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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’ OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE; CERTIFICATE OF SERVICE Hearing: Date: May 27, 2015 Time: 9:45 a.m. Judge: Hon. Susan Oki Mollway Trial Date (Penalties): August 11, 2015 Related to ECF 172

PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF FAIR NOTICE

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I. INTRODUCTION

As this Court recently observed, Defendant County of Maui faces substantial civil penalties "because it has violated the Clean Water Act." Order Denying Motion for Certification for Interlocutory Appeal and Denying Motion to Stay Proceedings (ECF184) at 5-6. Defendant now seeks to avoid responsibility for its actions, alleging the assessment of any civil penalty would violate due process. In bringing its motion, Defendant ignores binding Ninth Circuit precedent that, "[i]f a district court finds a [Clean Water Act] violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory." Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 1001 (9th Cir. 2000). While the Court has discretion to consider Defendant's equitable claims at the time the Court determines the appropriate amount of civil penalty to impose, it may not decline to impose any penalty at all, as Defendant requests.

Defendant's motion is grounded on the counterfactual claim that, until this Court entered partial summary judgment in May 2014, Defendant had no notice its unpermitted discharges from the Lahaina Wastewater Reclamation Facility ("LWRF") injection wells might subject it to penalties for violating the Clean Water Act. The Court should reject Defendant's invitation to enter "Superman Comics' Bizarro world, where reality is turned upside down." Natural Resources Defense Council, Inc. v. Daley, 209 F.3d 747, 754 (D.C. Cir. 2000). As Defendant

knows full well, for many years before this Court held Defendant's unpermitted use of the LWRF injection wells violated the Clean Water Act, Plaintiffs and other concerned Maui residents had warned Defendant about the illegality of its conduct and that its continued refusal to secure and comply with the required National Pollutant Discharge Elimination System ("NPDES") permit exposed Defendant to significant civil penalties. Plaintiffs' warnings were echoed by the Environmental Protection Agency ("EPA"), the federal agency charged with administering the Clean Water Act, which issued an order over five years ago putting Defendant on notice that its discharges from the LWRF injection wells might subject it to Clean Water Act liability.

Even if Defendant could justify burying its head in the sand and ignoring these repeated warnings prior to receiving Plaintiffs' notice of intent to sue on June 28, 2011, that letter provided Defendant the full measure of the statutorily required notice of its Clean Water Act violations. Congress expressly authorized concerned citizens like Plaintiffs who have complied with the notice requirement to bring suit to enforce the Clean Water Act, including the mandatory imposition of civil penalties once violations have been established. Binding Ninth Circuit precedent holds that, even where regulatory agencies have expressly notified a polluter that no NPDES permit is required for its discharges (which did not occur here), the polluter is not shielded from liability, and federal courts "must honor the Act's

express provisions authorizing citizen suits." Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1012 (9th Cir. 2002).

After receiving each of these numerous warnings, Defendant opted to take a gamble and to continue discharging wastewater from the LWRF injection wells without securing NPDES permit coverage or altering its behavior to avoid violating the Clean Water Act. Defendant continued its illegal conduct even after this Court issued an order denying Defendant's motion to dismiss in August 2012, leaving no doubt that the Court would hold Defendant liable if Plaintiffs could establish that effluent from the LWRF injection wells reaches the ocean (a fact Defendant concedes it has known for decades). Having gambled that it could get away with continued discharges from the LWRF injection wells without an NPDES permit and lost, Defendant may not now shirk responsibility for its illegal conduct.

Finally, Defendant's motion ignores that its illegal discharges are ongoing, subjecting Defendant to additional civil penalties each day Defendant discharges wastewater from the LWRF wells without the required NPDES permit. Assuming for the sake of argument that fair notice is relevant to citizen suits and that Defendant lacked adequate notice prior to this Court's initial summary judgment order, there have been hundreds of days of unpermitted discharges from the LWRF

injection wells in the year since this Court ruled. Defendant articulates no basis for this Court to decline to impose civil penalties for these violations.

II. CIVIL PENALTIES ARE MANDATORY

Defendant's motion ignores binding Ninth Circuit precedent that, "[i]f a district court finds a [Clean Water Act] violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory." Natural Resources Defense Council, 236 F.3d at 1001; see also Leslie Salt Co. v. United States, 55 F3d. 1388, 1397 (9th Cir.), cert. denied, 516 U.S. 955 (1995). The Act's penalty provisions are couched in mandatory language, stating that any person who violates the Act "shall be subject to a civil penalty not to exceed $25,000 per day." 33 U.S.C. § 1319(d) (emphasis added).[1] As the Ninth Circuit has explained, "[i]f Congress had intended civil penalties under section 309(d) to be discretionary, it would have used the word 'may' instead of 'shall be subject to.'" Leslie Salt Co., 55 F3d. at 1397.

