

2015 WL 328227
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 Jan. 23, 2015.

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

[SUSAN OKI MOLLWAY](#), Chief Judge.

I. INTRODUCTION.

*1 Before the court are cross-motions for partial summary judgment filed by Plaintiffs Hawai'i Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association (collectively, "Plaintiffs") and by Defendant County of Maui (the "County"). The cross-motions concern whether the County has violated the Clean Water Act by discharging effluent without a National Pollutant Discharge Elimination System ("NPDES") permit at two of four injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). The court grants Plaintiffs' motion and denies the County's motion.

II. FACTUAL 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* ECF No. 41, PageID # 451; ECF No. 139–10, PageID # 5029. The facility receives approximately four million gallons per day of sewage from a collection system serving approximately 40,000 people. *See* ECF No. 139–10, PageID # 5029. The facility filters and disinfects the sewage, then releases the treated effluent (sometimes called "reclaimed water" or "wastewater") into four on-site injection wells. *See id.* The effluent reaches a groundwater aquifer, the precise depth of which "fluctuates somewhat, depending on water inputs and other conditions." The aquifer contains "a sufficient quantity of ground water to supply a public water system." *See* ECF No. 12913, PageID # 4230.

This court granted summary judgment to Plaintiffs as to the County's liability under the Clean Water Act for discharges of effluent into two of the injection wells, wells 3 and 4, that cause pollutants to make their way to the Pacific Ocean. *See* ECF No. 113. Both parties now seek summary judgment on the issue of whether the County has violated the Clean Water Act by discharging effluent into the two remaining wells, wells 1 and 2.

The Environmental Protection Agency ("EPA"), the State of Hawaii Department of Health ("DOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study "to provide critical data about the possible 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." ECF No. 139–10, PageID # 5026. The study involved placing tracer dye into injection wells 2, 3, and 4, and monitoring the submarine springs of Kahekili Beach on Maui's west shore. *See id.*

Although dye introduced into wells 3 and 4 was detected at the seeps (i.e., the areas where the groundwater reaches the surface) eighty-four days after being placed in those wells, dye introduced to well 2 was not detected. *Id.*, PageID # 5028, 5042. The study concluded that the presence of dye from wells 3 and 4 at the seeps "conclusively demonstrate[s] that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui." *Id.*, PageID # 5028. No tracer study has been

conducted on well 1. *See* ECF No. 127, PageID # 3733; ECF No. 139, PageID # 4889.

*2 Irrespective of the tracer study's results for well 2 and the lack of such a study for well 1, the parties do not dispute that effluent pumped into wells 1 and 2 eventually finds its way to the Pacific Ocean. *See* ECF No. 129, PageID # 3933; ECF No. 136, PageID # 4515. Though the County contends that the point of entry into the ocean of flow from wells 1 and 2 cannot be identified, the County acknowledges that there is a hydrogeologic connection between wells 1 and 2 and the ocean. *See* ECF No. 136, PageID # 4515. Indeed, this court repeatedly confirmed at the hearing on the present cross-motions that the County was expressly conceding that pollutants introduced by the County into wells 1 and 2 were making their way to the ocean.

Plaintiffs contend that the County's continued discharge of effluent into wells 1 and 2 without an NPDES permit violates the Clean Water Act. *See* ECF No. 128–1, PageID # 3927. The County contends that it is not subject to liability with respect to wells 1 and 2. *See* ECF No. 125, PageID # 3708.

III. STATUTORY FRAMEWORK.

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.

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 discharges Plaintiffs contend were unlawful.

IV. 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 movant must support his or her 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 (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. A moving party without the ultimate burden of persuasion at trial—usually, but not always, the defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

*3 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). “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 material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted).

The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv., Inc.*, 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 (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); 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.”).

All evidence and inferences must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc.*, 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.*

V. ANALYSIS.

A. Requests for Judicial Notice.

The County makes multiple requests for judicial notice. See ECF Nos. 127–13, 137–13, 141–8. There being no opposition from Plaintiffs, the court grants those requests and takes judicial notice of the documents as public records and government documents.

B. Plaintiffs are Entitled to Summary Judgment on the County’s Liability Under the Clean Water Act for Discharges into Wells 1 and 2 at the LWRF.

To establish the County’s liability under the Clean Water Act, Plaintiffs must show that the County has discharged a pollutant into navigable waters from a point source without an NPDES permit. See 33 U.S.C. §§ 1311(a), 1342, 1362(12); see also *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir.2001).

*4 There is no dispute that the County is discharging a pollutant into navigable waters without an NPDES permit. See ECF No. 136, PageID # 4515 (“The County does not dispute that effluent injected into Wells 1 and 2 enters groundwater and eventually flows to and enters the ocean. In other words, Plaintiffs meet three of the four elements of the ‘discharge of any pollutant’ definition, *i.e.*, ‘addition of any pollutant to navigable waters.’ ”).¹ The only area of dispute between the parties is whether the discharge is from a point source. See *id.*

The County contends that an indirect discharge of pollutant to navigable waters requires “a series of sequential point sources conveying [the] pollutant [] from the initial point of discharge to navigable waters.” ECF No. 125, PageID # 3710. In other words, according to the County, when a single point source does not discharge pollutant directly into navigable waters, liability under the Clean Water Act does not arise unless the pollutant passes through point sources along the entire pathway it travels. Because Plaintiffs do not offer evidence of such multiple point sources, the County says that the effluent injected into wells 1 and 2 cannot be said to be discharged into navigable waters from a point source. According to the County, the groundwater through which the effluent travels cannot be a point source under 33 U.S.C. § 1362(14) because groundwater is not a “discernible, confined and discrete conveyance.” *Id.*, PageID # 3715.

The County acknowledges that, in making its present argument, it is seeking to persuade this court to revisit its earlier ruling granting Plaintiffs summary judgment as to wells 3 and 4. In its earlier order, this court addressed the County’s argument that groundwater could not be considered a conduit because there is no “confinement or containment of the water,” as required of a point source under the Clean Water Act. ECF No. 97, PageID # 3504 (internal quotation marks omitted). This court stated:

This argument elides the distinction between 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.”

ECF No. 113, PageID # 3654

Plaintiffs note that the County failed to file a timely motion for reconsideration of this court's earlier order, and argue that the County cannot now challenge this court's prior decision given the law of the case doctrine. Under that 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. Cuddy*, 147 F.3d 1111, 1114 (9th Cir.1998) (internal quotation marks omitted). The County urges this court to depart from the law of the case because the prior ruling was clearly erroneous and results in a manifest injustice. *See id.* (“[A] court may have discretion to depart from the law of the case if: 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.”).

*5 This court remains unpersuaded by the County's reading of what the Clean Water Act requires. The authorities the County refers to are neither binding authority for the County's theory nor analyses establishing error in this court's prior ruling. In this court's “Inclinations,” routinely issued by this judge in advance of hearings, the County was asked to come to the hearing on the present motions prepared to discuss authority specifically requiring pollutants not directly discharged into navigable waters to travel through “a series of sequential point sources conveying pollutants from the initial point of discharge to navigable waters.” ECF No. 156 (internal quotation marks omitted). At the hearing, the County discussed: *Rapanos v. United States*, 547 U.S. 715 (2006); *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *United States v. Ortiz*, 427 F.3d 1278 (10th Cir.2005); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir.2005); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114 (2d Cir.1994); *Committee To Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir.1993); *Dague v. City of Burlington*, 935 F.2d 1343 (2d

Cir.1991); *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, 940 F.Supp.2d 1005 (D.Alaska 2013); *San Francisco Baykeeper v. West Bay Sanitary District*, 791 F.Supp.2d 719 (N.D.Cal.2011); and *United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945 (W.D.Tenn.1976).

These cases, many of which were cited in the County's papers, do not directly address the County's point source theory. Some of the cases involve sequential point sources, and some consider whether groundwater itself constitutes a point source, but none actually holds that a pollutant's indirect journey to navigable waters must be through a series of point sources.

At the hearing on this matter, the County articulated its position by saying that it could only be liable under the Clean Water Act if a pollutant from well 1 and/or well 2 ultimately reached navigable waters through a point source. Even assuming this particular articulation could be said to have been included in what the County advanced in its papers, the County fails to cite any binding authority for that proposition. Additionally, exempting discharges of pollutants from a point source merely because the polluter is lucky (or clever) enough to have a nonpoint source at the tail end of a pathway to navigable waters would undermine the very purpose of the Clean Water Act.

The County's present expansion of arguments made during earlier proceedings does not establish a basis for this court to read the point source requirement for wells 1 and 2 differently from the requirement for wells 3 and 4. The statutory language at issue includes no suggestion that a pollutant taking an indirect path from a well to the ocean must pass through “a series of sequential point sources.” *See* ECF No. 125, PageID # 3710. The Clean Water Act prohibits “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Neither this language nor the statutory definition of “point source” supports the County's theory.

*6 This court rests on the analysis set forth in its order addressing wells 3 and 4. Adopting the County's interpretation of the point source requirement would erode the Clean Water Act's prohibition on discharges of pollutants without an NPDES permit. It would be nonsensical to regulate a polluter that discharges effluent to the ocean through a series of sequential point sources, while exempting a polluter that discharges the same effluent through a combination of an initial point source and subsequent nonpoint sources.

In both situations, pollutants are discharged into navigable waters from point sources. There is no basis for distinguishing between the two.

This court's rejection of the County's interpretation of the point source requirement by no means "nullifie[s] the meaning of point source" or "read[s] the point source requirement out of the statute," as the County contends. ECF No. 125, PageID # 3713, 3714 (internal quotation marks omitted). The injection wells are indisputably point sources. *See* ECF No. 125, PageID # 3715 ("The LWRF injection wells are the only confined and discrete conveyances here. 33 U.S.C. § 1362(14) (point source includes well) ."). The County's discharge of effluent into the injection wells satisfies the point source requirement, the only disputed issue before this court on the present motions.

The parties' discussions concerning the location and expanse of the pollutant's entry into the ocean and the harm, or lack thereof, resulting from discharge of the pollutants, are irrelevant to the County's liability. *See, e.g., Comm. To Save Mokolumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir.1993) ("[T]he Act categorically prohibits any discharge of a pollutant from a point source without a permit. Thus, the factual issue raised by defendants concerning the historical level of pollution compared to the current level of pollution is not material to the resolution of the Committee's claim, and therefore does not preclude summary judgment on the issue of liability." (citations omitted)). This court sees no need to address those arguments on the present motions, which go solely to the issue of whether the County is liable.

Because Plaintiffs meet the point source requirement, and because there is no dispute regarding any of the other elements necessary for liability under the Clean Water Act, this court concludes that there is no genuine issue of material fact precluding a finding that the County is liable for discharges from wells 1 and 2 without an NPDES permit.

C. Requests to Strike Evidence.

Both parties request that this court strike opposing experts' statements. *See* ECF No. 138, PageID # 4851; ECF No. 140, PageID # 5322; ECF No. 145. Whether this court considered the challenged evidence or not, the court's ruling would be unchanged. This court in actuality does not deem the challenged material necessary to deciding the summary judgment motions before it. The requests to strike are denied on the ground that parsing the assertions in those requests will have no impact on the summary judgment motions.

VI. CONCLUSION.

*7 Plaintiffs' motion for partial summary judgment is granted and the County's motion for partial summary judgment is denied.

The requests for judicial notice are granted, and the requests to strike evidence are denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 328227, 80 ERC 1432

Footnotes

- 1 As this court has noted earlier in this order, the County's statement that, with respect to wells 1 and 2, there is no tracer study data of the type available with respect to wells 3 and 4 concerns a meaningless distinction for purposes of the present motions given the County's concession that pollutants from wells 1 and 2 reach the ocean. The County nowhere contends that the amount of effluent is *de minimis*.

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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

HAWAI'I 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 MEMORANDUM IN
SUPPORT OF THE COUNTY'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO
WELLS 1 AND 2**

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I. INTRODUCTION

To prevail on their claim that the County of Maui (“County”) violated Clean Water Act (“CWA”) § 301(a) by injecting treated effluent into Wells 1 and 2 at the Lahania Wastewater Reclamation Facility (“LWRF”), Plaintiffs must show the effluent was discharged “to navigable waters from any point source.” 33 U.S.C. §§ 1311(a), 1362(12). Plaintiffs cannot prove that critical fact. Plaintiffs contend the effluent made its way to the ocean—which admittedly is navigable water—but lack evidence the effluent was added to the ocean through a point source. With no evidence of a point source discharge, the County is entitled to summary judgment.

Importantly, the County is entitled to summary judgment on Wells 1 and 2 notwithstanding the Court’s ruling on Wells 3 and 4. Critical to that ruling was the Court’s understanding that the 2013 University of Hawaii Tracer Study (“Tracer Study”) showed 64% of effluent injected into Wells 3 and 4 discharged in the vicinity of the submarine springs. Hawai’i Wildlife Fund v. County of Maui, Civil No. 12-00198 SOM/BMK, 2014 WL 2451565, at *16 (D. Haw. May 30, 2014). While the County respectfully disagrees with the Court’s ruling on Wells 3 and 4, the same is not the case with Wells 1 and 2 as no tracer study was performed on Well 1, and multiple tracer studies on Well 2 detected no entry point to the ocean. Thus, there is no legal or factual basis for applying that reasoning to Wells 1 and 2.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there is “no genuine issue as to any material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (internal citation and quotation marks omitted). The party bearing the burden of proof at trial—here, the Plaintiffs—has the burden of showing that a genuine dispute exists that precludes summary judgment. Id. That party cannot rely on its pleadings to make that showing. It must demonstrate through admissible evidence that a genuine dispute exists. First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-290 (1968) (“sufficient evidence supporting the claimed factual dispute [must] be shown”). Moreover, disputes over immaterial facts do not matter. “[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Cline v. Industrial Maint. Eng’g & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (internal quotation marks omitted)).

III. ARGUMENT

A. The Point Source Discharge Requirement Must Be Met To Impose CWA § 301(a) Liability

CWA § 301(a) prohibits the “discharge of any pollutant” except in compliance with specified sections of the CWA, including an NPDES permit. 33 U.S.C. § 1311(a). “Discharge of a pollutant” is defined as “any addition of any

pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

“Point source” is defined as “any discernible, confined and discrete conveyance” including “any pipe, ditch, channel, tunnel, conduit, well” 33 U.S.C. § 1362(14).

To meet their burden to show the County’s injection of treated effluent from Wells 1 and 2 violates § 301(a), Plaintiffs must prove pollutants from Wells 1 and 2 enter the ocean via a point source discharge. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001). Plaintiffs cannot meet this burden because they are unable to demonstrate the “point source discharge” requirement. Specifically, Plaintiffs cannot show that effluent from Well 1 or 2 reaches the ocean via a “discernible, confined and discrete conveyance.” Id.

