.

In this lawsuit, the Citizens assert that Defendant has violated and is continuing to violate Clean Water Act section 301(a), 33 U.S.C. § 1311(a), by allowing continuous, unpermitted discharges of wastewater and other pollutants from its LWRF injection wells into groundwater that is hydrologically connected to, and has a substantial effect on the chemical, physical, and biological integrity of, the Pacific Ocean at Kahekili. First Amended Complaint (Dkt. No. 36) ¶¶ 1-3, 44-62, 64.

On May 9, 2012, Defendant filed a motion to dismiss (Dkt. No. 8). Defendant raised various grounds for dismissal, including the claim it reasserts in its pending motion for judgment on the pleadings: the Court should refuse to adjudicate the Citizens' claims under the primary jurisdiction doctrine. Def's Motion to Dismiss Memo. (Dkt. No. 8-1) at 14-16. On August 8, 2012, this Court denied the motion, specifically finding that Defendant had failed to show that the primary jurisdiction doctrine applies here. Order Denying Motion to Dismiss at 10.

Following the Court's denial of the motion to dismiss, the parties engaged in extensive settlement negotiations, meeting with Magistrate Judge Barry M. Kurren for settlement conferences on eleven occasions over a period spanning a year and a half. See 8/27/12 Minutes (Dkt. No. 42); 10/3/12 Minutes (Dkt. No. 44); 12/6/12 Minutes (Dkt. No. 48); 12/18/12 Minutes (Dkt. No. 50); 1/14/13 Minutes (Dkt. No. 51); 2/12/13 Minutes (Dkt. No. 52); 3/21/13 Minutes (Dkt. No. 54); 5/10/13

Minutes (Dkt. No. 56); 12/9/13 Minutes (Dkt. No. 59); 1/30/14 Minutes (Dkt. No. 60); 2/11/14 Minutes (Dkt. No. 63). At the May 10, 2013 settlement conference, the parties agreed, and Magistrate Judge Kurren subsequently ordered, that, if the parties could not reach a settlement, they would file dispositive motions no later than March 17, 2014. 5/10/13 Minutes (Dkt. No. 56); Henkin Decl. ¶ 3.

On November 14, 2012, Defendant submitted an NPDES permit application for the LWRF injection wells to the State of Hawai'i Department of Health ("DOH"). Def's Exh. A (Dkt. No. 71-3): NPDES Application and Cover Letter. As its cover letter made clear, in submitting the application, Defendant was not conceding that its discharges require an NPDES permit. COM3 NPDES 006087 ("The County does not feel that "the Clean Water Act's NPDES permit program is applicable for this discharge").[1] On the contrary, Defendant categorically denied that its injection wells discharge effluent to waters of the United States, COM3 NPDES 006092, and, accordingly, left the "Description of Receiving Waters" section blank. COM3 NPDES 006094.

As noted in the Environmental Protection Agency's ("EPA's") NPDES Permit Writers' Manual, a description of the receiving waters is "basic application information," required of all applicants seeking permit coverage for discharges from wastewater treatment facilities. Def's Exh. I (Dkt. No. 71-11): EPA NPDES

[1] For ease of reference, the Citizens cite to the consecutive Bates stamp numbers appearing at the bottom of Defendant's Exhibit A.

Permit Writers' Manual at 4-5. Defendant left several other required sections of the application completely blank, including Part B, which requests basic effluent testing information and is required of "[a]ll applicants that discharge to waters of the US," COM3 NPDES 006095; see also EPA NPDES Permit Writers' Manual at 4-5. Moreover, despite Defendant's admission that it discharges three to five million gallons of wastewater per day from the LWRF injection wells, it failed to provide the additional effluent and toxicity testing data required in Parts D and E for applicants with a design flow greater than or equal to 1.0 million gallons per day ("mgd"). COM3 NPDES 006097 (data required for design flow greater than or equal to 0.1 mgd); COM3 NPDES 006099-106 (data required for design flow greater than or equal to 1.0 mgd); see also EPA NPDES Permit Writers' Manual at 4-5 to 4-6.

