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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' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE Hearing: Date: May 12, 2014 Time: 10:30 a.m. Judge: Hon. Susan Oki Mollway Trial Date: Not Yet Determined

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. THE LAW OF THIS CASE CONTROLS WHICH FACTS ARE MATERIAL

Defendant's arguments that various material facts are disputed, precluding summary judgment, ignore that this Court has already ruled on which facts are material to determining whether the Clean Water Act covers the groundwater into which Defendant discharges. "Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (citation omitted).

In denying Defendant's motion to dismiss, this Court held 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 (Dkt. No. 34) at 6. The Court then defined those circumstances, specifying that, for Clean Water Act jurisdiction to attach, there must be "a hydrologic connection," and the connection must be "sufficient to establish a 'significant nexus.'" Id. at 7 (citing Rapanos v. United States, 547 U.S. 715, 786 (2006) (Kennedy, J., concurring)). With respect to the "significant nexus" prong, this Court observed 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." Id. (citing Northern California River

Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008)).

The Court then turned to Defendant's claim that:

> Until ongoing scientific studies are concluded, the necessary factual record will not be complete enough to allow this Court to determine whether disposal of treated wastewater in Lahaina through injection wells … is a "direct discharge" from a "point source" into the "navigable waters of the United States" or the "waters of the United States" as those terms are used in the Clean Water Act.

Def's Motion to Dismiss Memo. (Dkt. No. 8-1) at 22. Defendant further argued the studies were essential because they might reveal "whether there is any harmful impact on the ocean as a result" of the LWRF discharges. Def's Motion to Dismiss Reply (Dkt. No. 28) at 3. Defendant raises identical arguments in opposing summary judgment. See Def's Opp. (Dkt. No. 78) at 7-10 (claiming Citizens have not established direct hydrologic connection), 15-21 (questioning discharges' impact on ocean).

This Court squarely rejected defendant's arguments as "unpersuasive." Order Denying Motion to Dismiss at 13. The Court looked to the Citizens' complaint, which "alleged that the County of Maui's discharge of wastewater into the injection wells causes pollutants to flow into the ocean" and that "this is shown by several studies." Id. at 13. Given the procedural posture of Defendant's motion, the Court assumed those facts were true. Id. The Court then held that

"Plaintiffs have sufficiently alleged a significant nexus between the County of Maui's discharge of pollutants and the ocean … ." Id.

Defendant's observation that some courts disagree about the Clean Water Act's application to groundwater is a legal *non sequitur*. Def's Opp. at 12-13. This Court's legal conclusions are the ones that are "relevant and binding." Rodriguez v. General Dynamics Armament and Technical Products, 2013 WL 4603057, at *2 (D. Hawai'i August 29, 2013). Guided by the Ninth Circuit's Healdsburg decision and after considering the contrary cases Defendant cites, the Court held that Clean Water Act jurisdiction extends to the groundwater under the LWRF as long as "the County of Maui's discharge of wastewater into the injection wells causes pollutants to flow into the ocean." Order Denying Motion to Dismiss at 13. That is the law of this case. See United States v. Phillips, 367 F.3d 846, 856 (9th Cir. 2004) ("Issues that a district court determines during pretrial motions become law of the case").

> This Court may depart from the law of the case only where:
>
> 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result.

Alexander, 106 F.3d at 876; see also id. ("Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of

discretion"). With the possible exception of alleging a change in the law, Defendant fails to argue – much less demonstrate – that any exception applies.

The Court should reject Defendant's suggestion to adopt the Environmental Protection Agency's ("EPA's") recent proposal to redefine the scope of waters under Clean Water Act jurisdiction. See Def's Opp. at 3-5. The Ninth Circuit has instructed that "proposed regulations carry no more weight than a position advanced on brief." Tedori v. United States, 211 F.3d 488, 492 (9th Cir. 2000) (citation omitted); see also In re AppleTree Markets, 19 F.3d 969, 973 (5th Cir. 1994) ("proposed regulations are entitled to no deference until final"); LeCroy Research Sys. Corp. v. Commissioner, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing"); Telvest v. Bradshaw, 618 F.2d 1029, 1036 n.10 (4th Cir. 1980) (refusing to consider proposed regulations "because the regulations are not in effect and we do not know when, if ever, they will become effective"). EPA's proposed new rule does not constitute an intervening change in law justifying departure from the law of this case.