B. The County Has Not Violated The CWA Because There Is No Point Source Discharge To The Ocean

1. Indirect Discharges Must Pass Through Point Sources

To demonstrate a point source discharge for purposes of CWA § 301(a) liability, Plaintiffs have two options: (1) a point source discharge directly to navigable waters (point source or direct discharge rationale); or (2) a series of sequential point sources conveying pollutants from the initial point of discharge to navigable waters (indirect discharge rationale). See Rapanos v. United States, 547 U.S. 715, 744 (2006). Neither rationale eliminates the mandatory point source requirement. Rather, the indirect discharge rationale “makes plain that a point

source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” Id. at 743 (internal citation and quotation marks omitted). See also Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at *7, 8 (E.D. Pa. Nov. 21, 2013). Thus, “pollutants discharged from a point source do not [need to] emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between” the initial point source and navigable water. Rapanos, 547 U.S. at 743 (internal citation omitted).

The cases the Supreme Court cite in Rapanos confirm an indirect discharge must still pass through discrete conveyances in reaching navigable waters. Id. at 743-744. In Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141(10th Cir. 2005), the indirect discharge was from a mineshaft through a tunnel to navigable waters. Likewise, United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) involved an indirect discharge from a chemical facility through a municipal storm sewer into navigable waters. The indirect discharge in South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 101 (2004) was from a pump station through a canal into navigable waters. In United States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005), the indirect discharge was from a toilet at an industrial facility through a storm drain into navigable waters. Similarly, Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2nd Cir. 1991) (rev’d on other grounds) involved seepage from a

landfill discharged through a culvert into navigable waters. Finally, in Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994), there was an indirect discharge from farm vehicles through a swale, a pipe and a ditch into navigable waters. In each case, the indirect discharges “pass ‘through conveyances’ in between” the source of the pollutants and navigable waters. Rapanos, 547 U.S. at 743 (internal citation omitted).

These basic CWA principles establish that pollutants entering navigable water through unconfined groundwater do not violate CWA § 301(a). Rather, the groundwater must be “confined” in *something else* to be a “point source” discharge. For example, LWRF effluent reaching the ocean through a single pipe, 50 small pipes or a lava-tube would meet the point source requirement and be regulated under § 301(a). See Tri-Realty Co., 2013 WL 6164092, at *8 (pollutants from an underground storage tank that migrate through soil to groundwater which reaches navigable water is not a point source discharge); see also Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1153 (9th Cir. 2010) (precipitation percolating through overburden and soils that eventually reaches surface water is a nonpoint source); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F.Supp. 1333, 1359 (D.N.M. 1995) (shallow seeps with trace pollutants emerging through soil are nonpoint source “carriers of water from the alluvium to the surface.”).

2. The Court's Conduit Theory Eliminates The Point Source Discharge Requirement

By asserting that “liability under the [CWA] is triggered when pollutants reach navigable water, regardless of *how* they get there,” the Court eliminated the point source requirement for indirect discharges. Hawai'i Wildlife Fund, 2014 WL 2451565, at *18 (emphasis in original). By expanding the indirect discharge theory such that a conduit no longer needs to be a “discernible, confined and discrete conveyance,” the Court nullified the meaning of point source. Id. at *16 (“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’ . . . and the groundwater acting as a conduit need not also be ‘confined and discrete.’”). Conduit is part of a defined term of art under the CWA; it is one of the identified point source examples of a “discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14). Where Congress has unambiguously spoken, courts lack discretion in interpreting the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”).

Contrary to the Court's prior opinion, generalized migration of pollutants from a point source through groundwater to navigable waters is not sufficient to impose CWA § 301(a) liability. Hawai'i Wildlife Fund, 2014 WL 2451565, at

*14, 18. Pollutants must enter navigable water via a point source – *i.e.*, a discernible, confined and discrete conveyance. See El Paso Gold Mines, 421 F.3d at 1140-41, 1146 n.6 (“We stress, again, that it is the combination of the . . . [mine] shaft, a point source, and the . . . Tunnel, another point source, that establishes a connection to a navigable stream. This system of infrastructure distinguishes our case from migration and seepage cases.”); Trustees for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984) (a point source discharge “reaches the water through a confined, discrete conveyance.”).

The “phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute.” Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 219 (2nd Cir. 2009); see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001) (“it is one thing to give [the] word[s] [discernible, confined and discrete conveyance] limited effect and quite another to give it no effect whatever.”). While a series of connecting point sources is permissible under the indirect discharge theory, expansion of the theory to unconfined groundwater as a conduit is not. See Hawai’i Wildlife Fund, 2014 WL 2451565, at *14 (the Court acknowledges no controlling appellate law or statutory language has expanded the conduit theory beyond point source discharges).

3. There Is No Point Source Discharge From Well 1 Or 2 To The Ocean

The LWRF injection wells are the only confined and discrete conveyances here. 33 U.S.C. § 1362(14) (point source includes wells). As the wells inject into groundwater, and groundwater is not a navigable water, there is no basis to impose CWA § 301(a) liability based on a point source discharge of a pollutant from the LWRF directly to navigable waters.¹ This leaves the indirect discharge rationale as the only potential available theory for Plaintiffs to impose CWA § 301(a) liability. As explained below, because the groundwater here is not a “discernible, confined and discrete conveyance,” Plaintiffs cannot establish the essential indirect discharge theory prerequisite of sequential point sources in the conveyance of treated effluent from the LWRF to the ocean.

a. The Groundwater/Effluent Mixture From Wells 1 And 2 Flows to And Enters The Ocean In A Broad And Diffuse Manner

Contrary to the Court’s prior opinion, the groundwater between the LWRF and the ocean is not *itself* a point source because the groundwater is not a

¹ Groundwater is not a “waters of the United States” as a matter of law. See 40 C.F.R. §§ 122.2, 230.3(s), 33 C.F.R. § 328.3(a); 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991); San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007). To the extent the Court (i) understood the County’s position was that groundwater could be classified as a navigable water, it was mistaken; or (ii) found the groundwater between the LWRF and the ocean is a navigable water under the CWA, this was incorrect as matter of law. See Hawai’i Wildlife Fund, 2014 WL 2451565, at *11, 20-21. As pertinent here, the only “navigable water” is the ocean.

“discernible, confined and discrete conveyance.” See id. at *17. Treated effluent from the LWRF exits Wells 1-4 at depths ranging from approximately 60 to 210 feet below ground surface with treated effluent exiting Wells 1 and 2 between approximately 60 and 165 feet below ground surface. Defendant County of Maui’s Rule 56.1 Statement of Undisputed Material Facts (“56.1”), ¶ 1. The roughly 100 foot expanse over which effluent from Wells 1 and 2 enters the groundwater is itself demonstrative of the lack of a defined or discrete conveyance. 56.1, ¶ 1. Upon entry, the effluent rises up and disperses broadly, both laterally and vertically, as it moves through the aquifer toward the ocean. 56.1, ¶ 2.

The Tracer Study findings on travel time for dye injected into Wells 3 and 4 to reach the submarine springs ranges from an initial appearance at 84 days, to peak concentrations between approximately 270 and 310 days, to an estimated four plus years for the tail end. 56.1, ¶ 8. The travel time for flow from Wells 1 and 2 to the ocean is even longer. 56.1, ¶ 8. This time span is further evidence that the flow path from the wells to the shoreline is broad and diffuse. 56.1, ¶ 8.

It is unknown where Well 1 flow enters the ocean. 56.1, ¶ 3. The same is true for Well 2. 56.1, ¶¶ 4-5, 7, 12. No tracer study has been performed on Well 1. 56.1, ¶ 3. Even with two independent tracer studies on Well 2 using different approaches (adding dye to Well 2 for 58 days or one day), neither study detected tracer dye, confirmed any point(s) of entry to the ocean, or reached a conclusion

regarding the hydrologic connectivity between Well 2 and the ocean. 56.1, ¶¶ 4-5. The Tracer Study recognizes this, saying “no conclusions can be made regarding the hydraulic connection between Well 2 and the nearshore waters at Kaanapali” (*i.e.*, Kahekili Beach); and “a discharge point deeper and further from shore needs to be considered.” 56.1, ¶ 5. The absence of dye illustrates the diffuse nature of the Well 2 flow as it travels through the aquifer and enters the ocean. 56.1, ¶ 6.

Modeling evidence supports the conclusion that the groundwater/effluent mixture from Wells 1 and 2 travels through the aquifer as broad and diffuse flow reaching the ocean at locations that are not readily ascertainable. 56.1, ¶¶ 4-7, 11-12. The County’s expert, Dr. List, modeled the flow from Wells 1 and 2 operating as a pair and Wells 3 and 4 operating as a pair, with both pairs operating at 50% injection rates. 56.1, ¶ 7. This model showed that flow from Wells 1 and 2 would be pushed to the lateral boundaries of the flow from Wells 3 and 4 (*i.e.*, outside the submarine spring area) and thus would not reach the ocean along the same path as effluent from Wells 3 and 4. 56.1, ¶ 7. The resulting broad and diffuse flow from Wells 1 and 2 through the aquifer also prevents identification of where the flow enters the ocean. 56.1, ¶ 7. Nonetheless, because the flow from Wells 1 and 2 is broader and more diffuse than the flow from Wells 3 and 4, it would enter the ocean over a larger area than the 800 meters of shoreline the Tracer Study estimates for flow entry from Wells 3 and 4. 56.1, ¶ 9.

Dr. List's conclusion is consistent with the Tracer Study modeling which showed flow from Well 2 would not appear at the submarine springs, but given the displacement caused by Wells 3 and 4, would be broad and diffuse through the aquifer entering at locations outside the submarine springs. 56.1 ¶ 7-9, 11. Given its diffuse nature, the groundwater/effluent mixture's flow to and entry into the ocean here does not meet the point source definition of a "discernible, confined and discrete conveyance."²

For their part, Plaintiffs rely solely on the report of Dr. Moran as the basis for their claim that Wells 1 and 2 enter the ocean along the same flow path and at the same locations as Wells 3 and 4. Dr. Moran's report does not create a genuine dispute of fact with respect to Wells 1 and 2. Her report identifies no point source discharge for any effluent from Wells 1 and 2 because the effluent reaches the ocean via groundwater which is insufficient, as a matter of law, to constitute a violation the CWA § 301(a).

Dr. Moran concedes the effluent injected into Well 2 would be displaced by the effluent from Wells 3 and 4 when they are operating and the information "necessary to locate preferential flow paths [for Wells 1 and 2], is not available."

² By limiting its argument to Wells 1 and 2, the County does not concede the groundwater/effluent mixture from Wells 3 and 4, which similarly flows through the aquifer in a broad and diffuse manner and enters the ocean over at least 800 meters of coastline, is a point source discharge. 56.1, ¶ 9. To the contrary, the County maintains the mixture was improperly classified as a point source discharge and reserves all rights to challenge the classification at a later time.

56.1 ¶ 12. Her opinion relies on Wells 3 and 4 not being used. But that is not the case during the time period referenced in her report. 56.1, ¶ 20. Accordingly, Dr. Moran's report does not fit the facts of this case. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591-592 (1993) (Expert testimony needs to be sufficiently tied to or "fit" the facts to be relevant).

Dr. Moran's opinion is unreliable. She claims to "heavily" rely on the Tracer Study to opine that Wells 1 and 2 have similar flow paths as Wells 3 and 4 to the submarine springs. 56.1, ¶ 12. But the Tracer Study modeling directly contradicts Dr. Moran's opinion. 56.1, ¶ 11. As the Tracer Study notes, "the treated wastewater plume [from Wells 3 and 4] is broad" and this flow displaces the flow from Well 2, causing the even broader and more diffuse Well 2 flow in the aquifer to only enter the ocean substantially north of the submarine springs. 56.1, ¶¶ 8, 11. This modeling also shows that with Wells 3 and 4 dormant, the broad and diffuse Well 2 flow exits the ocean even further north than when Wells 3 and 4 are operating as well as at and south of the springs. 56.1, ¶ 11.

Dr. Moran also relies on flow from Wells 1 and 2 from 2006 through May 2007 making up approximately 50% of the total effluent injected into all four wells to support her conclusion that flow from Wells 1 and 2 would appear at the submarine springs roughly ten months later. 56.1, ¶ 12. In contrast, Dr. List's modeling, which uses 50% injection rates for each of the pairs of wells, shows

flow from Wells 1 and 2 is laterally displaced, emerging outside the boundaries of the submarine springs. 56.1, ¶ 7. Any suggestion by Dr. Moran that treated effluent from Wells 1 and 2 would make it to the ocean if Wells 3 and 4 were off is irrelevant. Between 2006 and July 2014 (the timeframes considered by Dr. Moran), Wells 3 and 4 were operating. 56.1, ¶ 12, 20. Bottom-line, Dr. Moran provides *no* evidence that (1) 50% of flow from Wells 1 and 2 is sufficient to nullify both the Tracer Study's and Dr. List's modeling, showing broad and disperse displacement of flow from these wells in the aquifer resulting in the flow entering the ocean away from the submarine springs; or (2) flow from Wells 1 and 2 enters the ocean at the same location as flow from Wells 3 and 4.

b. ***The Percent Of Treated Effluent Entering The Ocean Is Not A Basis For Demonstrating A Point Source Discharge***

In determining whether there is a point source discharge, the pertinent inquiry is *how* the treated effluent makes it to the ocean, not how much. See Trustees for Alaska, 749 F.2d at 558 (point sources are not distinguished from nonpoint sources “by the kind of pollution they create or by the activity causing the pollution, *but rather by whether the pollution reaches the water through a confined, discrete conveyance.*”) (emphasis added). Nonetheless, in finding the County liable under the CWA for Wells 3 and 4 based on the theory that groundwater was a point source, the Court relied in part on the Tracer Study's

estimate that 64% of effluent injected into the wells discharges from the submarine springs area. “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.” Hawai’i Wildlife Fund, 2014 WL 2451565, at *17. Similarly, in referencing 65% of effluent discharging through Wells 3 and 4, Dr. Moran also appears to adopt the 64% estimate.

