24 F.Supp.3d 980
United States District Court,
D. Hawai'i.

HAWAI'I WILDLIFE FUND, a Hawaii non-profit corporation; Sierra Club–Maui Group, a non-profit corporation; Surfrider Foundation, a non-profit corporation; and West Maui Preservation Association, a Hawaii non-profit corporation, Plaintiffs,
v.
COUNTY OF MAUI, Defendant.

Civil No. 12–00198 SOM/BMK. | Signed May 30, 2014.

Synopsis

Background: Environmental organizations brought action against county, alleging that county violated the Clean Water Act (CWA) by discharging effluent, without a National Pollutant Discharge Elimination System (NPDES) permit, at four injection wells. Organizations moved for summary judgment, and county moved for stay or dismissal.

Holdings: The District Court, Susan Oki Mollway, Chief Judge, held that:

[1] district court would not stay environmental organizations' action pending determination on permit application, and

[2] failure to obtain permit violated CWA.

Plaintiffs' motion granted; defendant's motions denied.

Attorneys and Law Firms

***983** David L. Henkin, Summer M. Kupau, EarthJustice Legal Defense Fund, Honolulu, HI, for Plaintiffs.

Colleen P. Doyle, Hunton & Williams LLP, Los Angeles, CA, Patrick K. Wong, Richelle M. Thomson, Thomas W. Kolbe, Department of the Corporation Counsel MAUI, Wailuku, HI, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR STAY AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

SUSAN OKI MOLLWAY, Chief Judge.

I. INTRODUCTION.

Plaintiffs Hawaii Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association move for partial summary judgment against Defendant County of Maui, arguing that the undisputed evidence demonstrates that the County has violated the Clean Water Act by discharging effluent, without a National Pollutant Discharge Elimination System ("NPDES") permit, at four injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). Plaintiffs contend that the wastewater eventually finds its way into the ocean on Maui's west shore.

The County brings its own motion, arguing that, given the County's application for an NPDES permit, the court should dismiss or stay this case to give Hawaii's Department of Health and the Environmental Protection Agency an opportunity to consider the need for a permit in the first instance.

The County concedes, and the undisputed evidence shows, that pollutant discharged at the two largest wells at the LWRF is migrating into the ocean. The court has not been given any firm date for a final decision on the County's NPDES permit application. The court therefore denies the County's motion for stay or dismissal and grants Plaintiffs' motion for partial summary judgment.

II. BACKGROUND.

The County of Maui operates the LWRF, a wastewater treatment facility approximately three miles north of the town of Lahaina on the island of Maui. *See* Tracer Dye Study Final Report at ES–21, ECF No. 73–10. The facility receives approximately four million gallons per day of sewage from a collection system serving approximately 40,000 people. The facility filters and disinfects the sewage, then releases the treated effluent (sometimes called "reclaimed water" or "wastewater") into four on-site injections wells. *Id.* The injection wells are long pipes into which ***984** effluent is pumped. The effluent then travels approximately 200 feet underground into a shallow groundwater aquifer beneath the facility. *See* 1993 Injection Well Report, ECF No. 73–21.

While "the precise depth of this aquifer fluctuates somewhat, depending on water inputs and other conditions," it contains "a sufficient quantity of ground water to supply a public water system." UIC Consent Decree at 28–29, ECF No. 73–24. The LWRF typically discharges three to five million gallons of effluent into the four injection wells on a daily basis. *See* Tracer Dye Study Final Report at 1–16. Approximately 80% of the effluent is discharged from wells 3 and 4. *Id.* at ES–21.

It is undisputed that effluent pumped into injection wells 3 and 4 eventually finds its way to the Pacific Ocean, emerging through "submarine springs" in the waters off Kahekili Beach on Maui's west shore. *Id.* at ES–2, 3. This finding was the conclusion of a study conducted jointly by the EPA, the Hawaii Department of Health ("DOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii. The study involved placing tracer dye into each of the LWRF injection wells and monitoring the submarine seeps off Kahekili Beach to see if and when the dye would flow into the ocean. *Id.* Dye from wells 1 and 2 did not emerge at the seeps, but the dye introduced into wells 3 and 4 was detected eighty-four days after being placed in the wells. *Id.* The study concluded that the presence of the dye "conclusively demonstrate[s] that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui." *Id.* at ES3. The study further estimated that "64% of the dye injected into Wells 3 and 4 will [eventually be] discharged at the submarine spring areas." *Id.* As a result of that finding, the report also concluded that "64% of the treated wastewater injected into [the] wells currently discharges from the submarine spring areas" and into the ocean. *Id.*

The County appears to have been aware for some time of the hydrologic connection between the aquifer under the LWRF and the ocean. A 1991 environmental assessment, conducted by the County's Department of Public Works, noted that treated effluent—including suspended solids, dissolved oxygen, nitrogen, and phosphorous—flows from the injection wells into the ocean. *See* LWRF Environmental Assessment, ECF No. 73–33.

In 2007, the University of Hawaii at Manoa conducted a study that showed an elevated level of a nitrogen isotope in algae growing in nearshore waters south of the LWRF. *See* Declaration of Jennifer E. Smith ¶ 8–9, ECF No. 72–2. The study concluded that the nitrogen came from the LWRF. *Id.* The United States Geological Survey also did a study that found "wastewater presence" in the ocean and elevated levels of a nitrogen isotope in ocean water samples. *See* A Multitracer Approach to Detecting Wastewater Plumes from Municipal Injection Wells in Nearshore Marine Waters at Kihei and Lahaina, ECF No. 73–13.

In 2010, the EPA responded to the County's request to renew its Underground Injection Control ("UIC") permit for the LWRF by informing the County that recent studies "strongly suggest that effluent from the facility's injection wells is discharging into the near shore coastal zone of the Pacific Ocean." EPA Letter, ECF No. 73–34.

Plaintiffs' experts contend that the water emerging from the submarine seeps near Kahekili beach is significantly affecting the chemical, physical, and biological integrity of the nearshore water. *See generally* ***985** Declaration of Adina Paytan, ECF No. 73–1; Smith Decl. In particular, Plaintiffs' experts conclude that the water near the seeps has elevated levels of inorganic nitrogen and phosphorus, low salinity, low pH, and high temperature. *See* Paytan Decl. ¶¶ 5, 23–36; Smith Decl. ¶¶ 13–40. The County's experts admit that the water *directly* above the seeps bears this properties, but argues that when the water mixes with ocean water these effects rapidly diminish. Declaration of Steven Dollar ¶¶ 9–14, ECF No. 79–2; Declaration of Susan C. Paulsen ¶¶ 19, 21–23, ECF No. 79–3. The County's experts conclude that the effect on nearshore water is not significant. *Id.*

Plaintiffs argue that the impact of the effluent on Kahekili's nearshore waters is "more than theoretical." Smith Decl. ¶ 22. Plaintiffs' experts state that, because of the additional nitrogen and phosphorus, the coral reefs at Kahekili have been repeatedly subjected to algal blooms, which have contributed to a dramatic decline in coral cover. *Id.* ¶ 13. Plaintiffs' experts also say that the effluent flowing into the ocean has substantially lower pH levels and oxygen concentration than the receiving water. Smith Decl. ¶¶ 29, 35; Paytan Decl. ¶¶ 31, 34. The low pH, Plaintiffs' experts say, is causing some species of reef-building corals and coralline algae to dissolve and die, and the low level of oxygen is suffocating coral, leading to loss of coral tissue and coral death. Smith Decl. ¶¶ 30, 34. In addition, Plaintiffs experts say that the effluent has lower salinity and higher temperature than the receiving water, properties that can also endanger and kill coral. *See* Paytan Decl. ¶¶ 25–29, 34; Smith Decl. ¶¶ 31–33, 37–38.

The County's expert argues, on the other hand, that visual inspection of the coral reveals that "all reef areas appeared essentially pristine," and that he "observed [no] bleached,

diseased, or otherwise stressed corals." Dollar Decl. ¶ 44. The County points to photographs of the reef close to the seeps, which appear to have healthy coral. Defendants' Exhs. 6 to 11, ECF Nos. 79–9, 79–10, 79–11, 79–12, 79–13 and 79–14.

In August 2001, the County of Maui and the EPA entered into a consent decree regarding the injection wells and compliance with the Safe Drinking Water Act, 42 U.S.C. §§ 300h–2(c), 300j–4(a). *See* ECF No. 8–3. This consent decree did not discuss whether an NPDES permit was needed for the injection wells under the Clean Water Act, although it required the County to obtain a water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341, from the State of Hawaii. The County has applied for that certification, but, as of March 6, 2014, not even a preliminary determination had been made as to whether the County will receive such certification. *See* DOH letter dated March 6, 2014, ECF No. 71–4.

The County has also applied for an NPDES permit. *Id.* Despite maintaining that such a permit is not required, the County submitted its application for the permit to the State's DOH on November 14, 2012, which was after this lawsuit was filed. The application was forwarded to the EPA on November 20, 2012. *Id.* As of March 6, 2014, the DOH had "not made a tentative or preliminary determination" on the application, nor received any comments from EPA. *Id.* However, after the hearing on the present motions, the County received a draft permit and was invited to comment on the draft by June 9, 2014. *See* ECF No. 106. The DOH says that, after receiving comments from Plaintiffs' counsel, the County, and the EPA, it will revise the draft permit if appropriate and proceed to notice and a thirty-day public comment period and public hearing. Depending ***986** on the public comments it receives, DOH intends to issue a final permit within a few months thereafter. *Id.*

Plaintiffs contend that the County's continued discharge of wastewater without an NPDES permit violates the Clean Water Act.

The Clean Water Act, passed in 1972, was intended by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To further that objective, the Clean Water Act prohibits the "discharge of any pollutant" unless certain provisions of the Clean Water Act are complied with. *See* 33 U.S.C. § 1311(a). The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). In relevant part, the Clean Water Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Clean Water Act defines "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). The Clean Water Act allows discharges of pollutants when an NPDES permit is obtained and complied with. *See* 33 U.S.C. § 1342.

The Clean Water Act is enforced by state and federal authorities working together. Under the Act, a state may apply for a transfer of permitting authority to state officials. *See* 33 U.S.C. § 1342. Hawaii obtained permitting authority in 1974. 48 F.R. 15662–01. Once "authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007). The state must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit. 33 U.S.C. §§ 1342(d)(1), (2). If the state does not adequately address EPA's concerns, authority over the permit reverts to the EPA. *Id.* § 1342(d)(4).

Plaintiffs sued the County, seeking to compel it to apply for and comply with the terms of an NPDES permit, and to pay civil penalties for its earlier allegedly unlawful discharge. The County moved to dismiss on various grounds. Among other things, the County contended that the court should defer acting until the DOH and the EPA had first reviewed what was then only a future NPDES permit application.

On August 08, 2012, 2012 WL 3263093, this court denied the County's motion to dismiss. *See* ECF No. 34. As noted above, subsequent to that dismissal, the County applied for an NPDES permit. It now renews its argument that this action should be dismissed or stayed until the DOH and the EPA have ruled on the permit application. The County also moves to strike several of the declarations introduced into evidence by Plaintiffs, including portions of the declarations of experts Jennifer Smith and Adina Paytan, ***987** and asks this court to take judicial notice of several documents.

Plaintiffs move for summary judgment, arguing that, in light of the findings of the tracer study, the undisputed evidence demonstrates that the County has violated the Clean Water Act.

III. ANALYSIS

A. Requests that the Court Strike Evidence and Take Judicial Notice.

Recognizing that the County's motion to strike evidence may bear on the contents of the record that the court will consult to resolve the parties' substantive motions, the court addresses that motion first.

The County first challenges the declarations of Hannah Bernard, Lauren Campbell, Antoinette Lucienne de Naie, Sharyn Matin, and Gary Savage, all of whom are representatives of the various organizations bringing suit. The County argues that certain statements in these declarations constitute hearsay and/or impermissible legal or scientific opinion that the declarants are not qualified to give. Plaintiffs respond that all of these declarations simply support the various Plaintiff organizations' standing, and that none of the opinions is intended to bear on the question of the County's liability. The County has not challenged any Plaintiff's standing. There is therefore no reason to strike the declarations.

More significantly, the County challenges the declarations of both of Plaintiffs' experts, Adina Paytan and Jennifer Smith.

First, the County argues that Paytan's only qualification is in chemical oceanography and that she therefore has no expertise regarding the effects of the ocean's chemistry on marine biology and on coastal ecosystems. Plaintiffs introduce a supplementary declaration by Paytan, which notes that chemical oceanography is an interdisciplinary field that includes the study of the effects of the ocean's chemistry on marine biology, and that Paytan runs a biogeochemistry laboratory at the University of California, Santa Cruz. Paytan Opp. Decl. ¶¶ 2, 3, ECF No. 92–1. According to the declaration, biogeochemists study how chemical cycles affect biological activity, and the research Paytan has directly conducted or overseen at the laboratory has been published in numerous peer-reviewed journals that focus on biogeochemistry and marine biology, including peer-reviewed articles specifically addressing effects on coral reefs. *Id.* The County's argument appears largely dependent on Paytan's own characterization of herself as qualified in "chemical oceanography" and the County's assertion that such a qualification is inadequate.

The County has not asked for an evidentiary hearing under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), regarding Paytan's alleged lack of expert qualification. The assertions in the County's motion do not, without more, establish that Paytan is not qualified as an expert. This court therefore declines to strike any part of her statements.

[1] Second, the County challenges statements made by both Paytan and Smith regarding the theoretical effects of elevated levels of nitrogen, phosphorus, and oxygen on marine life. The County describes Paytan and Smith's testimony as "speculation" and therefore inadmissible. However, the theoretical contentions made by both Smith and Paytan are not speculative. Rather, they appear to be based on "the expert[s'] scientific, technical, or other specialized knowledge." Fed.R.Evid. 702. The declarations directly relate to the potential effects effluent may have on ocean ***988** water, and therefore go to whether there is a significant nexus between the aquifer and the ocean. Even if such statements were insufficient to establish such a nexus in themselves, the County does not show that they are either irrelevant or prejudicial with respect to the matters that are to be decided on the present motions.

Third, the County objects to the term "wastewater," used in both the Paytan and Smith declarations and in a declaration submitted by Plaintiffs' attorney, David Henkin. The County believes the material discharged from the LWRF should be described as "reclaimed water" or "effluent." "Wastewater" is a term that has been used throughout this litigation to refer to treated sewage that emerges from the LWRF and is the term used by the independently produced Tracer Dye Study. It is also what the "W" stands for in "LWRF," the acronym the County itself uses to describe the Lahaina facility. The

court understands that the treatment of sewage at LWRF may eliminate various toxins from the water, and even make it safe for drinking. Whether this treated water is referred to as "wastewater," "effluent," or "reclaimed water" has no bearing on any of the County's arguments. The court understands the terms being used, and there is no prejudice to any party flowing from the use of the term "wastewater."

[2] Finally, with regard to Plaintiffs' experts, the County objects that Smith's algal bloom study—Smith Decl. ¶ 9—is prejudicial because it analyzes the impact of water taken directly from the LWRF, without taking into account the diffusion and mixing that the effluent undergoes as it travels through groundwater and ocean water. The court recognizes that Smith's study does not account for these diffusion and mixing effects, but nevertheless finds the study's analysis probative as to the potential effect that effluent has on marine life. This is a matter going to the weight of the evidence, not its admissibility. Defendant was free to seek its own analysis or expert testimony showing that the diffusive effects of the effluent's journey undermine Smith's analysis. The impact of the alleged diffusion is a matter in dispute between the experts, not a reason to strike one side's expert testimony.