Moreover, nothing in the proposed rule indicates that this Court's holding that the Clean Water Act applies if pollutants from Defendant's discharges travel through groundwater to the ocean is clearly erroneous. On the contrary, EPA affirms that both it and the Army Corps "have always preserved the authority to determine in a particular case that [groundwater is] a 'water of the United States,'"

which is entirely consistent with this Court's holding. Def's Exh. 21: 79 Fed. Reg. 22,188, 22,218 (Apr. 21, 2014); see, e.g., Def's Exh. 22: 66 Fed. Reg. 2,960, 3,017 (Jan. 12, 2001) ("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"); Def's Exh. 23: 63 Fed. Reg. 7,858, 7,878 (Feb. 17, 1998) (Clean Water Act "regulate[s] releases of polluants to groundwater [if] there is a direct hydrological connection between a point source and surface waters of the United States through such groundwater"); Def's Exh. 24: 2/13/12 EPA Letter at 2 ("EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water"). The EPA is now considering narrowing "the scope of regulatory jurisdiction" as compared to "that under the existing regulations" not because the agency contends its current, broader interpretation is in error, but rather for administrative convenience, to "minimize[e] the number of case-specific determinations." 79 Fed. Reg. at 22,188-89. The proposed rule provides no basis for the Court to question its prior holding, which is consistent with the Ninth Circuit's binding precedent in Healdsburg and Congress's intent in adopting the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Order Denying Motion to Dismiss at 4 (quoting 33 U.S.C. § 1251(a)).

II. THERE ARE NO DISPUTES ABOUT FACTS THAT ARE MATERIAL TO APPLYING THE CLEAN WATER ACT TO THE GROUNDWATER INTO WHICH DEFENDANT DISCHARGES

This Court's prior ruling identifying the circumstances under which Defendant's discharges qualify as a discharge of pollutants into navigable waters defines "which facts are material." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. Defendant cannot defeat the Citizen's motion by raising "[f]actual disputes that are irrelevant or unnecessary." Id.

A. It Is Undisputed That The Groundwater Into Which Defendant Discharges Has A Hydrologic Connection To The Pacific Ocean.

Faced with the Tracer Dye Study, which "conclusively demonstrate[s] that a hydrologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui," Defendant does not dispute that the groundwater into which its injection wells discharge has a hydrologic connection to the Pacific Ocean at Kahekili. Plfs' Exh. 2: Final Tracer Dye Study Report at ES-3; see Def's Concise Statement Response (Dkt. No. 79) at 3; Dollar Decl. ¶ 9. Consistent with this Court's order denying Defendant's motion to dismiss and the Ninth Circuit's Healdsburg decision, that concession establishes the first prong of the Clean Water Act jurisdiction inquiry: the groundwater into which Defendant discharges has a hydrologic connection to navigable waters. Defendant, however,

asserts that Clean Water Act does not cover the groundwater because the hydrologic connection is "not direct and immediate." Def's Opp. at 8.

Defendant derives these additional elements from various statements from EPA, none of which defines these terms. See Association Concerned Over Res. and Nature v. Tenn. Aluminum Processors, 2011 WL 1357690, at *17 n.16 (M.D. Tenn. Apr. 11, 2011) ("the term '[d]irect hydrologic connection' … has not been defined by the EPA"). The Citizens are aware of only one court that has considered the meaning of "[d]irect hydrologic connection," noting that the term "implies that the groundwater flows to and enters the surface water body." Id. This definition is consistent with the cases applying the Clean Water Act to groundwater. See, e.g., Washington Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) (since Clean Water Act's goal " 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"); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1320 (S.D. Iowa 1997) (same); Sierra Club v. Colorado Ref. Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("Clean Water Act's preclusion of the discharge of any pollutant into navigable waters includes such discharges which reach navigable waters through groundwater"). As discussed, there is no dispute that the groundwater into which

