IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-17447

COUNTY OF MAUI,

Defendant-Appellant,

v.

HAWAI‘I WILDLIFE FUND, SIERRA CLUB - MAUI GROUP, SURFRIDER FOUNDATION, AND WEST MAUI PRESERVATION ASSOCIATION,

Plaintiffs-Appellees,

On Appeal From The United States District Court For The District of Hawai‘i
(Civil Action No. 12-00198 SOM BMK)

PLAINTIFFS–APPELLEES' ANSWERING BRIEF

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May 23, 2016

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28, Plaintiffs-Appellants Hawai‘i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation and West Maui Preservation Association hereby certify that they have no parent corporations, and do not issue stock.

Dated at Honolulu, Hawai‘i, May 23, 2016.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Page(s)

FEDERAL CASES (CONTINUED)

Page(s)

FEDERAL CASES (CONTINUED)

Page(s)

FEDERAL CASES (CONTINUED)

Page(s)

FEDERAL CASES (CONTINUED)

Page(s)

FEDERAL CASES (CONTINUED)

Page(s)

FEDERAL CASES (CONTINUED)

FEDERAL STATUTES

Page(s)

FEDERAL STATUTES (CONTINUED)

CODE OF FEDERAL REGULATIONS

Page(s)

FEDERAL REGISTER

HAWAI‘I ADMINISTRATIVE RULES

FEDERAL RULES OF CIVIL PROCEDURE

LEGISLATIVE HISTORY

Page(s)

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this Clean Water Act ("CWA") case pursuant to 33 U.S.C. § 1365(a) and 28 U.S.C. §§ 1331, 2201-02. Plaintiffs-Appellants Hawai'i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation and West Maui Preservation Association (collectively, "Citizens") otherwise agree with Defendant-Appellant County of Maui's jurisdictional statement.

II. STATEMENT OF ISSUES

There is no dispute that, under the CWA, the injection wells at Defendant's Lahaina Wastewater Reclamation Facility ("LWRF") constitute "point sources" and the effluent they discharge is a "pollutant." There is likewise no dispute the millions of gallons of effluent Defendant's injection wells discharge daily flows into the Pacific Ocean, a "water of the United States." Finally, there is no dispute Defendant lacks a National Pollutant Discharge Elimination System ("NPDES") permit for these discharges.

The sole issues on appeal are:

(1) Whether the district court correctly held the NPDES permit requirement applies to Defendant's discharges of pollutants to the ocean through hydrologically connected groundwater; and

(2) Whether the district court properly held that, given decades of Environmental Protection Agency ("EPA") pronouncements and court rulings that point source discharges of pollutants that reach navigable waters through hydrologically connected groundwater trigger the CWA's NPDES permit requirement, as well as Citizens' detailed notice letter, imposing a civil penalty for Defendant's ongoing, illegal discharges did not deprive Defendant of due process.

Pertinent statutes and regulations are set forth in the attached addendum.

III. STATEMENT OF THE CASE

A. Defendant's Injection Wells.

Defendant owns and operates the LWRF, which disposes of treated effluent through four injection wells. Excerpts of Record ("ER") 645 (¶ 2), 648-49 (¶¶ 16, 21). The LWRF originally included two injection wells, Wells 1 and 2, both installed in 1979. Supplemental Excerpts of Record ("SER") 228. Wells 3 and 4 were added in 1985. Id.

Each LWRF injection well consists of a borehole, with steel casing for part of its length, extending to depths ranging from 180 to 255 feet. SER 220-26. The injection wells discharge effluent directly into the groundwater below the facility,

"which has the characteristics of sea water." SER 230; see also SER 214, 216; ER 696 (¶¶ 28-29).

Defendant first began discharging effluent from Wells 1 and 2 in May 1982, and began additional discharges from Wells 3 and 4 in 1985. ER 649 (¶ 21), 670 (¶ 43). Defendant has continued discharging from some or all of the four injection wells on a daily basis to the present. Id.

On average, Defendant disposes of three to five million gallons of effluent per day into its injection wells. ER 649 (¶ 22). Prior to December 2013, almost none of the effluent discharged from the injection wells was UV disinfected. ER 694-95 (¶ 17), 697-99 (¶¶ 34-44, 55).

Defendant does not have an NPDES permit for these discharges. ER 645 (¶ 2), 647 (¶ 12).

B. The Injection Wells' Hydrologic Connection To The Ocean.

There is no dispute about the fate of the millions of gallons of effluent Defendant's injection wells discharge daily. Effluent is injected into the groundwater and travels with the groundwater to the Pacific Ocean, discharging

pollutants into the ocean near Kahekili Beach in West Maui. SER 109 (lines 14-21), 267 (lines 8-12).[1]

According to Defendant, when it injects only 2.8 million gallons per day ("mgd"), an atypically low rate, the flow of effluent into the ocean is "about 9 liters/minute per meter of coastline" along about 800 meters of shoreline. ER 462. While Defendant downplays the magnitude of pollution entering the ocean, stating it is "roughly equivalent to a running garden hose per meter of coastline," nine liters/minute per meter translates to a daily discharge of nearly 13,000 liters of effluent at each meter along the coast (over 1,000 gallons per day per foot). Id. LWRF effluent is a major source of freshwater discharge; about one of every seven gallons of groundwater entering the ocean at Kahekili is LWRF effluent. SER 194-95 (¶¶ 36-37).

Even before the LWRF's construction began, Defendant knew effluent from the injection wells would travel underground to the ocean. When the project underwent environmental review in 1973, Defendant's consultant acknowledged

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[1] Citizens dispute Defendant's claim that the figure in its opening brief – modeling an injection plume elsewhere on Maui and labeled "Vertical Exaggeration 20X" – "generally depicts" the flow of LWRF effluent to the ocean. Op. Br. at 4; see SER 116 (¶¶ 13-14). LWRF effluent concentrates in preferential flow paths to the ocean. SER 111-13 (¶¶ 3-7), 117 (¶ 16), 183 (¶ 11), 185-88 (¶¶ 16-23), 250-54 (¶¶ 18-25).

"the effluent will eventually get into the ocean." ER 342. Defendant considered, but rejected, the alternative of disposing of effluent via an ocean outfall. ER 333-34.

A couple of decades later, when Defendant considered upgrades, Defendant's knowledge regarding the fate of LWRF effluent was unchanged. Defendant noted:

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

ER 325. Defendant understood the marine environment was receiving these discharges, conceding that "[t]reatment plant effluent contributes various constituents, including but not limited to, suspended solids, dissolved oxygen, and nutrients such as nitrogen and phosphorous to the ocean." ER 326.

Since then, study after study confirmed LWRF effluent flows with groundwater to the ocean. In 2007, researchers surveyed the waters around Maui, using nitrogen isotopes associated with human waste ($\delta^{15}N$) in marine algae to identify locations of significant sewage inputs. SER 347-48 (¶ 7).[2] The study

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[2] "$\delta^{15}N$" is a nitrogen isotope ratio used to distinguish between naturally-occurring nitrogen or nitrogen from fertilizer, and nitrogen derived from sewage. SER 351-52 (¶ 15). Naturally-occurring nitrogen and nitrogen from fertilizer have low levels of $\delta^{15}N$, while sewage from a treatment plant has notably higher levels.

identified the ocean off Kahekili as a sewage hot spot, with algae samples grown over freshwater seeps in the nearshore waters containing the highest $\delta^{15}N$ values ever reported in the scientific literature. SER 152, 348 (¶ 8). This discovery indicated LWRF effluent was entering the ocean through the Kahekili seeps. SER 151, 352 (¶ 16).

The researchers returned in 2009 to determine the extent of the LWRF effluent plume across the Kahekili reef. SER 352-53 (¶ 17). The study found significant increases in $\delta^{15}N$ values throughout the nearshore shallow region, including sites 345 meters south of the freshwater seeps, confirming that LWRF effluent continuously flows through the reef and then to the south. Id.; SER 301.

Also in 2009, the U.S. Geological Survey ("USGS") published the results of its study of nearshore marine waters at Kahekili, which "convincingly" detected an effluent plume from Defendant's injection wells. SER 307; see also SER 308. USGS found that "[t]reated wastewater presence was confirmed by multiple 'inherent' wastewater tracers, the most conclusive being pharmaceuticals, organic waste indicator compounds, and heavy $\delta^{15}N$." SER 309; see also SER 144, 147,

303.[3] The USGS study confirmed the earlier, "convincing detection of the effluent plumes offshore" at Kahekili using algal $\delta^{15}N$ surveys. SER 305.

EPA concluded the aforementioned studies "strongly suggest that effluent from the facility's injection wells is discharging into the near shore coastal zone of the Pacific Ocean." ER 122. Consequently, before EPA would give further consideration to the LWRF's Underground Injection Control ("UIC") permit renewal, it insisted that Defendant first secure CWA section 401 certification to ensure the injection wells' continued use "will not violate applicable water quality standards." Id.