The County also challenges parts of the declaration of David Henkin. The County argues that various statements describing data in the Henkin declaration should be stricken because Henkin is not an expert. The County asks that the court consider the data without his interpretation. Henkin's statements do no more than point to other evidence in the record, but, in any event, the court does not rely on the Henkin declaration in interpreting any study in the record. The County further suggests that it is incorrect for Henkin to call the LWRF discharges "unpermitted" because the County held various permits other than a NPDES permit. There is no prejudice caused by the use of the word "unpermitted," which the court construes as referring specifically to an NPDES permit and not all permits. Finally, Plaintiffs admit that the Henkin declaration's description of Defendant's NPDES application as "incomplete" is better suited to a legal brief than a declaration. The court does not rely on this statement in paragraph 29 of Henkin's declaration.

For the reasons stated above, this court denies the County's motion to strike evidence. Plaintiffs do not oppose either of the County's two requests for judicial notice. ECF Nos. 80, 89. Those requests are therefore granted.

B. Primary Jurisdiction.

[3] The Ninth Circuit has stated that a defendant must obtain an NPDES permit when it "(1) discharge[s] (2) a pollutant (3) ***989** to navigable waters (4) from a point source." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir.2001). It is not disputed that the effluent being discharged at the LWRF constitutes a pollutant that is being discharged from a point source. The only area of dispute between the parties is whether the discharge into the aquifer beneath the facility constitutes a discharge into "navigable waters."

The County argues that for the aquifer itself to be considered "navigable water" under the Clean Water Act, it must have both "a direct and immediate hydrological connection" to the ocean and "significantly affect the chemical, physical, and biological integrity" of the ocean waters. The County argues that this is a fact-sensitive inquiry best left to the DOH and the EPA.

The County therefore moves for judgment on the pleadings, or, in the alternative, for a stay, asking this court to rule that the DOH and the EPA have primary jurisdiction to decide whether the County requires an NPDES permit to discharge effluent at the Lahaina facility. Even if this court were to conclude that the agencies have primary jurisdiction, the court would not enter judgment on the pleadings in the County's favor.

[4] "The rule in this Circuit is that where a court suspends proceedings in order to give preliminary deference to an independent adjudicating body ... jurisdiction should be retained by a stay of proceedings, not relinquished by a dismissal." *United States v. Henri*, 828 F.2d 526, 528 (9th Cir.1987) (internal quotation omitted). Therefore, the court denies the County's motion for judgment on the pleadings and considers only its request for a stay.

[5] **[6]** The doctrine of primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir.2002). Primary jurisdiction "is not a doctrine that implicates the subject matter jurisdiction of the federal courts," and it is left "to the sound discretion of the court" whether to stay a case pending resolution of an agency proceeding. *Id.* at 780–81.

"No fixed formula exists for applying the [primary jurisdiction] doctrine." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir.2006) (internal quotation marks and citation omitted). However, the Ninth Circuit has stated that the doctrine "should be used 'if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency, and if protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.' " *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir.2010) (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir.2008)).

The County argues that the primary objective of this lawsuit is to compel the County to apply for an NPDES permit, and that, because that application has been made, this court should allow the DOH and the EPA to decide whether a permit is required. The County further contends that this case involves "highly technical fact-specific inquiries" that require "the specialized expertise typically possessed by the agencies." Memo. in Support of Primary Jurisdiction Motion at 10–11, ECF No. 71–1.

[7] The decision as to whether the County requires an NPDES permit is certainly within the jurisdiction and competence of the DOH and the EPA. However, ***990** "while competence of an agency to pass on an issue is a necessary condition to the application of the [primary jurisdiction] doctrine, competence alone is not sufficient." *United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir.2003) (internal quotation marks omitted). Given the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817–18, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the primary jurisdiction doctrine should not be invoked unless "it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *Culliton*, 328 F.3d at 1082. *See also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir.1994) ("Whether there should be judicial forbearance hinges ... on the authority Congress delegated to the agency in the legislative scheme.").

It would not be inconsistent with the Clean Water Act's legislative scheme for this court to decide the question of whether the County requires an NPDES permit for its discharge at the LWRF. The citizen suit provision in the Clean Water Act was specifically designed to allow courts to ensure direct compliance with the Act's requirements. The presence of the citizen suit provision demonstrates that Congress believed courts were competent to make fact-sensitive determinations over whether a particular discharge requires a permit. Congress could easily have committed that judgment to the sole discretion of an agency, or, at the very least, limited citizen suits to situations in which an agency had taken no action. Congress did not do that.

The Clean Water Act contains other express limitations on citizen suits. For example, it bars suits undertaken prior to the giving of notice to the agency and suits initiated during the pendency of any government-initiated court action. *See* 33 U.S.C. § 1365(b). The absence of any textual limitation on citizen suits initiated during agency review is a strong indication that Congress intended such suits to proceed. *See Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F.Supp.2d 448, 460 (E.D.La.2013) ("If Congress had intended for the primary jurisdiction doctrine to bar citizen suits, it would have included the doctrine among the specifically delineated circumstances under which citizen suits are barred."). *See also Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir.2002) (allowing citizen suit despite prior agency determination of no NPDES permit requirement, because "Congress [has] empowered citizens to pursue enforcement of the Clean Water Act when all procedural requirements [are] satisfied").

Moreover, courts are plainly competent to address the types of questions raised by the present citizen suit, such as whether there is a hydrologic connection and significant nexus between two bodies of water. Indeed, those are precisely the types of determinations that the Supreme Court made in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006), and that the Ninth Circuit made in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir.2007). The very existence of the citizen suit provision in the Clean Water Act indicates that Congress expected courts to make such judgments.

The County's references to *Montgomery Environmental Coalition Citizens Coordinating Committee of Friendship Heights v. Washington Suburban Sanitary Commission*, 607 F.2d 378 (D.C.Cir.1979), and *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333 (D.N.M.1995), are unpersuasive. Those cases "concerned ***991** the contents of a NPDES permit ... and not whether a permit should be issued in the first place." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 657 F.Supp. 989, 1001 (W.D.Mich.1987), *rev'd*

on other grounds, 862 F.2d 580 (6th Cir.1988). Here, by contrast, "[r]esolution of plaintiffs' claim[s] does not require the court to set effluent standards or to write a permit for the defendant." *Sierra Club v. El Paso Gold Mines, Inc.*, 198 F.Supp.2d 1265, 1271 (D.Colo.2002), *rev'd on other grounds*, 421 F.3d 1133 (10th Cir.2005). Instead, all that is required of this court is a determination as to whether the County is discharging a pollutant from a point source into the navigable waters of the United States. Such a judgment is within the conventional expertise of courts and does not require the type of complex technical judgment at issue in *Montgomery* and LAC *Minerals.*

[8] The County argues, "Given that the administrative process is underway, an agency decision may make a court order moot, or, should this litigation proceed, a court order could subject the County to conflicting obligations." Memo. in Support of Primary Jurisdiction Motion at 17. However, even if the DOH and the EPA were to render a decision during the pendency of this suit, or shortly afterwards, that would neither make the case moot nor create conflicting obligations. "[A] court may, in entertaining a citizen suit, decide whether a discharge of particular matter into navigable waters violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir.2007). If this court requires a permit, the DOH and the EPA cannot supersede a decision by this court by determining that an NPDES permit is not required. *See Hammersley*, 299 F.3d at 1012. And if the agencies require an NPDES permit, that does not render this entire case moot, because the County could still be liable for the payment of civil penalties. *See Chafin v. Chafin*, ——U.S. ——, 133 S.Ct. 1017, 1023, 185 L.Ed.2d 1 (2013) ("[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.") (internal quotation marks omitted). In other words, there is no discernible harm in proceeding with this litigation while the agencies consider the County's application.

By contrast, further delay in this case will result in the continued alleged discharge of pollutants into the ocean. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir.2005) (noting that in assessing whether to issue a stay, a court must consider "the possible damage which may result from the granting of [the] stay"). Over a year and a half has passed since the County submitted its permit application.

The recent issuance of a draft permit suggests that the DOH has concluded that some permit is indeed required. That is, the County may not presently argue that it expects the DOH to announce that no permit is needed. While not privy to the content of the draft permit, this court assumes that its details remain to be resolved. No firm deadline for resolution has been set. At most, the DOH has set a deadline for comments by the EPA, the County, and Plaintiffs' counsel. Revisions may follow, then an opportunity for the public to comment. The best the DOH can predict is the issuance of a final permit "a few months" after it reacts to public comment. The County is therefore asking for the disfavored remedy of an "indefinite, and potentially lengthy" stay for as long as administrative proceedings may continue. ***992** *See Yong v. I.N.S.*, 208 F.3d 1116, 1121 (9th Cir.2000). [1]

It is well settled that "a stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir.2007). If a court were to grant an indefinite stay in circumstances such as those now before this court, a defendant would be able to buy itself potentially years of further pollution through last-minute applications for an NPDES permit. Indeed, a polluting entity would be able to spend years in litigation prior to even applying for an NPDES permit, then seek to stay proceedings for several more years during the pendency of a belatedly submitted application, all the while continuing to release pollutants in violation of the Clean Water Act. An application for an NPDES permit, without more, cannot justify a lengthy or indefinite stay.

Congress placed no restrictions on citizen suits during the pendency of administrative proceedings, and the County can identify no particular harm associated with allowing this particular suit to proceed. "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997). The County has failed to meet its burden and, as a result, no stay is ordered.

C. Summary Judgment.

1. Legal standard.

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed.R.Civ.P. 56(a). *See Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.2000). The movants must support their position that a material fact is or is not genuinely disputed by either "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"; or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323, 106 S.Ct. 2548. The burden initially falls on the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the ***993** material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted).

The nonmoving party may not rely on the mere allegations in the pleadings and instead must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv.*, 809 F.2d at 630. At least some " 'significant probative evidence tending to support the complaint' " must be produced. *Id.* (*quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)); *see also Addisu*, 198 F.3d at 1134 ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact."). "[I]f the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch'l Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987) (*citing Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. 1348). *Accord Addisu*, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

In adjudicating summary judgment motions, the court must view all evidence and inferences in the light most favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *Id.* When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id.*

2. A party is liable under the Clean Water Act if, without an NPDES permit, it indirectly discharges a pollutant into the ocean through a groundwater conduit.

The County contends that, to prevail, Plaintiffs must show that the aquifer beneath the LWRF is "navigable water" under the jurisdiction of the Clean Water Act.

It has long been settled "that the meaning of 'navigable waters' in the CWA is broader than the traditional understanding of that term." *Rapanos*, 547 U.S. at 731, 126 S.Ct. 2208 (2006). "[T]he term 'navigable' is of 'limited import' and ... Congress [has] evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.' " *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (*quoting United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985)).

The framework for understanding what waters are regulable under the Clean Water Act beyond such "navigable-in-fact" water comes from the Supreme Court's decision in *Rapanos*. *Rapanos* presented the Court with the question of whether wetlands adjacent to tributaries of navigable-in-fact water could be described as regulable "waters of the United States." The Court split 4–4–1, with the four Justices in the plurality limiting the definition of "navigable water" under the Act to "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' " *Rapanos*, 547 U.S. at 739, 126 S.Ct. 2208 (*quoting* ***994** Webster's New International Dictionary 2882 (2d ed.)). The four Justices in the dissent viewed all wetlands

adjacent to tributaries of navigable waters as protected under the Act. *Id.* at 797, 126 S.Ct. 2208.

Justice Kennedy, concurring with the plurality, examined whether there was a hydrologic connection sufficient to establish a "significant nexus." *See id.* at 786, 126 S.Ct. 2208. Under Justice Kennedy's view, a "significant nexus" exists "if ... wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' " *Id.* at 780, 126 S.Ct. 2208. Justice Kennedy opined that this nexus is not satisfied by a "hydrologic linkage" that is "speculative or insubstantial," but wetlands adjacent to navigable waterways are covered by the Act given "the reasonable inference of ecologic interconnnection" with navigable-in-fact water. *Id.*

In *Healdsburg*, the Ninth Circuit read Justice Kennedy's concurrence as providing the controlling rule. 496 F.3d at 999–1000. *Healdsburg* involved a waste treatment plant that discharged sewage into a body of water known as "Basalt Pond," a rock quarry pit that was filled with water from a surrounding aquifer located next to the Russian River. *See id.* at 995. The Russian River and Basalt Pond were situated on top of a gravel bed saturated with water such that there was "a continuous passage of water between Basalt Pond and the Russian River." *Id.* at 997. The Ninth Circuit deemed the unpermitted discharge of pollutants into Basalt Pond to be a violation of the Clean Water Act. Noting that "water from the Pond seeps into the river through both the surface wetlands and the underground aquifer" and that "this hydrological connection ... [had] a significant effect on the chemical, physical, and biological integrity of the Russian River," the Ninth Circuit held that the relationship between the two bodies of water was "sufficient to confer jurisdiction under the Act pursuant to Justice Kennedy's substantial nexus test." *Id.* at 1000.

Although neither *Rapanos* nor *Healdsburg* addressed the context of groundwater, the County argues that, in *Healdsburg* the Ninth Circuit established a two-part test for determining whether there is a significant nexus between bodies of water, including groundwater. The County says that, given this test, Plaintiffs must show *both* that a "hydrological connection exists between the Lahaina Facility's UIC groundwater discharges and coastal waters" *and* that "there are significant physical, chemical and biological impacts as a result of the connection to warrant issuance of an NPDES permit." *See* Defendant's Primary Jurisdiction brief at 10–11. Whether or not this reading of *Healdsburg* is correct, the parties appear to agree that such a two-part test is a reasonable interpretation of the standard Plaintiffs must meet to show that the aquifer under LWRF is *itself* "navigable water" under the Act.

However, this court concludes that such a showing is not necessarily the only way in which Plaintiffs may prevail. Under this court's reading of the Clean Water Act and the court's extrapolation from appellate law, Plaintiffs may also prevail if they show that the discharge into the groundwater below the LWRF is functionally equivalent to a discharge into the ocean itself. That is, liability arises even if the groundwater under the LWRF is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.

***995** The plurality in *Rapanos* made clear that the prohibition in the Clean Water Act is not limited to "the addition of any pollutant *directly* to navigable waters from any point source," but rather extends to "the addition of any pollutant *to* navigable waters." *Rapanos*, 547 U.S. at 743, 126 S.Ct. 2208 (emphasis in original) (internal quotation marks omitted). "Thus, ... lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit directly into covered waters, but pass through conveyances in between." *Id.* (internal quotation marks omitted).

The *Rapanos* plurality also approvingly noted that "many courts have held that ... upstream, intermittently flowing channels themselves constitute "point sources" under the Act." *Rapanos*, 547 U.S. at 743, 126 S.Ct. 2208. The definition of "point source" under the Clean Water Act includes "any discernible, confined and discrete conveyance, including ... but not limited to any conduit ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act specifically excludes from the definition of a point source "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* It may be inferred from this narrow list of exclusions that Congress sought to include sufficiently "confined and discrete" groundwater conduits as "point sources" under the Act. *See Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir.1996) ("An item which is omitted from a list of exclusions is presumed not to be excluded.") (internal quotation marks omitted).