For an NPDES permit application to be complete, "[a]t a minimum, the application form must have all applicable spaces filled in." EPA NPDES Permit Writers' Manual at 4-14; see also Plfs' Exh. A: DOH Instructions for Individual NPDES Permit Application at 2. If an applicant believes an item is not applicable, it must "use the statement *not applicable* (N/A) to indicate that the item has been considered," rather than leave the item blank, as Defendant did throughout its application. EPA NPDES Permit Writers' Manual at 4-14; DOH Instructions for Individual NPDES Permit Application at 2. Before an application is deemed

complete, "[a] permit writer must obtain a response to the blank items" from the applicant. EPA NPDES Permit Writers' Manual at 4-14.

Despite the obvious deficiencies in Defendant's application, which left blank key sections regarding the pollutants Defendant discharges and the waters that receive those discharges, over seventeen months later, DOH still has not decided, even preliminarily, whether it considers the application complete. See Def's Exh. B (Dkt. No. 71-4): 3/6/14 DOH Letter at 1. Moreover, DOH has not even articulated an estimated time when it will make that threshold determination. Id. As for EPA, while it received Defendant's application in November 2012, in the intervening nearly year and a half, EPA has not provided any comments. Id.

On the March 17, 2014 dispositive motion deadline, Defendant filed its Motion for Judgment on the Pleadings, or in the Alternative, Stay (Dkt. No. 71), and the Citizens filed their Motion for Partial Summary Judgment (Dkt. No. 72). This Court is scheduled to hear both motions at the same hearing on May 12, 2014. Notice of Hearing on Motion (Dkt. No. 74).

III. APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE IS DISFAVORED IN CITIZEN SUITS

As the Ninth Circuit has noted, "The Clean Water Act explicitly allows private citizens to bring enforcement actions against any person alleged to be in violation of federal pollution control requirements." Hammersley, 299 F.3d at 1012. Congress authorized such citizen suits as long as (1) the citizen plaintiffs

provide EPA, the relevant state agency, and the alleged violator at least sixty-days advance notice of their intent to file suit, and (2) EPA or the state is not already diligently prosecuting a civil or criminal action in court to require compliance. See 33 U.S.C. § 1365(a), (b). "Congress thus empowered citizens to pursue enforcement of the Clean Water Act when all procedural requirements [are] satisfied." Hammersley, 299 F.3d at 1012.

In this case, the Citizens have satisfied all procedural requirements to invoke this Court's jurisdiction over Defendant's Clean Water Act violations. As Defendant acknowledges, the Citizens provided the required notice of intent to sue. See First Amended Complaint ¶ 8; Answer ¶ 9. In addition, this Court previously held that neither EPA nor the State of Hawai'i was "diligently prosecuting the County of Maui for a Clean Water Act violation" when the Citizens filed suit. Order Denying Motion to Dismiss at 16. Since the Citizens have met the Act's procedural requirements, this Court should "honor the Act's express provisions authorizing citizen suits" and resolve the Citizens' claims on the merits. Hammersley, 299 F.3d at 1012; see also Wilson v. Amoco Corp., 989 F. Supp. 1159, 1170 (D. Wyo. 1998) (refusing to invoke "primary jurisdiction to surrender [court's] statutorily imposed duty to entertain and decide" citizen suit).

In the early days of the Republic, the Supreme Court observed that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404

(1821) . In the nearly two centuries since the Court expressed this fundamental principle, it has repeatedly "acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). Abstention based on application of the primary jurisdiction doctrine "is particularly inappropriate in situations involving a statute like [the Clean Water Act], which expressly allows for citizens to bring suit in order to ensure uniform enforcement of federal environmental laws." Williams v. Alabama Dep't of Transp., 119 F. Supp. 2d 1249, 1256 (M.D. Ala. 2000); see also El Paso Gold Mines, 198 F. Supp. 2d at 1269 ("[t]he primary jurisdiction doctrine should be applied sparingly to citizen suits; otherwise, delay by the agency could frustrate the congressional intent of broadened enforcement that underlies citizen suit provisions"); Wilson, 989 F. Supp. at 1170 (noting "overriding reason for courts to hear [Clean Water Act] cases despite their supposed unique nature: Congress has told us to"); California Sportfishing Prot. Alliance, 905 F. Supp. at 807 n.21 (in Clean Water Act cases, primary jurisdiction doctrine has "no application . . . because Congress has expressly set forth the ground rules for citizen suits and only bars penalty actions in specified circumstances").[2]