In 2011, EPA collaborated with the State of Hawai'i Department of Health ("HDOH"), the U.S. Army Engineer Research and Development Center and University of Hawai'i researchers to investigate the "existence of a hydraulic connection between the injection of treated wastewater effluent at the [LWRF] and nearby coastal waters, confirm locations of emerging injected effluent discharge in these coastal waters, and determine a travel time from the LWRF injection wells to the coastal waters." SER 316. The study's centerpiece was the addition of tracer dye to the injection wells and the subsequent monitoring of the nearshore seeps off

[3] These inherent tracers disprove Defendant's claim LWRF effluent is indistinguishable from other nutrient sources. SER 167-72 (¶¶ 10-24).

Kahekili Beach for the dye's arrival. Fluorescein dye added to Wells 3 and 4 was first detected at Kahekili's nearshore seeps eighty-four (84) days after being placed in the wells and continued to flow to the ocean, with average travel time to the seeps of 14 to 16 months. Id. The study concluded it would take about four years for discharged effluent to "fully exit the coast." SER 318.

The tracer study's results "conclusively demonstrate that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui." Id. The study estimated "64 percent of the treated wastewater injected into these wells currently discharges from the submarine spring areas" at Kahekili. Id. The study emphasized "[t]he major discharge areas are confined to two clusters, only several meters wide, with very little discharge in between and around them." SER 157. It concluded the remainder of the effluent reaches the ocean, but at other locations, possibly including other seep areas. SER 156, 343.

Defendant erroneously claims "[d]iffuse flow" from the LWRF "has no identifiable ocean entry point." Op. Br. at 4. The tracer study specifies the "groundwater discharge … via diffuse seepage" is constrained "within the 70 x 100 m^2 area of [the South Seep Group] and 53 x 60 m^2 area of [the North Seep Group]. SER 156; see SER 337.

While the tracer study did not conclusively detect dye from Well 2, Defendant has never disputed that effluent discharged from both Wells 1 and 2 flows into the ocean. Haw. Wildlife Fund ("HWF") v. Cnty. of Maui, 2015 WL 328227, at *2 (D. Haw. Jan. 23, 2015) ("HWF III") (ER 26); SER 212 (¶¶ 8-9).

Using scientifically accepted methods, the tracer study modeled the flow to the ocean of effluent discharged from Well 2. SER 188-90 (¶¶ 24-27), 237, 241, 255-57 (¶¶ 27-29); see also SER 116-17 (¶¶ 15-16). The modeling shows that, when Wells 3 and 4 receive eighty percent (80%) of LWRF effluent (the conditions prevailing during the tracer study), Well 2 effluent is displaced by the injectate from Wells 3 and 4, with most of Well 2 effluent "taking a northwesterly path to the ocean." SER 237; see also SER 240-41, 243, 316, 336. When Well 2 receives the bulk of LWRF effluent (conditions that prevail at other times), Well 2 injectate "moves south and southwest resulting in a significantly higher concentration of [the effluent] being discharged from the submarine springs" at Kahekili. SER 241-42; see also SER 190-91 (¶ 28), 237, 240, 243, 257 (¶ 30), 261-62 (¶ 37). Under either injection scenario, the model shows effluent injected into Well 2 reaches the Kahekili seeps, with Well 2 effluent concentrations at the seeps increasing as the proportion of total LWRF effluent injected into Well 2 increases. SER 118 (¶ 18), 191-92 (¶¶ 29, 31), 243, 262-63 (¶ 38).

It is undisputed that, because Well 1 is in close proximity to Well 2, the modeling for Well 2 also predicts the fate of effluent from Well 1. SER 189 (¶ 25); ER 443 (Wells 1 and 2 "are so close to each other the pairs can be regarded as single sources").

The parties disagree about whether LWRF effluent harms Kahekili's coral reefs, but there is no dispute that, at the point the effluent enters the ocean, its chemistry and temperature differ substantially from that of the receiving ocean waters. See Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980, 1003-1004 (D. Haw. 2014) ("HWF II") (ER 90-94); see also SER 269-73, 277, 281-96 (¶¶ 2-39), 299-300, 345-61 (¶¶ 3-40). As Defendant's experts acknowledge, the effluent-laden groundwater discharging from the seeps "is elevated in temperature and nutrient concentrations and depressed in salinity, dissolved oxygen, and pH relative to control values." ER 589 (¶ 16); see also ER 565-66 (¶ 35), 574-76 (¶¶ 48-49), 588-91 (¶¶ 15-19). "Mean temperature" at the seeps "was elevated … by about 4-5^{o}C over control site water," while concentrations of one nutrient – nitrate + nitrite nitrogen – are two orders of magnitude higher than at control sites. ER 590 (¶ 18); see also ER 589 (¶ 17); SER 268, 293-94 (¶¶ 31-32). The "thermal anomaly" associated with the effluent's elevated temperature extends over more than 167 acres. SER 317-18, 338.

The National Oceanic and Atmospheric Administration ("NOAA") has identified Defendant's injection wells as a "hotspot" for nutrients and other pollutants and designated them a "high" priority for pollution prevention measures. ER 398, SER 159.[4] In 2010, prompted by concerns about elevated nutrients triggering algal blooms, the Hawai'i Division of Aquatic Resources "established the Kahekili Herbivore Fisheries Management Area (FMA) in an effort to increase the number of herbivores to help reduce the turf algae or macroalgae that have overgrown the corals at the site." SER 277; see also SER 273, 282-84 (¶¶ 5-9).

Data HDOH collected show that every measurement of Total Phosphorus at the Kahekili seeps exceeds every water quality standard for that pollutant. Compare Haw. Admin. R. § 11-54-6(b)(3) with SER 126-37; see also SER 141 (¶¶ 4-5). Monitoring samples at the seeps frequently exceed water quality standards for Total Nitrogen and for Nitrate + Nitrite Nitrogen. SER 142 (¶¶ 6-7).

Defendant concede the pollutants introduced into the ocean by LWRF effluent-laden groundwater – elevated temperature and nutrients, and low salinity, pH and dissolved oxygen – have the potential to harm coral reefs and reef-dependent organisms. See HWF II, 24 F. Supp. 3d at 1003 (ER 90-91). The

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[4] NOAA expressed no opinion about whether LWRF effluent is point or nonpoint source pollution. SER 162, 207-09 (¶¶ 2-7).

parties disagree only about whether LWRF effluent actually harms Kahekili's reef, which all agree is irrelevant to liability. Op. Br. at 8, 46.

C. The Regulatory Agencies Provided Notice That Defendant's Injection Wells Are Subject To NPDES Permitting.

Neither HDOH nor EPA ever expressed a formal agency position that Defendant's injection wells do not need an NPDES permit. As Defendant previously conceded, "neither HDOH nor EPA have 'directly informed [the County] … of the proper interpretation' of the CWA NPDES permit requirements applicable to the wells." SER 107 (citation omitted; brackets and ellipses in Defendant's memorandum). While Defendant reverses course on appeal, claiming "HDOH has consistently said the Lahaina wells do not require a NPDES permit," Op. Br. at 11, the only official documents Defendant cites do not substantiate that claim, stating merely that HDOH "has not made a tentative or preliminary determination on [Defendant's] NPDES application." ER 136; see also ER 362.[5]

[5] The internal agency emails and memoranda Defendant cites are irrelevant. Such "informal communication[s] between staff" do not establish "the official view of any agency." Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers, 384 F.3d 1163, 1174 (9th Cir. 2004).

While Defendant places great weight on UIC permits issued under the Safe Drinking Water Act, every State permit expressly notes Defendant's obligation to comply with the NPDES permit requirements and associated regulations in Hawai'i Administrative Rules chapter 11-55. See SER 20-22, 27-29, 34-36, 40-42; ER 161-63.[6] EPA's UIC permits similarly state that compliance with the permit's terms "does not constitute a defense to any action brought under … any other common or statutory law," such as the CWA. ER 156; SER 15.

Defendant inaccurately suggests HDOH has concluded "the Lahaina UIC permit can act as an 'equivalent control document,'" substituting for an NPDES permit. Op. Br. at 11. HDOH, however, merely "is considering" whether to treat the UIC permit as an "equivalent control document." ER 361. In the two years since HDOH made that noncommittal statement, it has yet to make a decision. ER 137 (HDOH will notify Defendant "once a decision is made"). In January 2015, EPA wrote a letter concluding the UIC permit conditions "would not function as NPDES permit requirements, and are unlikely to achieve compliance with the [CWA]." ER 357.

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[6] HDOH's inspection forms describe the LWRF's "NPDES Permit Status" as "Not Applicable" because the injection wells have never had an NPDES permit. ER 211; see also ER 215.