There is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits under the Clean Water Act. When either type of waterway is a conduit through which pollutants reach the ocean, then there has been the "addition of [a] pollutant to navigable waters." 33 U.S.C. § 1362(12)(A).

"It would, of course, make a mockery of [the Clean Water Act's regulatory scheme] if [the] authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir.1974). No less can be said for groundwater flowing directly into the ocean. *See 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."); *Washington Wilderness Coal. v. Hecla Min. Co.*, 870 F.Supp. 983, 990 (E.D.Wash.1994) ("[S]ince the goal of the CWA 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."). *See also* Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 HARV. ENVTL. L. REV.. 569, 596 (1988) ("To forbid pollution of a surface stream, but to permit the stream to be polluted by a nearby waste injection well is a manifest absurdity.").

This view is consistent with the EPA's pronouncements. "As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act." ***996** National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule, 66 FR 2960–01, 3017 (Jan. 12, 2001); *see also* Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 FR 64876, 64892 (Dec. 12, 1991) ("[T]he affected ground waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters."). *Cf. Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002) (noting that an agency's proposed rule "warrants respectful consideration").

[9] **[10]** This does not mean that groundwater is always and necessarily *itself* part of the navigable waters of the United States. *See* 66 FR 2960–01 at 3017 ("EPA does not argue that the CWA directly regulates ground water quality."); Definition of "Waters of the United States" Under the Clean Water Act, 79 FR 22188–01, 22218 (Apr. 21, 2014) ("The agencies have never interpreted 'waters of the United States' to include groundwater."). An unpermitted discharge into the groundwater, without more, does not constitute a violation of the Clean Water Act. It is the migration of the pollutant into navigable-in-fact water that brings groundwater under the Clean Water Act. In other words, if a party were only releasing rocks or other fill material that did not cause pollutants to migrate through groundwater, this court would not be talking about this "conduit" theory for liability under the Clean Water Act. This theory applies only when pollutants find their way to navigable-in-fact waters. In that event, a permit is required. *See Hecla Mining*, 870 F.Supp. at 990 ("[P]ollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.").

While there appears to be a split in authority over whether groundwater pollution violates the Clean Water Act, this split may largely flow from a lack of clarity by courts as to whether they are determining that groundwater itself may or may not be regulated under the Clean Water Act or are determining that groundwater may or may not be regulated when it serves as a conduit to water that is indeed regulated. Almost every court that has allowed unpermitted discharges into groundwater has done so under the theory that the groundwater is not *itself* "water of the United States." That is, those courts were not determining whether discharging pollutants into groundwater *conduits* required a permit. *See, e.g., Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir.1994); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312, 1318 (D.Or.1997).

While it makes sense to regulate groundwater under the conduit theory, this court acknowledges that it cannot point to controlling appellate law or statutory text expressly allowing this theory in the present context.[2] The Supreme Court in *Rapanos* dealt only with wetlands that the EPA argued had ecological value in and of themselves. The value of the wetlands in question was not necessarily that they were conduits into navigable-in-fact water, but that they had independent ecological ***997** worth because of such functions as "providing critical habitat for aquatic animal

species." 547 U.S. at 766, 126 S.Ct. 2208. Even when the wetlands in question required protection because of their "critical functions related to the integrity of other waters," those functions, "such as pollutant trapping, flood control, and runoff storage" went beyond the simple transmission of pollutants. *Id.* at 779, 126 S.Ct. 2208. For those reasons the wetlands at issue in *Rapanos* may have required protection even if there was no possibility that the pollutants would migrate into navigable-in-fact water. *Id.* at 744, 126 S.Ct. 2208 (noting that the case involved "dredged or fill material, which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an addition ... to navigable waters when deposited in upstream isolated wetlands").

By contrast, Plaintiffs here do not appear to be arguing that the County would necessarily require an NPDES permit if it deposited material in the aquifer that did not find its way to the ocean. Instead, the harm alleged appears to be based on the migration of the effluent to the ocean. That is, Plaintiffs do not appear to be arguing that the groundwater requires protection for its own independent ecological value. Instead, the concern is that the County should not be allowed to pollute the ocean *through* that groundwater.

The test articulated by the Ninth Circuit in *Healdsburg* is not a good fit when groundwater is involved. If the *Healdsburg* test is the *only* way through which a discharge into groundwater could be determined to come under the Clean Water Act, *Healdsburg* poses enormous barriers to the regulation of groundwater—barriers that even the plurality in *Rapanos* would likely not endorse. Under a strict application of *Healdsburg*, even with definitive proof that 100% of all pollutants discharged from a point source into groundwater rapidly reach the ocean, a permit would not be required unless there are also significant effects on the physical, biological, and chemical integrity of the ocean.

[11] The Clean Water Act creates a strict liability scheme that "categorically prohibits any discharge of a pollutant from a point source without a permit," irrespective of whether that discharge affects the receiving water. *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir.1993). Applying *Healdsburg* to cases of groundwater pollution could undermine the Clean Water Act's strict liability scheme, as it would require plaintiffs to show *both* that pollutants are being discharged into navigable water *and* that those pollutants are affecting the receiving water. Congress intended to bar all unpermitted discharges, without regard to their effects on protected waters; Congress did not intend a scheme whereby certain citizen suit plaintiffs were subject to entirely different proof requirements based solely on the manner in which pollutants reach the ocean. Drawing such a distinction is not only illogical, it runs counter to the structure and intent of the Act.

This court is not reading *Healdsburg* as requiring such a distinction. *Healdsburg* does not *sub silentio* create novel and significant barriers to groundwater regulation. Instead, this court reads *Healdsburg* as limited to situations in which, as in *Rapanos*, a plaintiff seeks to protect a particular wetland in and of itself. *Healdsburg* does not require that a plaintiff who shows that pollutants indirectly reach navigable-in-fact water must make a further showing that those pollutants have significantly affected the receiving water.

[12] Of course, a plaintiff must demonstrate more than "a general hydrological ***998** connection between all waters." *Hecla Min. Co.*, 870 F.Supp. at 990. Plaintiffs in the present case must show that pollutants can be *directly traced* from the injection wells to the ocean such that the discharge at the LWRF is a *de facto* discharge into the ocean. Further, Plaintiffs must show that the level of pollutants emerging into navigable-in-fact water is more than *de minimis*. If they make these showings, it would make no sense to exempt a polluter from regulation simply because its pollution passes through a conduit. If the point of emission is readily identified, and the transmission path to the ocean is clearly ascertainable, the discharge is functionally one into navigable water.

[13] That is not to say that groundwater can never be regulated under the *Healdsburg* test. An aquifer with a substantial nexus with navigable-in-fact water may itself be protected under the Clean Water Act even if it is not necessarily a conduit for pollutants. But when it is established that groundwater is a conduit for pollutants, liability may attach to a discharge into that groundwater even if the groundwater is not itself protected under the Act.

3. It is undisputed that the County has discharged pollutants into the ocean through the conduit of the groundwater below the LWRF.

[14] Applying the above analysis to the present case, the court first addresses whether the groundwater under the LWRF constitutes a conduit to the ocean.

The central finding of the Tracer Dye Study—and the centerpiece of Plaintiffs' case—is that "64% of the treated wastewater injected into wells [3 and 4] currently discharges from the submarine spring areas" and into the ocean. Tracer Dye Study at ES–2, 3; Paytan Decl. ¶ 18. Because wells 3 and 4 "receive more than 80 percent of the treated wastewater," *see* Tracer Dye Study ES–21, it appears that over 50% of the wastewater discharged at the LWRF emerges into the ocean. At the hearing on the present motions, the County admitted that pollutants discharged at the LWRF are reaching the ocean, but disputed the specific quantities stated in the Trace Dye Study. What the County failed to do was explain why it believed the quantities cited in the Study were incorrect. Nor did the County point to any evidence in the record disputing the Study's precise findings.

The County's expert, Paulsen, maintains that, "as groundwater moves through the subsurface, various chemical and biological reactions can occur that alter the characteristics of the groundwater." Paulsen Decl. ¶ 17. However, neither that statement nor the rest of Paulsen's declaration indicates that the chemical and biological reactions that occur as the effluent travels through the groundwater to the ocean transform the effluent into something other than a "pollutant." In other words, even if, for example, the levels of nitrogen and phosphorus in the water being released at the seeps are less than in the effluent injected at the wells, that does not mean that the water at the seeps is not or does not contain a "pollutant" within the meaning of the Act. Indeed, at the hearing on the present motion, the County explicitly disclaimed any such argument, conceding that "pollutants" were released at the seeps.

The County appeared to be arguing at the hearing that deep groundwater could not, as a matter of law, be viewed as a "conduit" because of these diffusive effects. That is, the County appeared to be arguing that any channel or conveyance to the ocean may be considered a conduit only if it "confine[s] or contain[s] the water." This argument elides the distinction between ***999** a point source and a conduit. A point source is specifically defined in the Clean Water Act as a "confined and discrete conveyance." While any conduit that is a "confined and discrete conveyance" is a point source, that does not mean that all conduits must be "confined and discrete conveyances." An injection well itself is a point source, and the groundwater acting as a conduit need not also be "confined and discrete." Courts have adopted "the 'indirect discharge' rationale and the 'point source' rationale *in the alternative*." *Rapanos*, 547 U.S. at 744, 126 S.Ct. 2208 (emphasis added). It would be anomalous for those alternative rationales to merge into a single rationale.

In any event, nothing in the record suggests that the groundwater is not itself a "confined and discrete conveyance." *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir.1979) ("The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."). The definition of "point source" is limited to "confined and discrete conveyances" to minimize the difficulty of discerning the source of pollutants. *See Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir.1984). The finding of the Tracer Dye Study is that more than 50% of the effluent originating at the LWRF is finding its way into the ocean. Any conveyance that transmits such a high proportion of a pollutant from one place to another is consistent with being "confined and discrete," irrespective of its other geologic properties.

The County's theory that groundwater cannot be considered a conduit because it is not "confined and discrete" would lead to the radical conclusion that *all* conveyances through groundwater into the ocean are permissible under the Act, even if 100% of the pollutants find their way into the ocean. Recognizing that such a contention conflicts with the numerous cases holding that the Act prohibits indirect pollution through groundwater, the County carves out an exception to its theory for transmission through "shallow subsurface" water. Neither logic nor case law supports distinguishing between "shallow" and "deep" groundwater. The key factor is not the depth of the groundwater, but the existence of a pollutant that eventually reaches the ocean. It would make no sense to conclude that the release of pollutants into "shallow subsurface water" surrounded by impermeable rock requires a permit, but the release of pollutants into "deep" groundwater does not require a permit even if the latter involves far greater transmission of pollutants into the ocean. And neither case authorities nor statutory or regulatory language provides any clue as to the precise measurement that might render groundwater deep.

Of course, releasing water deeper underground may correlate to diffusion of a pollutant before it reaches the ocean. That diffusion may sometimes be so great that it is no longer reasonable to conclude that any pollutant is reaching the ocean. But depth is not the only consideration in determining whether pollutants are reaching navigable-in-fact water.

Other factors, such as the permeability of the rock, may be equally important. There is no support, therefore, for creating a categorical exclusion for "deep" groundwater. The core inquiry must be a case-by-case determination of whether pollutants are reaching navigable-in-fact water. That determination is immensely simplified in the present case by the presence of an independently produced report that traces pollutants from the LWRF to the ocean.

***1000** At the hearing, the County also suggested that the effluent was diffused as it spread through the groundwater, and that such diffusion precluded a finding that the groundwater was a conduit to navigable water. But liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of *how* they get there. As with a "deep" conduit, a diffused conduit is no less covered under the Act if it actually conveys pollutants to navigable-in-fact water.

Under the County's "diffusion" theory, for example, a single pipe taking effluent to the ocean would be covered under the Clean Water Act, but 50 smaller pipes, taking the same quantity of pollutant into the ocean, might not. Nothing in the Act supports relying on the manner in which the pollutants travel to determine liability.

Similarly, at the hearing, the County argued that the injection wells were "too far" from the ocean to qualify as conduits. Counsel for the County admitted, however, that if the pollutant traveled in a half-mile-long lava tube that confined the water, it would constitute a "direct" discharge into the ocean. To the County therefore, distance appeared to be a proxy for the degree of diffusion. Because diffusion is itself only relevant to the extent it may prevent the water from reaching the ocean, there is no support for a categorical rule that allows any discharge of pollutants through groundwater so long as the discharge originates a certain distance from the ocean.

This court recognizes that, in the absence of a tracer dye study, depth, diffusion, and distance might serve as proxies to help a court determine how much, if any, pollutant is reaching navigable-in-fact water. But such approximations are unnecessary when pollutants have been precisely traced from the point of discharge to the ocean.

[15] Liability under the Clean Water Act is triggered as soon as pollutants are discharged into navigable water from a point source. *See Headwaters,* 243 F.3d at 532. The core undisputed fact of this case is that pollutants discharged by the County at the LWRF injection wells migrate to the ocean. Having no NPDES permit allowing this discharge, the County is violating the Clean Water Act.

4. Even under *Healdsburg's* two-part test, Plaintiffs are entitled to summary judgment on the issue of whether the County has violated the Clean Water Act.

[16] As discussed in Section III(C)(2) of this order, the *Healdsburg* test may present significant obstacles to the regulation of groundwater by requiring plaintiffs who are able to clearly show pollutants flowing into protected water to also demonstrate that the flow of those pollutants has "significant effects." In many cases, "significant effects" may not be discernable until considerable pollution has already occurred. In other cases, plaintiffs may not have the resources to identify such effects. The present case does not present those difficulties. The record before this court is exceptionally extensive. The discharges from the LWRF have been the subject of investigation and scrutiny by scientists and federal and state authorities for over a decade. The consensus of the numerous studies and reports placed before the court appears to be that effluent from the LWRF is reaching the ocean and is significantly affecting the water near the submarine seeps where it is being discharged. This record allows this court to conclude, even under the *Healdsburg* test, that the County is violating the Clean Water Act.

In referring to the *Healdsburg* test, this court notes that the parties appear to ***1001** agree that, under *Healdsburg*, Plaintiffs must show that there is both a "hydrologic connection" between the aquifer under the LWRF and the ocean, and that the aquifer "either alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of [the ocean]." *Healdsburg,* 496 F.3d at 1000 (internal quotation marks omitted).