Defendant discharges flows to and enters the ocean. Accordingly, the hydrologic connection is undeniably "direct."[1]

Defendant cites no authority interpreting when a hydrologic connection is "immediate." Instead, it merely notes that Healdsburg applied the Clean Water Act to a pond with an underground hydraulic connection to the Russian River where "a change in the water level in one *immediately affects* the water level in the other." Def's Opp. at 7-8 (quoting Healdsburg, 496 F.3d at 1000).[2] In that case, the Ninth Circuit considered that fact as one of several establishing the pond's "significant nexus," in that case due to this "physical effect." Healdsburg, 496 F.3d at 1000. The court did not rely on that fact to determine if the first prong of

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[1] Defendant's reliance on a letter from the state Department of Health stating that the LWRF effluent "*indirectly* enters the Pacific Ocean" is misplaced. Def's Opp. at 9 (quoting Def's Exh. 25). The question is not whether the connection between the point source and the surface water is direct, but whether "there is a direct … hydrologic connection … between the groundwater and the surface water." 63 Fed. Reg. at 7,881 (emphasis added). In cases examining discharges though groundwater, the point source always has an "indirect path of discharge" to the surface waters that ultimately receive the pollutants. Washington Wilderness Coal., 870 F. Supp. at 989; see also Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D. Puerto Rico 2009) ("Congress intended to regulate the discharge of pollutants that could affect surface waters of the United States, whether it reaches the surface water directly or through groundwater") .

[2] As the district court explained, "river water was [not] flowing into the pond via the aquifer." Healdsburg, 2004 WL 201502, at *5 (N.D. Cal. Jan. 23, 2004). Rather, the river's rise and fall "transmitted [pressure] through the aquifer," affecting the pond's level. Id.

the jurisdiction test were met, and none of the many other cases applying the Clean Water Act to groundwater has required a similar physical effect.[3]

Defendant similarly fails to cite any authority to support its claim that "[t]he spatial and temporal distance between the wells and navigable waters is too great to be direct and immediate." Def's Opp. at 8.[4] Few decisions applying the Clean Water Act to groundwater mention those factors, confirming they are not material. See Friends of Santa Fe County v. LAC Minerals, 892 F. Supp. 1333, 1357 (D.N.M. 1995) (Clean Water Act applies if polluted water "eventually made its way" to navigable water). Among the few cases that mention spatial distance, courts have applied the Clean Water Act to discharges into groundwater located a similar distance or farther away from navigable waters than the half mile between the LWRF injection wells and the ocean at Kahekili. See Coldani v. Hamm, 2007 WL 2345016, at *1 (E.D. Cal. Aug. 16, 2007) (discharge through groundwater to river "less than a mile" away); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1307 (S.D. Iowa 1997) (discharge into groundwater "approximately

[3] Should this Court deem such a physical effect relevant, it is present here. A report prepared by Defendant's own consultant confirms that "fluctuations in water levels in Wells 3 and 4 basically correspond to stages in the tides." Plfs' Exh. 12: 1993 Injection Well Report at 16; see also id. at Figs. 7 & 8.

[4] To the extent Defendant relies on Dr. Paulsen to provide a legal opinion about the Clean Water Act's applicability, the Court should exclude that testimony. See Paulsen Decl. ¶¶ 19, 24-25; see also United States v. Boulware, 558 F.3d 971, 975 (9th Cir. 2009) (expert testimony excluded "because it constituted a legal opinion"); Aguilar v. International Longshoremen's Union, 966 F.2d 443, 447 (9th Cir. 1992) ("matters of law … [are] inappropriate subjects for expert testimony").