As Defendant concedes, EPA's letter left no doubt the agency had concluded the LWRF injection wells require an NPDES permit. Op. Br. at 16. For its part, HDOH would not be considering whether the UIC permit can function as an equivalent control document had it not acknowledged the need for NPDES permit coverage. See ER 353.

Long before EPA wrote its latest letter, written warnings from both EPA and HDOH put Defendant on notice its injection wells are not exempt from NPDES permitting. In 1992, HDOH warned Defendant that, if the wells were linked to pollution in the ocean off West Maui, "a critical issue will focus over the compliance requirements of the [CWA]." ER 379.

More recently, in January 2010, EPA ordered Defendant to conduct sampling, monitoring and reporting necessary "to determine whether [Defendant] is in violation of the [CWA's] requirements." SER 5. Noting the "substantial evidence that injected effluent from the [LWRF] is emerging from submarine springs into the coastal water around Kahekili Beach Park," EPA's letter made clear these discharges potentially violate the CWA. Id. EPA issued this order "pursuant to [CWA] section 308(a)," id., which applies only to "the owner or operator of [a] point source." 33 U.S.C. § 1318(a)(A).

In March 2010, EPA followed up with an order requiring Defendant to secure a water quality certification from the State of Hawai‘i pursuant to CWA section 401. ER 121. EPA explained it was requiring the certification based on its determination that "operation of the [LWRF] may result in a discharge into navigable waters." ER 122. EPA specified that, among other things, the State would have to certify the injection wells' continued use will not violate "the applicable provisions of [CWA] section 1311," which prohibit unpermitted discharges from point sources. ER 121; see also 33 U.S.C. § 1311(a).

D. Citizens Warned Defendant About Its CWA Violations.

For years before Citizens filed suit in 2012, concerned Maui residents met repeatedly with Defendant's representatives, including its current and former mayors, to warn Defendant of the illegality of the LWRF's unpermitted discharges and Defendant's exposure to significant civil penalties and to urge Defendant to secure NPDES permit coverage for its injection wells. SER 68-78, 82-95, 97-99 (¶¶ 2-7), 101-04 (¶¶ 2-8); ER 164-71.

In 2010, several citizen groups appealed to the Maui Planning Commission a decision to build two new injection wells at the Wailuku-Kahului Wastewater Reclamation Facility. SER 104-05 ¶ 9. In that appeal, the groups argued that discharges from injection wells into groundwater that conveys pollutants to the

ocean require NPDES permit coverage. See SER 55-65. Defendant was represented by Jane Lovell, the same attorney who represented Defendant here. See SER 67; ER 654.

In June 2011, Citizens served on Defendant a notice of intent to sue detailing both Defendant's CWA violations and the substantial civil penalties Defendant faces for those violations. SER 43-54; ER 646-47 (¶ 9). Citizens' notice cited many of the same cases on which the district court subsequently relied to find Defendant liable. SER 52-53.

E. District Court Proceedings.

Citizens supplement Defendant's recital of the proceedings:

In August 2012, the district court denied Defendant's motion to dismiss. The court held Citizens' allegations that Defendant's "discharge of wastewater into the [LWRF] injection wells causes pollutants to flow into the ocean" state a claim Defendant is violating the CWA. Haw. Wildlife Fund v. Cnty. of Maui, 2012 WL 3263093, at *5 (D. Haw. Aug. 8, 2012) ("HWF I") (SER 375).

The district court subsequently issued two separate rulings regarding liability. In May 2014, the court granted summary judgment that unpermitted discharges from LWRF Wells 3 and 4 violate the CWA. The court noted the CWA's prohibition on unpermitted discharges "is not limited to 'the addition of

any pollutant directly to navigable waters from any point source,' but rather extends to 'the addition of any pollutant to navigable waters." HWF II, 24 F. Supp. 3d at 995 (ER 69) (quoting Rapanos v. United States, 547 U.S. 715, 743 (2006); emphasis in Rapanos). It further observed it would "make a mockery" of the CWA's regulatory scheme to allow Defendant to use "groundwater flowing directly into the ocean" as a sewer. Id. (ER 70) (citation omitted).

The district court concluded "[a] party is liable under the [CWA] if, without an NPDES permit, it indirectly discharges a pollutant into the ocean through a groundwater conduit." Id. at 993 (ER 65). In such cases, "the discharge is functionally one into navigable water." Id. at 998 (ER 77).

The district court articulated a two-part test to determine when indirect discharges violate the CWA. First, Citizens must show "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." Id. (ER 76-77). Second, Citizens must show "the level of pollutants emerging into navigable-in-fact water is more than de minimis." Id. (ER 77).

The district court noted the "exceptionally extensive" record before it, with EPA's tracer study pinpointing the locations where LWRF pollutants enter the ocean through groundwater, allowing precise measurements of the pollutants'

concentrations at those locations. Id. at 1000 (ER 84). The court recognized, however, that such evidence will not always be available, and that it would contravene congressional intent to protect our Nation's waters if the absence of a conclusive tracer dye study insulated polluters from liability. See id. (ER 84). The court affirmed that, "in the absence of a tracer dye study," courts may look to "proxies to … determine how much, if any, pollutant is reaching navigable-in-fact water." Id. (ER 83).

In January 2015, based on separate briefing, the court granted summary judgment that Defendant's unpermitted discharges from LWRF Wells 1 and 2 are illegal. The court grounded its holding in Defendant's concessions that "there is a hydrogeologic connection between wells 1 and 2 and the ocean" and "pollutants introduced by [Defendant] into wells 1 and 2 were making their way to the ocean." HWF III, 2015 WL 328227, at *2 (ER 26).

On appeal, Defendant disputes several of the tracer dye study's conclusions. Op. Br. at 7-8. As the docket numbers indicate, Defendant failed to present any of this evidence to the district court prior to the summary judgment ruling finding liability for unpermitted discharges from Wells 3 and 4. As the court stated:

> At the hearing on the present motions, the County admitted that pollutants discharged at the LWRF are reaching the ocean, but disputed the specific quantities stated in the Trace[r] Dye Study. What the County failed to do was explain why it believed the

> quantities cited in the Study were incorrect. Nor did the County point to any evidence in the record disputing the Study's precise findings.

HWF II, 24 F. Supp. 3d at 998 (ER 78) (emphasis added).

IV. STANDARD OF REVIEW

Citizens agree this Court's review of the district court's summary judgment rulings is *de novo*. Op. Br. at 20. In conducting appellate review, the Court is "concerned … only with the record before the trial judge when his decision was made." United States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1988).

V. SUMMARY OF ARGUMENT

Each day, Defendant discharges millions of gallons of effluent from the LWRF injection wells. The effluent travels with groundwater to the Pacific Ocean, with most of the effluent discharging from seeps in the coral reef immediately offshore of Kahekili Beach in West Maui. So massive are these discharges that one of every seven gallons of groundwater entering the ocean at Kahekili is LWRF effluent.

When Defendant built the LWRF, it considered building an outfall to discharge effluent directly into the ocean. It opted instead for injection wells, knowing the effluent would discharge into the ocean through hydrologically connected groundwater.

This Court has identified 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." Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993). It is undisputed that Defendant's injection wells are "point sources," the ocean at Kahekili is a "navigable water," LWRF effluent is a "pollutant," pollutants from Defendant's injection wells enter the ocean at Kahekili, and Defendant does not have an NPDES permit. The question here is whether Defendant can lawfully circumvent the CWA's NPDES permit requirements by discharging into the ocean indirectly, rather than directly.

The district court correctly held Defendant's unpermitted, indirect discharges from point source injection wells violate the CWA. The court grounded its holding in the text of the statute; its prohibition on unpermitted discharges "is not limited to 'the addition of any pollutant directly to navigable waters from any point source,' but rather extends to 'the addition of any pollutant to navigable waters." HWF II, 24 F. Supp. 3d at 995 (ER 69) (quoting Rapanos, 547 U.S. at 743; emphasis in Rapanos). The court also looked to Congress' intent to protect the Nation's waters, concluding it would make a mockery of the CWA's regulatory

scheme to allow Defendant to use "groundwater flowing directly into the ocean" as a sewer. Id. (ER 70).

The district court acknowledged the absence of binding precedent directly on point, but that is a far cry from Defendant's claim the liability decisions are unprecedented. The court's decisions find support in Supreme Court precedent and the EPA's longstanding statutory interpretation, which is entitled to deference, that the CWA "requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters." 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991). The court ruled consistently with the decisions of the majority of courts, in this Circuit and elsewhere, that, "since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit." Wash. Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994).

