DAVID L. HENKIN #6876
CAROLINE C. ISHIDA #9475
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai'i 96813
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: dhenkin@earthjustice.org
cishida@earthjustice.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

HAWAI'I WILDLIFE FUND, SIERRA CLUB - MAUI GROUP, SURFRIDER FOUNDATION, and WEST MAUI PRESERVATION ASSOCIATION, Plaintiffs, v. COUNTY OF MAUI, Defendant.	Civil No. 12-00198 SOM BMK PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS; CERTIFICATE OF COMPLIANCE; DECLARATION OF CAROLINE C. ISHIDA; EXHIBITS "A" & "B;" CERTIFICATE OF SERVICE Hearing: Date: July 31, 2012 Time: 9:45 a.m. Judge: Hon. Susan Oki Mollway

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Page

FEDERAL CASES (cont.)

Page

FEDERAL CASES (cont.)

UNPUBLISHED CASES

Page

UNPUBLISHED CASES (cont.)

UNITED STATES CODES

FEDERAL RULES OF CIVIL PROCEDURE

Page

FEDERAL RULES OF CIVIL PROCEDURE (cont.)

FEDERAL RULE OF EVIDENCE

HAWAII REVISED STATUTE

HAWAII ADMINISTRATIVE RULES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs' lawsuit challenges defendant County of Maui's ongoing, unpermitted discharges of wastewater and other pollutants from the injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF") into West Maui's nearshore waters, in violation of the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA"). Rather than answer plaintiffs' complaint, defendant filed a motion to dismiss alleging several grounds for dismissal (Dkt. No. 8), none of which has any basis.

Plaintiffs challenge actual, ongoing, unpermitted discharges of pollution, not abstract, speculative ones, and, thus, the issues in plaintiffs' complaint are ripe for adjudication. See infra Part IV. Refusing to resolve the parties' disputes, as defendant urges, would serve only to perpetuate the harm to West Maui's fragile marine ecosystem. Additionally, since plaintiffs are asking the Court to order only that defendant apply for and secure the required National Pollutant Discharge Elimination System ("NPDES") permit, not to dictate the terms of that permit, the doctrine of primary jurisdiction does not come into play, see infra Part V, and plaintiffs have not failed to join any indispensible parties. See infra Part VI. Finally, since neither the State nor the Environmental Protection Agency ("EPA") has brought suit to require defendant's compliance with the Clean Water Act, defendant's claim that plaintiffs' complaint should be barred because of "diligent prosecution" is frivolous. See infra Part VII.

Plaintiffs respectfully submit that, since defendant has failed to establish any valid grounds to dismiss plaintiffs' complaint, the Court should reach the merits and prohibit defendant from continuing to violate the Clean Water Act by illegally discharging wastewater and other pollutants from the LWRF injection wells into ocean waters without the required NPDES permit.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is the owner and operator of the LWRF in Lahaina, Maui, Hawai'i. Complaint (Dkt. No. 1) ¶ 43. The focus of defendant's activities at the LWRF is the treatment, partial reuse, and disposal of 3-5 million gallons of wastewater per day into some or all of the facility's four injection wells. Id. ¶¶ 43-44. Defendant began using injection wells 1 and 2 in 1982 and added injection wells 3 and 4 in 1985. Id. ¶ 43. The injected wastewater is discharged into groundwater through a subsurface pipe at the bottom of each individual injection well, where it flows with the groundwater out to the ocean and is discharged via seeps in the ocean floor into the nearshore waters of the Kahekili Beach area of West Maui. Id. ¶ 44.

Defendant currently has two permits for the injection wells. The first permit is a federal Underground Injection Control ("UIC") permit issued by the EPA pursuant to the Safe Drinking Water Act's UIC program, 42 U.S.C. §300f et seq. Def's Exh. A ¶¶ 22-23. The second permit is a state UIC permit issued by the

Hawai‘i Department of Health ("DOH") pursuant to H.R.S. § 340E et seq. Id. ¶ 27. Defendant does not have an NPDES permit for the LWRF injection wells. Complaint ¶ 61; Def's Memo. (Dkt. No. 8-1) at 4.

On June 28, 2011, plaintiffs sent defendant written notice of their intent to sue to challenge defendant's illegal discharges of wastewater from the LWRF injection wells. Complaint ¶ 8; Def's Exh. E. Shortly thereafter, the EPA, with assistance from scientists from the University of Hawai‘i at Mānoa ("UH"), DOH, and the U.S. Army Corps of Engineers, began a tracer dye study at the injection wells to confirm the hydrological connection between the injection wells and the ocean. Complaint ¶ 58. Dye was injected into the wells in late July and early August 2011, and the EPA and scientists from UH began monitoring the nearshore waters, including the freshwater seeps on the ocean floor in the Kahekili Beach area, for dye. Id. The scientists began detecting dye discharging from the seeps in the ocean floor offshore from Kahekili Beach in October 2011. Id.