Defendant's protestations it did not know that its unpermitted use of the LWRF injection wells was illegal similarly ignores that the Clean Water Act imposes strict liability. Committee To Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993). Thus, even if Defendant could establish it had no prior notice of the illegality of its conduct (a claim Plaintiffs

[1] The maximum daily penalty per violation has been adjusted for inflation and is $37,500 for violations after January 12, 2009. See 40 C.F.R. § 19.4.

vigorously dispute), such a showing would provide no shield to Clean Water Act liability. As this Court has previously held, "[t]he fact that a violator is 'without fault' in committing violations of the Clean Water Act does not absolve the violator from penalties … ." Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1392 (D. Haw. 1993).

While imposition of a civil penalty for Defendant's Clean Water Act violations is mandatory, this Court retains "broad discretion to set a penalty commensurate with the defendant's culpability." Leslie Salt Co., 55 F3d. at 1397; see also Hawaii's Thousand Friends, 821 F. Supp. at 1392. To determine the appropriate civil penalty, the statute instructs this Court "to consider the following factors: (1) the seriousness of the violation(s); (2) the economic benefit, if any, derived from the violations; (3) the history of violations; (4) the good faith efforts, if any, to comply with the CWA; (5) the economic impact of the penalty on the defendants; and (6) any other factor that justice requires." Center for Biological Diversity v. Marina Point Development Associates, 434 F. Supp. 2d 789, 798 (C.D. Cal. 2006) (citing 33 U.S.C. § 1319(d)). At the trial on civil penalties, which is set for August 11, 2015, Defendant will have ample opportunity to advocate for a reduction of the civil penalty amount based on the allegations set forth in its motion. See First Amended Rule 16 Scheduling Order on Penalties (ECF 120-1) ¶

1.[2] Having found Defendant in violation of the Clean Water Act, however, this Court may not decline to impose any civil penalty at all, as Defendant requests.

III. HAVING RECEIVED THE STATUTORILY REQUIRED NOTICE FOR THIS CITIZEN SUIT, DEFENDANT MAY NOT EVADE CIVIL PENALTIES BY CLAIMING A LACK OF FAIR NOTICE

With two exceptions, which Plaintiffs will address below, the cases on which Defendant relies to argue against the imposition of civil penalties do not involve citizen suits. This is significant because, as this Court has repeatedly affirmed, "[b]oth the Congress and the courts of the United States have regarded citizen suits under the Act to be an integral part of its overall enforcement scheme." Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1402 (D. Haw. 1995); see Save Our Bays and Beaches v. City and County of Honolulu, 904 F. Supp. 1098, 1125 (D. Haw. 1994) (same); see also Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987) ("legislative history indicates … that citizen suits should be handled liberally, because they perform an important public function"). Congress provided for citizen enforcement of the Clean Water Act specifically to address situations where, for whatever reason, federal and state regulators do not take action to compel polluters' compliance with

[2] As discussed below, Plaintiffs dispute Defendant's claim that, prior to this Court's grant of partial summary judgment with respect to LWRF wells 3 and 4, Defendant lacked fair notice that it was violating the Clean Water Act. At trial, the Court will have the opportunity to resolve the parties' factual disputes.

the Act's requirements. See 33 U.S.C. § 1365(b)(1)(B). In such cases, "Congress … empowered citizens to pursue enforcement of the Clean Water Act when all procedural requirements [are] satisfied." Association to Protect Hammersley, 299 F.3d at 1012.

Congress authorizes citizens to file Clean Water Act enforcement actions "sixty days after the plaintiff has given notice of the alleged violation to ... any alleged violator of the standard, limitation, or order." 33 U.S.C. § 1365(b). The notice requirement is detailed in the Act's implementing regulations at 40 C.F.R. § 135.3. First, "[n]otice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated." 40 C.F.R. § 135.3(a). Second, the notice must describe "the activity alleged to constitute a violation." Id. The location of the alleged violation and the person or persons responsible for the violation must be specified, as well as the date or dates of the violation. Id. Finally, the contact information of the person giving notice and that person's legal counsel, if any, must be included. Id. § 135.3(c).