2,000 feet" from river). As for timing, in Healdsburg, the district court found the Clean Water Act applied, and the Ninth Circuit affirmed, where, as here, it took "several months" for wastewater to reach navigable waters through groundwater. 2004 WL 201502, at *4; see also Final Tracer Dye Study Report at ES-1 (tracer dye took 84 days to first arrive at nearshore seeps); Quivira Min. Co. v. Environmental Prot. Agency, 765 F.2d 126, 129 (10th Cir. 1985) (Clean Water Act applies to "underground aquifers" that, "after a lengthy period, perhaps centuries," reach navigable waters).[5]

Changes in the wastewater's chemical properties as it travels through the groundwater prior to flowing into the ocean do not "elimat[e] any claim of a 'direct' discharge," as Defendant baldly asserts. Def's Opp. at 9. In Healdsburg, "the effluent [was] partly cleansed" as it traveled from Basalt Pond through the groundwater, with chloride concentrations cut in half and reduced biochemical oxygen demand by the time the groundwater discharged into the river. 2004 WL 201502, at *5. The alteration of the chemical properties was no bar to both the district court and Ninth Circuit finding the requisite hydrologic connection.

[5] This case is easily distinguished from Greater Yellowstone Coal. v. Larson, 641 F. Supp. 2d 1120 (D. Idaho 2009), where modeling predicted it would take "hundreds of years," not mere months, for pollutants to reach surface waters located up to four miles away. Id. at 1139. Notably, Greater Yellowstone did not hold categorically that the Clean Water Act cannot cover such discharges, but only that the agency's decision had a rational basis. Id. Moreover, unlike Greater Yellowstone, the groundwater discharges here violate state water quality standards. See Dollar Decl. ¶¶ 21-22 (N+N and total phosphorus standards).

B. It Is Undisputed That The Groundwater Into Which Defendant Discharges Has A Significant Nexus To The Ocean.

As discussed above, this Court previously held that, to establish a "significant nexus," the Citizens need demonstrate only that "the County of Maui's discharge of wastewater into the injection wells causes pollutants to flow into the ocean." Order Denying Motion to Dismiss at 13. The Tracer Dye Study concluded that LWRF wastewater constitutes the lion's share – an average of 62% and sometimes up to 96% – of "submarine spring discharge" at Kahekili. Final Tracer Dye Study Report at ES-1. Defendant does not dispute this critical fact, admitting that "an effluent-groundwater mixture is flowing out of the seeps." Dollar Decl. ¶ 57; see also Def's Opp. at 18 ("some portion of the discharge is derived from effluent – a fact upon which all four experts agree"); Paulsen Decl. ¶¶ 11-12.[6]

Defendant's argument that it "is inappropriate" to rely on water quality data taken at the seeps to establish a significant nexus cannot be squared with binding

[6] For reasons unknown, Defendant repeatedly insists its injection wells discharge "reclaimed water" rather than "wastewater." Def's Concise Statement Response at 1-3. Defendant previously admitted "it disposes … treated wastewater … into the LWRF's injection wells." Plfs' Exh. 11: Answer (Dkt. No. 41) ¶ 22 (emphasis added). Regardless of what Defendant calls it, there is no dispute that the substance Defendant discharges from the injection wells is a "pollutant" under the Clean Water Act. See Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1391 (D. Haw. 1993) ("Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines the term 'pollutant' broadly to include sewage, sewage sludge, municipal waste, and biological materials").

Ninth Circuit precedent. Def's Opp. at 16. In Healdsburg, the Ninth Circuit affirmed the district court's finding "that Basalt Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels." 496 F.3d at 1001. The district court's finding was based on the fact that the chloride concentration in pond water entering the river (18 parts per million) was triple the river's concentration upstream (5.9 parts per million). 2004 WL 201502, at *5 ("chloride from the pond over time makes its way to the river in higher concentrations than naturally occurring in the river"). To find the requisite significant nexus to apply the Clean Water Act, the Ninth Circuit did not demand proof that water from Basalt Pond increased chloride levels throughout the entire river; an increase in the portion "on the west side of the River adjacent to the Pond" was sufficient. 496 F.3d at 1001.