Healdsburg itself does not actually speak of a "two-part" test. Instead it simply states that "wetlands are regulable under the CWA only if there is a significant nexus between the wetlands at issue and the navigable waterway." 496 F.3d at 1000. *Healdsburg* notes that "mere hydrologic connection should not suffice in all cases [because] the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* (internal quotation marks omitted). Instead

of expressly articulating a "two-part" test, this statement recognizes that a hydrologic connection does not alone meet the significant nexus test. In other words, if there are two bodies of water with no hydrologic connection that affect one another's "chemical, physical or biological integrity," they may still be regulable under the Act. Because the aquifer under the LWRF and the ocean have a clear hydrological connection, the court is not faced with such a circumstance. However, given the parties' agreement that *Healdsburg* creates a two-part test, the court applies their framework for the purposes of deciding this part of the motion, although the court is not thereby ruling that the parties' agreement is necessarily the correct application of *Healdsburg.*

As a threshold matter, the County argues that groundwater categorically cannot be considered a "water of the United States," irrespective of any nexus it may have with navigable-in-fact water. The County's primary basis for this assertion is a recently proposed rule by the EPA and the Army Corps of Engineers stating, "Groundwater, including groundwater drained through subsurface drainage systems ... [is] expressly not 'water[ ] of the United States' by rule." 79 FR 22188–01 at 22218. If this rule were to become final, it would be entitled to deference by this court under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and would likely mean that the groundwater under the LWRF could not itself be considered "water of the United States." It is important to note that, even if this rule does become final, it need not affect the indirect discharge theory discussed in Section III(C)(2) of this order. In keeping with the agencies' pronouncements, the indirect discharge theory does not treat groundwater as itself "water of the United States," but as a conduit to such water. If adopted, the proposed rule would, however, affect whether Plaintiffs may prevail on the alternative theory that the discharge at the LWRF meets the *Healdsburg* test.

[17] In the Ninth Circuit, "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). The proposed rule purports to interpret the statutory language of the Clean Water Act. When agencies have asserted new interpretations of statutory language in legal briefs, the Ninth Circuit has consistently declined to give controlling weight to the agency's pronouncements. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 395 (9th Cir.2011); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 780 (9th Cir.2011). Because proposed rules are not entitled to more respect than positions advocated in briefs, the proposed groundwater rule is ***1002** similarly not owed deference here. To hold otherwise would give similar force in the courts to an agency's proposed and final rules. Such a result would, to some degree, allow agencies to circumvent the very notice and comment process that the Supreme Court has found to be highly relevant in determining the deference owed to an agency interpretation. *United States v. Mead Corp.*, 533 U.S. 218, 230, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

Therefore, while the court gives "respectful consideration," *Blumer*, 534 U.S. at 497, 122 S.Ct. 962, to the agencies' proposed categorical exclusion of groundwater from the definition of the "waters of the United States," the agencies' view does not control. Instead, the court must make a determination based on the unique facts present here regarding whether the aquifer under the LWRF is regulable under the Clean Water Act. This court now applies the parties' two-part test to that subject.

The County argues that, to meet the first part of its reading of the *Healdsburg* test, Plaintiffs must demonstrate a hydrologic connection between the aquifer and the ocean that is "direct and immediate." The County cites almost no authority to support its novel "direct and immediate" requirement and does not articulate what constitutes a sufficiently "direct" or "immediate" connection. The cases the County relies on in describing its "direct and immediate" requirement actually support the conclusion that the hydrologic connection between the aquifer and ocean here is sufficiently "direct and immediate."

For example, in *Greater Yellowstone Coalition v. Larson*, 641 F.Supp.2d 1120, 1139 (D.Idaho 2009), the court held that it was not arbitrary and capricious for the EPA to decide that there was no hydrologic connection when pollutants traveled "between one to four miles until reaching the surface water," and "would take between 60 and 420 years for peak concentrations ... to arrive at surface water." Here, the effluent travels for less than half a mile and reaches the ocean within three months of discharge. The *Larson* court considered the degree of hydrologic connection to involve a close question despite the much longer distance and vastly slower speed the pollutants traveled in that case. *Larson* therefore supports the conclusion that the discharge at the LWRF has a "direct and immediate" hydrologic connection with the ocean.

Similarly, the court in *Association Concerned Over Resources and Nature, Inc. v. Tennessee Aluminum Processors, Inc.*, 2011 WL 1357690 at *18 (M.D.Tenn. Apr.

11, 2011), required the plaintiffs to show only "a link between contaminated ground waters and navigable waters." Nothing in that case suggests that the link between the aquifer under the LWRF and the ocean is insufficiently direct.

The County further argues that the "direct and immediate" requirement is consistent with *Healdsburg* because the court in that case found "a hydrological connection between a pond and nearby river where 'a change in the water level in one *immediately* affect[ed] the water level in the other.' " Opp. at 7 (emphasis in original) (*quoting Healdsburg,* 496 F.3d at 1000). But that language in *Healdsburg* relates to the "physical connection" between the Basalt Pond and the Russian River under the second prong of the test, not to the degree of hydrologic connection under the first prong. In any event, *Healdsburg* does not purport to set the outer bounds of the Clean Water Act's applicability. The County fails to establish that any hydrologic connection less than the one at issue in *Healdsburg* is insufficient to trigger liability under the Clean Water Act.

***1003** Unlike the courts in the cases discussed above, this court has before it the Tracer Dye Study, which indisputably demonstrates the relatively rapid flow of significant quantities of pollutant from the LWRF to the ocean. In these circumstances, it would be anomalous for the court to read *Healdsburg,* or any other case, as requiring a finding of no hydrologic connection. Plaintiffs clearly meet the first prong of the *Healdsburg* test.

This court turns to the second part of the test defined by the parties—whether the water in the aquifer "significantly affects the [ocean's] physical, biological and chemical integrity." *See Healdsburg,* 496 F.3d at 1001. Plaintiffs contend that the ocean water close to the submarine seeps has been affected in five separate ways.

First, Plaintiffs contend that water near the seeps has "exceptionally elevated" levels of nitrogen and phosphorus. *See* Smith Decl. 11, 17–19. In particular, the area near the seeps apparently has the highest levels of sewage-derived nitrogen "ever reported in the scientific literature." *Id.* ¶ 8. Elevated levels of such nutrients can accelerate the growth of fleshy seaweed and algae, which can compete with, outgrow, and kill coral. *Id.* ¶ 20. In keeping with this conclusion, the coral reefs near the submarine seeps have been subject to algal blooms that have led to a decline in coral cover from 55% to 33% between 1994 and 2006. *Id.* ¶ 25.

Second, Plaintiffs show that the water near the submarine seeps is substantially more acidic than the rest of the ocean's nearshore water. *Id.* ¶ 29; Tracer Dye Study at 2–12, 2–13. This ocean acidification reduces the amount of carbonate ions available for species such as corals, mussels, and limpets, and promotes the growth of seaweed that competes with coral. Smith Decl. ¶ 27.

Third, Plaintiffs demonstrate that the emerging water has lower salinity than the ocean water, *see* Tracer Dye Study at 2–12, 2–13, and this low salinity can be harmful to coral that has evolved to live in seawater rather than freshwater. Smith Decl. ¶ 33.

Fourth, Plaintiffs show that oxygen concentrations from the water emerging from the seeps is substantially lower than in the marine water elsewhere in West Maui. Smith Decl. ¶ 35; Paytan Decl. ¶ 34. The lack of oxygen can suffocate coral and promote the growth of seaweed. Smith Decl. ¶¶ 34–36; Paytan Decl. ¶¶ 34–35.

Fifth, Plaintiffs show that the water temperature is substantially elevated near the seeps. *See* Tracer Dye Study at 2–12, 2–13. The Tracer Dye Study found that these higher temperatures extended over more than 167 acres around the seeps. *See* Paytan Decl. ¶¶ 26–29. These higher temperatures can lead to bleaching and death of the coral in the affected area. *See* Smith Decl. ¶ 37.

Neither the County nor their experts dispute that the water directly emerging from the seeps bears these properties. Nor do they dispute that the theoretical effect of such alterations to ocean water would be to damage coral in the ways described above. Rather, the County argues that "measurements at the seeps fail to account for mixing of the seep discharge with ocean water." Memo. in Opp. to Motion for Summary Judgment at 16; *see also* Paulsen Dec., ¶¶ 23, 38; Dollar Dec., ¶ 12–13. The County and their experts note that, as the water emerging from the seeps moves through the water column, the effects of the effluent dissipate. *Id.* As the County puts it, "[a]ny effects of the seep discharge are ... attenuated, particularly given the small area of the seeps compared to the entire reef." Memo in Opp. at 17–18. The County's experts contend ***1004** that, given this dispersion of effluent, the reef in the nearshore area is not being harmed by the discharge at the LWRF. *See, e.g.,* Dollar Dec., ¶ 44. ("[A]ll reef areas appeared essentially pristine, i.e., no observed bleached, diseased, or otherwise stressed corals.").

Even accepting these statements by the County's experts, the court finds that there is no genuine dispute that the discharge at the LWRF significantly affects the physical, chemical, and biological integrity of the ocean water. There is no dispute that water is flowing from the aquifer into the ocean, and that the properties of the aquifer water can and are altering the properties of water near the seeps. Of course, given the vastness of the ocean, these effects will dissipate as the aquifer water is dispersed into ocean water. To hold that an "effect" is "insignificant" merely because of such dispersion would license unfettered discharge into any body of water voluminous enough to rapidly diffuse the effects of the effluent. Ocean water near the seeps is, indisputably, being significantly affected. The County provides no basis for the contention that these effects must be felt throughout all the nearshore waters to meet the "significant effects" test.

Notably absent from the County's analysis is any framework for determining when such dispersion renders an effect "insignificant." The effects of any amount of pollutant will eventually disperse as the pollutant travels through the ocean, but the County does not articulate how great a distance from the discharge an "effect" must be felt for it to be deemed "significant."

The crux of the "significant effects" test is determining whether the aquifer's "effects on water quality are speculative or insubstantial, [such that] they fall outside the zone fairly encompassed by the statutory term 'navigable waters.' " *Healdsburg,* 496 F.3d at 1000 (*quoting Rapanos,* 547 U.S. at 717, 126 S.Ct. 2208 (Kennedy, J., concurring in judgment)). Here, the effect is indisputably neither speculative nor insubstantial. The LWRF releases three to five million gallons of effluent a day; an independent EPA study has determined that at least 50% of this effluent makes its way relatively rapidly into the ocean; this effluent has properties that can radically alter the properties of the water it is introduced into; and such radical effects have been observed and measured at the point of discharge into the ocean. If such a relationship is considered "speculative" and "insubstantial," it is hard to imagine any groundwater connection meeting what the parties construe as the *Healdsburg* test.

Finally, the County's assertion that coral is not being damaged and is "pristine," even if true, is irrelevant for determining a significant nexus. An "effect" on the ocean is not coextensive with "harm" to the ocean. *Comm. to Save Mokelumne River,* 13 F.3d at 309 (noting that the CWA "does not impose liability only where a point source discharge creates a net increase in the level of pollution" but instead creates a strict liability scheme that "categorically prohibits any discharge of a pollutant from a point source without a permit"). The undisputed physical, chemical and biological changes observed in the water near the seeps are sufficient to establish that the aquifer and the ocean have the required nexus. To establish the County's liability, Plaintiffs need not show that coral or other marine life has been damaged or harmed.

The only reasonable inference that the undisputed evidence permits is that the discharge into the aquifer significantly affects the physical, chemical and biological integrity of the receiving waters. Both ***1005** prongs of the *Healdsburg* test defined by the parties are met here. Therefore, the County's discharge of pollutants into the aquifer beneath the LWRF without an NPDES permit is a violation of the Clean Water Act.

In concluding that Plaintiffs in this case prevail even under the *Healdsburg* two-part test they have defined, this court is not suggesting that *Healdsburg* must be applied to all cases involving groundwater pollution. This case does not require this court to address, for example, whether *Healdsburg* bars the introduction of pollutants into groundwater that do not migrate to navigable-in-fact water. This court holds only that, given the undisputed evidence in the record showing that pollutants rapidly flow from the aquifer into the ocean and cause significant change to the ocean water near the submarine seeps, the County is liable under both the *Healdsburg* framework articulated by the parties and the indirect discharge (or "conduit") framework. The *Healdsburg* test, which developed in the context of wetlands that plaintiffs sought to protect for the wetlands' own ecological value, may not always provide a good fit for cases involving groundwater. If *Healdsburg,* rather than the "conduit" theory, is to govern groundwater cases, it may require further clarification and elaboration in cases with fact patterns different from the one before this court. In the present case, however, the *Healdsburg* test relied on by the parties leads ineluctably to the same conclusion as the "conduit" theory: the County's release of pollutants at the LWRF without an NPDES permit violates the Clean Water Act.

IV. *CONCLUSION.*

The court denies Defendant's motion for judgment on the pleadings or, in the alternative, a stay. The court grants Plaintiffs' motion for partial summary judgment as to the County's liability under the Clean Water Act. The court makes no determination at this stage regarding any civil penalties.

The court grants the County's two requests for judicial notice and denies the county's motion to strike expert declarations.

Because Plaintiffs are prevailing on the substantive motions before this court, the court sees no need to address the merits of their Motion to Strike Defendant's Second May 23, 2014 Letter. That motion is denied.

IT IS SO ORDERED.

All Citations

24 F.Supp.3d 980, 79 ERC 1589

Footnotes

1 At the hearing on the present motion, the County suggested, as an alternative to an indefinite stay, a stay of three to six months, based on its suggestion that the DOH was concluding a relevant study in July. The County provides no evidence, however, that the DOH and the EPA are likely to render a decision soon after this alleged study. Nor does it show why this court cannot or should not address the need for an NPDES permit absent this study.

2 In deciding that Justice Kennedy's concurrence in *Rapanos* is the controlling rule of law in the Ninth Circuit, the majority in *Healdsburg* was addressing only the question in that case, which, as in *Rapanos,* involved whether particular wetlands were *themselves* navigable waters of the United States. Admittedly, neither *Healdsburg* nor Justice Kennedy's concurrence in *Rapanos* applied the conduit theory discussed here to groundwater.

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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' MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF SERVICE Hearing: Date: May 12, 2014 Time: 9:45 a.m. Judge: Hon. Susan Oki Mollway

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, plaintiffs Hawai‘i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association, through their counsel Earthjustice, hereby move for summary judgment that:

(1) defendant County of Maui has violated and is violating section 301(a) of the federal Clean Water Act, 33 U.S.C. § 1311(a), which prohibits discharges of pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit, by discharging wastewater and other pollutants from Lahaina Wastewater Reclamation Facility ("LWRF") Injection Wells 3 and 4 into groundwater that has a hydrologic connection to the Pacific Ocean and that significantly affects the physical, biological and chemical integrity of the receiving waters;

(2) defendant has violated the Clean Water Act every day it has discharged wastewater into LWRF Injection Wells 3 or 4;

(3) these violations will continue until defendant obtains and complies with an NPDES permit for its discharges;

(4) 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 Clean Water Act violations; and

(5) 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 Clean Water Act violations.

This motion is based on the pleadings and other papers on file herein, the memorandum attached hereto, the concise statement, declarations and exhibits filed herewith, and such other matters as may be presented to the Court.

Dated: Honolulu, Hawai'i, March 17, 2014.

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

HAWAI'I WILDLIFE FUND, a Hawai'i non-profit corporation, SIERRA CLUB - MAUI GROUP, a non-profit corporation, SURFRIDER FOUNDATION, a non-profit corporation, and WEST MAUI PRESERVATION ASSOCIATION, a Hawai'i non-profit corporation, Plaintiffs, v. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM BMK PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Even before defendant County of Maui broke ground to build its Lahaina Wastewater Reclamation Facility ("LWRF"), defendant was well aware that effluent pumped into the facility's injection wells would travel underground and ultimately end up in the Pacific Ocean. In succeeding years, study after study sounded the alarm that wastewater from the LWRF was, indeed, discharging with groundwater into West Maui's nearshore waters, with a huge plume detected offshore of Kahekili Beach containing the highest levels of sewage-derived nitrogen ever recorded. Last year, a government study conclusively demonstrated the hydrologic connection between the LWRF injection wells and the nearby coastal waters of West Maui, with tracer dye placed into the injection wells emerging from nearshore seeps off Kahekili Beach less than three months later.