[2] In cases involving the Resource Conservation and Recovery Act ("RCRA"), another environmental statute where Congress has authorized citizen suits, "the majority of courts that have addressed [primary jurisdiction] have held that abstention is rarely, if ever, appropriate in a citizen's suit ... ." DMJ Assocs.,

The cases on which Defendant relies to urge this Court to defer to agency expertise do not involve citizen suits and, accordingly, are inapposite. See Lyon v. Gila River Indian Cmty., 626 F.3d 1059, 1065 (9th Cir. 2010) (dispute between Indian tribe and bankruptcy trustee over rights of access to parcel of land); Clark v. Time Warner Cable, 523 F.3d 1110, 1112 (9th Cir. 2008) (class action against cable operator for switching consumers' telephone services without consent). Indeed, many of the cases Defendant cite do not even mention the primary jurisdiction doctrine, much less involve applying it to justify abstention from ruling on the merits of a citizen suit. See Far East Conference v. United States, 342 U.S. 570, 573 (1952) (applying provisions of Shipping Act to dismiss anti-trust action brought by United States); Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1445 (1st Cir. 1992) (challenge under Administrative Procedure Act to Army Corps' issuance of dredge-and-fill permit); Deltona Corp. v. Alexander, 682

LLC v. Capasso, 228 F. Supp. 2d 223, 229-30 (E.D.N.Y. 2002). Those courts have concluded that, "[b]y authorizing citizens to file private lawsuits … and narrowly defining the conditions under which state or federal action can circumscribe that right, Congress clearly signaled that the federal courts have a duty to hear and decide these claims and carefully limited the deference courts should pay to the expertise of an administrative agency." Id.; see also Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd., 633 F.3d 20, 31 (1st Cir. 2011) ("the careful structure of federal court jurisdiction under RCRA makes us distinctly reluctant to countenance abstention here;" "When it enacted RCRA, … Congress recognized and addressed the specific clash of interests at issue here, by carefully delineating (via the diligent prosecution bar) the situations in which a state or federal agency's enforcement efforts will foreclose review of a citizen suit in federal court"); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998) ("[Abstention] would be an end run around RCRA. Congress has specified the conditions under which the pendency of other proceedings bars suit under RCRA ... .") (emphasis omitted).

F.2d 888, 891 (11th Cir. 1982) (challenge to Army Corps' denial of dredge-and-fill permits). These cases fail to account for Congress' express intent to "empower[] citizens to pursue enforcement of the Clean Water Act when," as here, "all procedural requirements [are] satisfied." Hammersley, 299 F.3d at 1012.

IV. THIS COURT IS COMPETENT TO ADJUDICATE DEFENDANT'S LIABILITY UNDER THE CLEAN WATER ACT

The main theme of Defendant's motion is that determining Defendant's liability under the Clean Water Act requires "highly technical fact-specific inquiries." Def's Memo. (Dkt. No. 71-1) at 10. Notably, neither case that Defendant cites for this proposition expresses any concern about the federal courts' ability to resolve complex questions about the Clean Water Act's application, with neither court invoking the primary jurisdiction doctrine to justify abstention. In Rapanos v. United States, 547 U.S. 715 (2006), the Supreme Court articulated the test to determine when wetlands are covered "waters of the United States" and then held that "the lower courts" – not federal or state regulatory agencies – "should determine, in the first instance," whether the Clean Water Act applies. Id. at 757 (plurality) (emphasis added); see also id. at 787 (Kennedy, J., concurring) (supporting "remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters"). Far from favoring judicial abdication to regulatory agencies to determine the Clean Water Act's scope, Rapanos rejected the Army Corps' basis for asserting jurisdiction over the

wetlands at issue, and the plurality chided the dissent for "its total deference to the Corps' ecological judgments." Id. at 749 (plurality); see also id. at 783 (Kennedy, J., concurring) (questioning Corps' assertion of jurisdiction).

In Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), the Ninth Circuit similarly expressed no reservations before it set out the test for whether a pond into which the City of Healdsburg's wastewater treatment plant discharged sewage was covered by the Clean Water Act. As this Court explained in rejecting Defendant's earlier motion to dismiss, the Ninth Circuit "read Justice Kennedy's concurrence [in Rapanos] as providing the controlling rule" and concluded that "a 'mere hydrological connection' could be too insubstantial to provide the required nexus" for Clean Water Act jurisdiction. Order Denying Motion to Dismiss at 7 (quoting Healdsburg, 496 F.3d at 1000). This Court continued:

> Focusing on the need for a "significant nexus," the Ninth Circuit noted that any connection had to be evaluated in light of the Clean Water Act's goals of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The Ninth Circuit concluded that Basalt Pond had a "significant nexus" to navigable waters, "not only because the Pond waters seep into the navigable Russian River, but also because they significantly affect the physical, biological, and chemical integrity of the River."

Id. (citations omitted).

Having articulated the legal test to determine the scope of Clean Water Act jurisdiction, the Ninth Circuit in Healdsburg had no difficulty evaluating the

district court's specific factual findings – including findings regarding the nature of the underground hydrologic connection between the pond and the river – to "affirm the district court's holding that Basalt Pond is subject to the [Act]." 496 F.3d at 995; see also id. at 1000-01. Courts across the country have engaged in similar, fact-specific inquiries to determine whether discharges into hydrologically connected groundwater fall within the scope of the Clean Water Act. See, e.g., Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1320 (S.D. Iowa 1997) (unpermitted fuel spills and leaks into groundwater with hydrologic connection to Des Moines River and wetland violated Clean Water Act); Quivira Mining Co. v. United States Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985) (NPDES permits required for mining company's discharges into arroyo and creek with regular flow through underground aquifers into navigable-in-fact streams).

As Healdsburg and similar decisions from courts around the country make clear, questions that arise under the Clean Water Act "are not so esoteric or complex as to foreclose their consideration by the judiciary." Wilson, 989 F. Supp. at 1170; cf. Clark, 523 F.3d at 1114 (primary jurisdiction doctrine "not designed to 'secure expert advice' from agencies 'every time a court is presented with an issue conceivably within the agency's ambit'") (citation omitted); Lyon, 626 F.3d at 1075 (same). As the drafters of the Clean Water Act explicitly stated, "Enforcement of pollution regulations is not a technical matter beyond the

competence of the courts." S. Rep. 92-414, at 81 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3747.

The Ninth Circuit has echoed this sentiment, stating:

> Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act.

Hammersley, 299 F.3d at 1012.

Accordingly, even if DOH or EPA someday were to conclude that Defendant's discharges from the LWRF injection wells did not require an NPDES permit, the Ninth Circuit has held that such an agency decision would "not [be] a barrier to a citizen's otherwise proper federal suit to enforce the Clean Water Act," including suits "brought where a party proceeds to discharge pollutants from a point source without a required permit." Id. at 1012 & n.4. While the agency's decision would "warrant[] consideration," it would "not divest the federal courts of jurisdiction" independently to adjudicate the alleged violations. Id. at 1012.

In this case, this Court has already set forth the test to determine whether Defendant's unpermitted discharges from the LWRF injection wells violate the Clean Water Act. Based on the facts presented, the Court must determine (1) "whether there [is] a hydrologic connection" between the groundwater into which Defendant discharges and the Pacific Ocean at Kahekili, and (2) whether that hydrologic connection is "sufficient to establish a 'significant nexus.'" Order

Denying Motion to Dismiss at 7. The Court specified that a "significant nexus" exists if the groundwater into which Defendant discharges "significantly affect[s] the physical, biological, and chemical integrity" of the nearshore waters. Id. (quoting Healdsburg, 496 F.3d at 995); see also id. at 13 (holding the Citizens "sufficiently alleged a significant nexus").[3]

The Citizens' pending motion for partial summary judgment provides this Court with ample evidence to determine whether the groundwater into which Defendant discharges is subject to the Clean Water Act. In addition to the tracer dye study that conclusively proved a hydrologic connection between that groundwater and the Pacific Ocean off Kahekili Beach, the Citizens have submitted declarations by expert witnesses who attest to the indisputable hydrologic connection, as well as to the substantial chemical, physical, and biological changes that the large volume of groundwater, which includes LWRF wastewater, causes to the nearshore receiving waters. See Plfs' Exh. 2 (Dkt. No. 73-10): Final Tracer Dye Study Report; Plfs' Exh. 3 (Dkt. Nos. 73-11 & 73-12): Interim Tracer Dye Study Report; Paytan Decl. (Dkt. No. 73-1); Smith Decl. (Dkt. No. 73-2). Based on this evidence, "[t]he court is competent to determine whether