Plaintiffs filed the present action on April 16, 2012, asking this Court to require defendant to apply for and obtain an NPDES permit for its discharges from the injection wells into the nearshore waters of West Maui. On May 9, 2012, defendant filed its motion to dismiss plaintiffs' complaint.

III. DEFENDANT'S MOTION REFLECTS FUNDAMENTAL MISUNDERSTANDINGS OF THE CLEAN WATER ACT'S PERMITTING SCHEME

Before addressing the specific arguments in defendant's motion to dismiss, plaintiffs clarify two basic legal issues related to plaintiffs' Clean Water Act claims. Misstatements about these aspects of the Clean Water Act's permitting scheme permeate defendant's motion to dismiss.

A. The Clean Water Act's Permitting Requirements Apply To Discharges To Groundwater That Are Hydrologically Connected To, And Have A Significant Effect On, Navigable Waters.

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To further this central goal, section 301(a) of the Act prohibits "the discharge of any pollutant" to navigable waters from a point source, except when specifically authorized, such as through issuance of an NPDES permit. Id. § 1311(a); see also id. §§ 1342, 1362(12).

The Act defines the term "navigable waters" as "the waters of the United States, including the territorial seas." Id. § 1362(7). West Maui's nearshore ocean waters unquestionably constitute navigable waters within the meaning of the Clean Water Act. See Rapanos v. United States, 547 U.S. 715, 739 (2006) ("the phrase 'the waters of the United States' includes" oceans).

A "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any … well, … from which pollutants are or may be discharged." Id. § 1362(14).

In this case, plaintiffs allege that defendant's LWRF injection wells continuously discharge wastewater and other pollutants into groundwater that is hydrologically connected to the nearshore ocean waters of West Maui. Complaint ¶ 3. Plaintiffs further allege that the pollutants from the LWRF that enter West Maui's nearshore waters via hydrologically connected groundwater have deteriorated ocean water quality and harmed the fragile marine ecosystem. Complaint ¶¶ 54-60. Contrary to defendant's assertion that it is "far from clear" whether Clean Water Act jurisdiction attaches to such discharges, the weight of Ninth Circuit authority compels the conclusion that, under the facts plaintiffs have alleged, it does. Def's Memo. at 2; see also 2 William H. Rodgers, Jr., Rodgers' Environmental Law, § 4:8 (2d Ed. 2011) ("There is little doubt that discharges into groundwater[] that eventually move into surface waters are prohibited under Section 301 of the Clean Water Act").

In Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008), the Ninth Circuit articulated the test to determine whether a hydrological connection is sufficient for Clean Water Act jurisdiction to attach. In that case, the Court considered whether a municipal wastewater treatment plant was required to obtain an NPDES permit for

wastewater discharges into a body of water known as "Basalt Pond," a rock quarry pit that had filled with water from the surrounding aquifer located next to the Russian River, "a navigable river of the United States." Id. at 994.

Water from Basalt Pond found its way into the river in two ways: "though both the surface wetlands and the underground aquifer." Id. at 1000. Of the two, the "vast underground aquifer" was "the principal pathway for a continuous passage of water between Basalt Pond and the Russian River." N. Cal. River Watch v. City of Healdsburg, 2004 WL 201502, *2 (N.D. Cal. Jan. 23, 2004); see also id. ("the underground aquifer is a slow-moving, underground tributary of the river"). In contrast, "[n]ormally, there is no surface connection" between the pond and the river, because a levee blocks the way. Id.; see also id. (levee broke only three times in eight years, "each time the levee being repaired within a few months").

The Court's analysis of the Clean Water Act's application to discharges into Basalt Pond did not turn on whether the hydrologic connection between the pond and the Russian River was surface or underground. Rather, the Court concluded that, in light of the "substantial nexus test" Justice Kennedy articulated in Rapanos, the relevant inquiry was whether, due to the hydrological connection, "Basalt Pond has a significant effect on 'the chemical, physical, and biological integrity' of the Russian River." 496 F.3d at 1000. The Court ultimately concluded that, since "the Pond significantly affects the physical, biological and chemical integrity of

the Russian River," it "warrants protection as a 'navigable water' under the CWA." Id. at 1001. In finding the requisite "substantial nexus" for Clean Water Act jurisdiction, the Court relied on district court findings regarding "several hydrological connections" between the pond and the river, placing particular weight on effects stemming from the "underground hydraulic connection." Id. at 1000.

