PATRICK K. WONG (5878)
Corporation Counsel
RICHELLE M. THOMSON (8965)
Deputy Corporation Counsel
COUNTY OF MAUI
200 South High Street
Wailuku, Maui, Hawaii 96793
Phone: 808•270•7740
Email: Richelle.Thomson@co.maui.hi.us

COLLEEN P. DOYLE (7209)
HUNTON & WILLIAMS LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627
Phone: 213•532•2000
Fax: 213•532•2020
Email: doylec@hunton.com

Attorneys for Defendant
COUNTY OF MAUI

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

HAWAII WILDLIFE FUND, SIERRA CLUB – MAUI GROUP, SURFRIDER FOUNDATION, AND WEST MAUI PRESERVATION ASSOCIATION,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

Civil Case No. 12-00198 SOM BMK

DEFENDANT COUNTY OF MAUI'S REPLY MEMORANDUM TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Hearing: May 12, 2014, 10:30 a.m.
Judge: Susan Oki Mollway
Trial Date: Not yet determined

Related to: Dkt No. 71, Defendant County of Maui's Motion for Judgment on the Pleadings, or in the Alternative, Stay

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE UNIQUE CIRCUMSTANCES IN THIS CASE WARRANT APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE 3

A. Primary Jurisdiction Applies in Cases of First Impression or Cases Involving Complicated Technical or Policy Questions 3

B. The Limited Circumstances for Application of the Primary Jurisdiction Doctrine Are Present Here 5

1. The Agencies Are Undergoing a Rulemaking Directly Related to This Case 5

2. This Case Involves a Unique Intersection of Laws 7

3. Critical Data Is Missing and Agency Review Is Ongoing 8

III. THE CHANGE IN CIRCUMSTANCES SINCE THE COURT'S 2012 DECISION WARRANTS APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE 10

IV. NO HARM WILL RESULT FROM APPLYING THE PRIMARY JURISDICTION DOCTRINE 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Ass'n to Protect Hammersley, ELD and Totten Inlets v. Taylor Res., Inc.,
299 F. 3d 1007 (9th Cir. 2002) 4

Avoylles Sportmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 4

Clark v. Time Warner Cable,
523 F.3d 1110 (9th Cir. 2008) 4, 6, 7

Friends of Santa Fe Cnty. v. LAC Minerals, Inc.,
892 F. Supp. 1333 (D.N.M. 1995) 5

Hawai'i Wildlife Fund, et al., v. Cnty. of Maui,
No. 12-0098, 2012 WL 3263093 (D. Haw. Aug. 8, 2012).....4, 10

Montgomery Envtl. Coal. Citizens Coordinating Comm. of Friendship Heights v. Wash. Suburban Sanitary Comm'n,
607 F.2d 378 (D.C. Cir. 1979).....4

Northern California River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007) 7

Rapanos v. United States,
547 U.S. 715 (2006).....7

S.F. Baykeeper v. Cargill Salt Div.,
481 F. 3d 700 (9th Cir. 2007) 4

STATUTES

33 U.S.C. § 1311(a) 5

33 U.S.C. § 1362(12) 5

42 U.S.C. § 300h.....7

OTHER AUTHORITIES

40 C.F.R. § 123.25 9

40 C.F.R. § 124.3(c).....9

79 Fed. Reg. 22,188 (Apr. 21, 2014) 6, 11

Haw. Code R. § 11-55-06 .....9, 10

I. INTRODUCTION

Plaintiffs' attempt to portray the issue before the Court as a simple permitting matter involving inept regulators, an obstinate County of Maui ("County"), and dire environmental consequences is simply wrong. In fact, whether the County requires a National Pollutant Discharge Elimination System ("NPDES") permit for its discharge to underground injection control ("UIC") wells with an indirect hydrological connection to navigable waters encompasses a complex cutting-edge area of law. Moreover, contrary to Plaintiffs' claim that "the agencies have allowed [the County's NPDES permit] application to languish," agency evaluation is actively underway. Unique circumstances here justify the Court's application of the primary jurisdiction doctrine.