Plaintiffs Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association have brought this lawsuit to address the harm that defendant's effluent discharges are inflicting on the marine environment at Kahekili.[1] While there is ample evidence of that harm, to

[1] As set forth in the declarations of Hannah Bernard, Antoinette Lucienne de Naie, Gary Savage, Lauren Campbell and Sharyn Matin, attached to plaintiffs' concise statement, defendant's operation of the injection wells at the LWRF in violation of the Clean Water Act and the resulting discharges of pollutants into ocean waters have adversely affected and continue to adversely affect plaintiffs' environmental, aesthetic, recreational, scientific, and educational interests. Plaintiffs bring this motion to protect their organizational, and their members' individual, interests from further injury.

determine whether defendant has violated, and continues to violate, the federal Clean Water Act, this Court need not resolve the parties' disputes about the seriousness of defendant's violations, which are relevant only to the "amount of [the] civil penalty" defendant should pay, not its liability. 33 U.S.C. § 1319(d). "[T]he Act categorically prohibits any discharge of a pollutant from a point source without a permit." Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993). Accordingly, to establish defendant's liability, plaintiffs need demonstrate only that defendant has "(1) discharged a pollutant …; (2) into navigable waters …; (3) from a point source …; (4) without a discharge permit." Id.

As discussed below, plaintiffs respectfully ask the Court to enter summary judgment that defendant has violated and is violating section 301(a) of the federal Clean Water Act, 33 U.S.C. § 1311(a), which prohibits discharges of pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit, by discharging wastewater and other pollutants from LWRF Injection Wells 3 and 4 into groundwater that has a hydrologic connection to the Pacific Ocean and that "significantly affects the physical, biological and chemical integrity" of the receiving waters. Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 1001 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008). Plaintiffs further seek summary judgment that defendant has violated the Clean Water Act every day that it has discharged wastewater into Injection Wells 3 or 4 and that

those violations will continue until defendant obtains and complies with an NPDES permit for such discharges. Finally, plaintiffs respectfully ask the Court to hold that, based on the evidence presented for the period from January 1, 2008 through March 31, 2013, defendant's unpermitted discharges from Injection Wells 3 and 4 constitute 3,792 days of Clean Water Act violations.

II. STATUTORY FRAMEWORK

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 mandates that "the discharge of any pollutant by any person shall be unlawful." Id. § 1311(a). The Ninth Circuit has recognized this prohibition as "[t]he 'cornerstone' and 'fundamental premise' of the Clean Water Act." Northwest Environmental Advocates v. United States Envt'l Prot. Agency, 537 F.3d 1006, 1020 (9th Cir. 2008) (citation omitted).

Section 402 of the Act provides for an exception to the general prohibition imposed by section 301(a) through the issuance of a permit under the National Pollutant Discharge Elimination System "for the discharge of any pollutant or combination of pollutants." 33 U.S.C. § 1342(a)(1). The NPDES permitting program is considered the "centerpiece" of the Clean Water Act and the primary method for enforcing the effluent and water-quality standards established by the

the federal Environmental Protection Agency ("EPA") and state governments. American Iron & Steel Inst. v. Environmental Prot. Agency, 115 F.3d 979, 990 (D.C. Cir. 1997).

Section 402(b) of the Act, 33 U.S.C. § 1342(b), gives the EPA Administrator authority to allow a state to administer its own NPDES program. In the state of Hawai'i, the EPA has delegated authority to DOH to issue NPDES permits. Id.; 40 C.F.R. § 123.24. A state-issued NDPES permit can impose effluent limits and other provisions that are more stringent than the federal requirements for an NPDES permit, but all provisions must be at least as stringent as the federal requirements. 40 C.F.R. § 123.25(a); H.A.R. § 11-55-02(c).

Under Hawai'i law, as under the federal Clean Water Act, "[no] person, including any public body, shall discharge any water pollutant into state waters, or cause or allow any water pollutant to enter state waters" except in compliance with the state's water pollution regulations. H.R.S. § 342D-50(a); see also H.A.R. § 11-55-03.

In the absence of compliance with a valid NPDES permit, a discharger cannot escape liability by arguing that its point source discharge does not "create[] a net increase in the level of pollution." Committee to Save Mokelumne River, 13 F.3d at 309. Rather, the Clean Water Act imposes strict liability, "categorically prohibit[ing] any discharge of a pollutant from a point source without a permit." Id.; see also Save Our Bays and Beaches v. City and County of Honolulu, 904 F.

Supp. 1098, 1105 (D. Haw.1994) ("The Act imposes strict liability for NPDES violations"); Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1391 (D. Haw. 1993) ("Section 301(a) … prohibits any discharges into navigable waters of the United States by any person (including a municipality) without a NPDES permit").

Congress chose a strict liability permitting regime for the Clean Water Act because it recognized that earlier laws, which "employed ambient water quality standards … as the primary mechanism in its program for the control of water pollution," had failed to clean up the nation's waters. Environmental Prot. Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 202 (1976); see also id. at 203 (noting "conclusion of the Senate Committee on Public Works that 'the Federal water pollution control program . . . has been inadequate in every vital aspect'"). By imposing "direct restrictions on discharges," 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." Id. at 204. To determine whether the Clean Water Act is being violated, the straightforward, threshold question is whether the discharge of pollutants – regardless of quantity or environmental impact – into waters of the United States is authorized under an NPDES permit. If not, the law is being violated. Id. at 205 ("it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms").

III. FACTUAL BACKGROUND

A. Operation Of The Lahaina Wastewater Reclamation Facility.

Defendant owns and operates the Lahaina Wastewater Reclamation Facility. Exh. 11: Answer (Dkt. No. 41) ¶¶ 2, 16. The LWRF currently uses four injection wells for the disposal of wastewater. Id. ¶ 21. Each injection well consists of a long pipe that extends approximately 200 feet underground. Exh. 12: 1993 Injection Well Report at 7 & Fig. 2; Exh. 13: 2004 Underground Injection Control ("UIC") Permit Application at Attachment M. Wastewater is pumped to the top of the well, where gravity moves the water down through the pipe, discharging into the groundwater below the facility. 1993 Injection Well Report at 4, Fig. 6 & App. B; Exh. 14: 2010 Section 401 Water Quality Certification Application at 2, 13; Exh. 15: 2011UIC Consent Decree ¶¶ 28-29; Exh. 16: 1996 UIC Permit at 7.

Defendant first began discharging wastewater into Injection Wells 1 and 2 at the LWRF in May 1982, and began additional discharges into Injection Wells 3 and 4 in 1985. Answer ¶ 21; Exh. 17: First Amended Complaint (Dkt. No. 36) ¶ 43. Defendant has continued discharging into some or all of the four injection wells on a nearly daily basis to the present. Answer ¶ 21; First Amended Complaint ¶ 43; see, e.g., Exh. 2: Final Tracer Dye Study Report at Table 1-2; Exh. 18: 2008 Injection Records; Exh. 19: 2009 Injection Records; Exh. 20: 2010 Injection Records; Exh. 21: 2011 Injection Records; Exh. 22: 2012 Injection Records; Henkin Decl. ¶¶ 23-25.

On average, defendant disposes of three to five million gallons of wastewater per day into the LWRF's injection wells. Answer ¶ 22. In recent years, Wells 3 and 4 have served as "the primary injection wells, receiving more than 80 percent of the treated wastewater" from the LWRF. Tracer Study at ES-21 & Table 1-2. In the nearly five-year period from January 1, 2008 through August 31, 2012, there were only seven days when defendant did not discharge effluent into both Wells 3 and 4, and, on two of those days, when one well was out of service, the other was used. See 2010 Injection Records; 2011 Injection Records; Henkin Decl. ¶¶ 17-18.

Defendant does not have an NPDES permit for its discharges from the LWRF injection wells. Answer ¶¶ 2, 12, 31.

B. The LWRF Injection Wells Have A Hydrologic Connection To The Pacific Ocean At Kahekili Beach.

Even prior to the construction of the LWRF, defendant was well aware that effluent discharged from the injection wells into groundwater below the facility would not stay there. When the project underwent environmental review in 1973, defendant's consultant readily acknowledged "the effluent will eventually get into the ocean." Exh. 23: 1973 Environmental Impact Statement at 91.

A couple of decades later, when defendant was considering upgrades to the LWRF, the conventional wisdom regarding the fate of effluent discharged from the injection wells had not changed. In its environmental assessment, defendant noted:

> Effluent from the Lahaina Wastewater Reclamation Facility currently is discharged via injection wells to fractures in the underlying basalt. This effluent, via gravity and the pressure from up-gradient groundwater, flows towards the ocean.

Exh. 24: 1991 Environmental Assessment at 6-2. Defendant understood that the marine environment was on the receiving end of pollutants from the LWRF injection wells, conceding that "[t]reatment plant effluent contributes various constituents, including but not limited to, suspended solids, dissolved oxygen, and nutrients such as nitrogen and phosphorous to the ocean." Id. at 6-3.

Since then, study after study has confirmed that LWRF effluent discharges into groundwater and then flows with that groundwater to the ocean, emerging offshore of Kahekili Beach. In the summer of 2007, marine biologist Dr. Jennifer Smith and other researchers surveyed the waters around Maui, using isotopes of nitrogen associated with human waste ($\delta^{15}N$) in marine algae to identify locations of significant sewage inputs into the marine environment. Smith Decl. ¶ 7.[2] The study identified the ocean off Kahekili Beach as a hot spot for sewage input, with algae samples grown over freshwater seeps in the nearshore waters containing the highest $\delta^{15}N$ values ever reported in the scientific literature. Id. ¶ 8. The discovery

[2] "$\delta^{15}N$" refers to a nitrogen isotope ratio used to distinguish between naturally-occurring nitrogen or nitrogen from fertilizer, and nitrogen derived from sewage. Id. ¶ 15. Naturally-occurring nitrogen and nitrogen from fertilizer have low levels of $\delta^{15}N$, while sewage that has gone through a treatment plant has notably higher levels.

of record levels of $\delta^{15}N$ in algae grown over the Kahekili seeps indicated that wastewater from the LWRF was entering the ocean through the seeps. Id. ¶ 16.

Dr. Smith and her fellow researchers returned to Kahekili in 2009 to determine the extent of the LWRF effluent plume across the coral reef at Kahekili, deploying samples of *Ulva fasciata* – a seaweed that has caused nuisance macroalgal blooms in shallow coastal waters around Maui – at 32 sites spanning the Kahekili area. Id. ¶ 17. The researchers found that all samples deployed over freshwater seeps drastically and significantly increased in $\delta^{15}N$ values. Id. Significant increases in algal $\delta^{15}N$ values were observed throughout the nearshore shallow region, including sites 345 meters to the south of the freshwater seeps. Id.; Exh. 8: Elevated $\delta^{15}N$ Values at Kahekili. The study's results confirmed that injected effluent from the LWRF is continuously flowing through the reef at Kahekili and then subsequently flows to the south. Smith Decl. ¶ 17.

Also in 2009, the U.S. Geological Survey ("USGS") published the results of its study of nearshore marine waters at Kahekili, which "convincingly" detected a wastewater plume from the LWRF injection wells. Exh. 4: 2009 USGS Study at 65; see also id. at Fig. 40. The USGS found that "[t]reated wastewater presence was confirmed by multiple 'inherent' wastewater tracers, the most conclusive being pharmaceuticals, organic waste indicator compounds, and heavy $\delta^{15}N$. Id. at 68; see also id. at iii. The USGS study confirmed Dr. Smith's earlier, "convincing

detection of the effluent plumes offshore" at Kahekili using algae $\delta^{15}N$ surveys. Id. at 9; see also Paytan Decl. ¶ 6.

After reviewing Dr. Smith's and USGS's studies, EPA concluded the studies "strongly suggest that effluent from the facility's injection wells is discharging into the near shore coastal zone of the Pacific Ocean." Exh. 25: 3/10/10 EPA Letter at 2. Consequently, EPA insisted that, before it would give further consideration to defendant's UIC permit renewal application for the LWRF, defendant would first have to secure Clean Water Act section 401 certification to ensure that continued use of the injection wells "will not violate applicable water quality standards." Id.

In 2011, EPA collaborated with the State of Hawai'i Department of Health ("DOH"), the U.S. Army Engineer Research and Development Center and researchers at the University of Hawai'i to investigate the "existence of a hydraulic connection between the injection of treated wastewater effluent at the ["LWRF"] and nearby coastal waters, confirm locations of emerging injected effluent discharge in these coastal waters, and determine a travel time from the LWRF injection wells to the coastal waters." Exh. 2: Final Tracer Dye Study Report at ES-1. The centerpiece of the study was the addition of tracer dye to the LWRF injection wells and the subsequent monitoring of the nearshore seeps off Kahekili Beach for the arrival of the dye in the marine environment. Paytan Decl. ¶¶ 6-15. Fluorescein dye that had been added to LWRF Injection Wells 3 and 4 was first detected at Kahekili's nearshore seeps eighty-four (84) days after being placed in

the wells and continued to flow to the ocean, with average travel time to the seeps of 14 to 16 months. Final Tracer Dye Study Report at ES-1; Paytan Decl. ¶ 15. The study's results "conclusively demonstrate that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui." Final Tracer Dye Study Report at ES-3; see also Paytan Decl. ¶¶ 5, 17, 36; Smith Decl. ¶¶ 11, 13.

C. Groundwater Emerging From Kahekili's Seeps Substantially Affects The Chemical, Physical and Biological Integrity Of The Nearshore Marine Waters At Kahekili.

The Tracer Dye Study determined that the average total discharge from Kahekili's nearshore seeps and surrounding diffuse flow is about 2.19 to 3.33 million gallons per day ("mgd"), with the freshwater component of that flow about 1.61 to 2.88 mgd. Final Tracer Dye Study Report at ES-2; Paytan Decl. ¶ 24. Since the groundwater discharging at Kahekili's seeps differs markedly from the surrounding ocean water in terms of temperature, nutrient concentration, acidity, salinity and dissolved oxygen, the millions of gallons of groundwater discharging through the seeps each day have substantial effects on the chemical, physical and biological integrity of the nearshore marine waters. Paytan Decl. ¶¶ 5, 23-36; Smith Decl. ¶¶ 13-40. The fact that the groundwater is percolating up from the nearshore seeps through the reef's limestone framework renders it particularly influential on Kahekili's biota, since there is no way for corals and reef-building

organisms to escape from the low salinity, low pH, low oxygen and high temperature water that is laden with inorganic nitrogen and phosphorus. Smith Decl. ¶ 13.

1. Nutrients.

As discussed above, researchers have documented in the groundwater discharging from Kahekili's nearshore seeps the highest levels of sewage-derived nitrogen ever recorded. These exceptionally elevated $\delta^{15}N$ values have allowed researchers to track the plume of effluent-rich groundwater emerging from the seeps across a broad swath of Kahekili's nearshore waters, vividly illustrating the groundwater's substantial influence on the receiving water's chemistry. Id. ¶¶ 17-18 & Exh. 8; 2009 USGS Study at iii, Fig. 40. Water quality samples taken from the seeps also test unusually high for another nutrient, phosphorous, when compared with background concentrations along the West Maui coast. Paytan Decl. ¶ 33; Smith Decl. ¶¶ 11, 19, 40.