While the County maintains that the percentage of effluent reaching the ocean is irrelevant to a point source inquiry, it nonetheless notes that both the Court and Dr. Moran failed to account for the multiple limitations associated with the Tracer Study 64% estimate. The fraction of effluent reaching the submarine springs area from Wells 3 and 4 was estimated using two different methods. 56.1, ¶ 13. As the Tracer Study acknowledges, there are significant uncertainties with both. 56.1, ¶ 13. While the estimated percent of recovered dye mass can be used to estimate the fraction of effluent discharging at the submarine springs, “*it must be stressed that there are significant uncertainties associated with these calculations.*” 56.1, ¶ 13. Likewise, “[t]here is *significant uncertainty* associated with the effluent percentage estimated” due to the multiple assumptions regarding the discharge made in performing the calculations. 56.1, ¶ 13.

The failure to account for seasonal variability is an inherent uncertainty in the Tracer Study analysis. 56.1, ¶ 13. While the rate at which groundwater exits

the submarine springs varies significantly by season, a constant rate was used in the calculations. 56.1, ¶ 13. Likewise, dye concentrations measured at less than 1% of the submarine springs were used to calculate total dye recovery from the entire submarine spring area, ignoring the fact that diffuse dye concentrations ranged from as much as six-fold to ten-fold lower than spring dye concentrations. 56.1, ¶ 13. This was the case even though greater than 90% of the discharge was diffuse. 56.1, ¶ 10. In another instance, half of the calculated data sets used to estimate the percentages of upland waters, marine waters and LWRF effluent emanating from the submarine springs were thrown out because they yielded unrealistic results (*i.e.*, > 100% or < 0%). 56.1, ¶ 14. Of the data sets used, the fraction of LWRF effluent ranged from 12% to 96%. 56.1, ¶ 14.

As Dr. List illustrates, different plausible assumptions used to calculate the dye recovery rate result in only 11% of the treated effluent injected into Wells 3 and 4 coming out at the submarine springs area. 56.1, ¶ 15. Dr. List's calculation confirms (1) the assumptions used in the Tracer Study were either flawed or difficult to justify; (2) a variety of plausible assumptions could be used in the calculations; and (3) the assumptions chosen for the Tracer Study calculations dictated the outcome.³ 56.1, ¶ 15. Given that percentage (or amount) of pollutant

³ Given the vast range in calculation, the County respectfully disagrees that the Tracer Study is sufficient evidence to impose CWA § 301(a) liability as a matter of law with respect to Wells 3 and 4.

is not relevant in determining a point source discharge and significant uncertainties surround the Tracer Study dye recovery rate calculations, the Court should not rely on the 64% estimate in making a point source finding.

4. An NPDES Permit Cannot Be Issued For Well 1 Or 2

An NPDES permit authorizes a facility to discharge pollutants into receiving (navigable) water under specified conditions. See CWA 33 U.S.C. § 1342(a), (k); 40 C.F.R. §§ 122.1, 122.5. Permits identify (1) permissible discharge limitations and locations; and (2) monitoring and reporting requirements to characterize both the discharge and receiving waters, and ensure compliance with permit conditions and water quality criteria. See generally 40 C.F.R. §§ 122.41, 122.43, 122.44. Permit applications require an outfall description, including its location, distance from shore and depth below surface. See e.g., 40 C.F.R. § 122.21(i). As no discernible ocean discharge location has been identified for Well 1 or 2, it is not feasible to issue an NPDES permit with appropriate standards, conditions and monitoring requirements for the wells. 56.1, ¶ 16.

C. LWRF Flow To The Ocean Is Nonpoint Source Pollution

1. Groundwater Is Generally Considered Nonpoint Source Pollution

With no statutory or regulatory definition, nonpoint source “includes all water quality problems not subject to [CWA] section 402.” National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165-166 (D.C. Cir. 1982); see also Oregon

Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 849 (9th Cir. 1987) (the CWA draws “a distinct line between point and nonpoint pollution sources.”).

Similar to groundwater, stormwater may contain pollutants, and depending on how it is conveyed to navigable waters, it may be either a point source or nonpoint source discharge. Stormwater entering navigable water through a confined and discrete conveyance is a discharge from a point source subject to NPDES permitting whereas diffuse runoff is not. See e.g., Environmental Def. Ctr., Inc., v. U.S. E.P.A., 344 F.3d 832, 841 n.8 (9th Cir. 2003) (“Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution”) (internal citation omitted); Northwest Env'tl. Def. Ctr. v. Brown, 640 F.3d 1063, 1070 (9th Cir. 2011) (“Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source”) (rev'd on other grounds); Greater Yellowstone Coal., 628 F.3d at 1152 (“some type of collection or channeling is required to classify an activity as a point source.”) (internal citation omitted); Cordiano, 575 F.3d at 221 (“surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and . . . is not subject to the CWA permit requirement.”) (internal citation omitted).

Importantly, the Watershed Management Plan that includes Kahekili Beach identifies LWRF effluent as nonpoint source pollution. 56.1, ¶ 17. Similarly, the

CWA identifies pollutants from well disposal and groundwater as nonpoint sources. 33 U.S.C. § 1314(f)(2)(D), (F). Likewise, the Hawaii Department of Health recognizes both nonpoint source pollution prevents surface waters from achieving water quality criteria and groundwater as a nonpoint source. 56.1, ¶ 17.

Pollutants reaching navigable waters via groundwater migration do not meet the point source discharge requirement. See Tri-Realty Co., 2013 WL 6164092, at *7 (“A discharge of pollutants into navigable waters occurring only through migration of groundwater . . . represents ‘nonpoint source’ pollution.”) (internal citation omitted). “[T]he diffuse downgradient migration of pollutants . . . through . . . groundwater . . . is nonpoint source pollution” Id. at *8; see also El Paso Gold Mines, 421 F.3d at 1140 n.4 (“Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.”).

Plaintiffs’ complaint characterizes the LWRF effluent as “percolating” into the ocean. First Amended Complaint ¶ 56. Pollutants entering navigable waters through percolation of groundwater constitute nonpoint source pollution. See e.g., Mary Cristina Wood, Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 Harv. Envtl. L. Rev. 569, 620 (1988) (percolating groundwater is not a point source discharge despite pollutants entering navigable waters). Because there is no point source discharge associated

with Well 1 or 2 to the ocean, Plaintiffs have failed to establish a CWA § 301(a) violation and the County is entitled to summary judgment as a matter of law. See Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011) (“[M]igrations of groundwater . . . is not point source pollution . . . There is no basis for a citizen suit for nonpoint source discharges under the CWA.”) (internal citations omitted); see also Oregon Natural Res. Council, 834 F.2d at 849.

2. Multiple Sources Of Pollutants Are In Groundwater Flowing To The Ocean

The ocean off Kahekili Beach receives drainage from the northern part of the Wahikuli Watershed (“Watershed”). 56.1, ¶ 17. Nutrients from various Watershed land uses enter groundwater as it flows to the ocean. The Watershed’s past and present agricultural practices have “impacted the hydrology of surface waters and groundwaters.” 56.1, ¶ 18. Similarly, landscaped areas around resort, residential and commercial properties, and golf courses in the Watershed result in fertilizer nutrients impacting groundwater. 56.1, ¶ 18. The LWRF’s R-1 water applied for irrigation also contributes pollutants to groundwater. 56.1, ¶ 18.

These other sources of nutrients commingle in groundwater with LWRF effluent, preventing sources from being distinguished from one another. 56.1, ¶ 18. Moreover, groundwater enters the coastline at undefined locations. 56.1, ¶ 4-7, 9. In April 2014, the Hawaii Department of Health proposed modifying

applicable water criteria for Kahekili Beach to account for the more than three million gallons per day of fresh water entering the ocean per mile of shoreline. 56.1, ¶ 19; HAR § 11-54-6 (defining “wet” criteria). By definition, groundwater containing a mixture of sources of pollutants entering the ocean at unidentifiable locations is a nonpoint source – *i.e.*, there is no discernible, confined and discrete conveyance. See e.g., Trustees for Alaska, 749 F.2d at 558.

D. The CWA Addresses LWRF Nonpoint Source Pollution

Contrary to Plaintiffs’ allegations, water quality in the ocean off Kahekili Beach is improving. As of April 2014, the area meets total phosphorous and nitrogen-related water quality criteria. 56.1, ¶ 19.⁴

Simply because the groundwater here is nonpoint source pollution not regulated by an NPDES permit does not mean it is outside the scope of the CWA; it is addressed through other CWA programs such as total maximum daily loads and state nonpoint source pollution control programs. 33 U.S.C. §§ 1313, 1329.⁵

⁴ The remainder of this Section is provided as background on Hawaii’s nonpoint source pollution control program and is not dispositive to the County’s Motion.

⁵ Congress clearly recognized the need to address nonpoint sources under the CWA. “The Clean Water Act, as written in 1972 and amended in 1977 and 1981, focused on point source discharges of pollution. Over the years, however, new information has indicated that nonpoint sources contribute up to 50 percent of the water pollution in some States. Thus, the conferees establish a new national policy to develop and implement programs for controlling nonpoint sources of pollution . . . With this new emphasis on nonpoint sources of pollution, we should be able to

See Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002) (the CWA uses “distinctly different methods” to control point source and nonpoint source pollution) (internal citation omitted). The improvement in Kahekili Beach water quality demonstrates the success of these programs.⁶

Additionally, as required by the CWA and the Coastal Zone Act Reauthorization Amendments, Hawaii developed a statewide program and integrated implementation plan for management of coastal nonpoint source pollution. See Doyle Dec., Ex. 9 at 2-1; see also 16 U.S.C. § 1455b(a)(2) (the CWA § 319 nonpoint source program (33 U.S.C. § 1329) works in concert with Coastal Zone Act to address nonpoint sources impacting coastal waters); Shanty Town Assocs. Ltd. P’ship v. E.P.A., 843 F.2d 782, 794 (4th Cir. 1988) (Coastal Zone Act requirements complement CWA programs). In 2012, a watershed management plan was developed for a portion of West Maui (including Kahekili Beach) that includes protections for coral reefs from nonpoint source land-based pollution. See e.g. Doyle Dec., Ex. 4 at i.

wage a more comprehensive and complete assault on water pollution throughout the Nation.” 133 Cong. Rec. 985 (1987).

⁶ As Dr. List explains, material exiting the submarine springs has geothermal origins. Geothermal activity, and not LWRF effluent, accounts for many apparent anomalies at the submarine springs such as temperature and salinity. See Doyle Dec., Ex. 10, List Expert Report at 3, 6, 7, 12, 20, 22-27.

IV. CONCLUSION

CWA § 301(a) liability requires that pollutants discharge to navigable waters from a point source. The broad diffuse groundwater flow containing a mixture of LWRF effluent and other pollutants is not entering the ocean through a discernible, confined and discrete conveyance. As such, Plaintiffs have presented no evidence of a point source discharge. Because Plaintiffs do not meet their burden to demonstrate the requisite elements of a § 301(a) violation, the County is entitled to summary judgment on Wells 1 and 2 as a matter of law.

DATED: November 5, 2014

By: /s/ Colleen P. Doyle
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Responses and Replies

[1:12-cv-00198-SOM-BMK Hawaii Wildlife Fund et al v. County of Maui](#)

U.S. District Court

District of Hawaii

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

HAWAI'I WILDLIFE FUND, a)	CIVIL NO. 12-00198 SOM BMK
Hawai'i non-profit corporation,)	
SIERRA CLUB - MAUI GROUP, a)	PLAINTIFFS' MEMORANDUM IN
non-profit corporation, SURFRIDER)	OPPOSITION TO DEFENDANT'S
FOUNDATION, a non-profit)	MOTION FOR PARTIAL
corporation, and WEST MAUI)	SUMMARY JUDGMENT AS TO
PRESERVATION ASSOCIATION, a)	WELLS 1 AND 2; CERTIFICATE OF
Hawai'i non-profit corporation,)	COMPLIANCE; CERTIFICATE OF
)	SERVICE
Plaintiffs,)	
)	<u>Hearing:</u> Jan. 12, 2015, at 9:45 a.m.
v.)	<u>Judge:</u> Hon. Susan Oki Mollway
)	<u>Trial Date (Liability):</u> April 7, 2015
COUNTY OF MAUI,)	
)	<u>Related to Dkt. No. 124</u>
Defendant.)	
)	

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I. INTRODUCTION

Defendant County of Maui's Motion for Summary Judgment is premised on the argument that this Court erred when it held, earlier in this case, that Defendant's unpermitted discharges of effluent from the injection wells at its Lahaina Wastewater Reclamation Facility ("LWRF") violate the Clean Water Act. Defendant takes aim at the Court's holding that indirect discharges through groundwater into navigable waters trigger Clean Water Act liability, as well as its findings that, under the facts of this case, the groundwater under the LWRF constitutes a water of the United States or, alternately, is adequately confined and discrete to qualify as a point source. Defendant failed to seek reconsideration of any of these rulings, which now constitute the law of this case.

Defendant had ample opportunity earlier in this proceeding to present its views on the legal and factual issues this Court has already resolved. Having failed to persuade the Court or to advance some of the arguments it now proffers, Defendant should not be given yet another bite at the apple. Should the Court nonetheless be willing to consider Defendant's arguments, its rehash of positions this Court previously considered and rejected provides no reason to alter the Court's earlier rulings. Finally, even if the Court were to agree with Defendant that facts previously deemed irrelevant to liability should be considered, Plaintiffs

vigorously dispute Defendant's version of those facts, precluding summary judgment on those claims.

II. DR. LIST'S UNSWORN EXPERT REPORT IS INADMISSIBLE AND SHOULD BE STRICKEN

To support its motion, Defendant relies heavily on an unsworn report by its expert, Dr. List (Dkt. No. 127-11). Federal Rule of Civil Procedure 56(c)(4) provides that "[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." In the Ninth Circuit, courts "have routinely held that unsworn expert reports are inadmissible" to support or oppose summary judgment. Harris v. Extendicare Homes, Inc., 829 F. Supp. 2d 1023, 1027 (W.D. Wash. 2011); see also Shuffle Master, Inc. v. MP Games LLC, 553 F. Supp. 2d 1202, 1210 (D. Nev. 2008) (citing authorities and noting that "the purpose of allowing affidavits or declarations at summary judgment is to consider testimony that would be admissible at trial").

Accordingly, as a threshold matter, Plaintiffs respectfully ask the Court to strike Dr. List's report, which is inadmissible. See Harris, 829 F. Supp. 2d at 1027; Shuffle Master, 553 F. Supp. 2d at 1210-11.