[3] Even in cases not involving citizen suits, the primary jurisdiction doctrine applies in only "a limited set of circumstances," such as where "a claim 'requires resolution of an issue of first impression.'" Clark, 523 F.3d at 1114 (citation omitted). There is no issue of first impression here, where the parties agree, and this Court previously held, that "[t]he significant nexus test is the 'controlling rule of law' in the Ninth Circuit." Def's Memo. at 9 (quoting Healdsburg, 496 F.3d at 999-1000); see also Order Denying Motion To Dismiss at 7.

the defendant has been 'discharging' 'pollutants' from a 'point source' into 'navigable waters' without a permit." El Paso Gold Mines, 198 F. Supp. 2d at 1271; see also id. ("Expert testimony will assist the court in resolving any complex technical issues presented").

To intimidate the Court into concluding that the issues presented are beyond its ken, Defendant attaches to its motion the EPA's 269-page NPDES Permit Writers' Manual (Defendant's Exhibit "I") and asserts that voluminous data are needed to develop and issue a permit for Defendant's discharges. See Def's Memo. at 12-14. It is stating the obvious that the Citizens are not asking this Court to write Defendant's NPDES permit. Rather, they merely ask the Court to rule that Defendant's unpermitted discharges violate the Clean Water Act, a task well within the Court's competence and for which the Citizens have already provided ample supporting evidence.[4] As the court in El Paso Gold Mines noted in rejecting a similar request to apply the primary jurisdiction doctrine, "[r]esolution of plaintiffs' claim does not require the court to set effluent standards or to write a permit for the defendant." 198 F. Supp. 2d at 1271.

[4] Defendant's strategy recalls its argument in support of its motion to dismiss that the Citizens' claims were not ripe because the tracer dye study was not yet complete. See Order Denying Motion To Dismiss at 13. As this Court correctly held, the studies completed prior to the tracer dye study – which are discussed in detail in the Citizens' motion – are adequate on their own to establish the requisite "significant nexus between the County of Maui's discharges of pollutants and the ocean." Id.; see also Paytan Decl. ¶ 6 & Plfs' Exh. 4; Smith Decl. ¶¶ 7-9, 16-19, 21-25, 31 & Plfs' Exhs. 8-10. Moreover, the tracer dye study is now complete, confirming that nexus.

V. THE AGENCIES' LACK OF URGENCY IN ADDRESSING DEFENDANT'S CLEAN WATER ACT VIOLATIONS MILITATES AGAINST APPLYING THE PRIMARY JURISDICTION DOCTRINE

Where the "[d]efendant has not presented any evidence to show that the agencies will issue a final determination . . . in the near future," application of the primary jurisdiction doctrine is inappropriate. El Paso Gold Mines, 198 F. Supp. 2d at 1271 (emphasis added). In El Paso Gold Mines, the court refused to apply the primary jurisdiction doctrine where the state permitting agency had been "investigating" the facility's discharges for over eight years, but had not, to date, issued any orders or permits. Id. Here, DOH and EPA have similarly never moved beyond the investigation stage, monitoring water quality at Kahekili and conducting various studies, but never taking any action to enforce the Clean Water Act.

While Defendant points to its pending NPDES permit application as a circumstance that has changed since the denial of its motion to dismiss, it is notable that neither DOH nor EPA took the initiative to require – or even request – Defendant to submit the application. Moreover, now that the application is on file, the agencies have allowed the application to languish. After nearly a year and a half, they have yet to make even a preliminary, threshold finding regarding the application's completeness or even set a schedule to make that finding. 3/6/14 DOH Letter at 1. Especially given the application's blatant deficiencies, with

entire sections of basic, mandated information left blank, the agencies' lengthy delay evinces a notable lack of urgency to resolve this matter. Applying the primary jurisdiction doctrine in the face of such agency inaction would "frustrate the congressional intent of broadened enforcement that underlies citizen suit provisions." El Paso Gold Mines, 198 F. Supp. 2d at 1269.