Here, as in Healdsburg, it takes mere months for discharged wastewater to travel through the underground hydraulic connection to the navigable receiving water. Compare id. at 996 (after pond water "drains into the surrounding aquifer," it takes "a period of a few months" to "find[] its way to the River" through seeps along the river's bank) with Complaint ¶ 58 (dye traveled from injection wells to ocean in three months). Moreover, the discharges into the LWRF injection wells, like those into Basalt Pond, have significant, adverse impacts on the chemical, physical, and biological integrity of the ultimate receiving waters. See Complaint ¶¶ 47-60 (LWRF discharges result in high levels of nutrients and other pollutants in nearshore waters, degrading water quality and triggering nuisance algal blooms).[1] The conclusion that, under the facts as alleged, defendant's unpermitted

[1] To the extent that defendant suggests that, to establish the requisite hydrologic connection to trigger the NPDES permit requirement, plaintiffs must establish that "a change in the water level in one [water body] immediately affect[s] the water level in the other," plaintiffs respectfully disagree that Healdsburg imposes that standard. Def's Memo. at 3. Rather, it is enough that the

discharges into the LWRF injection wells – which then travel through groundwater to West Maui's nearshore waters – are subject to the Clean Water Act's NPDES permit requirement is supported not only by Healdsburg, but by a long line of district court cases from this Circuit. See, e.g., Coldani v. Hamm, 2007 WL 2345016, at *7 & nn. 9-10 (E.D. Cal. Aug. 16, 2007) ("because Coldani has alleged that Lima Ranch polluted groundwater that is hydrologically connected to surface waters that constitute navigable waters, he has sufficiently alleged a claim within the purview of the CWA"); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (Clean Water Act regulates "discharges into hydrologically connected groundwater which adversely affect surface water"); Wash. 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 and receiving ocean water "commingle." Healdsburg, 496 F.3d at 1000.

Plaintiffs do, however, intend to introduce evidence that changes in tide levels affect the level of the water in the LWRF injection wells. Thus, should the Court conclude that an allegation of this type of physical effect is necessary to assert an actionable Clean Water Act claim, it should grant plaintiffs leave to amend, rather than grant defendant's motion to dismiss. See Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) ("a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts").

groundwater, is subject to regulation by NPDES permit").[2] Numerous courts outside the Ninth Circuit have likewise concluded that discharges to groundwater that is hydrologically connected to waters of the United States require an NPDES permit. See, e.g., Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141 (10th Cir. 2005) (holding that "since plaintiffs have alleged the contemporaneous discharge from a point source-the El Paso shaft-which flows [underground] through other conveyances to navigable waters, CWA jurisdiction is established"); Ass'n Concerned Over Res. and Nature, Inc. v. Tenn. Aluminum Processors, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) (holding "groundwater is subject to the CWA provided an impact on federal waters"); Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 181 (D. Puerto Rico 2009) (same); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) ("Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater"); Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1358 (D.N.M. 1995) ("most courts to have considered the issue have held

[2] Defendant cites only a single district court case from the Ninth Circuit for the proposition that the Clean Water Act does not regulate discharges to groundwater that is hydrologically connected to surface waters: Umatilla Waterquality Prot. Ass'n v. Smith Frozen Foods, 962 F. Supp. 1312 (D. Or. 1997). Umatilla is an outlier, and even the court that issued it subsequently disagreed with its holding. See Nw. Envtl. Def. Ctr. v. Grabhorn, Inc., 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009) ("this court concludes that, contrary to Umatilla, the CWA covers discharges to navigable surface waters via hydrologically connected groundwater").

that hydrologically connected groundwaters are regulated waters of the United States").

B. A Clean Water Act Section 401 Water Quality Certification Is Not A Prerequisite For Issuance Of An NPDES Permit In The State of Hawai'i.

Defendant's repeated assertions that, in Hawai'i, "an entity without a [Clean Water Act] § 401 certification from the state cannot obtain a federal NPDES permit" are baseless. Def's Memo. at 6; see also id. at 17, 20.

Section 401 provides:

> Any applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of [the Clean Water Act related to effluent limitations and water quality standards].

33 U.S.C. § 1341(a)(1) (emphasis added). Congress enacted this provision "to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92–414, reprinted in 1972 U.S.C.C.A.N. 3668, 3735 (emphasis added); see also 33 U.S.C. § 1341(d) (certification helps ensure compliance with, inter alia, "any other appropriate requirement of State law set forth in such certification"); S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 386 (2006) ("State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution").

As evinced by the statute's plain language, section 401 applies to only federal licenses or permits, not ones issued by a state. Thus, in discussing section 401, the EPA, which administers the Clean Water Act, notes that the provision "is limited in scope and application to situations involving federally-permitted or licensed activities." Plfs' Exh. A: EPA Section 401 Handbook at 2 (2010) (emphasis added).[3] Accordingly, "[i]f a federal permit or license is not required, … the activity is not subject to CWA §401." EPA Section 401 Handbook at 2. The Hawai'i state regulations implementing section 401 are in agreement, defining a "license or permit" subject to certification as " any permit, certificate, approval … or other form of permission granted by an agency of the federal government to conduct any activity which may result in any discharge into navigable waters." H.A.R. § 11-54-9.1 (emphasis added).