III. THE COURT SHOULD APPLY THE LAW OF THE CASE REGARDING THE “INDIRECT DISCHARGE” RATIONALE FOR CLEAN WATER ACT LIABILITY

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. Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993); see also Hawaii Wildlife Fund v. County of Maui, Civ. No. 12-00198 SOM BMK, 2014 WL 2451565, at *15 (D. Haw. May 30, 2014). In moving for partial summary judgment, Defendant does not deny that (1) effluent injected into Wells 1 and 2 reaches the Pacific Ocean, (2) the Pacific Ocean is a navigable water, (3) Wells 1 and 2 are point sources, and (4) Defendant does not have a National Pollutant Discharge Elimination System (“NPDES”) permit for the discharges of pollutants from Wells 1 and 2 that reach the ocean. Rather, Defendant’s motion rests on the claim that it cannot be held liable under the Clean Water Act unless the groundwater through which effluent from Wells 1 and 2 indirectly reaches the ocean is itself a point source. Def’s Memo. (Dkt. No. 125) at 2-5.

As Defendant acknowledges, its argument cannot be squared with this Court’s May 30, 2014 order granting Plaintiffs’ motion for partial summary judgment, in which the Court thoroughly considered, and then rejected,

Defendant's argument that, for Clean Water Act liability to attach, the groundwater through which LWRF effluent flows to the ocean must itself be "a 'discernible, confined and discrete conveyance.'" Def's Memo. at 3. The Court explained:

This argument elides the distinction between 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."

Hawaii Wildlife Fund, 2014 WL 2451565, at *16 (emphasis added).

This Court's earlier holding that the groundwater acting as a conduit for LWRF effluent need not itself be a point source constitutes the law of the case and is both "relevant and binding." Rodriguez v. General Dynamics Armament and Technical Products, Inc., Civ. No. 08-00189 SOM KSC, 2013 WL 4603057, at *2 (D. Haw. Aug. 29, 2013). The Court should decline Defendant's request to reconsider its prior ruling.¹

¹ Plaintiffs note that Defendant "could have asked this court to reconsider its [earlier] ruling by filing a motion for reconsideration under Local Rule 60.1." Thompson v. Thomas, Civ. No. 08-00218 SOM KSC, 2012 WL 3777143, at *5 (D. Haw. Aug. 29, 2012); see also Local Rule 60.1 (reconsideration motion must be brought "not more than fourteen (14) days after the court's written order is filed"). Having failed "timely [to] avail[] itself of a reconsideration motion under Local Rule 60.1," Defendant should not now be permitted to "seek[] untimely reconsideration" of this Court's earlier ruling. Thompson, 2012 WL 3777143, at *5.

As this Court recently explained, “[u]nder the doctrine of ‘law of the case,’ 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.” Thompson, 2012 WL 3777143, at *4.

This court has discretion to decline to apply the law of the case doctrine only when “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.”

Id. at *5 (quoting United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997); see also United States v. Jingles, 702 F.3d 494, 503 n.3 (9th Cir. 2012) (citing Gonzalez v. Arizona, 677 F.3d 383, 390 n. 4 (9th Cir. 2012) (en banc), and noting the “en banc court ... has consistently identified only three exceptions,” treating “the ‘manifest injustice’ and ‘clearly erroneous’ inquiries as two parts of the same exception” and not recognizing an exception for “changed circumstances”). The Ninth Circuit has instructed that “[f]ailure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion.” Alexander, 106 F.3d at 876.

In opposing Plaintiffs’ earlier motion for partial summary judgment, Defendant “had [its] bite at the apple,” and the Court should not “give [Defendant] a second bite unless one of the exceptions to the law of the case doctrine applies.” Jingles, 702 F.3d at 502. Here, Defendant does not point to a change in law or

substantially different evidence. Rather, Defendant rests its case solely on the proposition that this Court's earlier holding was clearly erroneous. Def's Memo. at 6-7. As discussed below, far from being in error, this Court's prior ruling is based on sound legal principles and is fully consistent with Congress's intent in enacting 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).

Defendant's claim that the "indirect discharge rationale" for Clean Water Act requires "a series of sequential point sources conveying pollutants from the initial point of discharge to navigable waters," Def's Memo. at 3, reflects a misreading of Justice Scalia's plurality decision in Rapanos v. United States, 547 U.S. 715 (2006). When Justice Scalia wrote that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,'" he was not describing the "indirect discharge" rationale for Clean Water Act liability, as Defendant claims. Def's Memo. at 3-4 (quoting Rapanos, 547 U.S. at 743). Rather, he was discussing decisions applying the separate "point source" rationale, under which "upstream, intermittently flowing channels themselves constitute 'point sources' under the Act." Rapanos, 547 U.S. at 743.²

² Justice Scalia cited three cases – South Fla. Water Management Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004); United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005); and Dague v. Burlington, 935 F.2d 1343 (2^d Cir. 1991) – as applying the "point source" rationale. Rapanos, 547 U.S. at 743-44. Those cases are not relevant to application of the "indirect discharge" rationale.

As this Court previously explained, “[c]ourts have adopted ‘the “indirect discharge” rationale and the “point source” rationale in the alternative.”’ Hawaii Wildlife Fund, 2014 WL 2451565, at *16 (quoting Rapanos, 547 U.S. at 744; emphasis in Hawaii Wildlife Fund). Accordingly, as this Court correctly concluded, “[i]t would be anomalous for those alternative rationales to merge into a single rationale,” as Defendant urges. Id.

The cases Justice Scalia cites in support of the “indirect discharge” rationale for Clean Water Act liability require that discharges originate from a point source, but do not require the conveyances between the point source and the covered water themselves to constitute point sources. Thus, in Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005), the Tenth Circuit found Clean Water Act jurisdiction where “plaintiffs have alleged the contemporaneous discharge from a point source—the El Paso shaft—which flows through other conveyances to navigable waters.” 421 F.3d at 1141. The Court held that “[t]he language of the [Clean Water Act] requires a connection or link between discharged pollutants and their addition to navigable waters.” Id. at 1146. In El Paso Gold Mines, the necessary link was provided by the Roosevelt Tunnel, which drained groundwater from various mines that reached the tunnel “through a series of drainage tunnels and underground shafts, including the El Paso mine shaft,” and conveyed that

groundwater to a portal discharging water “into Cripple Creek, which eventually empties into the Arkansas River.” Id. at 1136.

Defendant seizes on a footnote calling the Roosevelt Tunnel “another point source” to claim the Tenth Circuit imposes Clean Water Act liability only if pollutants enter navigable water via a discernible, confined and discrete conveyance. Def’s Memo. at 7 (quoting El Paso Gold Mines, 421 F.3d at 1146 n.6). The El Paso opinion makes clear, however, that the Roosevelt Tunnel is far from confined or discrete. Rather, water “enters and exits the tunnel through cracks and fractures in the rock along the tunnel’s six-mile length.” 421 F.3d at 1136. So porous is this tunnel that the Tenth Circuit found the existence of a genuine dispute whether any “pollutants, discharged from the El Paso shaft, actually make their way to the Roosevelt Tunnel portal where they are then discharged into navigable waters” Id. at 1146; see also id. at 1149-50.

Notably, the existence of “compelling and unrebutted evidence that pollutants enter and exit the Roosevelt Tunnel at numerous places along the two and a half mile route from the El Paso shaft to the portal” did not preclude the Tenth Circuit from concluding that this porous, unconfined conveyance was adequate for Clean Water Act jurisdiction to attach. Id. at 1150. The key fact was that the discharges originated from “the El Paso shaft, which is undoubtedly a point source.” Id. at 1140 n.4. Likewise, there is no dispute that Defendant’s

discharges originate from Wells 1 and 2 and that these injection wells are point sources. Def's Memo. at 8.³ Moreover, unlike El Paso Gold Mines, there is no dispute here that pollutants from Wells 1 and 2 reach navigable-in-fact waters. See, e.g., id. at 9 (LWRF effluent "moves through the aquifer to the ocean"), 10 ("groundwater/effluent mixture from Wells 1 and 2 travels through the aquifer ... reaching the ocean"), 11 ("flow from Well 2 ... enter[s the ocean] at locations outside the submarine springs"); see also List Report at 9 (LWRF "effluent injected into the aquifer ... ultimately find[s] its way to the sea"); Moran Decl. ¶¶ 9, 24; Paytan Decl. ¶¶ 6-9.

Concerned Area Residents for Environment ("CARE") v. Southview Farm, 34 F.3d 114 (2^d Cir. 1994), which, as Justice Scalia noted, "adopted both the 'indirect discharge' rationale and the 'point source' rationale," likewise cannot be squared with Defendant's claim that the "indirect discharge" rationale requires intervening conveyances to be point sources. Rapanos, 547 U.S. at 744. In CARE, citizens brought a Clean Water Act challenge to a dairy farm's liquid manure spreading operations. The Second Circuit applied the indirect discharge rationale as an independent, alternate basis to find Clean Water Act liability. 34 F.3d at 119. The court initially concluded that the defendant's "manure spreading vehicles

³ Because Defendant's discharges originate from point sources, this Court has not, as Defendant claims, "read the point source requirement out of the statute." Id. at 7 (citation omitted).

themselves were point sources.” Id. The court then held that “[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges.” Id.

For purposes of applying the indirect discharge rationale (as opposed to the alternate, “point source” rationale), the Second Circuit did not deem relevant whether the fields that conveyed the liquid manure to navigable waters were themselves point sources. Rather, to find Clean Water Act liability, it was enough that the defendant “collected by human effort” into its “tankers and other vehicles” the liquid manure the defendant subsequently discharged from those point sources onto fields that led to navigable waters. Id. at 118. Here, there is no dispute that Defendant “collect[s] by human effort” wastewater, treats the wastewater at the LWRF, and then discharges the treated wastewater from Wells 1 and 2 into groundwater that conveys the effluent to the ocean. Since Defendant’s injection wells are point sources, there is no need for the groundwater leading to the ocean also to constitute a point source.

The foregoing discussion confirms this Court did not err when it previously held that, under Rapanos’ indirect discharge rationale, “the groundwater acting as a conduit” for discharges from a point source “need not also be ‘confined and discrete.’” Hawaii Wildlife Fund, 2014 WL 2451565, at *16. In its moving papers, Defendant cites decisions reaching contrary conclusions, but none

constitutes controlling authority. When this Court issued its earlier ruling, it was well aware of the “split in authority over whether groundwater pollution violates the Clean Water Act.” Id. at *14. Having considered the competing theories, the Court concluded that, to accomplish the Clean Water Act’s objectives, “it makes sense to regulate groundwater under the conduit theory.” Id.; see also id. at *15 (“it would make no sense to exempt a polluter from regulation simply because its pollution passes through a conduit”).

Far from erroneous, this Court’s holding is consistent with numerous other decisions affirming that, “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.” Washington Wilderness Coal. v. Hecla Min. Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994); see also Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D. Puerto Rico 2009); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997); Sierra Club v. Colorado Ref. Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993); 66 Fed. Reg. 2,960, 3,016 n.1 (Jan. 12, 2001) (listing additional cases).

The Court's ruling is also consistent with positions adopted by the Environmental Protection Agency ("EPA"), which considered the Act's "purpose of protecting surface waters and their uses" and concluded:

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

56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991); see also 66 Fed. Reg. at 3,017 ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act"); 63 Fed. Reg. 7,858, 7,878 (Feb. 17, 1998) (Clean Water Act "regulate[s] releases of [pollutants] to groundwater [if] there is a direct hydrological connection between a point source and surface waters of the United States through such groundwater"). The agency has emphasized that interpreting the Clean Water Act to "exclud[e] regulation of point source discharges to the waters of the U.S. which occur via ground water," as Defendant urges, "would... be inconsistent with the overall Congressional goals expressed in the statute." 66 Fed. Reg. at 3,015-16.

IV. THE COURT SHOULD APPLY THE LAW OF THE CASE THAT GROUNDWATER UNDERLYING THE LWRF CONSTITUTES “WATERS OF THE UNITED STATES”

In granting Plaintiffs’ earlier motion for partial summary judgment, this Court rejected Defendant’s contention that “groundwater can never be regulated under the Healdsburg test,” holding that “[a]n aquifer with a substantial nexus with navigable-in-fact water may itself be protected under the Clean Water Act.” Hawaii Wildlife Fund, 2014 WL 2451565, at *16; see also id. at *19. The Court went on to find, under the specific facts of this case, that “the discharge into the aquifer [underlying the LWRF] significantly affects the physical, chemical and biological integrity of the receiving waters,” such that the Clean Water Act protects “the aquifer beneath the LWRF.” Id. at *23. Defendant’s renewed argument that, as a matter of law, groundwater can never constitute “waters of the United States” is contrary to the law of this case and should be rejected. Def’s Memo. at 8 n.1.⁴

As this Court observed in its earlier ruling, “[i]t has long been settled ‘that the meaning of “navigable waters” in the CWA is broader than the traditional understanding of that term.’” Hawaii Wildlife Fund, 2014 WL 2451565, at *11 (quoting Rapanos, 547 U.S. at 731). Accordingly, “the term ‘navigable’ is of ‘limited import’ and ... Congress [has] evidenced its intent to ‘regulate at least

⁴ As discussed above, Defendant should not be permitted to “seek[] untimely reconsideration” of this Court’s earlier ruling. Thompson, 2012 WL 3777143, at *5.

some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” Id. (quoting Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 167 (2001) (internal citation omitted)). There is nothing erroneous about the Court’s well-reasoned application of Justice Kennedy’s concurrence in Rapanos and the Ninth Circuit’s opinion in Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008), to conclude that, given its significant nexus to the Pacific Ocean, the aquifer beneath the LWRF is protected under the Clean Water Act as a water of the United States. Hawaii Wildlife Fund, 2014 WL 2451565, at *18-23.

None of the regulations Defendant cites supports its contention that, regardless of the circumstances, “[g]roundwater is not a ‘waters [sic] of the United States’ as a matter of law.” Def’s Memo. at 8 n.1; see, e.g., 40 C.F.R. § 122.2 (“waters of the United States” include tributaries of waters used in interstate or foreign commerce). As the EPA recently affirmed, both it and the Army Corps of Engineers – the agencies that issued the regulations Defendant cites – “have always preserved the authority to determine in a particular case that [groundwater

is] a ‘water of the United States,’” agency positions that are entirely consistent with this Court’s holding. 79 Fed. Reg. 22,188, 22,218 (Apr. 21, 2014).⁵

There is no dispute in this case that Wells 1 and 2 discharge treated wastewater into the aquifer underneath the LWRF. Def’s Concise Statement (Dkt. No. 127) ¶ 1. This Court’s prior ruling that the aquifer is protected as a water of the United States provides an independent basis (in addition to the “indirect discharge” rationale) for finding Defendant’s unpermitted discharges violate the Clean Water Act. Notably, the tracer dye study’s model shows that, even when Wells 3 and 4 receive over eighty percent (80%) of LWRF effluent, effluent from Wells 1 and 2 reach the submarine seeps off Kahekili Beach. Plfs’ Exh. 34: Final Tracer Study at Fig. 5-19(a); Moran Decl. ¶¶ 25-26. Moreover, when Defendant changes the injection regime and discharges a greater proportion of LWRF effluent into the aquifer from Wells 1 and 2, as it has in recent months, increased volume and concentration of that effluent emerge into the ocean from the seeps off Kahekili Beach. Final Tracer Study at Fig. 5-19(b); Moran Decl. ¶¶ 25-26, 28-29.