The Ninth Circuit has held that "[t]he key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." Community Ass'n for Restoration of

the Env't v. Henry Bosma Dairy, 305 F.3d 943, 951 (9th Cir. 2002). "Notice is sufficient if it is reasonably specific and if it gives 'the accused company the opportunity to correct the problem.'" Waterkeepers Northern California v. AG Industrial Mfg., Inc., 375 F.3d 913, 917 (9th Cir. 2004) (quoting San Francisco BayKeeper v. Tosco Corp., 309 F.3d 1153, 1158 (9th Cir. 2002)).

There is no dispute that, in June 2011, Plaintiffs served on Defendant a letter that provided detailed notice regarding both Defendant's violations of the Clean Water Act's NPDES permit requirements at the LWRF and the substantial civil penalties Defendant faces for those violations. See Plfs' Exh. 6: Plfs' Notice Letter; see also Plfs' Exh. 7: Answer (ECF 41) ¶ 9; Plfs' Exh. 8: Def's Concise Statement (ECF 173) ¶ 15. Plaintiffs' notice letter cited many of the same cases on which this Court subsequently relied to find Defendant in violation of the Clean Water Act. Plfs' Notice Letter at 10-11.[3] Because Plaintiffs had hoped to convince Defendant voluntarily to comply with the Act, they provided far longer than the statutorily required sixty days' advance notice, serving their notice letter nearly ten months before filing suit. See Plfs' Exh. 3 at 2. Defendant, therefore,

[3] As discussed in Part V, infra, even prior to sending their notice letter, Plaintiffs and other concerned Maui residents had provided Defendant with citations to cases holding that unpermitted point source discharges that reach navigable waters via groundwater violate the Clean Water Act. Defendant cannot credibly claim to have been ignorant of this case law prior to this Court's summary judgment orders.

had both ample notice of its illegal conduct and far longer than the statute mandates to bring its conduct into conformity with its Clean Water Act obligations.

Having received the notice that Congress required before citizens can bring suit for Clean Water Act violations, Defendant cannot now claim inadequate notice for purposes of avoiding the civil penalties that Congress mandated once violations are found. In its moving papers, Defendant cites Association of Irritated Residents v. Fred Schakel Dairy, 2008 WL 850136 (E.D. Cal. Mar. 28, 2008), for the proposition that "[t]he fair notice requirement applies in [Clean Water Act] citizen suits." Def's Memo. (ECF 172-1) at 4. In fact, that case cuts the other way.

The question presented in Association of Irritated Residents, was whether the defendant dairy lacked fair notice, precluding a citizen suit to enforce the Clean Air Act, because the state and federal regulatory agencies had not established standards for determining whether the dairy emits more than ten tons of methane per year, the regulatory threshold that triggered the requirement to "obtain a Maximum Available Control Technology ('MACT') determination for methanol emissions prior to initiating construction." 2008 WL 850136, at *1; see also id. at *14. While the court did consider – and reject – a fair notice claim, the court's closing remarks make clear it seriously questioned the doctrine's relevance to citizen suits. See id. at *16. The court observed, "A further inquiry remains which

has not been fully briefed: Does the Fair Notice doctrine even apply in this type of challenge?" Id. After all, the court noted:

> even if the EPA or the [state Air Pollution Control] District published emission factors, the EPA and the District do not have the exclusive authority under the [Clean Air Act] to determine if a party is in violation of 112(g)(2)(B), and a party could bring a suit in federal court … finding that a MACT determination is required, even though the District found it was not required.

Id.

Significantly, while the parties were litigating Association of Irritated Residents, the state Air Pollution Control District made a formal determination that the defendant dairy "did not emit more than ten tons per year of methanol and therefore no MACT determination was necessary under CAA § 112(g)(2)(B)." Id. at *1; see also id. at *4-6. The court rejected the defendant dairy's claim that the agency's finding rendered the citizen suit moot. Relying on the Ninth Circuit's decision in Association to Protect Hammersley, the court held that "a citizen suit may be brought where a state agency, here, the District, has determined that … no MACT determination is required under CAA § 112(g)(2)(B)." Id. at *7.

Association to Protect Hammersley makes clear that, in the Ninth Circuit, even if an agency with regulatory authority to implement the Clean Water Act unambiguously and expressly states that "NPDES permits are not required" and refuses to "accept [or] process an NPDES permit application," citizens still may

proceed with a lawsuit to enforce the Clean Water Act's requirements. The Ninth Circuit held:

> 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.

299 F.3d at 1012. The court further held that neither the EPA nor authorized state regulatory agencies have the "statutory or common law right to veto environmental review sought by a citizen who otherwise has complied with the Act." Id.