As defendant acknowledges, DOH, not EPA, administers the NPDES permit program in Hawai'i. Def's Memo. at 17; see also EPA Section 401 Handbook at 3 n.10 (listing states in which EPA administers NPDES permitting). Hawai'i's "implementation of a state permit program in lieu of the federal program does not 'federalize' the resulting permits or licenses for purposes for §401." EPA Section 401 Handbook at 4. Since Hawai'i administers the NPDES program, "permitting

[3] Plaintiffs respectfully ask the Court to take judicial notice of this document pursuant to Federal Rule of Evidence 201(b)(2). See Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1112 n.14 (9th Cir. 2010) (taking judicial notice of agency handbook).

authority resides with the state …, not a federal agency, and 401 certification does not apply to those authorizations issued by the state ….” Id.; cf. Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 653 & n.4 (2007) (Endangered Species Act “consultation requirement does not apply to [NPDES] permitting decisions by state authorities” because those decisions are not “‘authorized, funded, or carried out’ by “Federal agenc[ies]”).

EPA has required defendant to apply for section 401 water quality certification in connection with its federally issued UIC permit under the Safe Drinking Water Act. See Def’s Exh. A ¶ 25. The pendency of that certification has no bearing, however, on defendant’s ability to apply for, or secure, a state-issued NPDES permit.

IV. THE COURT HAS SUBJECT MATTER JURISDICTION

A. Plaintiffs’ Claims Are Ripe For Adjudication.

Defendant initially argues that plaintiffs’ claims are not ripe because state and federal regulatory agencies “are in the process of reviewing the Lahaina Facility’s existing [UIC] permits” and the ultimate permitting decisions may allay plaintiff’s concerns. Def’s Memo. at 12. “Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1).” St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

"[R]ipeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 1999) (en banc) (citations omitted). It is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993).

"The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." Anchorage Equal Rights Comm'n, 220 F.3d at 1138. "Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to [the Court's] exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'" Id. at 1139 (quoting Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945)). A claim is not ripe if it involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 580-81 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984)).

Once a court has determined that plaintiffs' claims meet the constitutional ripeness requirement, it examines "prudential ripeness" by evaluating "the fitness

of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S 99 (1977). "[These] prudential considerations of ripeness are discretionary." Anchorage Equal Rights Comm'n, 220 F.3d 1142.

1. Plaintiffs' Claims are Constitutionally Ripe

To establish a violation of the Clean Water Act's NPDES permit requirement, plaintiffs need demonstrate only "that defendant[] (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source." Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001). Plaintiffs' complaint contains precisely such allegations, discussing numerous studies that demonstrate that wastewater and other pollutants from defendant's LWRF injection wells reach West Maui's nearshore waters through groundwater, and that these discharges are causing harm to ocean water quality and coral reefs. Complaint ¶¶ 46-58. Plaintiffs further allege that defendant does not have an NPDES permit for those discharges, a fact defendant does not dispute. Id. ¶¶ 5, 61; Def's Memo. at 4.

Plaintiffs' claims do not involve "contingent future events that may not occur as anticipated, or indeed may not occur at all." Union Carbide Agr. Prods. Co., 473 U.S. at 580-81. Far from it. Defendant has been illegally discharging pollutants from the LWRF without a permit for decades, harming the nearshore

marine environment, and continues to do so to this day. Since the effects of defendant's illegal discharges are being felt "in a concrete way," plaintiffs' claims are ripe for review. Abbott Labs., 387 U.S. at 148.

2. Plaintiffs' Claims Satisfy Prudential Considerations

a. Plaintiffs' claims are fit for judicial decision.

Defendant's moving papers are notable for failing to cite a single case in which a court has found that a Clean Water Act claim challenging illegal discharges is not fit for judicial review. The one case defendant does cite – Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC, 531 F. Supp. 2d 747 (S.D.W.Va. 2008) – goes the other way, holding a challenge to discharges in excess of existing NPDES permit limits was ripe. Id. at 757-58. Defendant's failure to find authority for its position is not surprising since Congress expressly authorized Clean Water Act citizen suits to challenge violations of "an effluent standard or limitation," including claims that, as here, a defendant is discharging without a permit. 33 U.S.C. § 1365(a)(1); see, e.g., Headwaters, Inc., 243 F.3d at 529. Congress clearly contemplated that courts would entertain the type of claim set forth in plaintiffs' complaint.

Arguments that claims are not fit for judicial review typically arise in cases involving pre-enforcement review of agency regulations, where key facts may not yet have been developed, judicial review would "entangl[e courts] in abstract

disagreements over administrative policies," and the challenging parties have not felt the effects of agency decisions "in a concrete way." Abbott Labs., 387 U.S. at 148-49. That is not the case here, where numerous studies have established the material facts regarding the hydrologic connection between defendant's injection wells and the ocean, as well as the concrete harms to the marine environment that plaintiffs seek to abate, and defendant does not dispute its lack of an NPDES permit for its wastewater discharges.

As defendant has acknowledged:

> [T]he case will ultimately turn on legal questions, rather than factual disputes. For example, the County admits that it does not have an NPDES permit for the Lahaina facility, but notes that the key issue in the case is whether County is legally required to have one.

Def's Scheduling Conf. Statement (Dkt. No. 19) at 4. The determination whether, as a matter of law, defendant must secure an NPDES permit is unquestionably a matter that is fit for judicial resolution. As the Supreme Court declared over two hundred years ago, "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803).