⁵ 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.” *Id.* at 22,188-89. As this Court previously held, “the proposed groundwater rule is ... not owed deference here.” Hawaii Wildlife Fund, 2014 WL 2451565, at *20.

V. THE COURT SHOULD APPLY THE LAW OF THE CASE THAT THE GROUNDWATER UNDERLYING THE LWRF IS A “CONFINED AND DISCRETE CONVEYANCE”

This Court should reject Defendant’s attempt to relitigate this Court’s prior finding that the groundwater into which the LWRF discharges is “itself a ‘confined and discrete conveyance.’” Hawaii Wildlife Fund, 2014 WL 2451565, at *17; see Def’s Memo. at 8-13. While the law of the case doctrine permits the Court to reconsider its earlier decisions when “new evidence has surfaced,” Defendant has the burden to “show that the evidence is newly discovered or unknown to it until after its prior motion was submitted for decision and that it could not with reasonable diligence have discovered and produced such evidence prior to that submission.” Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc., 389 F. Supp. 2d 1145, 1156 (D. Alaska 2005); cf. Au v. Association of Apartment Owners of the Royal Iolani, Civ. No. 14–00271 SOM/BMK, 2014 WL 4634981, at *1 (D. Haw. Sept. 9, 2014) (same standard for motions for reconsideration).

Here, Defendant relies on excerpts from various tracer studies involving the LWRF and an expert report analyzing those studies. See Def’s Memo. at 8-13 (citing Def’s Concise Statement ¶¶ 1-9, 11-12). These tracer studies were not only known to Defendant at the time it participated in the earlier round of summary judgment briefing, but Defendant even filed excerpts from the interim and final EPA-funded tracer study in support of its positions. See Dkt. Nos. 89-4 (final

tracer study), 89-5 (interim tracer study); Henkin Decl. ¶¶ 2-4 (Tetra Tech study); see also Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir. 1987) (“Evidence is not ‘newly discovered’ under the Federal Rules if it was in the moving party’s possession at the time of trial or could have been discovered with reasonable diligence”). As for Defendant’s expert report, “the nature of the evidence demonstrates that [Defendant] could have discovered the evidence by the exercise of reasonable diligence, e.g., simply making an inquiry of its [expert].” Certain Underwriters at Lloyds, 389 F. Supp. 2d at 1156; see also Coastal Transfer Co., 833 F.2d at 212 (expert testimony not “newly discovered” if based on evidence previously in party’s possession). Since Defendant fails to proffer any newly discovered evidence, this Court should apply the law of the case that the groundwater underlying the LWRF constitutes a point source.

Even if the Court were willing to reconsider its earlier finding, Defendant fails to demonstrate the Court erred. There is no dispute that all of the effluent discharged from the LWRF injection wells, including Wells 1 and 2, reaches the Pacific Ocean through groundwater. Def’s Memo. at 9-11; Def’s Exh. 10: List Report at 9 (LWRF effluent “must ultimately find its way to the sea”); Moran Decl. ¶¶ 9, 24;⁶ Paytan Decl. ¶¶ 6-9.⁷ While the absence of conclusive tracer

⁶ Dr. Moran’s opinions about Well 1 and 2 effluent do not, as Defendant claims, “rel[y] on Wells 3 and 4 not being used” and are not inconsistent with the tracer study’s results. Def’s Memo. at 12. Rather, Dr. Moran applies the tracer

results for Wells 1 and 2 means that one cannot pinpoint the precise location where Well 1 and 2 effluent enters the ocean, it is undisputed that the effluent reaches the ocean. Moran Decl. ¶¶ 24, 47-55.⁸ As this Court correctly found, “[a]ny 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.” Hawaii Wildlife Fund, 2014 WL 2451565, at *17; see also id. (rejecting “radical conclusion that all conveyances through groundwater into the

study’s results and modeling, as well as other sources of data, to reach conclusions regarding the fate and transport of Well 1 and 2 effluent under a variety of LWRF injection regimes that are entirely consistent with the tracer study’s results. Moran Decl. ¶¶ 13-32.

⁷ The tracer study concluded that 64% of the effluent injected into Wells 3 and 4 discharges at specific locations: the submarine seeps off Kahekili Beach. Final Tracer Study at ES-3. The study’s model concluded that the remainder of the effluent would also reach the ocean, but at other locations. Id. at 4-90.

⁸ Defendant inaccurately claims the tracer study did not “reach[] a conclusion regarding the hydrologic connectivity between Well 2 and the ocean.” Def’s Memo. at 9-10. While the non-detection at the Kahekili seeps of the dye that was placed into Well 2 precluded conclusive statements about Well 2’s hydrologic connection to that precise location, the study modeled all Well 2 effluent reaching the ocean. Moran Decl. ¶¶ 24-27, 53-55; Final Tracer Study at 4-90 (Fig. 4-39), 5-46 (Fig. 5-19).

Defendant’s claim that the tracer study concludes Well 2 effluent will not reach the Kahekili seeps when Wells 3 and 4 receive 80% of total LWRF effluent cannot be squared with the study’s modeling of the Well 2 plume. Def’s Memo. at 11. The model predicts that, even when Wells 3 and 4 receive 80% of LWRF effluent, effluent injected into Well 2 reaches the Kahekili seeps. Moran Decl. ¶ 26; Final Tracer Study at Fig. 5-19(a).

ocean are permissible under the Act, even if 100% of the pollutants find their way into the ocean”).

Defendant’s argument that the flow path from the LWRF injection wells to the ocean is too “broad and diffuse” to trigger Clean Water Act liability suffers from the same infirmity as its earlier claim that only “transmission through ‘shallow subsurface’ water” is regulated, with Defendant failing to ground its argument in “logic or case law” or to provide “any clue as to the precise measurement that might render groundwater” too broad or diffuse. *Id.* As this Court correctly noted, “[t]he key factor is ... the existence of a pollutant that eventually reaches the ocean.” *Id.*⁹ The Court specifically addressed the issue of diffusion, holding that “a diffused conduit is no less covered under the Act if it actually conveys pollutants to navigable-in-fact water.” Hawaii Wildlife Fund, 2014 WL 2451565, at *18. It is undisputed here that the groundwater under the

⁹ Here, there is no dispute that LWRF effluent not only eventually reaches the ocean, but does so within only a matter of months, with all effluent reaching the ocean within a few years after discharge into the aquifer. See Final Tracer Study at ES-3 (“the injectate travel time takes from about three months to arrive, to over an estimated four years for the draining trailing edge fully exit the coast”); Def’s Memo. at 9; Moran Decl. ¶¶ 11, 16, 44; contrast Final Tracer Study at ES-1 (peak tracer concentrations detected in ocean 9 to 10 months after discharge from LWRF) with Greater Yellowstone Coalition v. Larson, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009) (close call whether Clean Water Act applies to discharges to groundwater where it “would take between 60 and 420 years for peak [pollutant] concentrations ... to arrive at surface water”).

LWRF conveys Well 1 and 2 effluent to the Pacific Ocean, a navigable-in-fact water.

Defendant relies substantially on Dr. List's unsworn report to support its argument regarding the breadth and diffusion of the groundwater conveying LWRF effluent. As previously discussed, Dr. List's report is inadmissible and cannot support Defendant's motion for summary judgment. If the Court nonetheless considers Dr. List's report, his analysis confirms that LWRF effluent contributes at least 14% of the 19.6 million gallons of groundwater entering the Pacific Ocean each day in the area affected by the LWRF, a substantial contribution of pollutants. Moran Decl. ¶¶ 36-37.

If this Court were to reverse its earlier decision and agree with Defendant that, for Clean Water Act liability to attach, the groundwater into which point sources discharge must convey pollutants to navigable waters in "narrow" flow paths, Plaintiffs vigorously dispute Defendant's claims that the groundwater at issue here is unconfined and conveys LWRF effluent to the ocean in a uniformly diffuse manner.¹⁰ The tracer study established the existence of preferential flow paths that convey the majority of Well 3 and 4 effluent to the seeps offshore of Kahekili Beach, concentrating flow in these specific areas, rather than spreading it

¹⁰ As discussed in Drs. Moran's and Paytan's declarations, much of Dr. List's analysis reflects unfamiliarity with basic scientific concepts. Moran Decl. ¶¶ 33, 38-44; Paytan Decl. ¶¶ 27-34.

uniformly and diffusely throughout the receiving water. Moran Decl. ¶¶ 17-20.

Defendant provides no support for its claim Well 1 and 2 effluent discharges to the ocean in a fundamentally different way. Id. ¶ 15.

For purposes of constructing his “simple model,” Dr. List assumes “a uniform groundwater flow,” but assuming does not make it so. List Report at 11. The flow field Dr. List presents would result in uniform tracer concentrations at locations where groundwater containing LWRF effluent enters the ocean, which is entirely inconsistent with the tracer study’s field observations. Moran Decl. ¶¶ 34-35; see also Daubert v. Merrill Dow Pharm., 509 U.S. 579, 590 (1993) (“Proposed [expert] testimony must be supported by appropriate validation— i.e., ‘good grounds,’ based on what is known”). The only way to explain the tracer study’s results is to recognize the existence of fast, preferential flow paths that convey concentrated LWRF effluent to the ocean through the “clinker zones” in lava flows in the area. Moran Decl. ¶¶ 17, 35; Final Tracer Study at Figs. 5-10, 5-11.

Defendant’s own well testing data confirm that effluent injected into Well 2 is transmitted rapidly away from the well via preferential flow paths. Plfs’ Exh. 38: Underground Injection Control Status Report for July 2011 at 15-19; Moran Decl. ¶ 22.¹¹ Studies conducted by the U.S. Geological Survey (“USGS”) and peer-reviewed research have confirmed there are discharge “hot spots,” surrounded

¹¹ It is undisputed that effluent injected into Well 1 will flow to the ocean in a similar manner as Well 2 effluent. Moran Decl. ¶¶ 23, 47.

by areas of diffuse discharge. Moran Decl. ¶ 21; see, e.g., Plfs'Exh. 36: Dailer (2012) Report at Fig. 4; Plfs' Exh. 40: USGS Report at Fig. 28. These data indicate that, like effluent injected into Wells 3 and 4, Well 1 and 2 effluent emerges into the ocean concentrated in submarine seeps, not uniformly dispersed. Moran Decl. ¶¶ 21-23.¹²

VI. THE COURT SHOULD REJECT DEFENDANT'S BELATED CHALLENGE TO THE TRACER STUDY

Plaintiffs generally agree with Defendant that, to determine Clean Water Act liability, "the pertinent inquiry is how the treated effluent makes it to the ocean, not how much." Def's Memo. at 13. In this case, it is undisputed that Defendant discharges effluent from point sources – Wells 1 and 2 – into groundwater that conveys that effluent to the ocean. As discussed above, those facts establish Defendant's liability under the "indirect discharge" rationale, regardless of the quantity of effluent reaching the ocean.

¹² Even if the groundwater were not confined and discrete as it travels to the ocean, the concentrated discharge of Well 1 and 2 effluent as it emerges from submarine seeps supports finding a point source discharge, triggering liability. See Raritan Baykeeper, Inc. v. NL Indus., Inc., 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013) (groundwater with hydrologic connection to river is point source); CARE, 34 F.3d at 118-19 ("diffuse run-off" from field channelized through depression in swale constitutes point source discharge); Sierra Club v. Abston Const. Co., 620 F.2d 41, 45 (5th Cir. 1980) (defendant liable for discharges from natural conveyances "so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into" navigable water); see also United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (point source concept "embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States").

This Court’s earlier opinion affirmed 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.” Hawaii Wildlife Fund, 2014 WL 2451565, at *15 (quoting Committee To Save Mokelumne River, 13 F.3d at 309). As long as “the level of pollutants emerging into navigable-in-fact water is more than de minimis,” unpermitted discharges from Wells 1 and 2 are illegal. Id. The Court referenced the tracer study’s estimate of the percentage of LWRF effluent emerging from the seeps at Kahekili – which Defendant now challenges – solely to affirm that, even if the groundwater conveying LWRF effluent had to qualify as a “confined and discrete conveyance” for Clean Water Act liability to attach (a conclusion the Court declined to adopt), that requirement would be satisfied. Id. at *17.

Even if the Court were to change its mind and conclude the percentage of effluent reaching the ocean were relevant to liability, as discussed above, there is no dispute the groundwater conveys 100% of injected effluent to the ocean and does so within only a few years. Defendant’s quibbling with the tracer study’s estimate of recovered dye at the Kahekili seeps is immaterial, as it does not alter the fact that the LWRF effluent “must ultimately find its way to the sea.” List Report at 9; Paytan Decl. ¶ 6.

Defendant had ample opportunity to raise challenges to the tracer study's methodology during litigation over liability for Well 3 and 4 discharges, but failed to do so. As this Court noted:

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.

Id. at *16. This Court should reject Defendant's untimely challenge to the tracer study, which is based solely on evidence previously available to Defendant. See Certain Underwriters at Lloyds, 389 F. Supp. 2d at 1156; Au, 2014 WL 4634981, at *1.

If the Court were to entertain Defendant's challenges, it should still reject them. Defendant relies extensively on Dr. List's unsworn report, which is inadmissible. See Def's Concise Statement ¶¶ 13-15. Even if his report were admissible, Dr. List does not ultimately opine that the tracer study's assumptions were implausible or that its dye recovery estimate was wrong. See List Report at 35 ("purpose of [List's] calculations ... is not to determine accurately the dye recovery rate"). Rather, he merely critiques the lack of quantification of the "inevitably ... high uncertainties" in calculating dye recovery rates. Id. at 34. One cannot, however, always quantify uncertainties, and the tracer study's acknowledgement of their existence simply reflects the scientific nature of the study. Moran Decl. ¶¶ 56-57.