In addition to affecting the chemical integrity of Kahekili's nearshore waters, the high levels of nutrients pose a serious threat to coral reefs. Smith Decl. ¶¶ 9, 20-21, 40. The primary threat comes from the potential for elevated levels of nutrients to accelerate growth rates of fleshy seaweed. On a healthy reef, corals and algae compete for space and often co-exist in a balance where a combination of low nutrient levels and high rates of grazing by herbivorous fishes prevent algae

from overgrowing or dominating benthic substrates. When these factors are altered substantially, such as with the introduction of nutrient-laden wastewater, a "phase-shift" can occur where an environment dominated by reef-building corals can shift to dominance by fleshy algae, which compete with corals and can overgrow and even kill them, ultimately destroying the reef and eliminating habitat for reef-dependent fish and other marine animals.

The threats from nutrient input to the biological integrity of Kahekili's nearshore waters are more than theoretical. Id. ¶ 22. The coral reefs at Kahekili have been repeatedly subjected to algal blooms, which have contributed to a dramatic decline in coral cover – from 55% to 33% between 1994 and 2006 – and associated harm to reef-dependent species. Id. ¶¶ 22-25 & Exhs. 9-10.

2. Low pH (High Acidity).

The groundwater discharging from the seeps at Kahekili is substantially lower in pH (i.e., more acidic) than the receiving ocean water. Paytan Decl. ¶ 31; Smith Decl. ¶ 29. In addition to causing substantial changes to the local ocean's chemistry, the addition of low-pH groundwater can have substantial negative effects on coral health. Smith Decl. ¶¶ 29-30. Ocean acidification reduces the amount of carbonate ions available for species such as corals, mussels, and limpets that build calcium carbonate shells and skeletons and simultaneously promotes the growth of seaweeds that compete with corals. Id. ¶ 27. Notably, the pH values

measured at the Kahekili seeps are substantially lower (more acidic) than the pH most researchers use to assess the dire effects of global ocean acidification that is expected to occur by the year 2100, when some species of reef-building corals and coralline algae will begin to dissolve and suffer mortality. Id. ¶¶ 28-30.

3. Low Salinity.

The groundwater that is coming out of the submarine seeps at Kahekili is much lower in salinity than the seawater at the control sites, substantially altering the chemistry of the waters surrounding the seeps. Smith Decl. ¶ 32; Paytan Decl. ¶ 34. This low salinity poses threats to Kahekili's coral reefs, which have evolved to live in seawater, not fresh water. Smith Decl. ¶¶ 31, 33. Indeed the salinity values measured at Kahekili's seeps are much lower than has been observed in large-scale, fresh-water coral reef kills in Hawai'i. Id. ¶ 32.

4. Low Dissolved Oxygen.

Oxygen concentrations in the groundwater discharging from Kahekili's seeps are substantially lower at than in marine water elsewhere in West Maui. Smith Decl. ¶ 35; Paytan Decl. ¶ 34. This alteration to the chemistry of the marine water at Kahekili likely adversely affects the health of the corals and other animals that are exposed to LWRF effluent discharging from the seeps. Smith Decl. ¶¶ 34-36; Paytan Decl. ¶¶ 34-35. Fleshy seaweeds that compete with corals are much more tolerant of low oxygen concentrations than are corals. Smith Decl. ¶ 34.

Moreover, when exposed for a long enough time to low oxygen conditions, corals essentially get suffocated, leading to loss of coral tissue and mortality. The low oxygen concentrations from polluted groundwater are likely contributing to the coral reef's decline at Kahekili. Id. ¶ 35.

5. High Temperature.

In addition to the substantial changes to the chemistry of Kahekili's nearshore waters, the groundwater discharging through the seeps has a profound effect on the receiving water's physical properties. The groundwater is substantially warmer than ocean water collected from control sites to the north and south of the seeps. Paytan Decl. ¶ 25; Smith Decl. ¶ 38. As part of the Tracer Dye Study, researchers mapped the spatial extent of the influence of the groundwater's elevated temperature and found that the thermal anomaly extends over more than 167 acres. Paytan Decl. ¶¶ 26-29; Exh. 3: Interim Tracer Dye Study Report at Fig. ES-5.

The groundwater's warm temperature can have devastating effects on the coral reefs at Kahekili, making them prone to bleaching and subsequent mortality. Smith Decl. ¶ 37. At a minimum, the warm water percolating through the reef adds to strain on the corals' health. Id. ¶ 38.

IV. DEFENDANT'S UNPERMITTED DISCHARGES OF WASTEWATER FROM LAHAINA INJECTION WELLS 3 AND 4 VIOLATE THE CLEAN WATER ACT

While there is ample evidence that the discharges from the LWRF's injection wells are causing substantial harm to the marine environment at Kahekili, questions related to "the seriousness of [defendant's] violation[s]" are not currently before the Court, as they relate only to the "amount of [the] civil penalty," not liability. 33 U.S.C. § 1319(d); see generally Paytan Decl.; Smith Decl. The Ninth Circuit has instructed:

> 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.

Committee To Save Mokelumne River, 13 F.3d at 309 (emphasis added).

Accordingly, to establish defendant's "liability under the Clean Water Act," plaintiffs must prove only that defendant has "(1) discharged a pollutant …; (2) into navigable waters …; (3) from a point source …; (4) without a discharge permit," regardless of the effect of those discharges on the receiving waters. Id.; see also Order Denying Motion to Dismiss (Dkt. No. 34) at 5. As a matter of law, each of these factors is present here, warranting entry of summary judgment in plaintiffs' favor.

A. Defendant Has Discharged A Pollutant.

The Clean Water Act's broad definition of "pollutant" includes sewage, sewage sludge, biological materials and municipal waste. 33 U.S.C. § 1362(6). Wastewater from sewage treatment plants like the LWRF is unquestionably a "pollutant" under the Act. Hawaii's Thousand Friends, 821 F. Supp. at 1391.

Defendant admits that, "on average, it disposes of 3 to 5 million gallons of treated wastewater per day into LWRF's injection wells." Answer ¶ 22; see also Exh. 26: 2012 NPDES Permit Application at 4; 2008 Injection Records; 2009 Injection Records; 2010 Injection Records; 2011 Injection Records; 2012 Injection Records; Final Tracer Dye Study Report at Table 1-2. As a matter of law, defendant has discharged, and continues to discharge on a nearly daily basis, one or more pollutants within the meaning of the Act.

B. Defendant Discharges Wastewater Into Waters Under Clean Water Act Jurisdiction.

The Clean Water Act defines the term "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The nearshore ocean waters at Kahekili unquestionably constitute navigable waters within the meaning of the statute. See Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality) ("the phrase 'the waters of the United States' includes" oceans); 33 U.S.C. § 1362(8) (phrase "territorial seas" extends from the coastline "seaward a distance of three miles").

Here, defendant does not discharge wastewater directly into the ocean. Rather, the LWRF injection wells discharge directly into groundwater located beneath the facility. See 1993 Injection Well Report at 4 & App. B; Def's Section 401 Water Quality Certification Application at 2, 13; 2011UIC Consent Decree ¶¶ 28-29. As discussed in Part III.B, supra, it is undisputable that the groundwater into which LWRF Injection Wells 3 and 4 discharge wastewater has a hydrologic connection to the nearshore waters at Kahekili.

The Supreme Court has held that, to achieve the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the statutory prohibition on unpermitted discharges of pollutants extends to "some waters that are not navigable in the traditional sense." Rapanos, 547 U.S. at 767 (Kennedy, J., concurring). In United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), the Court emphasized that "Congress chose to define the waters covered by the Act broadly" and had made "it clear that the term 'navigable' as used in the Act is of limited import." Id. at 133. Noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems," the Court upheld Army Corps regulations that interpreted "the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." Id. (noting the regulation "abandon[ed] traditional notions of 'waters'").

Earlier in this case, this Court denied defendant's motion to dismiss, which was premised on defendant's argument that "it is not discharging pollutants into navigable waters." Order Denying Motion to Dismiss at 6. The 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." Id.

To identify the relevant circumstances, this Court looked to the Ninth Circuit's decision in Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007). Id. In that case, the Ninth Circuit 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 water of the United States protected by the [Clean Water Act]." Northern California River Watch, 496 F.3d at 995. Water continuously flowed between Basalt Pond and the Russian River via the "vast underground aquifer." Northern California River Watch v. City of Healdsburg, 2004 WL 201502, *2 (N.D. Cal. Jan. 23, 2004).

To determine whether an NPDES permit was required for discharges into Basalt Pond, the Ninth Circuit examined the Supreme Court's decision in Rapanos, concluding that "Justice Kennedy's concurrence provides the controlling rule of law." Id. at 999-1000. In Justice Kennedy's view, in order for a water to be protected under the Clean Water Act, "the body of water itself need not be

continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable." Id. at 995.

As this Court explained:

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

Order Denying Motion to Dismiss at 7 (citations omitted).

The question here, then, is whether the groundwater underlying the LWRF, which has an undeniable hydrologic connection to the Pacific Ocean, "has a significant effect on 'the chemical, physical, and biological integrity'" of the receiving waters at Kahekili. Northern California River Watch, 496 F.3d at 1000. As discussed at length in Part III.C, supra, the groundwater discharging at Kahekili's seeps differs markedly from the surrounding ocean water in terms of temperature, nutrient concentration, acidity, salinity and dissolved oxygen. Accordingly, the millions of gallons of groundwater discharging through the seeps each day have profound effects on the chemistry and temperature of the receiving ocean waters. See, e.g., Smith Decl. ¶¶ ¶¶ 17-18 & Exh. 8 (plume of nitrogen-rich groundwater seeps across a broad swath of Kahekili's nearshore waters); Interim

Tracer Dye Study Report at Fig. ES-5 (temperature anomaly from groundwater extends more than 167 acres). Moreover, particularly because the groundwater into which the injection wells discharge percolates up through the structure of the reef itself, the groundwater significantly affects the biological integrity of Kahekili's coral reef ecosystem. Smith Decl. ¶ 13; Cf. Riverside Bayview Homes, 474 U.S. at 132 (Clean Water Act's use of "the word 'integrity' ... refers to a condition in which the natural structure and function of ecosystems [are] maintained") (quoting H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76 (1972)).

Because protecting the groundwater underneath the LWRF is essential to protect the ocean water to which it is hydrologically connected, as a matter of law, the groundwater into which defendant's injection wells discharge "warrants protection as a 'navigable water' under the [Clean Water Act]." Northern California River Watch, 496 F.3d at 1001; see also Association Concerned Over Res. and Nature, Inc. v. Tenn. Aluminum Processors, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) ("groundwater is subject to the [Clean Water Act] provided an impact on federal waters"); Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 181 (D. Puerto Rico 2009) (same); 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, is subject to regulation by NPDES permit"); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (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").[3]

C. The LWRF Injection Wells Are Point Sources.

A "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, … tunnel, conduit, [or] well … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Each of the LWRF injection wells consists of a long pipe that extends approximately 200 feet underground, discharging wastewater into a well. See 2004 Underground

[3] Plaintiffs are not, at this point, asking the Courtto make any findings of fact regarding the environmental harm associated with discharges from the LWRF injection wells into Kahekili's nearshore waters. Rather, at the liability phase of this proceeding, the evidence presented in Part III.C, supra, serves to confirm that the groundwater coming out of the nearshore seeps can have a substantial effect on the marine environment at Kahekili, bringing that groundwater within the ambit of Clean Water Act jurisdiction. Simply put, because the groundwater into which the LWRF injection wells discharge can materially affect achievement of Congress's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's water," the Clean Water Act regulates defendant's activities. 33 U.S.C. § 1251(a).

Injection Control ("UIC") Permit Application at Attachment M. By definition, each injection well is a point source.

D. Defendant Does Not Have A Permit For The Discharges From The LWRF Injection Wells.

Defendant admits that it does not have an NPDES permit for discharges from the LWRF injection wells. Answer ¶¶ 2, 12, 31.

V. DEFENDANT VIOLATED THE CLEAN WATER ACT EACH DAY IT DISCHARGED WASTEWATER FROM INJECTION WELLS 3 OR 4 WITHOUT AN NPDES PERMIT AND WILL CONTINUE TO VIOLATE THE ACT UNTIL IT SECURES PERMIT COVERAGE

The Clean Water Act provides for the Court to impose civil penalties based on the number of days that "each violation" persists. 33 U.S.C. § 1319(d); see also Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810, 817 (9th Cir. 2001) ("each distinct violation is subject to a separate daily penalty assessment"). In this case, because defendant lacked an NPDES permit for its wastewater discharges from the LWRF injection wells, "the number of violations is readily calculated by simply counting the number of days of illegal discharges." United States v. Gulf Park Water Co., Inc., 14 F. Supp. 2d 854, 857-58 (S.D. Miss. 1998).

In citizen enforcement actions brought under the Clean Water Act, the otherwise applicable "five-year statute of limitations period is tolled sixty days before the filing of the complaint, to accommodate the statutorily-mandated sixty-

day notice period." Sierra Club v. Chevron, USA, Inc., 834 F.2d 1517, 1524 (9th Cir. 1987). Since plaintiffs filed their complaint on April 16, 2012, the relevant period for calculating the number of days that defendant has violated the Clean Water Act extends back to February 15, 2007. See Complaint (Dkt. No. 1).

For the period from January 1, 2008 through March 31, 2013, defendant's own records of operations at the LWRF show that defendant discharged wastewater from Injection Well 3 every day during 2008 (366 days), every day during 2009 (365 days), on 362 days during each of 2010 and 2011, every day during January through August and October through December of 2012 (336 days) and every day during the first three months of 2013 (90 days), for a total of 1,881 days of unpermitted discharges. See 2008 Injection Records; 2009 Injection Records; 2010 Injection Records; 2011 Injection Records; 2012 Injection Records; Final Tracer Dye Study Report at Table 1-2; Henkin Decl. ¶¶ 17-25. The same records show that defendant discharged wastewater from Injection Well 4 every day during 2008 (366 days), every day during 2009 (365 days), on 362 days during each of 2010 and 2011, every day during 2012 (366 days) and every day during the first three months of 2013 (90 days), for a total of 1,911 days of unpermitted discharges.

Due to this case's procedural history, plaintiffs have not yet secured discovery regarding the number of days that defendant discharged pollutants from LWRF Injection Wells 3 and 4 in 2007 and in the year since March 2013, and from

Injection Well 3 during the month of September 2012. Henkin Decl. ¶¶ 2-3.[4] For purposes of this motion, plaintiffs respectfully ask the Court to hold that defendant violated the Clean Water Act on every day that it discharged wastewater from either Injection Well 3 or Injection Well 4 and that those violations will continue until defendant obtains and complies with an NPDES permit for any discharges from either injection well in the future. See Environmental Prot. Agency v. State Water Resources Control Bd., 426 U.S. at 205 ("it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms").

In addition, the Court should find that (1) 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 Clean Water Act violations, and (2) 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 Clean Water Act violations. In total, the evidence before the Court establishes 3,792 days of violation.