The alleged difficulty of permitting indirect discharges via groundwater is irrelevant to liability, and, in any event, HDOH's years of water quality monitoring at the Kahekili seeps proves permitting is entirely feasible. Similarly, that other pollutant sources may be subject to NPDES permitting is no reason to disturb the district court's holding. To achieve Congress's goal to "restore and maintain the

chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), it is vital to impose "direct restrictions" on all identified point sources of pollution through NPDES permitting. Envt'l Prot. Agency v. Cal. ex rel. State Water Resources Control Bd., 426 U.S. 200, 204 (1976).

In holding Defendant liable, the district court primarily relied on the indirect discharge rationale, but, in the alternative, held the groundwater beneath the LWRF could itself constitute a point source and also satisfies the test articulated in Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), for the CWA to regulate waters that are not navigable-in-fact. HWF II, 24 F. Supp. 3d at 999, 1005 (ER 80, 95). Both alternate grounds are well-supported in the evidence the parties presented and applicable case law.

Finally, the district court properly rejected Defendant's argument that imposing any civil penalty – even a nominal one – would violate due process. It is well-established that, "[i]f a district court finds a [CWA] violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory." Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 1001 (9th Cir. 2000). Had the parties not resolved the penalty amount by agreement, the district court would have had discretion to consider Defendant's equitable claims in assessing a civil penalty, but could not lawfully decline to impose any penalty. Given the parties'

settlement, this Court need determine only if, at some point, Defendant had "a reasonable opportunity to know what is prohibited." United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008) (citation omitted).

Defendant's appeal presents the counterfactual claim that, until the district court entered summary judgment in May 2014, Defendant had no notice its unpermitted discharges might subject it to penalties. Even if true, Defendant's illegal discharges are ongoing. Following the district court's order, which undeniably provided notice, Defendant continued its illegal, unpermitted discharges. Defendant articulates no reason to find a lack of fair notice for these violations.

The fact is, long before the May 2014 ruling, Defendant received repeat warnings about its illegal conduct. Two years earlier, the district court denied Defendant's motion to dismiss, leaving no doubt the court would hold Defendant liable if Citizens could establish that effluent from Defendant's injection wells reaches the ocean (a fact Defendant concedes it has known for decades).

Citizens' notice of intent to sue in June 2011 provided Defendant the full measure of the statutorily required notice. Congress expressly authorized citizens who comply with the notice requirement to sue to enforce the CWA, including

mandatory civil penalties for violations. Even if regulatory agencies formally notify a polluter no NPDES permit is required (which did not occur here), the polluter is not shielded from liability, and federal courts "must honor the Act's express provisions authorizing citizen suits." Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1012 (9th Cir. 2002).

Defendant also received fair notice from EPA, which issued two orders in 2010 alerting Defendant that unpermitted discharges from its injection wells might subject it to CWA liability.

After receiving each of these numerous warnings, Defendant opted to throw the dice and continued discharging effluent from the LWRF injection wells without NPDES permit coverage. Having gambled and lost, Defendant may not now shirk responsibility for its illegal conduct.

VI. ARGUMENT

A. Statutory Framework

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation." Milwaukee v. Illinois, 451 U.S. 304, 318 (1981); see also id. at 318 n.12.

To further Congress' central goal, CWA section 301(a) mandates that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source" and expressly includes "well" within the definition of "point source." Id. § 1362(12), (14). "The term 'navigable waters' means the waters of the United States, including the territorial seas." Id. § 1362(7). This Court recognizes the prohibition on point source discharges as "[t]he 'cornerstone' and 'fundamental premise' of the [CWA]." Nw. Envtl. Advocates v. Envt'l Prot. Agency, 537 F.3d 1006, 1020 (9th Cir. 2008) (citation omitted).

CWA section 402 provides an exception to section 301(a)'s general prohibition through the issuance of a permit under the National Pollutant Discharge Elimination System "for the discharge of any pollutant or combination of pollutants." 33 U.S.C. § 1342(a)(1). NPDES permitting is to key to achieving Congress's goal to "abate and control water pollution." Envt'l Prot. Agency, 426 U.S. at 203; see also Am. Iron & Steel Inst. v. Envt'l Prot. Agency, 115 F.3d 979, 990 (D.C. Cir. 1997) (NPDES permitting is CWA's "centerpiece"). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations … of the

individual discharger" and makes those obligations enforceable. Envt'l Prot. Agency, 426 U.S. at 205.

Absent compliance with a valid NPDES permit, a discharger cannot escape liability by arguing its point source discharge does not "create[] a net increase in the level of pollution." Mokelumne River, 13 F.3d at 309. The CWA imposes strict liability, "categorically prohibit[ing] any discharge of a pollutant from a point source without a permit." Id.

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

When Congress amended the CWA in 1987 to address nonpoint source pollution, it reaffirmed the importance of NPDES permitting, emphasizing the nonpoint source program was neither "a substitute for the point source programs already in place under the act" nor "an excuse to reduce the effort or relax the requirements on the point source side." 133 Cong. Rec. 1,279 (1987). Supporters of the legislation called for "[p]oint sources not yet in compliance with the law … to be pursued." Id.

B. The District Court Properly Held Defendant's Indirect Discharges Violate The CWA.

This Court has identified 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." Mokelumne River, 13 F.3d at 309.

Defendant has never disputed the existence of the first and fourth elements. The effluent the injection wells discharge falls within the CWA's broad definition of "pollutant," which includes sewage, and Defendant admits it lacks an NPDES permit for the injection wells. 33 U.S.C. § 1362(6); ER 645 (¶ 2), 647 (¶ 12).

Regarding the third and fourth elements, while Defendant asserts the district court dispensed with the "point source" requirement, Defendant has never disputed

its injection wells are "point sources" under the CWA definition, which expressly includes wells. See 33 U.S.C. § 1362(14); SER 265. Nor has Defendant questioned that the Pacific Ocean that receives LWRF effluent is a navigable water. See 33 U.S.C. § 1362(7); Rapanos, 547 U.S. at 739 ("waters of the United States" includes oceans). Rather, because its injection wells – "the "original point source[s]" – do not discharge directly to the ocean, Defendant argues the district court improperly "eliminate[d] the requirements that a discharge to navigable waters be from a point source." Op. Br. at 30. As discussed below, the district court did no such thing.

1. The District Court Properly Applied Rapanos' "Indirect Discharge" Rationale For CWA Liability.

Defendant acknowledges that, in Rapanos, the Supreme Court stated "a point source does not need to discharge directly into navigable waters to trigger NPDES permitting;" rather, "[a]n NPDES permit is also required if pollutants 'pass "through conveyances" in between' the initial point source and navigable water." Op. Br. at 27 (quoting Rapanos, 547 U.S. at 743). Defendant asserts, however, that, under Rapanos' indirect discharge rationale, "the intermediate conveyances themselves must be point sources." Id. Defendant's argument is unsupported.

In Rapanos, Justice Scalia, writing for a plurality, espoused a narrower view of the "scope of 'navigable waters'" than the other five justices, but vigorously denied that interpretation would allow polluters "to evade the permitting requirement … simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." 547 U.S. at 742-43. The plurality emphasized "[t]he Act does not forbid the 'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" Id. at 743 (quoting 33 U.S.C. § 1362(12)(A); citing 33 U.S.C. § 1311(a); emphasis in Rapanos). It noted:

> from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

Id. (citation omitted).

Rapanos identifies two "alternative" bases for liability: "the 'indirect discharge' rationale and the 'point source' rationale." Rapanos, 547 U.S. at 744. Under the "point source" rationale, a pollutant enters navigable waters directly from a point source, which "need not be the original source of the pollutant." Id. (quoting S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 105

(2004)).[7] In contrast, under the "indirect discharge" rationale, as its name indicates, "the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." Rapanos, 547 U.S. at 743 (citation omitted).

The cases Rapanos cites in support of the "indirect discharge" rationale make clear that, while the intervening conveyances may themselves constitute point sources, they need not.[8] Thus, in Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005), the Tenth Circuit concluded a mine owner could be liable under the CWA for "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 "[t]he language of the CWA requires a connection or link between discharged pollutants and their addition to navigable waters." Id. at 1146. In El Paso, the necessary link was the Roosevelt Tunnel, which drained groundwater reaching the tunnel "through a series of drainage

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[7] In addition to South Florida Water Management District, the plurality cites two cases – United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005), and Dague v. Burlington, 935 F.2d 1343 (2d Cir. 1991) – as applying the "point source" rationale. Rapanos, 547 U.S. at 743-44.

[8] United States v. Velsicol Chemical Corp., 438 F. Supp. 945 (W.D. Tenn. 1976), does not provide adequate information to determine whether the conveyance separating the point source from navigable waters is itself a point source. See id. at 946-47.

tunnels and underground shafts, including the El Paso mine shaft," and conveyed that groundwater to a portal discharging "into Cripple Creek, which eventually empties into the Arkansas River." Id. at 1136.

The El Paso opinion makes clear the Roosevelt Tunnel is far from confined or discrete, debunking Defendant's argument that "intermediate conveyances themselves must be point sources." Op. Br. at 27. The court noted 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. This tunnel was so porous 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 this porous, unconfined conveyance was adequate for CWA 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.