The cases on which Defendant relies are outliers in applying the primary jurisdiction doctrine to citizens suits and, in any event, readily distinguished because, unlike here, state or federal regulatory agencies were actively engaged in "exercising regulatory oversight" with respect to the defendants' illegal conduct. Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1344 (D. N.M. 1995). In Friends of Santa Fe County, the state regulators took extensive action over more than a decade to address acid mine drainage ("AMD") from the mine's waste pile, the focus of the plaintiffs' complaint, issuing an order to compel the defendants to conduct extensive site remediation and to contain the AMD, modifying the mine's permit several times to address AMD from the waste pile, and imposing a stipulated penalty provision. Id. at 1344-45. Noting that "the advisability of invoking primary jurisdiction is greatest where the issue is already before the agency," the New Mexico district court concluded that the state agency "has already acted to ensure that Defendants investigate and contain AMD, and it continues to exercise regulatory oversight." Id. at 1350 (internal quotation marks and citation omitted). Furthermore, the court held that the agency "demonstrated

diligence in resolving the issue," justifying the application of the primary jurisdiction doctrine. Id.

Before the court invoked primary jurisdiction in Montgomery Envtl. Coalition Citizens Coordinating Comm. on Friendship Heights v. Wash. Suburban Sanitary Comm'n, 607 F.2d 378 (D.C. Cir. 1979), the EPA had already issued an NPDES permit to the defendant sewage treatment plant, the plaintiff had filed objections to that permit, and the plaintiff was actively involved in an administrative proceeding pending before the EPA that would establish the appropriate level and quality of discharge authorized under the permit. Id. at 380-81. "In view of the likelihood that the permit will be issued in the near future," the court found dismissal appropriate, particularly since "any relief that this court could grant [the plaintiff] might be mooted by the issuance of the permit." Id. at 382 (emphasis added).

In contrast, in this case, neither DOH nor EPA has taken action to exercise regulatory oversight to address Defendant's Clean Water Act violations. Unlike Friends of Santa Fe County, neither DOH nor EPA has issued any orders to abate Defendant's ongoing, unpermitted discharges from the LWRF injection wells. In addition, unlike Montgomery Envtl. Coalition, no NPDES permit has been issued, and Defendant has failed to adduce any evidence that a permit is likely to be issued in the near future. Finally, even if the agencies at some point in the future issue an NPDES permit and Defendant comes into compliance with its terms, those

developments would not moot the Citizens' request for the Court to impose civil penalties for Defendant's years of illegal discharges. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 173-74 (2000).

When this Court rejected Defendant's primary jurisdiction argument in August 2012, it noted that the evidence Defendant presented "[a]t most … suggest[ed] a possible decision relating to an NPDES permit." Order Denying Motion To Dismiss at 10. The same can be said today. DOH's responses to Defendant's inquiries about the status of its NPDES permit application make clear that, while a decision might be forthcoming someday, it is anyone's guess when that might be. As the court noted in Friends of Santa Fe County, "Administrative delay constitutes reason to retain jurisdiction." 892 F. Supp. at 1350.

VI. THE CITIZENS ARE ENTITLED TO THEIR DAY IN COURT

In deciding whether to invoke the primary jurisdiction doctrine, courts "must be mindful of the fact that abstention, as a practical matter, often permanently deprives the plaintiff of his or her day in court." Williams, 199 F. Supp. 2d at 1256. In this case, a stay would deprive the Citizens of vital relief from Defendant's ongoing, illegal discharges and the associated damage to the marine environment at Kahekili, and a dismissal would inflict even greater prejudice, precluding Plaintiffs from holding Defendant to account for its long history of Clean Water Act violations.

As a threshold matter, Defendant's argument that its submission of an NPDES permit application achieved the Citizens' goals in this litigation, warranting dismissal, is frivolous. Def's Memo. at 17-18. As Defendant notes, the Citizens have asked this Court to issue an order compelling Defendant to both "apply for and comply with the terms of an NPDES permit." Id. at 17 (citing First Amended Complaint, Prayer for Relief ¶ 2; emphasis added). While Defendant did go through the motions of submitting a permit application, the application's blatant deficiencies make the submission an exercise in elevating form over substance. To date, Defendant has failed to submit the basic information necessary for DOH to issue a permit, and, accordingly, Defendant has yet to take even the first step toward accomplishing the Citizens' goals. Furthermore, Defendant has neither obtained nor complied with the terms of an NPDES permit, so its unpermitted discharges from the LWRF injection wells continue to violate the Clean Water Act on a daily basis. Finally, Defendant ignores that the Citizens have also asked the Court to impose substantial civil penalties for Defendant's illegal conduct, which have yet to be levied. See First Amended Complaint, Prayer for Relief ¶ 3.