In arguing that future agency permitting decisions "may … allay[]" plaintiffs' concerns, defendant is not really claiming that the parties' dispute is not currently ripe, but rather is speculating that, one day, it may become moot. Def's Memo. at 12. Such speculation cannot satisfy defendant's "heavy burden" to

establish mootness. In re Palmdale Hills Property, LLC, 654 F.3d 868, 874 (9th Cir. 2011). Moreover, by suggesting that plaintiffs' claims be deferred until some uncertain time in the future when DOH and the EPA issue new UIC permits, defendant is effectively seeking an indefinite stay of these proceedings, which is disfavored. See Dependable Highway Exp., Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007) ("stays should not be indefinite in nature").

Finally, plaintiffs do not understand defendant's suggestion that requiring it to secure an NPDES permit might subject it to "potentially conflicting permit requirements." Defs' Memo. At 12. Should the Court grant the relief plaintiffs seek and compel defendant to apply for, and comply with, an NPDES permit, DOH is the entity that will establish the permit terms, likely in consultation with EPA. These are the same agencies currently reviewing defendant's UIC permit, and defendant gives the Court no reason to believe these agencies would administer the Clean Water Act in conflict with the Safe Drinking Water Act. Simply put, there is no reason for the Court to give any credence to defendant's unsupported speculation that it may suffer prejudice.

b. The hardship to plaintiffs from withholding consideration far outweighs any speculative hardship to defendant.

The second prudential ripeness factor – "the hardship to the parties of withholding court consideration" – weighs heavily in plaintiffs' favor. Abbott Labs., 387 U.S. at 149. As discussed above, defendant's claim that requiring it to

apply for an NPDES permit "may lead to inconsistent or duplicative conditions and requirements" is pure speculation and its handwringing about the ultimate permit terms DOH may impose even more so. Def's Memo. At 14. All plaintiffs are asking the Court to do is determine whether defendant's unpermitted discharges require an NPDES permit, not to impose permit terms. As defendant has conceded, the answer to that question will "turn on legal questions, rather than factual disputes." Def's Scheduling Conf. Statement at 4.

As opposed to defendant's speculative fears about what the permitting process may bring, plaintiffs and the marine environment of West Maui are suffering concrete, ongoing harm from defendant's unpermitted discharges of wastewater and other pollutants. Defendant attempts to muddy the waters by noting that its injection wells are not the sole sources of nutrients and other pollutants, but plaintiffs have never said they are. Rather, plaintiffs allege that the injection wells are significant contributors of marine pollution, a claim substantiated by the U.S. Geological Survey ("USGS") study defendant cites. See Def's Exh. F at 2 ("Municipal wastewater plumes discharging from aquifer to ocean were detected by nearshore wading surveys at . . . Lahaina."); Plfs' Exh. B at 68-69 (while "the effluent plumes are not the sole source of nutrients discharging to the ocean on Maui," "[m]unicipal injection plumes were successfully detected in the ocean by nearshore wading surveys at . . . Lahaina, Maui" and "wastewater presence was further confirmed at submarine springs by [chemicals and

pharmaceuticals] that were also detected in sampled effluent at the treatment plant.").[4] Consequently, plaintiffs would suffer hardship if the court declines to hear this case because the defendant would be able to continue its illegal discharges of wastewater and other pollutants to nearshore waters and cause harm to the water quality and coral reef ecosystems of West Maui.

B. The Ongoing UIC Permitting Process Has No Bearing on the Ripeness of Plaintiffs' Clean Water Act Claims

Defendant argues that, because "regulatory agencies are in the process of reviewing the Lahaina Facility's existing [UIC] permits," the issue of whether defendant needs an NPDES permit is not ripe. Def's Memo. at 12. Throughout its moving papers, defendant conflates its obligations under the Clean Water Act with its obligations under the Safe Drinking Water Act, an entirely distinct regulatory program.[5]

[4] Plaintiffs' Exhibit "B" provides additional excerpts from the same document that is excerpted in defendant's Exhibit "F." Plaintiffs respectfully ask the Court to take judicial notice of this document pursuant to Federal Rule of Evidence 201(b)(2).

[5] For example, to support its claim that EPA is considering whether to require an NPDES permit for the LWRF, defendant cites the consent agreement that was entered pursuant to the Safe Drinking Water Act. See Def's Memo. at 17; see also Def's Exh. A ¶ I (consent agreement "issued pursuant to the authorities vested in the [EPA] by … the Safe Drinking Water Act"). The paragraph defendant cites, however, discusses only the delay in issuing "a final decision on [defendant's UIC] permit application" due to the need for a "Section 401 water quality certification from the State in order for EPA to grant [this federal] permit." Def's Exh. A ¶ 25. Indeed, the consent agreement makes no mention whatsoever of the NPDES permit requirement.

The purpose of the Safe Drinking Water Act's UIC program is "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b)(1). The UIC program seeks to prevent underground injection from introducing unhealthful contaminants into "underground water which supplies or can reasonably be expected to supply any public water system." Id. § 300h(d)(2). The Clean Water Act, for its part, seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It focuses on preventing pollution discharges into navigable waters, rather than underground water, without regard to whether those waters are amenable to serving as drinking water sources. See id. § 1362(12); see also id. § 1362(7) (term "navigable waters" includes "the territorial seas").