In this case, there is no dispute that the chemistry and temperature of the effluent-laden groundwater coming out of Kahekili's seeps differ substantially from that of the receiving ocean waters. As Defendant's experts acknowledge, the groundwater discharging from the seeps "is elevated in temperature and nutrient concentrations and depressed in salinity, dissolved oxygen, and pH relative to control values." Dollar Decl. ¶ 16; see also id. ¶¶ 13, 15-20; Paulsen Dec. ¶¶ 35, 44, 46, 48, 49. Dr. Dollar states that "[t]he greatest difference between seep water and control water is observed for nitrate + nitrite nitrogen (NO3- + NO2-) (hereafter referred to as N+N)," with N+N concentrations in groundwater emerging

from the seeps two orders of magnitude higher than at the control sites (304-682 µg/L versus about 5 µg/L for the North Seep Group, and 513-581 µg/L versus about 7 µg/L for the South Seep Group). Id.; see also id. ¶ 17. If chloride concentrations triple those in the receiving water were enough to establish "that Basalt Pond significantly affects the chemical integrity of the Russian River," there is no question that an influx of nutrient concentrations up to ***one hundred times greater*** than the receiving ocean water establishes a "significant nexus" for the groundwater at issue here. Healdsburg, 496 F.3d at 1001.[7]

The undisputed, significant effects are not only chemical, but physical as well. Dr. Dollar acknowledges that "[m]ean temperature" of effluent-laden groundwater discharging at the seeps "was elevated … by about 4-5°C over control site water." Dollar Decl. ¶ 18.[8] Defendant does not dispute that seawater only two degrees Celsius above normal conditions can kill corals or that corals at Kahekili cannot escape the influx of warm groundwater percolating through the reef framework. Smith Decl. ¶¶ 37, 39. Undeniably, these elevated temperatures

[7] While the significant nexus inquiry does not demand proof that changes to water chemistry extend beyond the seeps, it is undisputed that, in the water column above the seeps, nutrient concentrations remain notably higher than at control sites. Dollar Decl. ¶¶ 17 ("2-3 fold increase [in N+N concentrations] over control sites"), 22 (higher phosphorus concentrations).

[8] Defendant does not dispute that the thermal anomaly from the groundwater's elevated temperature extends over more than 167 acres. Paytan Decl. ¶¶ 26-29; Plfs' Exh. 3: Interim Tracer Dye Study Report at Fig. ES-5.

constitute a significant effect on the physical integrity of the receiving ocean waters.

In addition, as discussed above, the ocean at Kahekili exerts a tidal influence on the groundwater into which Defendant discharges. See 1993 Injection Well Report at 16, Figs. 7 & 8. The existence of this type of "physical effect" in Healdsburg was sufficient for the Ninth Circuit to find a "significant nexus" to "the physical integrity of the River." 496 F.3d at 1000.

Finally, Defendant does not dispute that the characteristics of the effluent-laden groundwater at the seeps – elevated temperature and nutrients; low salinity, pH and dissolved oxygen – can be harmful to coral reefs and reef-dependent organisms. Rather, Defendant merely claims that, as the groundwater rises above the sea floor, it will eventually mix with ocean water, diluting its effects. Def's Op. at 16-17. Because the pollutant-laden groundwater percolates up through the reef, its harmful properties threaten the biological integrity of Kahekili's reef, further warranting a finding of significant nexus. See Smith Decl. ¶¶ 39-40.[9]

Defendant's claims that other sources of pollution exist and its denials that its discharges harm Kahekili's corals do not create disputed facts about the existence of a significant nexus, triggering liability for unpermitted discharges.

[9] Defendant's suggestion that the Court write off the portion of Kahekili's reef located directly over the seeps finds no support in the Clean Water Act, which broadly seeks "to restore and maintain the … biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

See Def's Opp. at 19-21.[10] As the Ninth Circuit explained in Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993):

> The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit.

Id. at 309; see also Environmental Prot. Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 204 (1976) (Congress intended to "facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated").