The primary jurisdiction doctrine applies in limited cases involving issues of first impression or complicated technical or policy questions best left in the first instance to the agency possessing regulatory authority. Both circumstances are present here. Rather than a direct discharge into navigable waters as required under the CWA, this case involves an indirect discharge via UIC wells to groundwater with an eventual hydrological connection to navigable waters. Historically, application of the federal Clean Water Act ("CWA") to non-traditional navigable waters (including groundwater) has been fraught with uncertainty. The United States Environmental Protection Agency ("EPA")

determined that this lack of clarity is too murky for the regulated public and too labor intensive for the regulatory agencies, leading it to issue a proposed rule clarifying the scope of waters regulated under the CWA. The proposed rule categorically excludes groundwater discharges, rendering moot the County's need for an NPDES permit. Moreover, the County's UIC well discharge is permitted under the federal Safe Drinking Water Act ("SDWA"). Thus, UIC well discharges hydrologically connected to navigable waters involve an unprecedented intersection between the CWA and SDWA. The convergence of these issues – an indirect discharge via groundwater, a pending rule in a muddled area of the CWA, and a collision of laws that could result in the first UIC/NPDES permit in Hawaii – makes this a particularly complex case of first impression.

Plaintiffs' erroneously accuse the agencies of failing "to exercise regulatory oversight." Before any permitting decision can be made, the agencies must understand both the degree of connectivity between the County's discharge and the near-shore navigable waters and whether the discharge has any significant effect on those waters. Because this information did not previously exist, EPA and Hawaii Department of Health's ("DOH") have been actively involved in implementing studies to address these data gaps. The Lahaina Groundwater Tracer Study ("Tracer Study") – the study on connectivity – was completed in June 2013. Beginning in January 2012, DOH commenced monthly water quality data

collection to determine whether there are any significant effects from the County's discharge on the near-shore waters off of Kahekili Beach. DOH expects to conclude this sampling in July 2014. Once all work is complete and the agencies have an opportunity to evaluate the data, they should be in a position to make a permitting decision.

Perhaps most critically, a site visit conducted earlier this month revealed the reef off of Kahekili Beach to be "essentially pristine" with "no observed bleached, diseased, or otherwise stressed corals." As such, no harm will result from the Court dismissing, or alternatively, staying this action, pending an agency decision.

Given that the unique facts here support agency deference, the County renews its request that the Court dismiss this action on primary jurisdiction grounds, or in the alternative, grant a stay pending the agencies' final decision on the County's NPDES permit application.

II. THE UNIQUE CIRCUMSTANCES IN THIS CASE WARRANT APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE

Primary jurisdiction should be applied here because this is a case of first impression involving complicated technical questions and policy considerations.

A. Primary Jurisdiction Applies in Cases of First Impression or Cases Involving Complicated Technical or Policy Questions

The Ninth Circuit has held the primary jurisdiction doctrine appropriate in a "limited set of circumstances" involving "an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory

agency." Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008) (internal quotation marks and citations omitted). It is a "prudential" doctrine applied when "an otherwise cognizable claim implicates technical and policy questions" best left in the first instance to regulatory agencies. Id. This Court and others have held similarly. See, e.g., Hawai'i Wildlife Fund, et al., v. Cnty. of Maui, No. 12-0098, 2012 WL 3263093, at *3 (D. Haw. Aug. 8, 2012); Montgomery Envtl. Coal. Citizens Coordinating Comm. of Friendship Heights v. Wash. Suburban Sanitary Comm'n, 607 F.2d 378, 381 (D.C. Cir. 1979).

Plaintiffs' allegation that "application of the primary jurisdiction doctrine is disfavored in citizen suits" is true[1] "when the responsible agencies fail [to act] or refuse to do so." S.F. Baykeeper v. Cargill Salt Div., 481 F. 3d 700, 706 (9th Cir. 2007); see also Ass'n to Protect Hammersley, ELD and Totten Inlets v. Taylor Res., Inc., 299 F. 3d 1007, 1014 (9th Cir. 2002). However, Plaintiffs' claim that cases cited by the County are inapposite because they do not involve citizen suits is a red herring. Plaintiffs Opp'n at 10. The principle remains: agency deference is appropriate in cases of first impression or involving particularly complex technical or policy questions. This includes CWA citizen suits. See Avoylles Sportmen's League, Inc. v. Marsh, 715 F.2d 897, 919 (5th Cir. 1983) (Though defendants did not raise primary jurisdiction on appeal, "[t]he district court might have been well

[1] Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings (Dkt. 84) ("Plaintiffs Opp'n") at 7.

advised to agree to the federal defendants' request that the Corps be allowed to make the initial determination about which activities should be permitted [under the CWA]."); see also Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 1350 (D.N.M. 1995).