While the requirements of the Safe Drinking Water Act and of the Clean Water Act are "complementary," they are not coextensive, and compliance with the former does not excuse compliance with the latter. Bath Petroleum Storage, Inc. v. Sovas, 309 F. Supp.2d 357, 368-71 (N.D.N.Y. 2004). Rather, as the court emphasized in Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), "Clearly, the Safe Drinking Water Act does not provide adequate justification for ignoring the express and unambiguous directive of the previously adopted Clean Water Act." Id. at 1100. The court then squarely rejected the defendants' argument – similar to the one defendant asserts here – that "all of the environmental issues posed" by a facility can be addressed through

compliance with the Safe Drinking Water Act, without need to secure and comply with a Clean Water Act discharge permit. Id. at 1099; see also id. at 1101 (holding defendants have "duty to apply for an [NPDES] permit for addition of pollutants to the navigable waters of the West Branch Reservoir from a point source within the definition of the Clean Water Act").

Since the processing of defendant's UIC permit has no bearing on its compliance with the Clean Water Act's NPDES permit requirement, the pendency of the UIC permit application does not render the claims plaintiffs assert unripe. The continuous discharge of wastewater and other pollutants into the nearshore ocean waters of Kahekili Beach without an NPDES permit has injured and continues to injure plaintiffs, and this issue is ripe for adjudication.

V. THE PRIMARY JURISDICTION DOCTRINE DOES NOT JUSTIFY DISMISSAL

The Court should reject defendant's request to "abstain from taking action on Plaintiffs' complaint pursuant to the primary jurisdiction doctrine." Def's Memo. at 14. Defendant's argument is premised on its claim that EPA and DOH are "currently considering whether to issue an NPDES permit to the County." Def's Memo. at 16. Defendant fails to offer, however, any admissible evidence in support of that proposition. Defendant cites to the consent agreement it entered into with EPA, but, as discussed above, that agreement makes no mention of the NPDES permit requirement. See Def's Exh. A. Defendant also relies on hearsay

set forth in two periodical articles, which are neither subject to judicial notice nor otherwise admissible. See Plfs' Memo. in Support of Motion to Strike (Dkt. No. 16-1). Moreover, even were the Court to consider those articles, neither states that EPA or DOH actually intends to take any steps to make an NPDES permit decision and, if so, when.

Even if the Court determined that EPA or DOH do, at some point, intend to make an NPDES permit decision, the primary jurisdiction doctrine still would not justify dismissing plaintiffs' lawsuit. The Ninth Circuit has instructed that the doctrine of primary jurisdiction applies when "Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings." United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987). "This doctrine has no application here because Congress has expressly set forth the ground rules for citizen suits" under the Clean Water Act, and plaintiffs' claims fall squarely within the class of suits Congress authorized. Cal. Sportfishing Prot. Alliance v. City of W. Sacramento, 905 F. Supp. 792, 807 n.21 (E.D. Cal. 1995); cf. Coho Salmon v. Pac. Lumber Co., 30 F. Supp. 2d 1231, 1245 (N.D. Cal. 1998) (doctrine does not apply to citizen enforcement of Endangered Species Act ("ESA"), which "has been placed squarely within the jurisdiction of the courts through the ESA's citizen-suit provisions"); Sierra Club v. Tri-State Generation and Transmission Ass'n, Inc., 173 F.R.D. 275, 284 (D.

Colo. 1997) (citing cases finding doctrine of primary jurisdiction inapplicable to citizen suits under environmental laws).

In promulgating the Clean Water Act's citizen suit provision, Congress vested this Court with jurisdiction over plaintiffs' claim that defendant is discharging pollutants without a permit. See 33 U.S.C. § 1365(a) ("The district courts shall have jurisdiction . . . to enforce [] an effluent standard or limitation"); see also id. § 1311(a) (prohibiting "the discharge of any pollutant by any person" without a permit); Milwaukee v. Illinois, 451 U.S. 304, 310-311 (1981) ("it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit"). Indeed, Congress has empowered citizens to sue even when "the EPA has elected not to regulate" a discharge. San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007).

As the court noted in Sierra Club v. El Paso Gold Mines, 198 F. Supp. 2d 1265 (D. Colo. 2002), rev'd on other grounds, 421 F.3d 1133 (10th Cir. 2005), a case likewise involving a challenge to unpermitted discharges, "[r]esolution of plaintiffs' claim does not require the court to set effluent standards or to write a permit for the defendant, which are functions within the special competency of the [state regulatory agency]." Id. at 1271. Rather, plaintiffs simply ask this Court to determine whether defendant is violating the Clean Water Act prohibition on unpermitted discharges and to order defendant to apply for and secure the required permit. "The court is competent to determine whether the defendant has been

'discharging' 'pollutants' from a 'point source' into 'navigable waters' without a permit." Id.; see also id. ("Expert testimony will assist the court in resolving any complex technical issues presented"). Accordingly, "the doctrine of primary jurisdiction [does not apply] to this citizen suit." Id.; see also Illinois Pub. Interest Research Group v. PMC Inc., 835 F. Supp. 1070, 1076 (N.D. Ill. 1993) ("There is no encroachment on administrative expertise if the court is not being called upon to set effluent standards").