Here, there is no dispute the LWRF injection wells, which are point sources, are the origin of Defendant's discharges. SER 265. Moreover, unlike El Paso, it is undisputed pollutants from the LWRF wells reach navigable-in-fact waters. SER 109 (lines 14-21), 267 (lines 8-12).

Concerned Area Residents for Environment ("CARE") v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), likewise cannot be squared with Defendant's assertion the "indirect discharge" rationale requires intervening conveyances to be point sources. In CARE, citizens challenged a dairy farm's liquid manure spreading operations. The Second Circuit applied the indirect discharge rationale as an independent, alternate basis for CWA liability. Id. at 119; see Rapanos, 547 U.S. at 744 (CARE "adopted both the 'indirect discharge' rationale and the 'point source' rationale in the alternative"). The court initially concluded the defendant's "manure spreading vehicles themselves were point sources." CARE, 34 F.3d at 119. It 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 CWA liability, it was enough that the defendant "collected by human effort" into its "tankers and other vehicles" the liquid manure those point sources subsequently discharged onto fields that led to navigable waters. Id. at 118. Here, it is undisputed Defendant "collect[s] by human effort" effluent, treats the effluent at the LWRF, and then discharges the effluent from injection wells 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.

Defendant cites Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980), to argue intervening conveyances must themselves be point sources, but the case cuts the other way. In Abston Construction, the Fifth Circuit concluded the key to CWA liability is whether the defendant "initially collected or channeled the water and other materials" that subsequently reach navigable waters. Id. at 45. If the defendant made such efforts, the discharge "constitutes a point source discharge," not unregulated "natural rainfall drainage." Id. at 44. The court therefore agreed with EPA that "[e]xamples of point source pollution" included "the collection, and subsequent percolation, of surface waters in the [mine] pits themselves," as well as "[s]ediment basins dug by the miners and designed to collect sediment[,] … even though the materials were carried away from the basins

by gravity flow of rainwater." Id. at 45; see also id. at 47 (rainwater trapped in mine pits "eventually percolated through the banks and flowed toward the creek, carrying with it acid and chemicals from the pit").

The point source versus nonpoint source distinction turns on whether pollutants are "traceable to any single discrete source." Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 508 (9th Cir. 2013). This case does not present a situation involving "runoff caused primarily by rainfall around activities that employ or create pollutants," which constitutes "nonpoint source pollution." Trs. for Alaska v. Envtl. Prot. Agency, 749 F.2d 549, 558 (9th Cir. 1984). Rather, Defendant collects effluent at the LWRF and then discharges it from injection wells, which are "identifiable point[s] of discharge." Id. Since Defendant "release[s] pollutants from a discernible conveyance" (i.e., the LWRF wells), its discharges "are subject to NPDES regulation, as are all point sources." Id.[9]

[9] Defendant's intentional, daily discharge of millions of gallons of effluent directly into hydrologically connected groundwater bears no resemblance to the nonpoint source pollution in Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143 (9th Cir. 2010), where rainwater seeping through a cover "designed to divert water away from [mining] pits … filters into the pits at a rate less than water would filter into the surrounding ground that is not protected by the cover" and then "filters through 200 feet of overburden and 250 to 750 feet of undisturbed material beneath the overburden, eventually entering the surface water." Id. at 1153. In Greater Yellowstone, the rainwater "is not collected or channeled." Id. Here, Defendant

The foregoing discussion confirms the district court did not err when it held, applying Rapanos' indirect discharge rationale, that "the groundwater acting as a conduit" for discharges from a point source "need not also be 'confined and discrete.'" HWF II, 24 F. Supp. 3d at 999 (ER 79). As the court correctly concluded:

> Courts have adopted "the 'indirect discharge' rationale and the 'point source' rationale in the alternative." It would be anomalous for those alternative rationales to merge into a single rationale.

Id. (quoting Rapanos, 547 U.S. at 744; emphasis in HWF II). Here, it is undisputed that "contaminant-laden waters" discharged from Defendant's injection wells "reach covered waters," violating the Act. Rapanos, 547 U.S. at 745.[10]

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collects and channels effluent into its injection wells for discharge directly into groundwater.

Notably, "the control of non-point source pollution often depends on land use controls," which would do nothing to address pollution from Defendant's injection wells. Or. Natural Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 785 (9th Cir. 2008) (citation omitted).

[10] Defendant reads far too much into the district court's statement that CWA liability attaches if a point source discharges pollutants that reach navigable water, "regardless of how they get there." HWF II, 24 F. Supp. 3d at 1000 (ER 82). The court specified liability cannot be based on merely "'a general hydrological connection between all waters;'" rather, Citizens must show "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." Id. at 997-98 (ER 76-77) (citation omitted); see also id. at 1000 (ER 83) ("pollutants have been precisely traced from the point of discharge to the ocean").

2. The District Court's Ruling Accords With EPA's Longstanding Interpretation.

A quarter century ago, noting the CWA's "purpose of protecting surface waters and their uses," EPA 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. at 64,892.[11] In the years since, EPA has consistently reaffirmed the CWA "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." 63 Fed. Reg. 7,858, 7,878 (Feb. 17, 1998); see 62 Fed. Reg. 20,177, 20,178 (Apr. 25, 1997); 66 Fed. Reg. 2,960, 3,015-18 (Jan. 12, 2001);[12] ER 121-22, 357, 685; SER 5.

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[11] EPA does not assert authority to regulate all groundwater. Rather, "for the purpose of protecting surface waters and their uses," EPA concludes it "may exercise authorities that may affect underground waters." Id.

[12] Because "[p]ollutant discharges from [concentrated animal feeding operations] to surface water via a groundwater pathway are highly dependent on site-specific variables," EPA decided the final rule would not include "national requirements" addressing such discharges. 68 Fed. Reg. 7,176, 7,216 (Feb. 12, 2003). That did not, as Defendant suggests, reflect a change in EPA's position. See id. at 7,216-17 (final rule does not affect CWA jurisdiction "over discharges to surface water via groundwater that has a direct hydrologic connection to surface

The CWA "delegates to the EPA the general rulemaking authority necessary for the agency to carry out its functions under the Act." Pronsolino v. Nastri, 291 F.3d 1123, 1133 (9th Cir. 2002). Pursuant to that authority, EPA promulgated a regulation defining "discharge of a pollutant" that, like the statute, covers "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'" 40 C.F.R. § 122.2. EPA's interpretation of the CWA and its implementing regulation to require NPDES permits for point source discharges that occur indirectly via groundwater is entitled to deference. See Pronsolino, 291 F.3d at 1133-35.

EPA's longstanding interpretation regarding indirect discharges does not conflict with other agency pronouncements. Defendant lifts out of context EPA statements about groundwater regulation, ignoring that these statements refer to isolated groundwater lacking "a direct hydrological connection" to surface waters. 56 Fed. Reg. at 64,892. Thus, EPA promulgated 40 C.F.R. § 122.50(a) to address situations where the disposal of wastewater into a well avoids "discharge[s] into waters of the United States." In promulgating this regulation, EPA invoked Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977), which expressly states it did not

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water"), 7229 (affirming authority to "impose [NPDES] permit terms and conditions" to "control discharges to ground water with a direct hydrologic connection to surface water … on a case-by-case basis").

address whether NPDES permits are required for "wastes disposed of into wells [that] do, or might, 'migrate' from groundwaters back into surface waters that concededly are within [EPA's] regulatory jurisdiction." Id. at 1312 n.1; see 43 Fed. Reg. 37,078, 37,081 (Aug. 21, 1978).[13]

Likewise, neither of the EPA General Counsel opinions Defendant cites addresses discharges into hydrologically connected groundwater. EPA's 1975 opinion analyzes United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975), which held merely that "[t]he disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a 'discharge of a pollutant' within the meaning of" the CWA, a conclusion entirely consistent with EPA's position. Id. at 1383 (emphasis added; footnote omitted); see In Re E.I. duPont de Nemours & Co., 1975 WL 23850, at *1 (E.P.A.G.C. Apr. 18, 1975). EPA's 1973 memorandum does not even mention hydrologically connected groundwater. 1975 WL 23850, at *2-3.

EPA's longstanding statutory interpretation does not "ignor[e] contrary legislative history." Op. Br. at 40. The legislative history Defendant cites relates

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[13] Defendant also cites 40 C.F.R. § 122.21(j)(1)(viii), but that provision does not distinguish between point and nonpoint source pollution. Rather, it distinguishes between "outfalls" and "other discharge or disposal methods" at publicly owned treatment works. Id.

only to whether Congress intended that "discharges to isolated groundwater be subject to permit requirements," which is not at issue. Hecla Mining, 870 F. Supp. at 989; see also id. at 989-90.