Accordingly, even had EPA or the Hawai'i Department of Health ("HDOH") expressly, unequivocally and formally told Defendant that discharges from the LWRF injection wells of pollutants that reach the ocean through groundwater do not require an NPDES permit, binding Ninth Circuit case law establishes that this Court "must honor the Act's express provisions authorizing citizen suits" where, as here, all "procedural requirements are met." Id. If those facts existed in this case (and, as discussed below, they do not), Association to Protect Hammersley would mandate a different outcome than Wisconsin Res. Prot. Council v. Flambeau Min. Co., 727 F.3d 700 (7th Cir. 2013), the other citizen suit case on which Defendant relies to argue against the imposition of civil penalties.

In Wisconsin Res. Prot. Council, the EPA had delegated to the Wisconsin Department of Natural Resources ("WDNR") authority to administer the NPDES

program within that state. 727 F.3d at 702-03. The defendant mining company "was told by the WDNR that its mining permit constituted a valid [Wisconsin Pollutant Discharge Elimination System (WPDES)] permit," the state version of an NPDES permit. Id. at 711. Accordingly, the sole issue in that case was whether the Clean Water Act's "permit shield" applies, precluding a finding of liability "where the permitting authority issues a facially valid NPDES permit and the permit holder lacks notice of the permit's (potential) invalidity." Id.; see also 33 U.S.C. § 1342(k). The Seventh Circuit held that, under such circumstances, "the permit shield applies, [the defendant] is deemed to be in compliance with the [Clean Water Act], and summary judgment should have been granted for [the defendant." 727 F.3d at 711; see also id. at 702 (reversing district court's judgment).

As discussed, the Ninth Circuit, whose decisions bind this Court, reached a contrary conclusion, holding that an authorized state agency's decision "that an NPDES permit is not needed warrants consideration but does not divest the federal courts of jurisdiction." Association to Protect Hammersley, 299 F.3d at 1012. Since Plaintiffs complied fully with the Clean Water Act's notice requirements, EPA and HDOH "have no statutory or common law right to veto environmental review sought by a citizen." Id.

IV. NEITHER EPA NOR HDOH EVER INFORMED DEFENDANT THAT THE LWRF DISCHARGES COMPLY WITH THE CLEAN WATER ACT

This Court need not dwell on the apparent disagreement between the Seventh and Ninth Circuits. Not only is this Court bound by the Ninth Circuit's holding that regulatory agencies' statements cannot bar citizen enforcement, but the factual predicate for the Seventh Circuit's application of the Fair Notice doctrine is not present here. Simply put, neither EPA nor HDOH ever told Defendant that its underground injection control ("UIC") permits satisfied the Clean Water Act's NPDES permit requirement.

In Wisconsin Res. Prot. Council, the defendant mining company's operations previously were covered by a state-issued NPDES permit. 727 F.3d at 704. The only reason that, at the time of suit, the defendant no longer had a state-issued NPDES permit was because the state agency had instructed that it was no longer needed. Id. at 704-05. Accordingly, the defendant "knew that it needed a WPDES permit but was informed by the WDNR that its mining permit would serve as a WPDES permit …, and the WDNR sua sponte terminated [the defendant's] separate WPDES permit." Id. at 710. Because the state agency charged with implementation of the Clean Water Act expressly told the defendant "that its mining permit constituted a valid WPDES permit," the Seventh Circuit concluded that "the permit shield applies" and the defendant "is deemed to be in compliance with the [Clean Water Act]." Id. at 711.

In contrast, Defendant here does not claim it ever received official agency notification from EPA or HDOH that, despite their lack of NPDES permit coverage, discharges from the LWRF injection wells nonetheless comply with the Clean Water Act. Defendant concedes that "neither HDOH nor EPA have 'directly informed [the County] … of the proper interpretation' of the [Clean Water Act] NPDES permit requirements applicable to the wells." Def's Memo. at 12 (citation omitted; brackets and ellipses in Defendant's memorandum). Accordingly, Defendant alleges merely that past agency statements "suggested an NPDES [permit] was not required," id. at 7 (emphasis added), and points to agency statements it claims "indicated the County may not need an NPDES permit." Id. at 11 (emphasis added). The equivocal agency statements Defendant cites are a far cry from the official, definitive pronouncements that compelled the Seventh Circuit to invoke the Clean Water Act's permit shield on due process grounds.