Refusing to rule on the merits of the Citizens' pending motion for partial summary judgment and instead granting Defendant's request for a stay would serve only to perpetuate, indefinitely, Defendant's illegal and environmentally destructive course of action. As discussed above, neither DOH nor EPA has shown any indication to take prompt action to address Defendant's Clean Water

Act violations. In the absence of agency action, there is no NPDES permitting process in which the Citizens can participate, and Defendant's illegal discharges will continue unabated, compounding the harm to the Citizens' interests. See Bernard Decl. (Dkt. No. 73-4); De Naie Decl. (Dkt. No. 73-5); Savage Decl. (Dkt. No. 73-6); Campbell Decl. (Dkt. No. 73-7); Matin Decl. (Dkt. No. 73-8).

Defendant's NPDES permit application has already been before DOH for nearly a year and a half, and DOH has declined to commit to any schedule to begin, much less complete, its evaluation of the application. See 3/6/14 DOH Letter at 1. Under these facts, it is clear that Defendant seeks an indefinite stay of the Citizens' lawsuit. The Ninth Circuit has repeatedly held that "[a] stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." Dependable Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857, 864 (9th Cir. 1979)). Stays of an indefinite period of time are disfavored, and this Court should decline to issue one. See id. at 1067 ("district court erred by issuing a stay without any indication that it would last only for a reasonable time"); Yong v. Immigration & Naturalization Serv., 208 F.3d 1116, 1120-21 (9th Cir. 2000) ("considerations of judicial economy … cannot justify the indefinite, and potentially lengthy, stay imposed here").

Dismissal would cause even greater prejudice to the Citizens. In Clean Water Act cases, the statute of limitations allows citizens to seek civil penalties for

illegal discharges that occurred up to five years and sixty days prior to the filing of the complaint. Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1524 (9th Cir. 1987). In this case, since the Citizens filed suit on April 16, 2012, they are asking this Court to impose penalties for Defendant's unpermitted discharges dating back to February 15, 2007. See Complaint (Dkt. No. 1); Plf's Partial Summary Judgment Memo. (Dkt. No. 72-1) at 23-25. If, however, this Court were to grant Defendant's request for dismissal and the Citizens had to file a new complaint in the future, the statute of limitations would bar them from holding Defendant to account for years of violations, contravening Congress's intent that the imposition of stiff penalties serve to "deter future [Clean Water Act] violations." Friends of the Earth, 528 U.S. at 185; see also Tull v. United States, 481U.S. 412, 422–423 (1987).

In addition, dismissal could prevent the Citizens from filing any future action to hold Defendant responsible for its years of illegal conduct. The Clean Water Act permits citizens to sue to enforce only an "ongoing violation." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987). In the event DOH ultimately issues an NPDES permit and Defendant promptly complies with its terms, the Citizens would be precluded from refiling a complaint to seek civil penalties for what would then be wholly past Clean Water Act violations. While the Citizens would welcome Defendant finally complying with its legal obligations, this Court should not allow Defendant to escape

responsibility for years of unlawful acts, which continue to this day, and deprive the Citizens of vital relief to deter future violations by granting Defendant's request for dismissal. See Friends of the Earth, 528 U.S. at 185 ("Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations").

VII. CONCLUSION

This Court currently has before it the Citizens' motion to hold Defendant liable for years of Clean Water Act violations due to its unpermitted discharges from LWRF Injection Wells 3 and 4, which have resulted in wastewater and other pollutants continuously flowing onto the coral reefs at Kahekili. Defendant has given the Court no good reason to fail to "honor the Act's express provisions authorizing citizen suits" and to refuse to adjudicate the Citizens' claims on the merits. Hammersley, 299 F.3d at 1012. The evidence before the Court makes clear that granting Defendant's request for a stay or dismissal would serve only to cast the Citizens' claims into an indefinite state of limbo, while the harm Defendant's wastewater discharges inflict on West Maui's nearshore environment continues unabated. The Citizens respectfully submit that Defendant's motion should be denied and that the Citizens should have their day in court.

Dated: Honolulu, Hawai‘i, April 21, 2014.

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