In conjunction with its primary jurisdiction argument, the defendant in El Paso argued that, because the state permitting agency was "investigating" the facility's discharges, the court should abstain from considering the case. 198 F. Supp. 2d at 1271. The court rejected that argument, explaining that "the [state] has been investigating [the facility's] discharges for at least eight years, but has not issued any orders or permits to date." Id. Similarly, here, decades have passed since defendant began using the LWRF injection wells, and, to date, neither the EPA nor DOH has required defendant to obtain an NPDES permit. Def's Memo. at 4. As in El Paso, "Defendant has not presented any evidence to show that the agencies will issue a final determination . . . in the near future." 198 F. Supp. 2d at 1271.

Defendant's reliance on Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D. N.M. 1995), to support its primary jurisdiction argument is misplaced. In that case, the court invoked the doctrine of primary jurisdiction

because the state agency had already issued an order for defendants to clean up contaminated acid mine drainage from a waste pile, and the court was concerned that a court order on the same issue could "subject Defendants to conflicting obligations." Id. at 1350. The court further noted that "relevant agency proceedings have actually been initiated," which constitutes circumstances where the "advisability of invoking primary jurisdiction is greatest." Id. (citation omitted). Moreover, the court concluded that "the [state] agency has demonstrated diligence in resolving the issue." Id.

None of those factors is present here. Neither DOH nor EPA has issued an order requiring defendant to obtain an NPDES permit or otherwise imposed conditions to address the impacts of the injection well discharges on West Maui's nearshore waters. Furthermore, despite regulating the injection wells for over twenty years pursuant to the Safe Drinking Water Act, neither agency has taken any action to enforce the Clean Water Act's NPDES permit requirement, which is what plaintiffs seek to accomplish. "Administrative delay constitutes reason [for this Court] to retain jurisdiction." Id.

Mongomery Envtl. Coal. Citizens Coordinating Comm. On Friendship Heights v. Wash. Suburban Sanitary Comm'n, 607 F.2d 378 (D.C. Cir. 1979), is also distinguishable. In that case, the EPA had issued an NPDES permit for a sewage treatment plant, and several parties, including the plaintiff, had objected to portions of the permit and were embroiled in an administrative adjudication over

the objections. Id. at 380. The court found "a particularly appropriate occasion for yielding primary jurisdiction to the expert agency" because "[t]he NPDES proceeding [was] currently pending before the administrator of EPA," id. at 381, and the same technical questions about "the appropriate level and quality of discharge" were before both the court and the EPA. Id. at 382.

Unlike in Montgomery, neither the EPA nor DOH has issued an NPDES permit for defendant's injection well discharges, and there is no pending NPDES proceeding that will address plaintiffs' claims. While defendant points to EPA's review of "the County's application for renewal of the County's existing UIC permit," as discussed above, the UIC program is concerned with discharges into underground drinking water sources, not into navigable waters. Def's Memo at 16. Accordingly, the discharges that EPA and DOH are addressing through UIC permitting are not "the same discharge that Plaintiffs seek to abate in this action." Id.

Far from asking the Court to resolve technical questions about whether an existing NPDES permit is adequate, as in Montgomery, plaintiffs simply seek a determination whether defendant is discharging pollutants to navigable waters from a point source and thus needs an NPDES permit in the first place, questions that courts routinely answer in Clean Water Act citizen suits.

In Wilson v. Amoco Corp., 989 F. Supp. 1159 (D. Wyo. 1997), a citizen suit presenting Clean Water Act claims, the court addressed the doctrine of primary

jurisdiction, specifically the court's alleged lack of expertise and its obligation to hear the suit:

> Other courts have held, and this Court agrees, that questions posed by … the CWA are not so esoteric or complex as to foreclose their consideration by the judiciary. [citation omitted] The drafters of the CWA even said so explicitly: "Enforcement of pollution regulations is not a technical matter beyond the competence of the courts."

Id. at 1170 (quoting S. Rep. 92–414, reprinted in 1972 U.S.C.C.A.N. at 3747).

The court continued:

> There is an additional, overriding reason for courts to hear … CWA cases despite their supposed unique nature: Congress has told us to. … [T]he CWA explicitly empower[s] citizens to enforce [its] provisions except in certain circumstances not present here. This Court could not in good faith unilaterally strip United States citizens of rights given them by their government.

Id. at 1170. Plaintiffs respectfully submit that, under the facts of this case, "applying the doctrine of primary jurisdiction" to plaintiffs' citizen suit "would frustrate Congress's intent … to facilitate broad enforcement of environmental-protection[] laws and regulations." Tri-State Generation and Transmission Ass'n, Inc., 173 F.R.D. at 284.