VI. CONCLUSION

In adopting the Clean Water Act, Congress established the NPDES permit program as its chosen "means of achieving and enforcing the effluent limitations"

[4] Plaintiffs expect that defendant will likely be willing stipulate to the number of days that Wells 3 and 4 were used during those time periods. If not, plaintiffs reserve the right to adduce additional evidence later in this proceeding to establish defendant's violations during those time periods.

required to protect our nation's waters. Environmental Prot. Agency v. State Water Resources Control Bd., 426 U.S. at 205. To ensure that permits would be both secured and complied with, Congress "categorically prohibit[ed] any discharge of a pollutant from a point source without a permit" and provided for severe penalties for those who subvert the statutory scheme. Committee to Save Mokelumne River, 13 F.3d at 309; see generally 33 U.S.C. § 1319.

For decades, defendant has defied Congress's ban, discharging on a nearly continuous basis wastewater into groundwater that flows into the ocean and through the coral reefs at Kahekili, without an NPDES permit. It is high time to hold defendant accountable for its illegal conduct. Plaintiffs respectfully submit that the undisputed facts in this case compel a finding that defendant's discharges of pollutants from LWRF Injection Wells 3 and 4 have violated, and continue to violate, the Clean Water Act and that entry of the requested partial summary judgment is warranted.

Dated: Honolulu, Hawai'i, March 17, 2014.

EARTHJUSTICE
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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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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 OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing: May 12, 2014, 1:30 p.m.
Judge: Susan Oki Mollway
Trial Date: Not yet determined

Related to: Dkt No. 72, Plaintiffs' Motion for Partial Summary Judgment

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I. INTRODUCTION

Summary judgment is not appropriate here because there are factual disputes as to whether the County of Maui ("County") requires a National Pollutant Discharge Elimination System ("NPDES") permit for discharges from its Lahaina Wastewater Treatment Facility ("LWRF"). Plaintiffs present the question before the Court as a "straightforward, threshold question [of] whether the discharge of pollutants – regardless of quantity or environmental impact – into waters of the United States is authorized under an NPDES permit." Motion for Partial Summary Judgment ("Plaintiffs' Motion" or "MSJ") at 5. Plaintiffs are wrong. Here, there is no discharge of pollutants into waters regulated under the Clean Water Act ("CWA"). Rather, the County's underground injection control ("UIC") wells discharge into groundwater, which the Environmental Protection Agency ("EPA") is currently proposing to exclude from CWA jurisdiction. Yet even if discharges to regulated waters via groundwater fall within CWA jurisdiction, there is a genuine issue of material fact as to whether the County's discharges require an NPDES permit. The County's wells must have a direct and immediate hydrological connection to regulated waters, an inquiry that Plaintiffs did not consider. The County maintains there is no such direct and immediate connection. In addition, the discharge must "significantly affect the chemical, physical, and biological integrity" of the receiving waters. Plaintiffs speculate there may be

significant effects. This is insufficient to require an NPDES permit. Moreover, the County disagrees. Finally, even if there are significant effects, it is not clear the County's UIC wells are the source of those effects.

Plaintiffs also request that the Court determine the number of days the County allegedly violated the CWA. Such a finding concerns the amount of the penalty and should not be considered at this phase of the litigation where Plaintiffs are solely seeking a liability determination. Further, the County disputes Plaintiffs' allegation that the County violated the CWA every day it discharged to the wells.

In light of the above genuine issues of material fact, Plaintiffs' Motion should be denied.

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be denied if there is a "genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56 (c)); see also Fed. R. Civ. P. 56(a). "[D]isputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The evidence and any inferences drawn therefrom "must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, 369 U.S. 654, 655 (1962).

III. SUMMARY JUDGMENT IS NOT APPROPRIATE BECAUSE THE COUNTY DISPUTES PLAINTIFFS' ALLEGATION THAT IT DISCHARGES POLLUTANTS INTO NAVIGABLE WATERS

Plaintiffs allege the County is liable based on a four-part inquiry: "[T]o establish defendant's 'liability under the Clean Water Act,' plaintiffs must prove only that defendant has '(1) discharged a pollutant . . . ; (2) into navigable waters. . . ; (3) from a point source . . . ; (4) without a discharge permit' regardless of the effect of those discharges on the receiving waters." MSJ at 16. This inquiry is appropriate when there is a direct discharge to navigable waters. Here, the inquiry is more complex. The County disputes Plaintiffs' allegation that it discharged into navigable waters under EPA's proposed exclusion of groundwater from CWA regulation. Even under EPA's prior CWA interpretation, whereby groundwater hydrologically connected to navigable waters was regulated on a case-by-case basis, the connection is too attenuated to require an NPDES permit.

A. The County's Discharges Do Not Require an NPDES Permit Because Groundwater Is Not a Navigable Water Under the CWA

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas" without further clarification. 33 U.S.C. § 1362(7). In cases of statutory ambiguity, deference to the agency interpretation is merited. Chevron, USA Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); see

also Wash., Dep't of Ecology v. U.S.E.P.A., 752 F.2d 1465, 1469 (9th Cir. 1985) ("When a statute is silent or unclear with respect to a particular issue, we must defer to the reasonable interpretation of the agency responsible for administering the statute. By leaving a gap in the statute, Congress implicitly has delegated policy-making authority to the agency." (citing Chevron)). In determining the meaning of navigable waters, the Ninth Circuit concurs that agency deference is appropriate: "By not defining further the meaning of 'waters of the United States,' Congress implicitly delegated policy-making authority to the EPA and the Corps, the agencies charged with the CWA's administration." S.F. Baykeeper v. Cargill Salt Div., 481 F. 3d 700, 704 (9th Cir. 2007).

EPA is currently undergoing a rulemaking to clarify the meaning of navigable waters under the CWA ("Proposed Rule"). The Proposed Rule unequivocally excludes groundwater from CWA jurisdiction: "The following are not 'waters of the United States' . . . Groundwater, including groundwater drained through subsurface drainage systems . . . ." See Request for Judicial Notice ("RJN") ¶ 1, Ex. 21 (79 Fed. Reg. 22,188, 22,263 (Apr. 21, 2014)). Further emphasizing the groundwater exclusion, waters not traditionally considered navigable waters are classified as "other waters." "[O]ther waters" are evaluated "[o]n a case-specific basis" to determine if they have a significant nexus to regulated waters. Id. at 22,263. However, EPA explains that "[w]aters and

features that are determined to be excluded . . . will not be jurisdictional under any of the categories in the proposed rule . . . even if they would otherwise satisfy the regulatory definition." Id. at 22,193. Groundwater is therefore excluded *even if* it has a significant nexus to regulated waters. Instead, groundwater may serve as a conduit between "other waters" and navigable waters, but itself is not regulated. See, e.g., id. at 22,248 ("The hydrologic connectivity of 'other waters' to downstream waters occurs on a gradient and can include waters that have groundwater or occasional surface water connections . . . .").

As noted by Plaintiffs, "the County does not discharge wastewater directly into the ocean." MSJ at 18. Rather, the County's UIC wells "discharge directly into groundwater located beneath the facility."[1] Id. Regardless of any hydrological connection to navigable waters, under EPA's Proposed Rule, this groundwater is excluded from CWA jurisdiction. Accordingly, the Court should deny Plaintiffs' Motion and dismiss this suit.

B. Even If Groundwater Hydrologically Connected to Navigable Waters May Be Regulated, a Genuine Issue of Material Fact Exists As to Whether the Connection Here Is Sufficient to Require an NPDES Permit

Prior to EPA's Proposed Rule categorically excluding groundwater, groundwater hydrologically connected to navigable waters could be regulated

[1] The County's UIC wells operate pursuant to UIC permits issued by the State of Hawaii and EPA. These same agencies would be responsible for issuing a NPDES permit for the County's UIC wells, if a permit is required.

under the CWA on a case-by-case basis. As noted by the Court, "[w]hether a discharge of wastewater into an injection well qualifies as a discharge of pollutants into navigable waters depends on the circumstances." Hawai'i Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2012 WL 3263093, at *2 (D. Haw. Aug. 8, 2012). In such cases, regulated discharges must have a direct and immediate connection to navigable waters and significant effects on the receiving navigable waters, a fact recognized by Plaintiffs.[2] Even under this prior interpretation of the CWA, the attenuated connection between the County's UIC wells and navigable waters does not warrant issuance of an NPDES permit.

1. A Genuine Issue of Material Fact Exists As to Whether There is a Direct and Immediate Hydrological Connection Between the County's UIC Wells and Navigable Waters

As an initial step, a direct and immediate hydrological connection must exist between discharges to the County's UIC wells and navigable waters. Plaintiffs improperly assume a connection without consideration of whether the connection is direct and immediate.

[2] Despite referring to the inquiry before the Court as a "straightforward, threshold question," Plaintiffs acknowledge that whether a discharge into injection wells falls under the CWA "depends on the circumstances" and requires consideration of whether the discharge has a significant effect on "the chemical, physical, and biological integrity" of the receiving waters. MSJ at 5, 19, 20.

a. ***An NPDES Permit May Be Required for Discharges to Groundwater Only When There Is a Direct and Immediate Hydrological Connection***

A hydrological connection between groundwater and navigable waters alone is insufficient to require an NPDES permit. Rather, the connection must be direct and immediate.

> . . . EPA is proposing to make clear that *a* general hydrologic connection between *all* waters is not sufficient to subject the owner or operator of a point source to liability under the Clean Water Act. Instead, consistent with the case law, there must be information indicating that there is a "direct" hydrologic connection to the surface water at issue.

RJN ¶ 2, Ex. 22 (66 Fed. Reg. 2960, 3017 (Jan. 12, 2001)); see also RJN ¶ 3, Ex. 23 (63 Fed. Reg. 7858, 7881 (Feb. 17, 1998)) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a *direct and immediate hydrologic connection* . . . between the groundwater and the surface water.") (emphasis added). EPA affirmed the need for a case-specific inquiry into the connection as recently as January 2012. RJN ¶ 4, Ex. 24 (EPA letter dated Feb. 13, 2012).

Various courts, including the Ninth Circuit, have followed EPA's interpretation. See N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007) (finding a hydrological connection between a pond and nearby river where "a change in the water level in one *immediately affects* the water level in the

other.") (emphasis added); Greater Yellowstone Coal. v. Larson, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) (affirming EPA's finding of no direct discharge because of the significant time and distance required for pollutants to travel to surface water via groundwater); Ass'n Concerned Over Res. And Nature, Inc. v. Tenn. Aluminum Processors, No. 1:10-0084 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) ("[O]f those courts that find that CWA jurisdiction applies to groundwater, the groundwater must have a direct hydrologic connection to surface waters that are waters of the United States.") (footnotes omitted).

b. *The Connection Between the County's UIC Wells and Navigable Waters Is Not Direct and Immediate*

Any connection that may exist between the County's UIC wells and navigable waters is not direct and immediate. The spatial and temporal distance between the wells and navigable waters is too great to be direct and immediate. Moreover, the discharged water is transformed as it moves from the wells through groundwater to navigable waters, precluding any finding of a "direct" connection.

A 2013 Lahaina Groundwater Tracer Study ("Tracer Study") found that treated water ("effluent") discharged from the County's UIC wells mixes with groundwater and is transported to the near-shore waters off of Kahekili Beach, approximately 0.5 miles southwest of the LWRF. Paulsen Dec., ¶¶ 11, 25. The Tracer Study identified the area of discharge as two small and adjacent clusters of submarine springs or seeps as well as a diffuse discharge. Id. at ¶ 12. On average,

the groundwater-effluent mixture took between 14 to 16 months to reach the seeps. Id. at ¶ 25.

Due to this spatial and temporal distance, effluent entering the UIC wells reaches navigable waters in an altered state. The Tracer Study found a "significant loss of nitrogen" caused by reactions occurring as the groundwater-effluent mixture travels away from the wells. Id. at ¶ 26. Mean concentrations of total nitrogen decreased roughly fivefold as the UIC discharge combines with groundwater and travels to the near-shore waters off of Kahekili Beach. Id. at ¶ 27. Phosphorus, on the other hand, is "enriched" during transport, with mean concentrations increasing roughly 2.7-fold between injection into the UIC well and discharge at the seeps. Id. at ¶¶ 26-27. As discussed below, these changes do not significantly affect the near-shore waters off of Kahekili Beach. However, these alterations demonstrate that the injected effluent has different chemical properties from the groundwater-effluent mixture discharged from the seeps. Hence, it is not the same material, eliminating any claim of a "direct" discharge.

The agencies agree there is an "indirect" connection between the County's UIC wells and navigable waters: "it appears the facility's injected treated effluent will directly enter State groundwater and *indirectly* enters the Pacific Ocean . . . ." RJN ¶ 5, Ex. 25 (DOH Letter dated Feb. 8, 2011) (emphasis added). Given the significant time and distance required for the discharge to reach navigable waters,

alteration of the groundwater/effluent mixture, and the agencies' own finding, the connection between the County's UIC wells and navigable waters is not direct and immediate. Accordingly, Plaintiffs' Motion should be denied.

2. A Genuine Issue of Material Fact Exists As to Whether There Is a Significant Nexus to Navigable Waters

In addition to a direct and immediate hydrological connection, the County's discharges to groundwater must "significantly affect the chemical, physical, and biological integrity" of navigable waters. Rapanos v. U.S., 547 U.S. 715, 780 (2006). Plaintiffs allege the discharges "*can* have a significant effect" on navigable waters. MSJ at 22, fn. 3 (emphasis added). This is insufficient to bring the discharges under CWA jurisdiction. Moreover, the County disputes that its discharges result in significant effects to navigable waters.

a. *Any Effects from the Connection Must Be Significant*

In Rapanos, the Supreme Court issued a 4-4-1 plurality opinion on the scope of the CWA's jurisdiction over wetlands, with a "significant nexus" test described in Justice Kennedy's opinion. The significant nexus test is the "controlling rule of law" in the Ninth Circuit. Healdsburg, 496 F.3d at 999-1000. A significant nexus exists if a water body "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Rapanos, 547 U.S. at 780. "[S]peculative or insubstantial [impacts] fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Id. The

existence of a hydrological connection does not necessarily satisfy the significant nexus test. As Justice Kennedy explained, a "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." Id. at 784-85.