Far from making a definitive, affirmative statement that the LWRF's UIC permits satisfy Defendant's obligation to secure and comply with an NPDES permit, HDOH has stated merely that it "is considering" whether to treat the UIC permit as an "equivalent control document." Plfs' Exh. 9: Apr. 22, 2014 HDOH Letter at 3. It did not make this noncommittal statement until this lawsuit was already two years old. Furthermore, in the year since HDOH made that statement, it has yet to reach a decision. See Plfs' Exh. 10: Mar. 6, 2014 HDOH Letter at 2

(stating HDOH would notify Defendant "once a decision is made"). Recent correspondence from EPA indicates that the ultimate conclusion will find that the LWRF's UIC permit conditions "would not function as NPDES permit requirements, and are unlikely to achieve compliance with the Clean Water Act." Plfs' Exh. 11: Jan. 15, 2015 EPA Letter at 1. Consequently, unlike the defendant in Wisconsin Resources Protection Council, which "did not have notice that its permit might not be a valid WPDES permit," Defendant here knew that the outcome of HDOH's deliberations over the adequacy of the LWRF's UIC permit to serve as an NPDES permit was highly uncertain, precluding any reasonable reliance on the UIC permit to satisfy Defendant's Clean Water Act obligations. 727 F.3d at 708 (emphasis added).

The record is equally clear that neither HDOH nor EPA has ever affirmatively stated that Defendant does not need an NPDES permit for the LWRF injection well discharges, distinguishing this case from both Wisconsin Res. Prot. Council and Association to Protect Hammersley. See, e.g., Mar. 6, 2014 HDOH Letter at 1 (HDOH "has not made a tentative or preliminary determination on [Defendant's] NPDES application"); Apr. 22, 2014 HDOH Letter at 4 (HDOH still evaluating whether an NPDES permit is required); cf. Oregon State Pub. Interest Research Grp., Inc. v. Pac. Coast Seafoods Co., 361 F. Supp. 2d 1232, 1243 (D. Or. 2005) (stipulated consent order ("SCO") did not trigger Clean Water Act's

permit shield where "[n]othing in the federal or state statutes provides that a state-issued SCO is the equivalent of an NPDES permit"). Far from supporting Defendant's alleged belief that "the County's compliance with its EPA and HDOH issued UIC permits was sufficient" to satisfy the Clean Water Act, Def's Memo at 8, every UIC permit HDOH has issued for the LWRF injection wells has noted Defendant's obligation to comply with the Clean Water Act's NPDES permit requirements and the associated regulations set forth in Hawai'i Administrative Rules chapter 11-55. See Plfs' Exh. 12: 1986 HDOH UIC Permit at COM002106, COM002109-10; Plfs' Exh. 13: 1992 HDOH UIC Permit at COM002193, COM002197-98; Plfs' Exh. 14: 1996 HDOH UIC Permit at COM002321, COM002324-25; Plfs' Exh. 15: 2000 HDOH UIC Permit at COM002614, COM002619-20; Plfs' Exh. 16: 2004 HDOH UIC Permit at COM002556, COM002561-62.[4] EPA's UIC permit for the LWRF similarly put Defendant on notice that compliance with the permit's terms "does not constitute a defense to any action brought under … any other common or statutory law," such as the Clean Water Act. Plfs' Exh. 18: 1996 EPA UIC Permit at COM003771; Plfs' Exh. 19: 1995 EPA UIC Permit at COM004064.[5]

[4] HDOH issued the most recent UIC permit for the LWRF in 2004. HDOH has administratively extended this permit until September 28, 2015. See Plfs' Exh. 17: HDOH Permit Rationale at 2; see, e.g., Def's Exh. 20.

[5] EPA issued the most recent federal UIC permit for the LWRF in 1996. EPA has administratively extended this permit indefinitely. See Def's Exh. 13. In

Written warnings Defendant received over the years from both EPA and HDOH further put Defendant on notice that discharges from the LWRF injection wells might violate the Clean Water Act. See General Elec. Co. v. U.S. Envtl. Prot. Agency, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("agency's pre-violation contact with the regulated party" can provide adequate notice).[6] In 1992, HDOH warned Defendant that, if use of the LWRF injection wells were linked to pollution emerging in the ocean off West Maui, "a critical issue will focus over the compliance requirements of the Clean Water Act." Plfs' Exh. 21: May 15, 1992 HDOH Letter at COM002259.

More recently, in January 2010, EPA ordered Defendant to conduct sampling, monitoring and reporting necessary "to determine whether [Defendant] is in violation of the requirements of the [Clean Water] Act." Plfs' Exh. 22: Jan. 27, 2010 EPA Letter at COM003144. Noting the "substantial evidence that injected effluent from the Lahaina Wastewater Reclamation Facility (LWRF) is emerging from submarine springs into the coastal water around Kahekili Beach

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2008, EPA issued a draft UIC permit with the identical provision. See Plfs' Exh. 20: 2008 EPA Draft UIC Permit at COM003369.