VI. EPA AND DOH ARE NOT INDISPENSABLE PARTIES TO THIS LITIGATION

Defendant alleges that plaintiffs have failed to join indispensible parties, and moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(7). Def's Memo. at 16-18. The Ninth Circuit has instructed:

> To determine whether a party is "indispensable" under Fed.R.Civ.P. 19, a court must undertake a two-part analysis: it must first determine if an absent party is "necessary" to the suit; then if . . . the party cannot be joined, the court must determine whether the party is "indispensible" so that in "equity and good conscience" the suit should be dismissed. The inquiry is a practical one and fact specific and is designed to avoid the harsh results of rigid application.

Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990) (citations omitted).

As the moving party, defendant "has the burden of persuasion in arguing for dismissal." Id. Defendant has failed, however, to cite any authority for the proposition that state and federal regulatory agencies are necessary parties in a Clean Water Act suit challenging unpermitted discharges and has not otherwise attempted to meet its burden.

Defendant's claim cannot be reconciled with binding Ninth Circuit precedent, which holds, in accord with "other federal circuits," that "federal and state agencies administering federal environmental laws are not necessary parties in citizen suits to enforce the federal environmental laws," including the Clean Water Act. Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1014 (9th Cir. 2002). As the court explained:

> The plain language of the Clean Water Act has created opportunity for citizen suit when government agencies do not act. We adopt the views of the Second Circuit and the District of Columbia Circuit in Clean Air Act cases where they accepted citizen suits without requiring joinder of a responsible government agency.

Id. Defendant's indispensable parties argument is frivolous and its request to dismiss the complaint on this ground should be denied.

VII. PLAINTIFFS' CLAIM IS NOT BARRED BY DILIGENT PROSECUTION

Defendant contends that, even if the court determines it has subject matter jurisdiction over this action, it should still dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted. Defendant argues that plaintiffs' claims are barred by EPA's allegedly "diligent prosecution" against the LWRF. Def's Memo. at 18. [6] Plaintiffs submit that defendant's argument is better characterized as a jurisdictional challenge under Rule 12(b)(1), rather than as a failure to state a claim under Rule 12(b)(6). Regardless of its basis, however, the claim is frivolous.

The Clean Water Act citizen suit language on which defendant relies is quite clear; for the "diligent prosecution" bar to apply, EPA or the state must be prosecuting (1) "a civil or criminal action in a court of the United States, or a State" and (2) that court proceeding must seek to compel "compliance with the standard, limitation, or order" that the citizen suit seeks to enforce. 33 U.S.C. § 1365(b)(1)(B). Under the facts of this case, neither prong of the "diligent prosecution" test is satisfied.

First, the consent agreement defendant invokes was reached in an administrative proceeding, not a judicial one. See Def's Exh. A: Final Order

[6] Defendant also argues that plaintiffs' second claim for relief should be dismissed. See id. at 20-22. On July 10, 2012, plaintiffs filed an amended complaint that removes the second claim for relief (Dkt. No. 24), so the dispute over that claim is now moot.

(signed by EPA presiding officer). Neither EPA nor the state has ever brought "a civil or criminal action in a court" regarding the LWRF. Thus, the first prong of the diligent prosecution is not met. See Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987).

Second, as is apparent from the caption of the UIC consent agreement, the administrative action that EPA took was pursuant to the Safe Drinking Water Act, not the Clean Water Act. See Def's Exh. A: Consent Agreement at 1 ("Proceedings under Sections 1423(c) and 1445(a) of the Safe Drinking Water Act"); see also id. ¶¶ II.1-13 (listing Safe Drinking Water Act requirements). Thus, EPA's administrative action did not seek "compliance with the [Clean Water Act] standard, limitation, or order" at issue in this case. 33 U.S.C. § 1365(b)(1)(B). On the contrary, defendant's position is that "EPA has not required [the] County to apply for an NPDES permit." Def's Memo. at 4.

In the absence of any state or federal prosecution to enforce the Clean Water Act's NPDES permit requirement, much less diligent prosecution, plaintiffs' claims are not barred by 33 U.S.C. § 1365(b)(1)(B).

VIII. CONCLUSION

For the reasons set forth above, plaintiffs respectfully ask the Court to deny defendant's motion to dismiss and to reach the merits of plaintiffs' claims so that

defendant can be held to account for its ongoing violations of the Clean Water Act's NPDES permit requirement.

DATED: Honolulu, Hawai'i, July 10, 2012.

EARTHJUSTICE
David L. Henkin
Caroline C. Ishida
223 S. King Street, Suite 400
Honolulu, Hawai'i 96813

/s/ Caroline C. Ishida
By: CAROLINE C. ISHIDA
Attorneys for Plaintiffs

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 7,403 words, exclusive of the caption, tables, and signature block. I have relied upon Microsoft Word to determine the word count.

DATED: Honolulu, Hawai‘i, July 10, 2012.

/s/ Caroline C. Ishida
CAROLINE C. ISHIDA
Attorney for Plaintiff