Defendant fails to cite any authority for its claim that the facts it disputes are material to determining whether the Clean Water Act protects the groundwater into which Defendant discharges. In Healdsburg, the district court expressly found the unpermitted wastewater discharges at issue were not the only source of chloride in Basalt Pond. 2004 WL 201502, at *5 (noting "naturally occurring salts"). That fact was no bar to the Ninth Circuit concluding the pond significantly affected the Russian River's chemical integrity, "warrant[ing] protection [of Basalt Pond] as a 'navigable water.'" 496 F.3d at 1001. Moreover, the Ninth Circuit did not require any showing of harm to the Russian River before concluding the "discharge of

[10] As discussed in the Citizens' opposition to Defendant's Objections, filed herewith, Dr. Dollar's testimony that the reef at Kahekili is essentially pristine should be excluded because it is not "based on sufficient facts or data" and is not "the product of reliable principles and methods." Fed. R. Evid. 702 (b), (c).

wastewater into Basalt Pond without a permit … violate[d] the [Clean Water Act]." Id.

In the final analysis, there is no dispute that "the County of Maui's discharge of wastewater into the injection wells causes pollutants to flow into the ocean," establishing the requisite "significant nexus" to apply the Clean Water Act. Order Denying Motion to Dismiss at 13. This Court should grant summary judgment that Defendant's unpermitted discharges of wastewater from LWRF Wells 3 and 4 violate the Clean Water Act.

III. DEFENDANT DOES NOT DISPUTE THE NUMBER OF DAYS OF UNPERMITTED DISCHARGES

In their Amended Complaint, the Citizens alleged a claim for civil penalties for each day of Defendant's Clean Water Act violations. Amended Complaint (Dkt. No. 36) ¶ 64 & Prayer For Relief ¶ 3. Federal Rule of Civil Procedure 56(a) authorizes the Citizens to move for partial summary judgment, "identifying … the part of each claim … on which summary judgment is sought." Accordingly, the Citizens seek partial summary judgment that (1) Defendant has violated the Clean Water Act every day it has discharged wastewater into LWRF Injection Wells 3 or 4, (2) these violations will continue until Defendant obtains and complies with an NPDES permit for its discharges, (3) defendant's unpermitted discharges from Injection Well 3 during the period from January 1, 2008 through August 31, 2012, and from October 1, 2012 through March 31, 2013 constitute 1,881 days of

violations, and (4) defendant's unpermitted discharges from Injection Well 4 during the period from January 1, 2008 through March 31, 2013 constitute an additional 1,911 days of violations. Plfs' Motion for Partial Summary Judgment (Dkt. No. 72) at 2-3.

The Citizens supported this aspect of their motion with admissible evidence (primarily Defendant's own records), shifting to Defendant the burden to come forward with admissible evidence showing disputed material facts or to demonstrate that the Citizens have not established the absence of a genuine dispute. Fed. R. Civ. P. 56(c)(1). Defendant failed to make any effort to do so, justifying summary judgment for the Citizens. Fed. R. Civ. P. 56(a).

Defendant cites no authority limiting summary judgment to issues related to liability. Moreover, that some penalty factors may not be susceptible to summary judgment (e.g., the seriousness of Defendant's violations, which is disputed) does not preclude partial summary judgment regarding the days of violations. Finally, while Defendant alleges a need for additional discovery, it fails to "identify the specific facts that further discovery would have revealed or explain why those facts would have precluded summary judgment." Tatum v. City and County of San Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006).

IV. CONCLUSION

Summary judgment is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citation omitted). Review of the dispositive factors in Healdsburg compels the conclusion that the groundwater into which Defendant discharges has both a hydrologic connection and a significant nexus to the ocean at Kahekili. Accordingly, the Court should grant partial summary judgment to the Citizens that Defendant has violated, and continues to violate, the Clean Water Act every day its injection wells discharge into that groundwater without an NPDES permit.

Dated: Honolulu, Hawai'i, April 28, 2014.

EARTHJUSTICE
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.5(e), I certify that the foregoing brief is set in a proportionally spaced 14-point font (Hawaiian version of Times New Roman) and contains 4,496 words, exclusive of the caption, tables, and signature block. I have relied upon Microsoft Word to determine the word count.

DATED: Honolulu, Hawai‘i, April 28, 2014.

/s/ David L. Henkin
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