[6] Defendant fails to explain the relevance of the many internal agency emails and memoranda it cites in its moving papers and in the two supplements (ECF 190 and 194) it filed without leave of court. See Local Rule 7.4 ("No further or supplemental briefing shall be submitted without leave of court"). Internal agency documents that Defendant did not see before it reviewed the responses to its recent Freedom of Information Act Request clearly had no bearing on Defendant's prior understanding of its potential liability for Clean Water Act penalties.

Park along the Kaanapali coast-line," EPA's letter made clear that these discharges potentially violate the Clean Water Act. Id. Significantly, EPA issued this order "pursuant to section 308(a) of the Clean Water Act." Id. By invoking this section, which applies only to "the owner or operator of [a] point source," EPA put Defendant on notice that EPA considered the LWRF injection wells to be point sources that might trigger NPDES permit requirements. 33 U.S.C. § 1318(a)(A).

In March 2010, EPA followed up with an order requiring Defendant to secure a water quality certification from the State of Hawai'i pursuant to section 401 of the Clean Water Act. See Plfs' Exh. 23: Mar. 10, 2010 EPA Letter at COM003125. EPA explained that it was requiring the certification based on its determination that "operation of the [LWRF] may result in a discharge into navigable waters." Id. at COM003126. EPA specified that, among other things, the state would have to certify that continued use of the LWRF will not violate "the applicable provisions of [Clean Water Act] section 1311," which prohibit unpermitted discharges from point sources. Id. at COM003125; see also 33 U.S.C. § 1311(a). Defendant, therefore, was clearly on notice of potential liability for Clean Water Act violations due to operation of the LWRF injection wells.

V. LONG BEFORE THIS COURT ISSUED ITS SUMMARY JUDGMENT ORDERS, DEFENDANT HAD AMPLE NOTICE OF ITS POTENTIAL LIABILITY FOR UNPERMITTED DISCHARGES FROM THE LWRF INJECTION WELLS

Having received numerous warnings over the years from both EPA and HDOH, Defendant cannot credibly claim that it was unaware of its potential liability for Clean Water Act violations until this Court issued its initial summary judgment order in May of 2014.[7] Defendant acknowledges, as it must, that the Clean Water Act's plain language "identifies a well as a point source requiring an NPDES permit." Def's Memo. at 6; see also 33 U.S.C. § 1362(14); United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008) ("Shark Fins") (plain language of statute provides fair notice). It claims, nonetheless, that it had no way to know that the LWRF's injection wells, which discharge to the ocean via groundwater, might require an NPDES permit.[8]

[7] Defendant seeks to use its latest motion as yet another opportunity to express its disagreement with this Court's rulings that the Clean Water Act requires NPDES permit coverage for the LWRF injection well discharges, rehashing arguments this Court previously considered and rejected. Plaintiffs will resist the temptation to refute every point and instead will focus on debunking Defendant's claim it had no notice of its potential liability for violating the Act.

[8] Defendant reads far too much into the Clean Water Act provision calling for EPA to share information about controlling pollution resulting from the disposal of pollutants in wells and from groundwater movement. See Def's Memo. at 6 (citing 33 U.S.C. § 1314(f)(2)(D), (F)). That pollution resulting from these sources is sometimes deemed nonpoint does not mean that, as a matter of law, it never constitutes point source pollution. See South Fla. Water Management Dist. v. Miccosukee Tribe, 541 U.S. 95, 106 (2004) ("§ 1314(f)(2)(F) does not explicitly

Defendant ignores EPA's longstanding, official statements that interpreting the Clean Water Act to "exclud[e] regulation of point source discharges to the waters of the U.S. which occur via ground water would… be inconsistent with the overall Congressional goals expressed in the statute." 66 Fed. Reg. 2960, 3015-16 (Jan. 12, 2001). In consideration of the statute's "purpose of protecting surface waters and their uses," EPA has repeatedly affirmed:

> the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.

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exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition").

Similarly, neither of the regulations Defendant cites support its claim that the disposal of pollutants into wells never constitutes a regulated point source discharge. See Def's Memo. at 6-7 (citing 40 C.F.R. §§ 122.21(j)(1)(viii)(E), 122.50(a)). 40 C.F.R. § 122.50(a) simply provides instructions on how to address situations where the disposal of wastewater into a well avoids "discharge[s] into waters of the United States," which even Defendant acknowledges is not the case here. 40 C.F.R. § 122.21(j)(1)(viii)(E) does not distinguish between point and nonpoint source pollution at all; rather, it distinguishes between "outfalls" and "other discharge or disposal methods" at publicly owned treatment works. Id.