B. The Limited Circumstances for Application of the Primary Jurisdiction Doctrine Are Present Here

This case is one of those "limited set of circumstances" where the primary jurisdiction doctrine should apply. Given confusion in the law, EPA is undergoing a rulemaking that could directly impact the issue before the Court. In addition, an NPDES permit for UIC well discharges involves an unchartered intersection between the CWA and SDWA. Finally, numerous technical questions remain that will be answered once the agencies finish their studies and complete their permit application review. All of these factors combine to make this a case of first impression with a host of outstanding technical and policy questions.

1. The Agencies Are Undergoing a Rulemaking Directly Related to This Case

The CWA prohibits the unpermitted discharge of pollutants into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). Therefore, whether the County requires an NPDES permit depends on whether the County's discharge to groundwater via its UIC wells qualifies as a discharge to navigable waters. As noted in the

County's MSJ Opposition[2], historically, there has been uncertainty among courts as to the reach of the CWA, particularly where groundwater is involved. County MSJ Opp'n at 12-13. This confusion has "resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA." See Request for Judicial Notice ("RJN") ¶ 1, Ex. 1 (79 Fed. Reg. 22,188, 22,188 (Apr. 21, 2014)).

EPA is undergoing a rulemaking to clarify the meaning of navigable waters in order to "minimiz[e] the number of case-specific determinations." Id. The proposed rule seeks to unequivocally exclude groundwater from CWA jurisdiction. Id. at 22,263; see also id. at 22,193 ("Waters and features that are determined to be excluded . . . will not be jurisdictional under any of the categories in the proposed rule . . . ."). This rule has a direct bearing on the question before the Court, as the County's wells discharge *directly* to groundwater. If groundwater is categorically excluded under the rulemaking, the County's discharge will be excluded from CWA jurisdiction, precluding the need for an NPDES permit. In Clark, the regulatory agency had recently initiated the rulemaking process to address the very issue before the court. The Ninth Circuit held the district court properly applied the primary jurisdiction doctrine because the proposed rulemaking demonstrated

[2] Plaintiffs' Motion for Partial Summary Judgment (Dkt. 72) is herein referenced as "MSJ". The County's Opposition to Plaintiffs' MSJ (Dkt. 78), is referenced as "County's MSJ Opposition" or "County MSJ Opp'n".

the agency's active consideration of the issue. 523 F.3d at 1115. Similarly, here, because EPA's proposed rule demonstrates the agency's active consideration of the same issue before the Court, the primary jurisdiction doctrine should be applied.

2. This Case Involves a Unique Intersection of Laws

Plaintiffs' claim that this is a straightforward, technical inquiry within the competence of the court, akin to Rapanos v. United States, 547 U.S. 715 (2006) and Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) ignores the novel issues presented by EPA's rulemaking and the intersection of the CWA and SDWA.

UIC wells are specifically regulated under the SDWA, not the CWA. 42 U.S.C. § 300h. Plaintiffs' allegation of "unpermitted discharges of wastewater and other pollutants" from the County's wells (Plaintiffs Opp'n at 4) is false, as these wells operate pursuant to UIC permits issued by DOH and EPA. Whether an NPDES permit is required for the County's UIC permitted discharge is particularly complicated due to this collision between the CWA and SDWA.

As of 2011, there were 5660 UIC wells in Hawaii. RJN ¶ 2, Ex. 2 (EPA UIC Inventory). DOH has not issued an NPDES permit for any UIC wells. RJN ¶ 3, Ex. 3 (DOH Letter). In an attempt to reconcile the conflicting requirements of the CWA and SDWA, as part of its NPDES permit application review, DOH is "actively considering" whether the County's "existing state UIC permit is an

'equivalent control document'" to an NPDES permit. Id. This may result in the first UIC-NPDES permit in Hawaii.