In enacting the CWA, Congress did not, as Defendant claims, ignore EPA's testimony that harm to surface waters can occur when "sources of pollution" are "discharged … through the ground water table" and that the CWA must "insure that … authority over interstate and navigable streams cannot be circumvented" if polluters dispose of "toxic wastes in deep wells" that, "through the ground water table, might contaminate existing water supplies." Water Pollution Control Legislation 1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. On Public Works, 92nd Cong. 230 (1971).[14] Rather, as Rapanos emphasizes, Congress drafted the CWA's prohibition broadly, prohibiting all unpermitted discharges "to navigable waters," not just those "directly to navigable waters." 547 U.S. at 743 (citations omitted); see also 66 Fed. Reg. at 3,016 ("Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters'"). As EPA correctly concluded, given "Congress' broad concern for the

[14] This Court should ignore Defendant's citation to the American Petroleum Institute's testimony. See id. at 742 (cited in Op. Br. at 21-22); cf. Kelly v. Robinson, 479 U.S. 36, 50 n.13 (1986).

integrity of the Nation's waters," interpreting the CWA to "exclude[] regulation of point source discharges to the waters of the U.S. which occur via ground water would … be inconsistent with the overall Congressional goals expressed in the statute." 66 Fed. Reg. at 3,015-16; see also United States v. Neal, 776 F.3d 645, 652 (9th Cir. 2015) ("[p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme").

CWA provisions that expressly mention groundwater do not indicate congressional intent to exempt from NPDES permitting indirect discharges to surface waters through groundwater. As EPA has observed:

> Specific references to ground water in other sections of the Act may shed light on the question of whether Congress intended the NPDES program to regulate ground water quality. That question, however, is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water.

66 Fed. Reg. at 3,015.

Defendant reads far too much into CWA provisions calling for states to regulate the disposal of pollutants into wells and for EPA to share information about controlling pollution from those sources. See Op. Br. at 24 & 51 (citing 33 U.S.C. §§ 1314(f)(2)(D) & (F), 1342(b)(1)(D)). That pollution resulting from well disposal is sometimes deemed nonpoint does not mean, as a matter of law, it never constitutes point source pollution. See S. Fla. Water Mgmt. 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"); Trs. for Alaska, 749 F.2d at 558 (rejecting claim mining activities described in "§ 1314(f)(2)(B) ... are not subject to NPDES permit requirements" because "point and nonpoint sources are not distinguished by … the activity causing the pollution"); Abston Const., 620 F.2d at 44 (same).[15] The CWA expressly defines the term "point source" to include "any … well … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Defendant's position that pollution from wells can never constitute point source pollution would result in an impermissible absurdity. See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1036 (9th Cir. 2013); cf. Joffe v. Google, Inc., 746 F.3d 920,

[15] Inland Steel Co. v. Environmental Protection Agency, 901 F.2d 1419 (7th Cir. 1990), similarly concludes the CWA "was not intended to authorize the regulation of all wells used to dispose of pollutants," but acknowledges NPDES permits may be required if well disposal has "effects on navigable waters." Id. at 1422. In that case, the "particular wells [did not] pose any menace to navigable waters." Id. EPA's position in Inland Steel – "all 'discharges' are 'disposals,' but not all 'disposals' are 'discharges'" – affirms that some well disposal is subject to NPDES permitting. Id.

936 (9th Cir. 2013) (rule of lenity inapplicable if "traditional tools of statutory interpretation" resolve ambiguity).[16]

3. The District Court's Liability Decisions Reflect The Majority View.

The district court's rulings on liability are far from "unprecedented." Op. Br. at 17. As discussed, the court's conclusion Defendant violates the CWA when it discharges millions of gallons of effluent daily into groundwater that indisputably conveys pollutants directly to the ocean is well-supported under Rapanos and the cases applying Rapanos' "indirect discharge rationale," as well as a quarter century of pronouncements by EPA, the agency entrusted with the CWA's implementation. Moreover, the district court's holdings reflect the majority view of courts – in this Circuit and elsewhere – on this issue. Like EPA, these courts look to the CWA's structure and goal "'to protect the quality of surface waters'" and conclude "Congress intended to regulate the discharge of pollutants that could affect surface waters of the United States, whether it reaches the surface water directly or through groundwater." Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175, 180 (D. Puerto Rico 2009) (quoting Hecla Mining,

[16] Requiring NPDES permits for the subset of well disposal that discharges pollutants to hydrologically connected groundwater does not displace state regulation of well disposal – or, for that matter, groundwater – generally.

870 F. Supp. at 990); see, e.g., Sierra Club v. Va. Elec. & Power Co., 2015 WL 6830301, at *5-6 (E.D. Va. Nov. 6, 2015); Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, 2015 WL 6157706, at *9-10 (M.D.N.C. Oct. 20, 2015); San Francisco Herring Ass'n v. Pac. Gas & Elec. Co., 81 F. Supp. 3d 847, 862-63 (N.D. Cal. 2015); Ass'n Concerned Over Res. and Nature, Inc. v. Tenn. Aluminum Processors, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011); Coldani v. Hamm, 2007 WL 2345016, at *7 & nn. 9-10 (E.D. Cal. Aug. 16, 2007); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997); Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1358 (D.N.M. 1995); Sierra Club v. Colo. Refining Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993); Quivira Mining Co. v. Envtl. Prot. Agency, 765 F.2d 126, 129-30 (10th Cir. 1985); 66 Fed. Reg. at 3,017 n.1 (listing cases). These cases support the district court's conclusion it would make a mockery of the CWA's regulatory scheme to give Defendant free rein to use "groundwater flowing directly into the ocean" as a sewer. HWF II, 24 F. Supp. 3d at 995 (ER 70).

As the district court correctly explained, "[a]lmost every court that has allowed unpermitted discharges into groundwater has done so under the theory that the groundwater is not itself 'water of the United States.'" Id. at 996 (ER 73).

"That is, those courts were not determining whether discharging pollutants into groundwater conduits required a permit." Id. (citing Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994); Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1318 (D. Or. 1997)); see, e.g., United States v. Johnson, 437 F.3d 157, 161 n.4 (1st Cir. 2006).[17] Other cases Defendant cites are inapposite because they do not involve direct discharges to hydrologically connected groundwater. See, e.g., Rice v. Harken Exploration Co.., 250 F.3d 264, 271 (5th Cir. 2001) (case involved oil spilled "onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage"); cf. 66 Fed. Reg. at 3,017 ("general hydrologic connection between all waters" not sufficient for CWA liability).[18]

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[17] The First Circuit vacated this opinion and remanded "for application of the Rapanos standards," holding that CWA jurisdiction can be established under "either Justice Kennedy's legal standard or that of the plurality." United States v. Johnson, 467 F.3d 56, 60 (1st Cir. 2006).

[18] Tri-Realty Co. v. Ursinus Coll., 2013 WL 616409 (E.D. Pa. Nov. 12, 2013), acknowledges Rapanos' indirect discharge rationale but mistakenly assumes intermediate conveyances must be point sources. Id. at *6-8.

4. The Alleged Difficulty Of NPDES Permitting Is Irrelevant.

Defendant's assertion it would be difficult to issue an NPDES permit for Defendant's injection wells is irrelevant to CWA liability. See Mokelumne River, 13 F.3d at 309 (listing "elements needed to establish liability"). As this Court has affirmed, "this ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all." Nw. Envtl. Advocates, 537 F.3d at 1026 (citation omitted).

Even if relevant, the Court should reject Defendant's assertion NPDES permitting is impossible absent defined outfalls. The regulations governing permit applications for publicly owned treatment works require outfall descriptions only "as applicable." 40 C.F.R. § 122.21(j)(3). Where, as here, effluent is disposed of through underground injection, the regulations require only readily available information:

> (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). Defendant knows this, having provided the specified information in its NPDES permit application. ER 626.

Even if Defendant's injection wells were "outfalls" for purposes of NPDES permitting, Defendant can easily provide the limited information the regulations request regarding each well's location, distance from shore, depth, average daily flow rate and frequency of discharge. 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 ER 627.

Defendant's argument it cannot monitor the locations where LWRF effluent enters the ocean is baseless. In its 2010 order, EPA provided precise coordinates for Defendant to monitor discharges at the Kahekili seeps. SER 7-9 (¶¶ 1-5). HDOH has been monitoring those seeps for years and included submarine spring monitoring and sampling in its draft UIC permit for the LWRF. ER 133-34; SER 126-37.

Finally, to the extent any permitting requirement does not apply to Defendant's discharges, HDOH and EPA can waive it. 40 C.F.R. § 122.21(j). The regulations similarly provide flexibility "[w]hen permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible." Id. § 122.45(h)(1); see also id. § 122.45(a), (h)(2).