Given that the Clean Water Act expressly defines the term "point source" to include "any … well … from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), Defendant's interpretation of the Act and its implementing regulations as providing that pollution from wells can never constitute point source pollution would result in an impermissible absurdity. See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1036 (9th Cir. 2013) (courts should avoid statutory interpretation that leads to absurd results or renders provision meaningless).

56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991); see also 66 Fed. Reg. at 3,017 ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act"); 63 Fed. Reg. 7,858, 7,878 (Feb. 17, 1998) (Clean Water Act "regulate[s] releases of [pollutants] to groundwater [if] there is a direct hydrological connection between a point source and surface waters of the United States through such groundwater"). As Defendant acknowledges, such official agency statements and guidance provide fair notice of Defendant's potential liability for unpermitted LWRF discharges. See Def's Memo. at 7; see also Shark Fins, 520 F.3d at 982-83 (agency explanation of regulations provides fair notice).

Defendant's claim that this Court's rulings on liability came like a bolt from the blue similarly ignores that numerous courts, including district courts in the Ninth Circuit, have long held that the Clean Water Act governs discharges to groundwater that reach surface waters. See, e.g., Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 181 (D. Puerto Rico 2009) ("the [Clean Water Act] extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180-81 (D. Idaho 2001) ("the [Clean Water Act] regulates discharges from the Grand View Dairy into the groundwater

where there exists a hydrological connection with Walker and/or Butler Springs, and such discharges can be traced from their source to those springs"); Washington Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("since the goal of the [Clean Water Act] is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit"); 66 Fed. Reg. at 3017 n.1 (listing additional cases). While this Court acknowledged the lack of "controlling appellate law" on this topic, that is a far cry from saying that no court previously held that unpermitted discharges similar to Defendant's violate the Clean Water Act. Def's Memo. at 14 (quoting May 2014 Order (ECF 113) at 35); see also May 2014 Order at 32-33 (citing supporting cases). Had Defendant bothered to read the case law on discharges to groundwater, it would have been well aware of its potential exposure to Clean Water Act liability and associated penalties.[9]

Defendant cannot claim that it lacked notice of this case law. As discussed in Part III, supra, ten months before filing suit, Plaintiffs served a notice letter on Defendant that cited many of these cases. Prior to that, in 2010, several concerned Maui organizations, including some of the plaintiffs in this lawsuit, appealed to the Maui Planning Commission a decision to allow the Department of Environmental

[9] While some courts have come out the other way, polluters like Defendant may not shirk responsibility for their Clean Water Act violations merely because there is a split in authority.

Management to build two new injection wells at the Wailuku-Kahului Wastewater Reclamation Facility. Bernard Decl. ¶ 9. In that appeal, the community groups presented claims similar to those this Court adjudicated, arguing that discharges from injection wells into groundwater that conveys pollutants to the ocean require NPDES permit coverage and that the failure to secure such coverage violates the Clean Water Act. Id. The groups cited many of the same cases on which this Court subsequently relied to conclude that indirect discharges to "waters of the US" are subject to the Clean Water Act's requirements. See Plfs' Exh. 5: April 15, 2010 Prehearing Brief at HWF001375. Defendant can hardly claim ignorance of this case law, particularly since the deputy corporation counsel representing Defendant in the Planning Commission Appeal was Jane Lovell, the same attorney who represented the County in the early phases of this lawsuit. See id. at HWF001385; Def's Answer at 11.

In addition to the foregoing, for years before Plaintiffs filed suit, concerned Maui residents, including several of the plaintiff groups, met repeatedly with Defendant's representatives, including the current and former Mayor, to warn Defendant of the illegality of the LWRF's unpermitted discharges and Defendant's exposure to significant civil penalties and to urge Defendant to secure NPDES permit coverage to bring the LWRF's operations into compliance with the Clean Water Act. Bernard Decl. ¶¶ 2-8; De Naie Decl. ¶¶ 2-7; Plfs' Exhs. 1-4.

Defendant had abundant notice that, in operating the LWRF injection wells without NPDES permit coverage, it ran the risk of Clean Water Act liability and that there were several citizen groups ready to hold Defendant to account.