3. Critical Data Is Missing and Agency Review Is Ongoing

As noted in the County's Motion for Judgment on the Pleadings, a "direct and immediate" hydrological connection between the County's wells and nearby coastal waters is a prerequisite for issuance of an NPDES permit. (Memorandum in Support of Defendant County of Maui's Motion for Judgment on the Pleadings, or in the Alternative, Stay ("MJP") at 8-9). The Tracer Study was initiated in 2011 "to provide critical data about the possible existence of a hydraulic connection . . . , confirm locations of emerging injected effluent discharge . . . , and determine a travel time from the LWRF injection wells to the coastal waters." RJN ¶ 4, Ex. 4 (Tracer Study Final Report ES-1). DOH and EPA, the two agencies Plaintiffs contend "have allowed the application to languish" (Plaintiffs Opp'n at 17), commissioned this study, along with the U.S. Army Engineer Research and Development Center, and subsequently reviewed and commented on it. RJN ¶ 4, Ex. 4 (Tracer Study Final Report cover, E-17–E-40); RJN ¶ 5, Ex. 5 (Tracer Study Final Interim Report Acknowledgements, 437-53).

The next step in the NPDES analysis is assessing whether the County's discharge significantly affects the near-shore waters off of Kahekili Beach. See MJP at 9-10. In addition to the data collected as part of the Tracer Study, DOH

began collecting monthly water quality data in January 2012 from the near-shore waters off of Kahekili Beach and expects to complete this work in July 2014. RJN ¶ 3, Ex. 3 (DOH Letter). This data is needed to evaluate the effects, if any, from the County's discharge on the near-shore waters. Plaintiffs' allegation that the County aims "[t]o intimidate the Court into concluding that the issues presented are beyond its ken" is an oversimplification of the facts that does not acknowledge the data gaps. Plaintiffs Opp'n at 16. By urgently pressing the Court for an NPDES determination, Plaintiffs put the Court in the untenable position of making a decision of first impression without all of the necessary information.

Moreover, Plaintiffs incorrectly assert that "neither DOH nor EPA has taken action to exercise regulatory oversight." Id. at 19. Because Plaintiffs do not understand the roles of DOH and EPA in the NPDES permitting process, Plaintiffs claim the agencies "have yet to make even a preliminary, threshold finding regarding the application's completeness or even a schedule to make that finding." Id. at 17. Unlike federal law, Hawaii law does not require any completeness determination. 40 C.F.R. §§ 123.25; 124.3(c). Hawaii law does, however, require "prompt transmittal" of a copy of the NPDES application to EPA. Haw. Code. R. § 11-55-06. DOH complied with this requirement on November 20, 2012, six days after the County submitted its application. RJN to MJP (Dkt 71-2) ¶ 1, Ex. A (Dkt. 71-3, County NPDES Permit Application); Id. ¶ 2, Ex. B (Dkt. 71-4, DOH Letter

dated Mar. 6, 2014). Because Hawaii is an authorized state with lead authority to issue NPDES permits, EPA's obligation is limited to objecting to application deficiencies. Haw. Code. R. § 11-55-06. The fact that EPA has not raised any concerns regarding the application in the time it has had it refutes Plaintiffs' suggestion that the application is deficient. Plaintiffs Opp'n at 5-7.

Plaintiffs' impatience with the agencies' methodical collection and review of complex data, and careful consideration of the shifting legal landscape does not merit pushing forward with a judicial decision. The agencies (or this Court) need all relevant facts if they are to find that, of the 5000-plus UIC wells in Hawaii, the circumstances here merit issuance of the first-ever NPDES permit.