EPA's Proposed Rule seeks to align the definition of navigable waters with Rapanos. RJN ¶ 1, Ex. 21 (79 Fed. Reg. at 22,213, 22,261). Agreeing with Justice Kennedy that a "mere hydrologic connection" is insufficient, "[t]he proposed definition recognizes that not all waters have this requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional." Id. at 22,195, 22,213. By rule, "[o]n a case-specific basis, other waters" must have a significant nexus to navigable waters, meaning the water "significantly affects the chemical, physical, or biological integrity" of the navigable water. Id. at 22,263. Recognizing that even Rapanos "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," the Proposed Rule aims to "minimiz[e] the number of case-specific determinations." Id. at 22,188. Accordingly, the Proposed Rule limits the significant nexus test to "other waters" and does not apply to excluded waters such as groundwater. Under

both the Proposed Rule and EPA's prior reading of the CWA, a water body not clearly regulated must have a significant nexus to navigable waters.

i. *Cases Cited by Plaintiffs Do Not Accurately Portray the Law*

Prior to Rapanos, courts were split about the reach of the CWA, including whether it encompassed groundwater. To support their allegation that the County's discharge "warrants protection as a navigable water," Plaintiffs cite a number of cases holding that groundwater adversely affecting navigable waters is subject to the CWA. MSJ at 21 (internal quotation marks and citations omitted). Plaintiffs ignore the discussion in each of these cases concerning the division among courts. Tenn. Aluminum Processors, 2011 WL 1357690, at *16 (M. ("Courts differ on whether groundwater is regulated under the CWA."); Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D. P.R. 2009) ("There is, in fact, a split among courts . . . ."); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001) ("The courts are split, however, on the issue of whether the discharge of pollutants into groundwater which find their way into and affect the waters of the United States are subject to CWA regulation."); Wash. Wilderness Coal. V. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("[Courts] are split, however, on the present question of whether tributary groundwater, which is naturally connected to surface water, is subject to CWA regulation."); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319

(S.D. Iowa 1997) ("Whether the legal concept of navigable waters includes groundwaters connected to surface waters is an unresolved question.") (citations omitted); Sierra Club v. Colorado Ref. Co., 838 F. Supp. 1428, 1433 (D. Colo. 1993) ("In sum, case law conflicts as to whether 'navigable waters' in the Clean Water Act encompass groundwater.").

Plaintiffs also ignore the multitude of decisions that found the CWA does *not* extend to groundwater. See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters."); Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1318 (D. Or. 1997) ("[T]he law as written, as intended by Congress . . . does not regulate even hydrologically-connected groundwater.").

Post-Rapanos cases cited by Plaintiffs recognized the role of the significant nexus test. Despite Plaintiffs' inference, Healdsburg did not find "as a matter of law, the groundwater into which defendant's injection wells discharge 'warrants protection as a "navigable water" under the [Clean Water Act].'" MSJ at 21. Rather, the Ninth Circuit applied the significant nexus test to find that a pond with groundwater and occasional surface water connections "significantly affects the physical, biological and chemical integrity of the [nearby] Russian River, and

ultimately warrants protection [of the pond] as a 'navigable water' under the CWA." Healdsburg, 496 F. 3d at 1001. Consistent with the Proposed Rule, where groundwater may be a conduit between "other waters" and navigable waters, the Ninth Circuit explained that an underground hydraulic connection established a "physical connection[]" because of the immediate effect of the pond on the river. Healdsburg, 496 F.3d at 1000; RJN ¶ 1, Ex. 21 (79 Fed. Reg. at 22,248). Chemical and biological effects on the river were also present. Healdsburg at 1000-01.

The other post-Rapanos decisions cited by Plaintiffs similarly required factual inquiries into the degree of connectivity and effects on receiving waters. In Tennessee Aluminum, the court explained that "groundwater must have a direct hydrologic connection to surface waters" to be regulated under the CWA. 2011 WL 1357690, at *17. The court denied defendants' motion to dismiss because factual inquiries into the connection were required. Id. at 18. In Hernandez, following the First Circuit's reasoning in Town of Norfolk v. U.S. Army Corp of Engr's, 968 F 2d 1438 (1st Cir. 1992) where an "ecological judgment" concerning a groundwater and surface water connection was required, the court held "there is a factual determination to be made as to the relationship between the groundwater . . . and the surface waters . . . , which may lead the fact finder to conclude that contamination of the groundwater has an adverse impact on waters of the United States." 599 F. Supp. 2d at 179, 181.

b. *The Effects Here Are Insufficient to Find a Significant Nexus to Navigable Waters*

Even under EPA's prior interpretation of the CWA, the connection between the County's wells and surface water is insufficient to require an NPDES permit. Moreover, Plaintiffs do not ask the Court to find there are significant effects. Rather, Plaintiffs ask the Court to grant summary judgment because the groundwater into which the County's UIC wells discharge "*can* have a substantial effect" on the receiving waters. MSJ at 22, fn. 3 (emphasis added). This is insufficient. Though EPA proposes to exclude groundwater as a navigable water, under its prior CWA interpretation, the County's discharges will "possess the requisite nexus . . . [only if they] significantly affect the chemical, physical, and biological integrity" of the receiving navigable waters. Rapanos, 547 U.S. at 717. The County disputes any allegation by Plaintiffs that a significant nexus exists.

Plaintiffs' expert, Dr. Adina Paytan, maintains that discharges from the seeps have an adverse impact on chemical and physical characteristics of the near-shore waters off of Kahekili Beach. See Declaration of Adina Paytan, Ph.D. ("Paytan Declaration") at ¶ 5 ("the continuous discharge from these seeps substantially alters the chemical and physical characteristics of the receiving ocean waters"). Plaintiffs' expert, Dr. Jennifer Smith, maintains that the discharge is negatively impacting the coral reef off of Kahekili Beach. Declaration of Jennifer E. Smith, Ph.D. ("Smith Declaration") at ¶ 39 ("the groundwater discharging

through the nearshore seeps at Kahekili has a profound effect on the biological integrity of the marine environment, including the coral reef ecosystem"), ¶ 40 ("the substantial quantities of LWRF effluent that are discharging from the nearshore seeps with natural groundwater are having a significant, adverse effect on Kahekili's coral reefs.")

The County's experts disagree. Dr. Paulsen maintains the discharges at the seeps do not "significantly affect the chemical, physical, and biological integrity of the near-shore waters off of Kahekili Beach." Paulsen Dec., ¶ 51. Similarly, Dr. Dollar believes "the coral reef in the near-shore waters off of Kahekili Beach is healthy, evidencing the fact that discharges from the NSG [North Seep Group] and SSG [South Seep Group] do not significantly affect the biological integrity of the nears-shore waters off of Kahekili Beach." Declaration of Steven Dollar, Ph. D., in Support of the County of Maui's Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Dollar Declaration"), ¶ 58.

To support their allegations of significant effects, Plaintiffs' experts rely on sampling data collected from piezometers located in the seeps (allowing collection of samples of seep material, with minimal or no mixing with ocean water). Dollar Dec., ¶ 14. Drs. Paulsen and Dollar assert that is inappropriate to rely on this seep data to demonstrate any significant effects because measurements at the seeps fail to account for mixing of the seep discharge with ocean water. Paulsen Dec., ¶¶ 23,

38; Dollar Dec., ¶ 12-13. Mixing throughout the ocean water column occurs as the seep discharge enters the ocean. Paulsen Dec., ¶¶ 34-37; Dollar Dec., ¶ 13. Winds, currents, tides, and waves further disperse the discharge from the seeps, transporting the discharge away from the seep areas. Paulsen Dec., ¶¶ 35, 40; Dollar Dec., ¶ 13. Accounting for mixing, the discharges at the seeps do not significantly affect the chemical, physical, and biological integrity of near-shore waters off of Kahekili Beach. Paulsen Dec., ¶¶ 22, 41; Dollar Dec., ¶¶ 10, 12-13.

Both Drs. Paulsen and Dollar dispute Plaintiffs' experts' opinions that seep discharge adversely affects nutrient concentrations, pH, temperature, dissolved oxygen content, or salinity in the near-shore waters off of Kahekili Beach. Paulsen Dec., ¶¶ 22, 23, 44, 46, 48-49; Dollar Dec., ¶¶ 17-20. As Dr. Dollar explains, concentrations of nutrients in the water columns of the seeps are similar to concentrations at the various control locations measured by the Hawaii Department of Health. Dollar Dec., ¶ 17. As Dr. Paulsen explains, the concentrations of nutrients measured at the seeps are similar to concentrations calculated at other West Maui locations. Paulsen Dec., ¶¶ 31, 42. These similarities hold true for measurements of pH, temperature, dissolved oxygen content, and salinity. Paulsen Dec., ¶¶ 44, 46, 48-49; Dollar Dec., ¶¶ 18-20. Any effects of the seep discharge are therefore attenuated, particularly given the small area of the seeps compared to

the entire reef. Paulsen Dec., ¶ 14 ("the reef is more than 200,000 times the total area of the individually measured seeps"), ¶ 39.

Dr. Smith relies heavily on the $\delta^{15}N$ concentrations measured at the seeps to support her opinion that seep discharges are adversely impacting the near-shore waters off of Kahekili Beach. Smith Dec. ¶¶ 15-22. However, as both Drs. Paulsen and Dollar explain, $\delta^{15}N$ concentrations are not relevant in evaluating the significant chemical, physical, and biological effects of seep discharges. Paulsen Dec., ¶ 28; Dollar Dec., ¶¶ 52-54. There are two stable isotopes of nitrogen: ^{14}N and ^{15}N. Dollar Dec., ¶ 52. The $\delta^{15}N$ value simply reflects the ratio between the two isotopes. Paulsen Dec., ¶ 28; Dollar Dec., ¶ 52. All nitrogen compounds contain both isotopes, with the concentrations varying depending on the material being analyzed. Dollar Dec., ¶¶ 52, 54. For example, the $\delta^{15}N$ value of fertilizer is low, while the $\delta^{15}N$ value of sewage is high. Id. Thus, the $\delta^{15}N$ value measured at the seeps simply confirms that some portion of the discharge is derived from effluent – a fact upon which all four experts agree. If anything, the $\delta^{15}N$ value measured at the seeps confirms the efficacy of the treatment occurring at the LWRF. Paulsen Dec., ¶ 28. Contrary to any suggestion by Dr. Smith, a high $\delta^{15}N$ value does not necessarily reflect any adverse environmental impact. Paulsen Dec., ¶ 28; Dollar Dec., ¶ 54.

Dr. Dollar's inspection of the reef on April 4, 2014 confirms that discharges at the seeps have not significantly affected the health of the reef. As Dr. Dollar explains, the LWRF has been operating for approximately 37 years, with no progressive decrease in discharge volume. Dollar Dec., ¶¶ 11, 41. Any adverse effects from this long-term operation would be evident as a gradient over the reef – with areas of the reef closest to the seeps being in worse condition than areas at a greater distance. Dollar Dec., ¶ 47. Dr. Dollar's recent inspection confirms that "all reef areas appeared essentially pristine, i.e., no observed bleached, diseased, or otherwise stressed corals." Dollar Dec., ¶ 44. Exhibits accompanying Dr. Dollar's Declaration, including April 2014 photos, corroborate his statements – the coral and other marine life are flourishing. Dollar Dec., Ex. 4, 6-12.

Dr. Dollar's inspection also illustrates the inaccuracies in Dr. Smith's statements suggesting "fleshy seaweeds" are dominant and overtaking the reef. Smith Dec., ¶ 13; Dollar Dec., ¶ 46 (There are "no areas of substantial growth of macro-algae in response to the discharge from the seeps. While numerous species of marine algae were observed on the reef, all of these plants were small in size and rare in abundance."). Dr. Dollar's observations were confirmed by recent (2012) studies in the area. Dollar Dec., ¶ 46. Contrary to Dr. Smith's assertions (Smith Dec., ¶ 22), the nutrient input threat is nothing more than theoretical.

Whether the discharge from the LWRF UIC wells has a significant effect on the near-shore waters off of Kahekili Beach is an essential inquiry in this case. The County's experts and Plaintiffs' experts disagree – the County's maintains it does not, and Plaintiffs' say it may. Given these conflicting opinions, there is a genuine dispute of material fact and Plaintiffs' Motion should be denied.

C. Even If There Are Significant Effects on Navigable Waters, a Genuine Issue of Material Fact Exists As to Whether the County's UIC Wells Are the Source of Those Effects

As outlined above, the County disputes that any discharge at the seeps significantly affects the chemical, physical, and biological integrity of the near-shore waters off of Kahekili Beach. Nonetheless, "[t]here are multiple sources of nutrients entering the West Maui near-shore waters in addition to effluent from the LWRF. Any evaluation of the effects of nutrients on the chemical, physical, and biological integrity of the near shore waters off of Kahekili Beach should consider these additional sources." Paulsen Dec., ¶ 20. Cesspools, septic tank systems, golf courses, fertilizers, and urban runoff are all examples of additional sources. Paulsen Dec., ¶ 29.

Terrestrial or surface waters draining to the ocean may be a significant source of nutrients to the near-shore waters of West Maui's coastline. Paulsen Dec., ¶ 32. For example, based on sampling from the Tracer Study, mean nitrogen concentrations of terrestrial water samples were twice as high as concentrations at

the seeps. Furthermore, because the concentration of nutrients in the near-shore waters off of Kahekili Beach are similar to the nutrient concentrations along the West Maui coastline, it is not possible to determine which nutrient source(s), if any, are responsible for any significant effect. Paulsen Dec., ¶ 31. Neither the Smith nor Paytan Declarations acknowledge these additional sources. Paulsen Dec., ¶ 33. The Tracer Study acknowledged them, but failed to consider them. Paulsen Dec., ¶ 33, Ex. 17 (Final Report 3-8) ("We note that earlier studies identified surface runoff as an important coastal nutrient source (Tetra Tech, 1993). Our study did not quantify these inputs.").

Without consideration of these additional sources of nutrients known to discharge to coastal waters, there is a genuine dispute of material fact as to whether the discharges from the County's UIC wells are the cause of any significant effects in the near-shore waters off of Kahekili Beach. Accordingly, Plaintiff's Motion should be denied.

IV. PLAINTIFFS' ALLEGATIONS REGARDING THE NUMBER OF DAYS OF ALLEGED VIOLATIONS ARE IRRELEVANT TO DETERMINING LIABILITY

Plaintiffs state that "this Court need not resolve the parties' disputes about the seriousness of defendant's violations, which are relevant only to the 'amount of [the] civil penalty' defendant should pay, not its liability." MSJ at 2 (citing 33 U.S.C. §1319(d)). Yet Plaintiffs ask the Court to find that the County violated the

CWA "every day that it has discharged wastewater into Injection Wells 3 or 4 and that those violations will continue until defendant obtains and complies with an NPDES permit for such discharges." Id. at 2-3. Despite Plaintiffs' attempt to portray this as a question of liability, the number of days of alleged violations directly concerns the "amount of [the] civil penalty."

There is no need for the Court to make this determination now. The CWA provides that a civil penalty finding requires a consideration of various factors:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. §1319(d) (footnote omitted). Because there has been only limited discovery in this matter, the information required to make these factual determinations is not yet available. Moreover, a ruling concerning the penalty is premature until there is a finding of liability. Furthermore, the County disputes Plaintiffs' allegation that the County violated the CWA every day it discharged to the County's wells. The Court should therefore defer its determination concerning the amount of any penalty at this time.

V. CONCLUSION

Plaintiffs allege "the undisputed facts in this case compel a finding that defendant's discharges of pollutants . . . have violated, and continue to violate, the Clean Water Act." MSJ at 26. The County disputes this. Plaintiffs' Motion should be denied because there are genuine issues of material fact as to whether groundwater is regulated under the CWA. Even if groundwater may be regulated under certain circumstances, genuine issues of material fact exist as to whether there is a direct and immediate hydrological connection between the County's UIC wells and navigable waters, and if so, whether the nexus is sufficient to fall within the jurisdiction of the CWA. Finally, there are genuine issues of material fact as to whether the County violated the CWA every day it discharged to the UIC wells. Given these genuine issues of material fact, summary judgment should be denied.

DATED: April 21, 2014

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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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FEDERAL RULES OF CIVIL PROCEDURE

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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/s/ David L. Henkin
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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.

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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