5. Whether Other Polluters May Need Permits Is Irrelevant.

The district court's conclusion Defendant violated the CWA because "pollutants can be directly traced from the injection wells to the ocean" is well-supported by the statutory language, congressional intent, applicable case law and a quarter century of EPA statutory interpretations. HWF II, 24 F. Supp. 3d at 998 (ER 76-77). Whether applying Rapanos' "indirect discharge" rationale would require NPDES permits for other injection wells – or, for that matter, entirely different projects – is irrelevant. Umatilla, 962 F. Supp. at 1320 (such "considerations are not controlling").[19]

In Northwest Environmental Advocates, this Court did not hesitate to hold that discharges from vessels require NPDES permits, even though such discharges were deemed exempt during the CWA's first three decades and many point sources were potentially affected. 537 F.3d at 1010-11; see also Lake Carriers' Ass'n v. Envt'l Prot. Agency, 652 F.3d 1, 4 (D.C. Cir. 2011) (EPA subsequently issued general permit covering discharges from nearly 70,000 vessels). As the Court noted, "[o]btaining a permit under the CWA need not be an onerous process." Nw.

[19] It is also unknowable, based on the limited information Defendant provides. "[W]hether a discharge to ground water in a specific case constitutes an illegal discharge … is a fact specific [determination]." 66 Fed. Reg. at 3,018; see also HWF II, 24 F. Supp. 3d at 997-98 (ER 76-77).

Envtl. Advocates, 537 F.3d at 1010. In any event, the Court's job was to determine whether the CWA, as drafted by Congress, regulates point source discharges from vessels, not make a policy decision. Id. at 1020 (quoting Chevron U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837, 842-43 (1984)).

That some polluters may be unaware their discharges to groundwater reach navigable waters cannot justify crafting a judicial exemption from NPDES permitting. "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" United States v. Riverside Bayview Homes, 474 U.S. 121, 132-33 (1985) (quoting S. Rep. No. 92-414, at 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742; emphasis added). To achieve Congress' goal to protect our nation's waters, it is vital to impose "direct restrictions" on all identified point sources of pollution through NPDES permitting. Envt'l Prot. Agency, 426 U.S. at 204.

While civil penalties for CWA violations are mandatory, courts retain "broad discretion to set a penalty commensurate with the defendant's culpability." Leslie Salt Co. v. United States, 55 F.3d 1388, 1397 (9th Cir. 1995). If a polluter were truly unaware its discharges are reaching navigable water, a court could consider the polluter's good faith and "'such other matters as justice may require'"

and, if warranted, "assess a civil penalty of only a nominal amount." Id. (quoting 33 U.S.C. § 1319(d)). There is no need for a blanket exemption to avoid unjust results.

C. The District Court Properly Found Alternate Grounds For Liability.

In holding Defendant's unpermitted discharges from LWRF Wells 3 and 4 are illegal, the district court relied primarily on Rapanos' indirect discharge rationale, but also articulated two alternate grounds. First, given the high proportion of LWRF effluent reaching the ocean, the court held the groundwater beneath the facility could itself constitute a point source. HWF II, 24 F. Supp. 3d at 999 (ER 80). Second, "given the undisputed evidence … that pollutants rapidly flow from the aquifer into the ocean and cause significant change to the ocean water near the submarine seeps," the court held "the aquifer beneath the LWRF" satisfies both prongs of the Healdsburg test and, thus, is regulated under the CWA. Id. at 1005 (ER 95). Both alternate grounds are well-supported in the evidence the parties presented and applicable case law.

1. Groundwater Beneath The LWRF Constitutes A Point Source.

After rejecting Defendant's argument that liability under the indirect discharge rationale requires a series of point sources, the district court held,

alternatively, that "nothing in the record suggests that the groundwater [beneath the LWRF] is not itself a 'confined and discrete conveyance.'" Id. at 999 (ER 79). Relying on the tracer study's finding that "more than 50%" of LWRF effluent reaches the ocean, the court concluded that "[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." Id.; see also id. at 999-1000 (ER 79-83). The district court's holding is consistent with the CWA's regulatory scheme, which "embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979); 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 can be point source).

This Court should reject Defendant's argument that factual disputes about the tracer study preclude summary judgment. In opposing summary judgment regarding Wells 3 and 4, Defendant was obliged to "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). Defendant did not, failing to

"point to any evidence in the record disputing the Study's precise findings." HWF II, 24 F. Supp. 3d at 998 (ER 78).

This Court is "concerned here only with the record before the trial judge when [her] decision was made." Walker, 601 F.2d at 1055. Defendant cannot properly challenge the grant of summary judgment on this issue by invoking evidence it proffered only at a later stage of the case.[20]

2. The CWA Regulates The Groundwater Beneath The LWRF.

Defendant's claim groundwater can never, regardless of circumstances, be regulated as "a water of the United States" relies on regulations not currently in force. Op. Br. at 46; see also id. at 21. On October 9, 2015, the Sixth Circuit issued a nationwide stay of newly issued regulations defining the "waters of the United States," restoring the "pre-Rule regime." In re Envtl. Prot. Agency, 803 F.3d 804, 806 (6th Cir. 2015). In proposing the new regulations, EPA and the Army Corps affirmed they "have always preserved the authority to determine in a particular case that [groundwater is] a 'water of the United States.'" 79 Fed. Reg.

[20] Defendant cites its expert's critique of tracer studies that Defendant possessed when litigating summary judgment regarding Wells 3 and 4. See, e.g., ER 531-38. "Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession … or could have been discovered with reasonable diligence." Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir. 1987).

22,188, 22,218 (Apr. 21, 2014); cf. 33 C.F.R. § 328.3(a)(5) ("waters of the United States" include tributaries of waters used in interstate or foreign commerce); 40 C.F.R. §§ 122.2, 230.3(s)(4) (same). The agencies sought to narrow "the scope of regulatory jurisdiction" as compared to "that under the existing regulations" not because they contend the current, broader interpretation is in error, but rather for administrative convenience, to "minimiz[e] the number of case-specific determinations." 79 Fed. Reg. at 22,188-89. Thus, when the district court issued its liability decisions (and for all but six weeks in late 2015), the governing regulations permitted groundwater to be regulated as "waters of the United States."

The Supreme Court has held that, to achieve Congress' goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the CWA's prohibition on unpermitted discharges of pollutants extends to "some waters that are not navigable in the traditional sense." Rapanos, 547 U.S. at 767 (Kennedy, J., concurring). In Riverside Bayview Homes, the Court emphasized "Congress chose to define the waters covered by the Act broadly" and made "it clear that the term 'navigable' as used in the Act is of limited import." 474 U.S. at 133. Noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems," the Court upheld Army Corps regulations interpreting "the term 'waters' to encompass wetlands

adjacent to waters as more conventionally defined." Id. (noting regulation "abandon[ed] traditional notions of 'waters'").

In Healdsburg, this Court considered whether a municipal wastewater treatment plant was required to obtain an NPDES permit for discharges into a body of water known as "Basalt Pond," a rock quarry pit connected to the Russian River via groundwater. 496 F.3d at 995-96. To determine whether CWA jurisdiction extends to Basalt Pond, this Court applied the "significant nexus" test Justice Kennedy articulated in Rapanos. 496 F.3d at 995. The Court concluded Basalt Pond had a "significant nexus" to navigable waters, "not only because the Pond waters seep into the navigable Russian River, but also because they significantly affect the physical, biological, and chemical integrity of the River." Id.; see also id. at 1000-01.

The district court did not, as Defendant claims, conclude the "substantial nexus" test "is inappropriate here." Op. Br. at 46. Rather, noting the test "poses enormous barriers to the regulation of groundwater – barriers that even the plurality in Rapanos would likely not endorse," the court questioned whether it "is the only way though which a discharge into groundwater could be determined to come under the [CWA]." HWF II, 24 F. Supp. 3d at 997 (ER 75); see also id. at 1000 (ER 83-84). The record here, however, is "exceptionally extensive,"

permitting the court to conclude the groundwater beneath the LWRF satisfies this demanding test, since LWRF effluent "is reaching the ocean and is significantly affecting the water near the submarine seeps where it is being discharged." Id. at 1000 (ER 84); see also id. at 1001-05 (ER 87-95).

The district court correctly dismissed as irrelevant disputes over whether LWRF effluent harms the Kahekili reefs. Id. at 1004 (ER 92); see Mokelumne River, 13 F.3d at 309 (CWA imposes strict liability). The only material facts – "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" – were undisputed. HWF II, 24 F. Supp. 3d at 1004 (ER 92). Consequently, the district court properly concluded the groundwater under the LWRF satisfies the "substantial nexus" test, bringing the groundwater under CWA jurisdiction.