Defendant gives this Court no reason to question the results of this “independent ... study,” which was funded by various regulatory agencies and carried out by qualified researchers with no connection to any of the parties to this dispute. Hawaii Wildlife Fund, 2014 WL 2451565, at *23. As Drs. Moran and Paytan explain, the tracer study’s conclusions are based on an unusually robust set of data and application of accepted scientific methodologies. Moran Decl. ¶¶ 43, 56-58; Paytan Decl. ¶¶ 29-31, 33. Plaintiffs dispute Defendant’s claim that the tracer study’s calculations of the percentage of LWRF effluent reaching the Kahekili seeps were flawed, rendering this issue – if relevant – inappropriate for resolution at summary judgment.

VII. THE ALLEGED DIFFICULTY OF ISSUING AN NPDES PERMIT IS IRRELEVANT TO DEFENDANT’S LIABILITY

The Court should reject Defendant’s argument its unpermitted discharges of effluent from Wells 1 and 2 into the Pacific Ocean do not violate the Clean Water Act because, allegedly, it is not feasible to issue an NPDES permit for those discharges. Def’s Memo at 16. Defendant cites no legal authority for this proposition, which is at odds with settled Ninth Circuit law that there are only four “elements needed to establish liability under the Clean Water Act”: Defendant has “(1) discharged a pollutant ...; (2) into navigable waters ...; (3) from a point source ...; (4) without a discharge permit.” Committee to Save Mokelumne River,

13 F.3d at 309. The alleged difficulty of issuing an NPDES permit is irrelevant to Defendant's liability.¹³

Even if relevant to liability, Defendant fails to support its claim of infeasibility with admissible evidence, as required by FRCP 56(c). Defendant relies solely on the unsworn report of Dr. List, which, as discussed above, is inadmissible. See Def's Concise Statement ¶ 16. Even had Dr. List provided a sworn statement, his resume states his knowledge, experience and education are in the fields of mathematics and environmental engineering, not NPDES permitting. See List Report at 62-68. Defendant, therefore, fails to establish Dr. List "is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Moreover, as Defendant's citations to numerous regulatory provisions make clear, whether issuance of an NPDES permit is feasible under the facts of this case involves "matters of law," which "are inappropriate subjects for expert testimony." Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1052 (9th Cir. 2012) (citing Fed. R. Evid. 702); G. v. Hawaii, Dep't of Human Services, 703 F. Supp. 2d 1112, 1128 (D. Haw. 2010) (experts "may not offer opinions on a purely legal issue or the application of legal standards to the evidence").

¹³ "In determining the amount of a civil penalty" for Defendant's violations, this Court may consider "any good-faith efforts to comply with the applicable requirements" and "such other matters as justice may require." 33 U.S.C. § 1319(d). Defendant will, therefore, have its chance later in this proceeding to argue about the alleged difficulty of securing a permit.

Turning to the law, Defendant fails to cite any regulation or other authority supporting its claim that, unless the precise locations where Wells 1 and 2 discharge to the ocean are identified, no NPDES permit can issue. The regulations governing permit applications for publicly owned treatment works like the LWRF do not require outfall descriptions for facilities like the LWRF that do not have outfalls. See 40 C.F.R. § 122.21(j)(3) (requiring information about outfalls only “as applicable”).¹⁴ Where, as here, wastewater is disposed of through underground injection, the regulations require Defendant to provide information that is readily available for Wells 1 and 2:

- (1) A description of the disposal method ...;
- (2) The annual average daily volume disposed of by this method, in gallons per day; and
- (3) Whether disposal through this method is continuous or intermittent;

Id. § 122.21(j)(1)(viii)(E); see also id. § 122.21(j)(2)(ii)(C) (requiring topographic map to show “[e]ach well where fluids from the treatment plant are injected underground”). Defendant knows this, having provided the specified information regarding the LWRF wells in the NPDES permit application it submitted in November 2012. Plfs’ Exh. 29: Def’s NPDES Application at COM3 NPDES 006093, 006116.

¹⁴ Defendant mistakenly cites to 40 C.F.R. § 122.21(i), which governs applications for concentrated animal feeding operations and aquatic animal production facilities.

Even if the LWRF injection wells were considered “outfalls” for purpose of NPDES permitting, Defendant can easily provide the limited information the regulations call for regarding each well’s location, distance from shore, depth, average daily flow rate and frequency of discharge, as well as whether the wells are equipped with diffusers. See 40 C.F.R. § 122.21(j)(3). The regulations similarly require minimal information about the receiving water (here, indisputably the Pacific Ocean) and, even then, only “if known.” Id. § 122.21(j)(3)(ii); see also Def’s NPDES Application at COM3 NPDES 006094. In the event that normally required information were not relevant, the permit application regulations have built-in flexibility, giving the Hawai‘i Department of Health (“HDOH”) discretion to waive any information requirement it deems “not of material concern for a specific permit.” 40 C.F.R. § 122.21(j).

In sum, the alleged difficulty in securing an NPDES permit for discharges from Wells 1 and 2 is irrelevant to Defendant’s liability and, in any event, there is no need to identify the precise locations that Well 1 and 2 effluent enters the ocean for Defendant to apply for and secure a permit.

VIII. UNDER THE FACTS OF THIS CASE, DEFENDANT’S UNPERMITTED DISCHARGES FROM WELLS 1 AND 2 VIOLATE THE CLEAN WATER ACT

As the foregoing discussion makes clear, applying the law of this case to the undisputed facts gives the Court several alternate grounds to conclude that

Defendant's unpermitted discharges from Wells 1 and 2 violate the Clean Water Act. It is undisputed that effluent discharged from Defendant's point sources – the injection wells – is conveyed through groundwater to the Pacific Ocean, warranting application of the “indirect discharge” rationale for Clean Water Act liability. See Part III, supra. In addition, having found that, under the facts of this case, the groundwater underlying the LWRF is protected as a water of the United States, this Court can apply the “point source” rationale to the unpermitted discharges from Wells 1 and 2 into that groundwater. See Part IV, supra. Finally, because the groundwater underlying the LWRF conveys 100% of Well 1 and 2 effluent to the ocean, the Court can conclude Defendant discharges through a series of point sources that ultimately discharge into the ocean. See Part V, supra.

In Part III.C of its memorandum, Defendant raises several irrelevant factual and legal issues to support its claim that, notwithstanding this Court's prior ruling on partial summary judgment, discharges into the groundwater under the LWRF cannot trigger Clean Water Act liability. Initially, Defendant cites several cases regarding regulation of stormwater that is neither collected nor channeled. See Def's Memo. at 17. These cases are inapposite, both because this case does not involve stormwater pollution and because it is undisputed that Defendant collects wastewater at the LWRF, treats it and then channels it through pipes that convey

the effluent to injection wells, which Defendant concedes are point sources. See Def's Memo. at 8 (citing 33 U.S.C. § 1362(14)); Def's Concise Statement ¶ 1.

Defendant next asserts that a watershed management plan the National Oceanic and Atmospheric Administration ("NOAA") commissioned "identifies LWRF effluent as nonpoint source pollution." Def's Memo. at 17. Even if true, Defendant fails to explain the relevance of anything NOAA might have to say on this topic, since NOAA has no regulatory authority under the Clean Water Act. In any event, it is simply not accurate that the watershed management plan expresses any opinion about whether LWRF effluent is point source or nonpoint source pollution. Hood Decl. ¶¶ 2-7.

Defendant then reads far too much into the Clean Water Act provision calling for EPA to share information about controlling pollution resulting from the disposal of pollutants in wells and from groundwater movement. Def's Memo. at 18 (citing 33 U.S.C. § 1314(f)(2)(D), (F)). That pollution resulting from these sources is sometimes deemed nonpoint does not mean that, as a matter of law, it never constitutes point source pollution. See South Fla. Water Management Dist., 541 U.S. at 106 ("§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition"). Indeed, given that the Clean Water Act expressly defines the term "point source" to include "any ... well ... from which pollutants are or may be

discharged,” 33 U.S.C. § 1362(14), it would create an absurdity to interpret 33 U.S.C. § 1314(f)(2)(D) as providing that pollution from wells can never constitute point source pollution. See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1036 (9th Cir. 2013) (courts should avoid statutory interpretation that leads to absurd results or renders provision meaningless).

Whether pollution from wells or involving groundwater is from a point or nonpoint source depends on the facts of the case. See 56 Fed. Reg. at 64,892 (“the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters”).¹⁵ Here, as discussed above, the Clean Water Act regulates the effluent that Defendant collects and then discharges from Wells 1 and 2 as point source pollution under either the “indirect discharge” or the “point source” rationales.¹⁶

¹⁵ Thus, the fact that HDOH concluded that groundwater is a nonpoint source of pollution to Hanalei Bay, Kaua‘i (Def’s Exh. 6) has no bearing on this Court’s determination whether discharges from the LWRF are regulated as point sources.

¹⁶ Defendant mistakenly claims that “Plaintiffs’ complaint characterizes the LWRF effluent as ‘percolating’ into the ocean.” Def’s Memo. at 18. In fact, Plaintiffs merely quote the Hawai‘i Division of Aquatic Resources, which chose that term. First Amended Complaint (Dkt. No. 24) ¶ 56. As clearly stated in their complaint, Plaintiffs challenge Defendant’s unpermitted “discharges of wastewater and other pollutants from its injection wells at the LWRF through hydrologically connected groundwater into waters of the United States.” Id. ¶ 64. Regardless of the term used, Defendant’s conduct violates the Clean Water Act. Cf. Hawaii Wildlife Fund, 2014 WL 2451565, at *5 (rejecting similar argument over terminology).

IX. PLAINTIFFS DO NOT BEAR THE BURDEN OF PINPOINTING THE EXACT LOCATION WHERE WELL 1 AND 2 EFFLUENT ENTERS THE OCEAN

There is no dispute that effluent from the LWRF enters the ocean, which establishes Defendant's liability under the Clean Water Act. See Hawaii Wildlife Fund, 2014 WL 2451565, at *15. Defendant fails to cite any authority to support its claim that Plaintiffs bear the additional burden of pinpointing the exact locations where Well 1 and 2 effluent enters the Pacific Ocean. Def's Memo. at 19-20. Defendant's claim cannot be squared with this Court's holding that Plaintiffs need show only that "the discharge into the groundwater below the LWRF is functionally equivalent to a discharge into the ocean itself." Hawaii Wildlife Fund, 2014 WL 2451565, at *12; cf. id. at *15 (rejecting interpretation that "poses enormous barriers to the regulation of groundwater").

The tracer study – which was funded and conducted independently of any of the parties to this dispute – developed a robust, well-constrained model that allows for science-based conclusions regarding the likely flowpaths and fate of injectate from Wells 1 and 2. Moran Decl. ¶¶ 24-25, 47, 55-58. The tracer study's model shows that, under all of the various LWRF injection regimes that have prevailed since the start of the applicable limitations period in 2007, Well 1 and 2 effluent enters the Pacific Ocean off West Maui, with a portion of that effluent at all times emerging from the nearshore seeps off Kahekili Beach. Id. ¶¶ 25-32; Final Tracer

Study at Fig. 5-19. That evidence easily satisfies Plaintiffs' burden to "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." Hawaii Wildlife Fund, 2014 WL 2451565, at *15.

X. WHETHER THERE ARE POLLUTION SOURCES IN ADDITION TO DEFENDANT'S INJECTION WELLS IS IRRELEVANT TO LIABILITY

Plaintiffs do not dispute that the groundwater that conveys LWRF effluent to the ocean may have sources of pollution in addition to Defendant's injection wells. See Def's Memo. at 19-20. Whether such additional sources of pollution exist is, however, irrelevant to Defendant's liability under the Clean Water Act. As the Ninth Circuit explained in Committee to Save Mokelumne River:

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.

13 F.3d at 309.

Defendant fails to cite any authority holding that Defendant escapes Clean Water Act liability if LWRF effluent cannot be distinguished from other possible sources of groundwater pollution. Defendant's position is antithetical to the Act's regulatory regime, which establishes "direct restrictions on discharges" from point sources like Wells 1 and 2. Environmental Prot. Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 204 (1976). As the Supreme Court

explained, Congress adopted this regime 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. Defendant’s claim that one cannot distinguish nutrients due to discharges of LWRF effluent from other nutrient sources “is not material to the resolution of the issue of [Defendant’s] liability.” Committee to Save Mokelumne River, 13 F.3d at 309; see also id. (rejecting claim defendants “are liable under the Clean Water Act only if the facility produces a net increase in the acidity of the surface runoff”).¹⁷

XI. WHETHER WATER QUALITY IN THE OCEAN OFF KAHEKILI BEACH IS IMPAIRED IS IRRELEVANT TO LIABILITY

This Court is well-aware the parties disagree about the extent to which Defendant’s discharges of LWRF effluent into the ocean cause environmental harm. See Hawaii Wildlife Fund, 2014 WL 2451565, at *21-23. The parties will have the opportunity to present their respective cases on that issue during the penalty phase of this case, when the Court will consider, among other things, “the seriousness of [Defendant’s] violation[s].” 33 U.S.C. § 1319(d). As this Court previously held, and Defendant apparently acknowledges, “[t]o establish the County’s liability, Plaintiffs need not show that coral or other marine life has been

¹⁷ If this issue were material, it would not be suitable for resolution at summary judgment. Plaintiffs dispute Defendant’s claim that sources of nutrients in the groundwater conveying LWRF effluent cannot be distinguished from one another. See Paytan Decl. ¶¶ 10-24.

damaged or harmed.” Hawaii Wildlife Fund, 2014 WL 2451565, at *23; see also Def’s Memo. at 20 n.4 (Part III.D of Defendant’s memorandum “not dispositive to the County’s Motion”).

Since it is premature to address issues related to environmental harm, Plaintiffs will limit their response to noting, as this Court previously observed:

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.

Hawaii Wildlife Fund, 2014 WL 2451565, at *22.

The corals through which groundwater emerges into the ocean are directly exposed to the nutrients and other damaging pollutants from LWRF effluent, before those pollutants can be diluted in the water column. Id. at *2, 21-22. Thus, whether the ocean offshore of Kahekili Beach now meets water quality standards for nutrients has little relevance to whether Defendant’s unpermitted discharges cause significant environmental harm.¹⁸ After all, if Defendant’s discharges into

¹⁸ HDOH’s finding that the ocean off Kahekili Beach now meets standards for nutrients does not necessarily mean, as Defendant asserts, that water quality is improving. HDOH’s decision to change the applicable water quality criteria from “dry” to “wet” means that Hawai‘i’s water quality regulations now permit

the LWRF injection wells were innocuous, NOAA's watershed management plan would not identify the injection wells as a "hotspot" for nutrients and other pollutants and designate them a "high" priority for implementing pollution prevention measures. Def's Exh. 4 at 4; Plfs' Exh. 30 at 86; see also Paytan Decl. ¶¶ 25-26, 34.