III. THE CHANGE IN CIRCUMSTANCES SINCE THE COURT'S 2012 DECISION WARRANTS APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE

Plaintiffs incorrectly claim that "this Court held the primary jurisdiction doctrine inapplicable to this case." Id. at 1. Rather, in ruling on the County's Motion to Dismiss in August 2012, the Court stated, "[i]n rejecting the primary jurisdiction doctrine argument . . . , the court is not foreclosing the possibility that it may deem the doctrine applicable on a different record." 2012 WL 3263093, at *4. The record is different now for a number of reasons:

- 2012
  - The County submitted an NPDES permit application (Nov. 2012). RJN to MJP (Dkt 71-2) ¶ 1, Ex. A (Dkt. 71-3, County NPDES Permit Application).
  - The Tracer Study Final Interim Report was released (Nov. 2012). RJN ¶ 5, Ex. 5 (Tracer Study Final Interim Report cover).
- 2013
  - The Tracer Study Final Report was released (Jun. 2013). RJN ¶ 4, Ex. 4 (Tracer Study Final Report cover).
  - The County upgraded its treatment facility to meet R-1 standards, the most stringent reclaimed water standard in Hawaii. Paulsen Declaration in Support of County MSJ Opp'n, ¶ 9.
- 2014
  - The County's expert confirmed the Kahekili reef is in healthy condition (Apr. 2014). Dollar Declaration in Support of County MSJ Opp'n ("Dollar Dec."), ¶ 44.
  - EPA issued a proposed rule excluding groundwater from CWA jurisdiction (Apr. 2014). RJN ¶ 1, Ex. 1 (79 Fed. Reg. 22,188 (Apr. 21, 2014)).
  - DOH will finish the monthly water quality data collection it began in January 2012 (Jul. 2014). RJN ¶ 3, Ex. 3 (DOH Letter).

IV. NO HARM WILL RESULT FROM APPLYING THE PRIMARY JURISDICTION DOCTRINE

Perhaps most importantly, no harm will result from allowing the agencies to complete their data collection and make the initial NPDES permit determination. Plaintiffs argue "a stay would deprive the Citizens of vital relief from Defendant's ongoing, illegal discharges and the associated damage to the marine environment at Kahekili, and a dismissal would inflict even greater prejudice . . . ." Plaintiffs Opp'n at 20. This is simply false. As detailed in the County's MSJ Opposition, Plaintiffs overstated any effects that may be caused by the indirect discharge from the County's wells to the near-shore waters off of Kahekili Beach. County MSJ Opp'n at 15-20. Plaintiffs claim that expert declarations submitted with their MSJ attest to "substantial chemical, physical, and biological changes that the large volume of groundwater, which includes LWRF wastewater, cause[] to the nearshore receiving waters." Plaintiffs' Opp'n at 15. Yet earlier this month, the County's expert inspected the reef and found that "all reef areas appeared essentially pristine, i.e., no observed bleached, diseased, or otherwise stressed corals." Dollar Dec., ¶ 44. Exhibits accompanying his declaration illustrate the healthy condition of the reef. Dollar Dec., Ex. 6-9. In addition, contrary to Plaintiffs' claim of "ongoing, illegal discharges," the County's discharge is extensively regulated under UIC permits issued by both DOH and EPA. Moreover, though the County's treatment facility has been operating for roughly

37 years, there is no evidence of reef degradation in the vicinity of the discharge in the near-shore waters off of Kahekili Beach. Dollar Dec., ¶¶ 41-42. Despite Plaintiffs' urgent call for "vital relief," there will be no significant effect on the reef if the Court chooses to dismiss or stay this action pending an agency decision.

V. CONCLUSION

The primary jurisdiction doctrine is warranted in this case of first impression involving unique technical and policy considerations. EPA is currently undergoing a rulemaking directly on point that could obviate the need for the Court to rule. In addition, a novel intersection between the CWA and SDWA is at issue here. The Court should not be forced into making a decision without all relevant information. The agencies should have the opportunity to finish their data collection and assess the complex technical and factual inquiries raised here. Moreover, given the healthy condition of the reef, no harm will result from allowing the agencies to complete this process. Accordingly, the County renews its request that the Court dismiss this action on primary jurisdiction grounds, or in the alternative, grant a stay pending the agencies' final decision on the County's NPDES permit application.

DATED: April 28, 2014

By: /s/ Colleen P. Doyle
HUNTON & WILLIAMS LLP
Attorneys for Defendant
COUNTY OF MAUI