Defendant's argument that it lacked notice prior to this Court's first ruling on liability in May 2014 also ignores this Court's denial of Defendant's motion to dismiss nearly two years earlier, in August 2012. By its very nature, a ruling on a motion to dismiss provides great clarity regarding the set of facts that a court determines "state[s] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In denying Defendant's motion, this Court stated that "[w]hether a discharge of wastewater into an injection well qualifies as a discharge of pollutants into navigable waters depends on the circumstances." Order Denying Motion to Dismiss (ECF 34) at 6. The Court went on to hold that Plaintiffs' allegations that Defendant's "discharge of wastewater into the injection wells causes pollutants to flow into the ocean" were adequate to state a claim that Defendant was violating the Clean Water Act. Id. at 13. Given Defendant's concession that it has been "public knowledge" since the 1970s that "treated effluent [from the LWRF injection wells] would move through groundwater to the ocean," Defendant has no

possible basis for claiming this Court's subsequent rulings on liability took Defendant by surprise. Def's Memo. at 7.[10]

VI. EVEN UNDER DEFENDANT'S VIEW OF THE FACTS AND THE LAW, DEFENDANT IS SUBJECT TO CIVIL PENALTIES FOR ITS ONGOING VIOLATIONS SUBSEQUENT TO THIS COURT'S DECISIONS REGARDING LIABILITY

As discussed above, binding Ninth Circuit precedent precludes application of the Fair Notice doctrine in the context of this citizen suit. Moreover, even if the doctrine did apply, the evidence abundantly demonstrates that Defendant had ample notice of its potential Clean Water Act liability years before Plaintiffs filed suit.

Assuming for the sake of argument that Defendant's view of the facts and the law were correct, this Court should still conclude that Defendant is liable for civil penalties and deny its motion. Defendant's motion hinges on the argument that, before this Court's decisions regarding liability, "the County has no notice it needed an NPDES permit, let alone 'ascertainable certainty' that such a permit was

[10] Defendant notes that, "[w]ithin months of the Court's denial of the County's motion to dismiss, the County submitted an NPDES permit application." Def's Memo. at 11. While Plaintiffs contend that Defendant's NPDES permit application was fundamentally flawed (and, thus, does not constitute a good faith effort to comply with the law), the fact that Defendant understood the need to go through the motions of securing an NPDES permit for the LWRF cannot be squared with its claim that it lacked notice of the law's requirements prior to this Court's rulings on liability. See Plfs' Exh. 24: Def's NPDES Permit Application (providing no information about discharges).

required." Def's Memo. at 1. Even if true (which Plaintiffs vigorously dispute), there can be no question that, following this Court's ruling in May 2014 that Defendant's unpermitted discharges from LWRF wells 3 and 4 violate the Clean Water Act, Defendant knew with "ascertainable certainty" – indeed, with absolute certainty – that it needed an NPDES permit. See id. at 14 (citing May 2014 Order).

By the time this Court hears Defendant's motion on May 27, 2015, a few days short of a year will have passed since Defendant claims it first had notice of its Clean Water Act violations, during which time Defendant has continued to violate the Act on a daily basis. See, e.g., Plfs' Exh. 25: LWRF Injection Flow Data (Aug. 1 to Nov. 15, 2014). Defendant presents no argument to justify shielding Defendant from responsibility for these ongoing violations, which trigger mandatory civil penalties.

VII. CONCLUSION

To ensure the Clean Water Act's goals would be accomplished even when EPA and state regulatory agencies fail to act, Congress authorized citizens to bring suit to enforce the statute's requirements. Far from constituting an exceptional circumstance that warrants relieving Defendant of responsibility for its illegal conduct, the inaction by EPA and HDOH to which Defendant points in its moving papers is the norm for citizen suits. Indeed, Congress made the absence of diligent

prosecution by federal and state regulators a condition precedent for citizens to file suit.

The only exceptional circumstances in this case are the abundant notice Defendant received of the illegality of its unpermitted discharges from the LWRF and of its exposure to significant civil penalties should Defendant fail to bring its conduct into conformity with the Clean Water Act's requirements. Not only did Plaintiffs provide Defendant with the statutorily mandated notice of their intent to sue far in advance of seeking this Court's assistance, but, for years prior to that, Plaintiffs and others repeatedly warned Defendant of the consequences of failing to secure NPDES permit coverage for the LWRF injection wells. During that same period, EPA issued several orders clearly putting Defendant on notice that the LWRF discharges might run afoul of the law. Rather than heed those warnings, Defendant chose to stick its head in the sand. Such willful ignorance provides no shield against the imposition of mandatory civil penalties.

Dated: Honolulu, Hawai‘i, May 6, 2015.

EARTHJUSTICE
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