XII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Defendant gives this Court no valid reason to disturb its Court's prior legal holdings and factual findings, which compel the conclusion that Defendant's unpermitted discharges from LWRF Wells 1 and 2 violate the Clean Water Act. Accordingly, the Court should apply the law of this case, deny Defendant's motion and enter summary judgment in Plaintiffs' favor.

Dated: Honolulu, Hawai'i, December 22, 2014.

EARTHJUSTICE
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substantially higher levels of nutrient pollution in the coastal waters off Kahekili Beach. See H.A.R. § 11-54-6(b)(3); Def's Exh. 7 at 33.

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 (Times New Roman) and contains 8,902 words, exclusive of the caption, tables, and signature block. I have relied upon Microsoft Word to determine the word count.

DATED: Honolulu, Hawai‘i, December 22, 2014.

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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

HAWAI'I 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 MEMORANDUM IN
SUPPORT OF THE COUNTY'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO
WELLS 1 AND 2**

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I. INTRODUCTION

To prevail on their claim that the County of Maui (“County”) violated Clean Water Act (“CWA”) § 301(a) by injecting treated effluent into Wells 1 and 2 at the Lahania Wastewater Reclamation Facility (“LWRF”), Plaintiffs must show the effluent was discharged “to navigable waters from any point source.” 33 U.S.C. §§ 1311(a), 1362(12). Plaintiffs cannot prove that critical fact. Plaintiffs contend the effluent made its way to the ocean—which admittedly is navigable water—but lack evidence the effluent was added to the ocean through a point source. With no evidence of a point source discharge, the County is entitled to summary judgment.

Importantly, the County is entitled to summary judgment on Wells 1 and 2 notwithstanding the Court’s ruling on Wells 3 and 4. Critical to that ruling was the Court’s understanding that the 2013 University of Hawaii Tracer Study (“Tracer Study”) showed 64% of effluent injected into Wells 3 and 4 discharged in the vicinity of the submarine springs. Hawai’i Wildlife Fund v. County of Maui, Civil No. 12-00198 SOM/BMK, 2014 WL 2451565, at *16 (D. Haw. May 30, 2014). While the County respectfully disagrees with the Court’s ruling on Wells 3 and 4, the same is not the case with Wells 1 and 2 as no tracer study was performed on Well 1, and multiple tracer studies on Well 2 detected no entry point to the ocean. Thus, there is no legal or factual basis for applying that reasoning to Wells 1 and 2.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there is “no genuine issue as to any material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (internal citation and quotation marks omitted). The party bearing the burden of proof at trial—here, the Plaintiffs—has the burden of showing that a genuine dispute exists that precludes summary judgment. Id. That party cannot rely on its pleadings to make that showing. It must demonstrate through admissible evidence that a genuine dispute exists. First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-290 (1968) (“sufficient evidence supporting the claimed factual dispute [must] be shown”). Moreover, disputes over immaterial facts do not matter. “[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Cline v. Industrial Maint. Eng’g & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (internal quotation marks omitted)).

III. ARGUMENT

A. The Point Source Discharge Requirement Must Be Met To Impose CWA § 301(a) Liability

CWA § 301(a) prohibits the “discharge of any pollutant” except in compliance with specified sections of the CWA, including an NPDES permit. 33 U.S.C. § 1311(a). “Discharge of a pollutant” is defined as “any addition of any

pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

“Point source” is defined as “any discernible, confined and discrete conveyance” including “any pipe, ditch, channel, tunnel, conduit, well” 33 U.S.C. § 1362(14).

To meet their burden to show the County’s injection of treated effluent from Wells 1 and 2 violates § 301(a), Plaintiffs must prove pollutants from Wells 1 and 2 enter the ocean via a point source discharge. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001). Plaintiffs cannot meet this burden because they are unable to demonstrate the “point source discharge” requirement. Specifically, Plaintiffs cannot show that effluent from Well 1 or 2 reaches the ocean via a “discernible, confined and discrete conveyance.” Id.

B. The County Has Not Violated The CWA Because There Is No Point Source Discharge To The Ocean

1. Indirect Discharges Must Pass Through Point Sources

To demonstrate a point source discharge for purposes of CWA § 301(a) liability, Plaintiffs have two options: (1) a point source discharge directly to navigable waters (point source or direct discharge rationale); or (2) a series of sequential point sources conveying pollutants from the initial point of discharge to navigable waters (indirect discharge rationale). See Rapanos v. United States, 547 U.S. 715, 744 (2006). Neither rationale eliminates the mandatory point source requirement. Rather, the indirect discharge rationale “makes plain that a point

source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” Id. at 743 (internal citation and quotation marks omitted). See also Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at *7, 8 (E.D. Pa. Nov. 21, 2013). Thus, “pollutants discharged from a point source do not [need to] emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between” the initial point source and navigable water. Rapanos, 547 U.S. at 743 (internal citation omitted).

The cases the Supreme Court cite in Rapanos confirm an indirect discharge must still pass through discrete conveyances in reaching navigable waters. Id. at 743-744. In Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141(10th Cir. 2005), the indirect discharge was from a mineshaft through a tunnel to navigable waters. Likewise, United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) involved an indirect discharge from a chemical facility through a municipal storm sewer into navigable waters. The indirect discharge in South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 101 (2004) was from a pump station through a canal into navigable waters. In United States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005), the indirect discharge was from a toilet at an industrial facility through a storm drain into navigable waters. Similarly, Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2nd Cir. 1991) (rev’d on other grounds) involved seepage from a

landfill discharged through a culvert into navigable waters. Finally, in Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994), there was an indirect discharge from farm vehicles through a swale, a pipe and a ditch into navigable waters. In each case, the indirect discharges “pass ‘through conveyances’ in between” the source of the pollutants and navigable waters. Rapanos, 547 U.S. at 743 (internal citation omitted).

These basic CWA principles establish that pollutants entering navigable water through unconfined groundwater do not violate CWA § 301(a). Rather, the groundwater must be “confined” in *something else* to be a “point source” discharge. For example, LWRF effluent reaching the ocean through a single pipe, 50 small pipes or a lava-tube would meet the point source requirement and be regulated under § 301(a). See Tri-Realty Co., 2013 WL 6164092, at *8 (pollutants from an underground storage tank that migrate through soil to groundwater which reaches navigable water is not a point source discharge); see also Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1153 (9th Cir. 2010) (precipitation percolating through overburden and soils that eventually reaches surface water is a nonpoint source); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F.Supp. 1333, 1359 (D.N.M. 1995) (shallow seeps with trace pollutants emerging through soil are nonpoint source “carriers of water from the alluvium to the surface.”).

2. The Court's Conduit Theory Eliminates The Point Source Discharge Requirement

By asserting that “liability under the [CWA] is triggered when pollutants reach navigable water, regardless of *how* they get there,” the Court eliminated the point source requirement for indirect discharges. Hawai'i Wildlife Fund, 2014 WL 2451565, at *18 (emphasis in original). By expanding the indirect discharge theory such that a conduit no longer needs to be a “discernible, confined and discrete conveyance,” the Court nullified the meaning of point source. Id. at *16 (“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’ . . . and the groundwater acting as a conduit need not also be ‘confined and discrete.’”). Conduit is part of a defined term of art under the CWA; it is one of the identified point source examples of a “discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14). Where Congress has unambiguously spoken, courts lack discretion in interpreting the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”).

Contrary to the Court's prior opinion, generalized migration of pollutants from a point source through groundwater to navigable waters is not sufficient to impose CWA § 301(a) liability. Hawai'i Wildlife Fund, 2014 WL 2451565, at

*14, 18. Pollutants must enter navigable water via a point source – *i.e.*, a discernible, confined and discrete conveyance. See El Paso Gold Mines, 421 F.3d at 1140-41, 1146 n.6 (“We stress, again, that it is the combination of the . . . [mine] shaft, a point source, and the . . . Tunnel, another point source, that establishes a connection to a navigable stream. This system of infrastructure distinguishes our case from migration and seepage cases.”); Trustees for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984) (a point source discharge “reaches the water through a confined, discrete conveyance.”).

The “phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute.” Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 219 (2nd Cir. 2009); see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001) (“it is one thing to give [the] word[s] [discernible, confined and discrete conveyance] limited effect and quite another to give it no effect whatever.”). While a series of connecting point sources is permissible under the indirect discharge theory, expansion of the theory to unconfined groundwater as a conduit is not. See Hawai’i Wildlife Fund, 2014 WL 2451565, at *14 (the Court acknowledges no controlling appellate law or statutory language has expanded the conduit theory beyond point source discharges).

3. There Is No Point Source Discharge From Well 1 Or 2 To The Ocean

The LWRF injection wells are the only confined and discrete conveyances here. 33 U.S.C. § 1362(14) (point source includes wells). As the wells inject into groundwater, and groundwater is not a navigable water, there is no basis to impose CWA § 301(a) liability based on a point source discharge of a pollutant from the LWRF directly to navigable waters.¹ This leaves the indirect discharge rationale as the only potential available theory for Plaintiffs to impose CWA § 301(a) liability. As explained below, because the groundwater here is not a “discernible, confined and discrete conveyance,” Plaintiffs cannot establish the essential indirect discharge theory prerequisite of sequential point sources in the conveyance of treated effluent from the LWRF to the ocean.

a. The Groundwater/Effluent Mixture From Wells 1 And 2 Flows to And Enters The Ocean In A Broad And Diffuse Manner

Contrary to the Court’s prior opinion, the groundwater between the LWRF and the ocean is not *itself* a point source because the groundwater is not a

¹ Groundwater is not a “waters of the United States” as a matter of law. See 40 C.F.R. §§ 122.2, 230.3(s), 33 C.F.R. § 328.3(a); 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991); San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007). To the extent the Court (i) understood the County’s position was that groundwater could be classified as a navigable water, it was mistaken; or (ii) found the groundwater between the LWRF and the ocean is a navigable water under the CWA, this was incorrect as matter of law. See Hawai’i Wildlife Fund, 2014 WL 2451565, at *11, 20-21. As pertinent here, the only “navigable water” is the ocean.

“discernible, confined and discrete conveyance.” See id. at *17. Treated effluent from the LWRF exits Wells 1-4 at depths ranging from approximately 60 to 210 feet below ground surface with treated effluent exiting Wells 1 and 2 between approximately 60 and 165 feet below ground surface. Defendant County of Maui’s Rule 56.1 Statement of Undisputed Material Facts (“56.1”), ¶ 1. The roughly 100 foot expanse over which effluent from Wells 1 and 2 enters the groundwater is itself demonstrative of the lack of a defined or discrete conveyance. 56.1, ¶ 1. Upon entry, the effluent rises up and disperses broadly, both laterally and vertically, as it moves through the aquifer toward the ocean. 56.1, ¶ 2.

The Tracer Study findings on travel time for dye injected into Wells 3 and 4 to reach the submarine springs ranges from an initial appearance at 84 days, to peak concentrations between approximately 270 and 310 days, to an estimated four plus years for the tail end. 56.1, ¶ 8. The travel time for flow from Wells 1 and 2 to the ocean is even longer. 56.1, ¶ 8. This time span is further evidence that the flow path from the wells to the shoreline is broad and diffuse. 56.1, ¶ 8.

It is unknown where Well 1 flow enters the ocean. 56.1, ¶ 3. The same is true for Well 2. 56.1, ¶¶ 4-5, 7, 12. No tracer study has been performed on Well 1. 56.1, ¶ 3. Even with two independent tracer studies on Well 2 using different approaches (adding dye to Well 2 for 58 days or one day), neither study detected tracer dye, confirmed any point(s) of entry to the ocean, or reached a conclusion

regarding the hydrologic connectivity between Well 2 and the ocean. 56.1, ¶¶ 4-5. The Tracer Study recognizes this, saying “no conclusions can be made regarding the hydraulic connection between Well 2 and the nearshore waters at Kaanapali” (*i.e.*, Kahekili Beach); and “a discharge point deeper and further from shore needs to be considered.” 56.1, ¶ 5. The absence of dye illustrates the diffuse nature of the Well 2 flow as it travels through the aquifer and enters the ocean. 56.1, ¶ 6.

Modeling evidence supports the conclusion that the groundwater/effluent mixture from Wells 1 and 2 travels through the aquifer as broad and diffuse flow reaching the ocean at locations that are not readily ascertainable. 56.1, ¶¶ 4-7, 11-12. The County’s expert, Dr. List, modeled the flow from Wells 1 and 2 operating as a pair and Wells 3 and 4 operating as a pair, with both pairs operating at 50% injection rates. 56.1, ¶ 7. This model showed that flow from Wells 1 and 2 would be pushed to the lateral boundaries of the flow from Wells 3 and 4 (*i.e.*, outside the submarine spring area) and thus would not reach the ocean along the same path as effluent from Wells 3 and 4. 56.1, ¶ 7. The resulting broad and diffuse flow from Wells 1 and 2 through the aquifer also prevents identification of where the flow enters the ocean. 56.1, ¶ 7. Nonetheless, because the flow from Wells 1 and 2 is broader and more diffuse than the flow from Wells 3 and 4, it would enter the ocean over a larger area than the 800 meters of shoreline the Tracer Study estimates for flow entry from Wells 3 and 4. 56.1, ¶ 9.

Dr. List's conclusion is consistent with the Tracer Study modeling which showed flow from Well 2 would not appear at the submarine springs, but given the displacement caused by Wells 3 and 4, would be broad and diffuse through the aquifer entering at locations outside the submarine springs. 56.1 ¶ 7-9, 11. Given its diffuse nature, the groundwater/effluent mixture's flow to and entry into the ocean here does not meet the point source definition of a "discernible, confined and discrete conveyance."²

For their part, Plaintiffs rely solely on the report of Dr. Moran as the basis for their claim that Wells 1 and 2 enter the ocean along the same flow path and at the same locations as Wells 3 and 4. Dr. Moran's report does not create a genuine dispute of fact with respect to Wells 1 and 2. Her report identifies no point source discharge for any effluent from Wells 1 and 2 because the effluent reaches the ocean via groundwater which is insufficient, as a matter of law, to constitute a violation the CWA § 301(a).

Dr. Moran concedes the effluent injected into Well 2 would be displaced by the effluent from Wells 3 and 4 when they are operating and the information "necessary to locate preferential flow paths [for Wells 1 and 2], is not available."

² By limiting its argument to Wells 1 and 2, the County does not concede the groundwater/effluent mixture from Wells 3 and 4, which similarly flows through the aquifer in a broad and diffuse manner and enters the ocean over at least 800 meters of coastline, is a point source discharge. 56.1, ¶ 9. To the contrary, the County maintains the mixture was improperly classified as a point source discharge and reserves all rights to challenge the classification at a later time.

56.1 ¶ 12. Her opinion relies on Wells 3 and 4 not being used. But that is not the case during the time period referenced in her report. 56.1, ¶ 20. Accordingly, Dr. Moran's report does not fit the facts of this case. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591-592 (1993) (Expert testimony needs to be sufficiently tied to or "fit" the facts to be relevant).

Dr. Moran's opinion is unreliable. She claims to "heavily" rely on the Tracer Study to opine that Wells 1 and 2 have similar flow paths as Wells 3 and 4 to the submarine springs. 56.1, ¶ 12. But the Tracer Study modeling directly contradicts Dr. Moran's opinion. 56.1, ¶ 11. As the Tracer Study notes, "the treated wastewater plume [from Wells 3 and 4] is broad" and this flow displaces the flow from Well 2, causing the even broader and more diffuse Well 2 flow in the aquifer to only enter the ocean substantially north of the submarine springs. 56.1, ¶¶ 8, 11. This modeling also shows that with Wells 3 and 4 dormant, the broad and diffuse Well 2 flow exits the ocean even further north than when Wells 3 and 4 are operating as well as at and south of the springs. 56.1, ¶ 11.

Dr. Moran also relies on flow from Wells 1 and 2 from 2006 through May 2007 making up approximately 50% of the total effluent injected into all four wells to support her conclusion that flow from Wells 1 and 2 would appear at the submarine springs roughly ten months later. 56.1, ¶ 12. In contrast, Dr. List's modeling, which uses 50% injection rates for each of the pairs of wells, shows

flow from Wells 1 and 2 is laterally displaced, emerging outside the boundaries of the submarine springs. 56.1, ¶ 7. Any suggestion by Dr. Moran that treated effluent from Wells 1 and 2 would make it to the ocean if Wells 3 and 4 were off is irrelevant. Between 2006 and July 2014 (the timeframes considered by Dr. Moran), Wells 3 and 4 were operating. 56.1, ¶ 12, 20. Bottom-line, Dr. Moran provides *no* evidence that (1) 50% of flow from Wells 1 and 2 is sufficient to nullify both the Tracer Study's and Dr. List's modeling, showing broad and disperse displacement of flow from these wells in the aquifer resulting in the flow entering the ocean away from the submarine springs; or (2) flow from Wells 1 and 2 enters the ocean at the same location as flow from Wells 3 and 4.

b. ***The Percent Of Treated Effluent Entering The Ocean Is Not A Basis For Demonstrating A Point Source Discharge***

In determining whether there is a point source discharge, the pertinent inquiry is *how* the treated effluent makes it to the ocean, not how much. See Trustees for Alaska, 749 F.2d at 558 (point sources are not distinguished from nonpoint sources “by the kind of pollution they create or by the activity causing the pollution, *but rather by whether the pollution reaches the water through a confined, discrete conveyance.*”) (emphasis added). Nonetheless, in finding the County liable under the CWA for Wells 3 and 4 based on the theory that groundwater was a point source, the Court relied in part on the Tracer Study's

estimate that 64% of effluent injected into the wells discharges from the submarine springs area. “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.” Hawai’i Wildlife Fund, 2014 WL 2451565, at *17. Similarly, in referencing 65% of effluent discharging through Wells 3 and 4, Dr. Moran also appears to adopt the 64% estimate.

While the County maintains that the percentage of effluent reaching the ocean is irrelevant to a point source inquiry, it nonetheless notes that both the Court and Dr. Moran failed to account for the multiple limitations associated with the Tracer Study 64% estimate. The fraction of effluent reaching the submarine springs area from Wells 3 and 4 was estimated using two different methods. 56.1, ¶ 13. As the Tracer Study acknowledges, there are significant uncertainties with both. 56.1, ¶ 13. While the estimated percent of recovered dye mass can be used to estimate the fraction of effluent discharging at the submarine springs, “*it must be stressed that there are significant uncertainties associated with these calculations.*” 56.1, ¶ 13. Likewise, “[t]here is *significant uncertainty* associated with the effluent percentage estimated” due to the multiple assumptions regarding the discharge made in performing the calculations. 56.1, ¶ 13.

The failure to account for seasonal variability is an inherent uncertainty in the Tracer Study analysis. 56.1, ¶ 13. While the rate at which groundwater exits

the submarine springs varies significantly by season, a constant rate was used in the calculations. 56.1, ¶ 13. Likewise, dye concentrations measured at less than 1% of the submarine springs were used to calculate total dye recovery from the entire submarine spring area, ignoring the fact that diffuse dye concentrations ranged from as much as six-fold to ten-fold lower than spring dye concentrations. 56.1, ¶ 13. This was the case even though greater than 90% of the discharge was diffuse. 56.1, ¶ 10. In another instance, half of the calculated data sets used to estimate the percentages of upland waters, marine waters and LWRF effluent emanating from the submarine springs were thrown out because they yielded unrealistic results (*i.e.*, $> 100\%$ or $< 0\%$). 56.1, ¶ 14. Of the data sets used, the fraction of LWRF effluent ranged from 12% to 96%. 56.1, ¶ 14.

As Dr. List illustrates, different plausible assumptions used to calculate the dye recovery rate result in only 11% of the treated effluent injected into Wells 3 and 4 coming out at the submarine springs area. 56.1, ¶ 15. Dr. List's calculation confirms (1) the assumptions used in the Tracer Study were either flawed or difficult to justify; (2) a variety of plausible assumptions could be used in the calculations; and (3) the assumptions chosen for the Tracer Study calculations dictated the outcome.³ 56.1, ¶ 15. Given that percentage (or amount) of pollutant

³ Given the vast range in calculation, the County respectfully disagrees that the Tracer Study is sufficient evidence to impose CWA § 301(a) liability as a matter of law with respect to Wells 3 and 4.

is not relevant in determining a point source discharge and significant uncertainties surround the Tracer Study dye recovery rate calculations, the Court should not rely on the 64% estimate in making a point source finding.

4. An NPDES Permit Cannot Be Issued For Well 1 Or 2

An NPDES permit authorizes a facility to discharge pollutants into receiving (navigable) water under specified conditions. See CWA 33 U.S.C. § 1342(a), (k); 40 C.F.R. §§ 122.1, 122.5. Permits identify (1) permissible discharge limitations and locations; and (2) monitoring and reporting requirements to characterize both the discharge and receiving waters, and ensure compliance with permit conditions and water quality criteria. See generally 40 C.F.R. §§ 122.41, 122.43, 122.44. Permit applications require an outfall description, including its location, distance from shore and depth below surface. See e.g., 40 C.F.R. § 122.21(i). As no discernible ocean discharge location has been identified for Well 1 or 2, it is not feasible to issue an NPDES permit with appropriate standards, conditions and monitoring requirements for the wells. 56.1, ¶ 16.

C. LWRF Flow To The Ocean Is Nonpoint Source Pollution

1. Groundwater Is Generally Considered Nonpoint Source Pollution

With no statutory or regulatory definition, nonpoint source “includes all water quality problems not subject to [CWA] section 402.” National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165-166 (D.C. Cir. 1982); see also Oregon

Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 849 (9th Cir. 1987) (the CWA draws “a distinct line between point and nonpoint pollution sources.”).

Similar to groundwater, stormwater may contain pollutants, and depending on how it is conveyed to navigable waters, it may be either a point source or nonpoint source discharge. Stormwater entering navigable water through a confined and discrete conveyance is a discharge from a point source subject to NPDES permitting whereas diffuse runoff is not. See e.g., Environmental Def. Ctr., Inc., v. U.S. E.P.A., 344 F.3d 832, 841 n.8 (9th Cir. 2003) (“Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution”) (internal citation omitted); Northwest Env'tl. Def. Ctr. v. Brown, 640 F.3d 1063, 1070 (9th Cir. 2011) (“Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source”) (rev'd on other grounds); Greater Yellowstone Coal., 628 F.3d at 1152 (“some type of collection or channeling is required to classify an activity as a point source.”) (internal citation omitted); Cordiano, 575 F.3d at 221 (“surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and . . . is not subject to the CWA permit requirement.”) (internal citation omitted).

Importantly, the Watershed Management Plan that includes Kahekili Beach identifies LWRP effluent as nonpoint source pollution. 56.1, ¶ 17. Similarly, the

CWA identifies pollutants from well disposal and groundwater as nonpoint sources. 33 U.S.C. § 1314(f)(2)(D), (F). Likewise, the Hawaii Department of Health recognizes both nonpoint source pollution prevents surface waters from achieving water quality criteria and groundwater as a nonpoint source. 56.1, ¶ 17.

Pollutants reaching navigable waters via groundwater migration do not meet the point source discharge requirement. See Tri-Realty Co., 2013 WL 6164092, at *7 (“A discharge of pollutants into navigable waters occurring only through migration of groundwater . . . represents ‘nonpoint source’ pollution.”) (internal citation omitted). “[T]he diffuse downgradient migration of pollutants . . . through . . . groundwater . . . is nonpoint source pollution” Id. at *8; see also El Paso Gold Mines, 421 F.3d at 1140 n.4 (“Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.”).

Plaintiffs’ complaint characterizes the LWRF effluent as “percolating” into the ocean. First Amended Complaint ¶ 56. Pollutants entering navigable waters through percolation of groundwater constitute nonpoint source pollution. See e.g., Mary Cristina Wood, Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 Harv. Envtl. L. Rev. 569, 620 (1988) (percolating groundwater is not a point source discharge despite pollutants entering navigable waters). Because there is no point source discharge associated

with Well 1 or 2 to the ocean, Plaintiffs have failed to establish a CWA § 301(a) violation and the County is entitled to summary judgment as a matter of law. See Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011) (“[M]igrations of groundwater . . . is not point source pollution . . . There is no basis for a citizen suit for nonpoint source discharges under the CWA.”) (internal citations omitted); see also Oregon Natural Res. Council, 834 F.2d at 849.

2. Multiple Sources Of Pollutants Are In Groundwater Flowing To The Ocean

The ocean off Kahekili Beach receives drainage from the northern part of the Wahikuli Watershed (“Watershed”). 56.1, ¶ 17. Nutrients from various Watershed land uses enter groundwater as it flows to the ocean. The Watershed’s past and present agricultural practices have “impacted the hydrology of surface waters and groundwaters.” 56.1, ¶ 18. Similarly, landscaped areas around resort, residential and commercial properties, and golf courses in the Watershed result in fertilizer nutrients impacting groundwater. 56.1, ¶ 18. The LWRF’s R-1 water applied for irrigation also contributes pollutants to groundwater. 56.1, ¶ 18.

These other sources of nutrients commingle in groundwater with LWRF effluent, preventing sources from being distinguished from one another. 56.1, ¶ 18. Moreover, groundwater enters the coastline at undefined locations. 56.1, ¶ 4-7, 9. In April 2014, the Hawaii Department of Health proposed modifying

applicable water criteria for Kahekili Beach to account for the more than three million gallons per day of fresh water entering the ocean per mile of shoreline. 56.1, ¶ 19; HAR § 11-54-6 (defining “wet” criteria). By definition, groundwater containing a mixture of sources of pollutants entering the ocean at unidentifiable locations is a nonpoint source – *i.e.*, there is no discernible, confined and discrete conveyance. See e.g., Trustees for Alaska, 749 F.2d at 558.

D. The CWA Addresses LWRF Nonpoint Source Pollution

Contrary to Plaintiffs’ allegations, water quality in the ocean off Kahekili Beach is improving. As of April 2014, the area meets total phosphorous and nitrogen-related water quality criteria. 56.1, ¶ 19.⁴

Simply because the groundwater here is nonpoint source pollution not regulated by an NPDES permit does not mean it is outside the scope of the CWA; it is addressed through other CWA programs such as total maximum daily loads and state nonpoint source pollution control programs. 33 U.S.C. §§ 1313, 1329.⁵

⁴ The remainder of this Section is provided as background on Hawaii’s nonpoint source pollution control program and is not dispositive to the County’s Motion.

⁵ Congress clearly recognized the need to address nonpoint sources under the CWA. “The Clean Water Act, as written in 1972 and amended in 1977 and 1981, focused on point source discharges of pollution. Over the years, however, new information has indicated that nonpoint sources contribute up to 50 percent of the water pollution in some States. Thus, the conferees establish a new national policy to develop and implement programs for controlling nonpoint sources of pollution . . . With this new emphasis on nonpoint sources of pollution, we should be able to

See Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002) (the CWA uses “distinctly different methods” to control point source and nonpoint source pollution) (internal citation omitted). The improvement in Kahekili Beach water quality demonstrates the success of these programs.⁶

Additionally, as required by the CWA and the Coastal Zone Act Reauthorization Amendments, Hawaii developed a statewide program and integrated implementation plan for management of coastal nonpoint source pollution. See Doyle Dec., Ex. 9 at 2-1; see also 16 U.S.C. § 1455b(a)(2) (the CWA § 319 nonpoint source program (33 U.S.C. § 1329) works in concert with Coastal Zone Act to address nonpoint sources impacting coastal waters); Shanty Town Assocs. Ltd. P’ship v. E.P.A., 843 F.2d 782, 794 (4th Cir. 1988) (Coastal Zone Act requirements complement CWA programs). In 2012, a watershed management plan was developed for a portion of West Maui (including Kahekili Beach) that includes protections for coral reefs from nonpoint source land-based pollution. See e.g. Doyle Dec., Ex. 4 at i.

wage a more comprehensive and complete assault on water pollution throughout the Nation.” 133 Cong. Rec. 985 (1987).

⁶ As Dr. List explains, material exiting the submarine springs has geothermal origins. Geothermal activity, and not LWRF effluent, accounts for many apparent anomalies at the submarine springs such as temperature and salinity. See Doyle Dec., Ex. 10, List Expert Report at 3, 6, 7, 12, 20, 22-27.

IV. CONCLUSION

CWA § 301(a) liability requires that pollutants discharge to navigable waters from a point source. The broad diffuse groundwater flow containing a mixture of LWRF effluent and other pollutants is not entering the ocean through a discernible, confined and discrete conveyance. As such, Plaintiffs have presented no evidence of a point source discharge. Because Plaintiffs do not meet their burden to demonstrate the requisite elements of a § 301(a) violation, the County is entitled to summary judgment on Wells 1 and 2 as a matter of law.

DATED: November 5, 2014

By: /s/ Colleen P. Doyle
HUNTON & WILLIAMS LLP
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Responses and Replies

[1:12-cv-00198-SOM-BMK Hawaii Wildlife Fund et al v. County of Maui](#)

U.S. District Court

District of Hawaii

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