D. The District Court Properly Denied Defendant's Summary Judgment Motion Regarding Fair Notice.

The parties have stipulated the appropriate civil penalty if this Court affirms Defendant has violated the CWA and "is not immune from civil penalties because of a lack of fair notice." ER 105 (¶ 4); see also ER 106-08 (¶¶ 9-13). To resolve Defendant's appeal of the denial of its summary judgment motion on fair notice, therefore, this Court need determine only whether, at some point, Defendant had "a

reasonable opportunity to know what is prohibited." Shark Fins, 520 F.3d at 980 (citation omitted).

1. Civil Penalties Are Mandatory.

As a threshold matter, the district court correctly concluded "civil penalties … are mandatory" once a CWA violation is found and that the CWA imposes strict liability. Natural Resources Defense Council, 236 F.3d at 1001; see also Mokelumne River, 13 F.3d at 309. Thus, even if Defendant could establish it had no prior notice its conduct was illegal, it would still be subject to penalties. Congress directed that equitable factors like "good-faith efforts to comply" and "other matters as justice may require," 33 U.S.C. § 1319(d), inform the court's "discretion to set a penalty commensurate with the defendant's culpability." Leslie Salt Co., 55 F3d. at 1397. Courts may impose a "nominal" civil penalty, but may not decline to impose any penalty at all. Id.

2. The District Court's Rulings Provided Notice.

The district court correctly held that, "[a]t the very latest, [Defendant] had fair notice that it was violating the [CWA] once this court issued its first summary judgment order on May 30, 2014," finding Defendant liable for unpermitted discharges from LWRF Wells 3 and 4. Haw. Wildlife Fund v. Cnty. of Maui, 2015

WL 3903918, at *6 (D. Haw. June 25, 2015) ("HWF IV") (ER 16). "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). The court's ruling eliminated any possible claim Defendant lacked notice of the CWA's requirements, removing any arguable constitutional impediment to penalties for the ongoing, illegal discharges occurring after the liability decision. See, e.g., SER 1-4.[21]

The district court's denial of Defendant's motion to dismiss nearly two years earlier, in August 2012, likewise provided great clarity regarding conduct that violates the CWA. By its nature, a decision resolving a motion to dismiss identifies the facts that "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Here, the court held Citizen's allegations that Defendant's "discharge of wastewater into the injection wells causes pollutants to flow into the ocean" were adequate to establish a CWA violation. HWF I, 2012 WL 3263093, at *5 (SER 375). Given Defendant has never disputed that injected effluent moves through groundwater to the ocean, Defendant has no basis to claim surprise from the subsequent liability rulings. Defendant had ample notice it would face civil

[21] As the court noted, Defendant's "argument as to the practicality of ending the violation … does not speak to fair notice," but, rather, is an equitable factor that "might mitigate any penalty." HWF IV, 2015 WL 3903918, at *6 (ER 16-17).

penalties for the years of daily violations that followed the motion to dismiss ruling. See, e.g., SER 211 (¶ 5), 298 (¶ 6), 342.

3. Citizens Provided Fair Notice.

With one exception (discussed below), the cases Defendant cites to argue against penalties do not involve citizen suits. This is significant because, as the district court noted, "[b]oth the Congress and the courts of the United States have regarded citizen suits under the Act to be an integral part of its overall enforcement scheme." HWF IV, 2015 WL 3903918, at *4 (ER 13) (citation omitted). Congress authorized citizen suits specifically to address situations where, for whatever reason, government regulators do not enforce the CWA. See 33 U.S.C. § 1365(b)(1)(B).

Before filing suit, citizens must give sixty days advance "notice of the alleged violation to ... any alleged violator." 33 U.S.C. § 1365(b); see 40 C.F.R. § 135.3. "Notice is sufficient if it is reasonably specific and if it gives 'the accused company the opportunity to correct the problem.'" Waterkeepers N. Cal. v. AG Industrial Mfg., Inc., 375 F.3d 913, 917 (9th Cir. 2004) (citation omitted). It is undisputed that, in June 2011, Citizens served a letter providing detailed notice regarding Defendant's CWA violations, citing many of the same cases on which

the district court subsequently relied to find Defendant liable. SER 43-54; ER 646-47 (¶ 9).

Congress requires advance notice to give "the alleged violator an opportunity to bring itself into complete compliance with the Act and thus … render unnecessary a citizen suit." San Francisco BayKeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 1157 (9th Cir. 2002) (citation omitted). Having received Citizens' letter, Defendant had ample opportunity to research Citizens' claims, particularly as Citizens held off filing suit for ten months, far longer than required.[22] Whether Defendant did due diligence or stuck its head in the sand is immaterial. Fair notice depends only on whether Defendant had "reasonable opportunity to know what is prohibited." Shark Fins, 520 F.3d at 980.

As discussed above, had Defendant researched Citizens' claims, it would have found the majority of courts – including nearly every district court in this Circuit – agree with EPA that the CWA "requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters." 56 Fed. Reg. at 64,892.[23] While some courts have concluded

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[22] Defendant was alerted to the same line of cases a year earlier, in a challenge to two proposed injection wells. See SER 63.

[23] Umatilla is an outlier. Even the court that issued it subsequently "conclude[d] that, contrary to Umatilla, the CWA covers discharges to navigable

otherwise, the weight of authority – including the consistent pronouncements of EPA, the agency charged with implementing the CWA – put Defendant on notice its activities "could" be subject to regulation. Shark Fins, 520 F.3d at 980. Fair notice does not require unanimity before any civil penalty can be imposed; otherwise, a single outlier would thwart CWA enforcement.

Defendant's claim that only agency communications are relevant is at odds with Hammersley, where this Court held:

> Although the EPA or an authorized state agency may be charged with enforcement of the [CWA], neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the [CWA].

299 F.3d at 1012. Accordingly, even had EPA or HDOH unequivocally and formally told Defendant that discharges from its injection wells of pollutants that reach the ocean through groundwater do not require an NPDES permit (and they did not), the district court would be bound to "honor the Act's express provisions authorizing citizen suits" where, as here, all "procedural requirements are met." Id.; see also Ass'n of Irritated Residents v. Fred Schakel Dairy, 2008 WL 850136,

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surface waters via hydrologically connected groundwater." Nw. Envtl. Def. Ctr. v. Grabhorn, Inc., 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009).

at *16 (E.D. Cal. Mar. 28, 2008) (questioning applicability of fair notice doctrine to citizen suits).

Hammersley mandates a different outcome than Wisconsin Resources Protection Council v. Flambeau Mining Co., 727 F.3d 700 (7th Cir. 2013), the only citizen suit case Defendant cites in arguing against civil penalties. In Flambeau, the state agency administering the CWA told the defendant "that its mining permit constituted a valid [Wisconsin Pollutant Discharge Elimination System] permit," the state version of an NPDES permit. Id. at 711. The Seventh Circuit held that, under such circumstances, "the permit shield applies," precluding citizen enforcement. Id.; see also 33 U.S.C. § 1342(k).

This Court reached a contrary conclusion in Hammersley, holding that an authorized state agency's decision "that an NPDES permit is not needed warrants consideration but does not divest the federal courts of jurisdiction." 299 F.3d at 1012. Since Citizens complied fully with the CWA's notice requirements, EPA and HDOH "have no statutory or common law right to veto environmental review sought by a citizen." Id.

Citizens' notice letter gave "'sufficient information to permit [Defendant] to identify' the alleged violations and bring itself into compliance." Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 951 (9th

Cir. 2002) (citation omitted). Having received the notice Congress required before citizens can sue, Defendant cannot claim inadequate notice for purposes of avoiding the civil penalties Congress mandated once violations are found.

4. EPA Provided Fair Notice.

Unlike Flambeau, neither DOH nor EPA ever made a formal determination Defendant's injection wells do not need an NPDES permit or that Defendant's UIC permit satisfies the CWA. See Part III.C, supra. Instead, Defendant relies on informal comments by HDOH staff and internal agency correspondence, neither of which establish "the official view of any agency." Nat'l Wildlife Fed'n, 384 F.3d at 1174.[24]

Formal agency pronouncements have long made clear Defendant needs an NPDES permit for the injection wells if LWRF effluent reaches the ocean via groundwater – as Defendant was well aware it does. As discussed, EPA has

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[24] Defendant's citations to internal agency documents are irrelevant, as those documents clearly had no bearing on Defendant's understanding of the CWA's requirements. As Defendant acknowledges, "[w]hat matters is what EPA told [Defendant], not what EPA may have secretly thought." Op. Br. at 59.

Moreover, the district court refused to admit into evidence many of these documents. HWF IV, 2015 WL 3903918, at *3 (ER 9); see also ER 123-131, 241-290 (inadmissible documents). Defendant's failure to challenge that evidentiary ruling constitutes waiver. See Knight v. Kellogg Brown & Root Inc., 333 F. App'x 1, 7 (9th Cir. 2009). This Court should disregard those documents.

consistently expressed that position for a quarter century. In 1992, HDOH raised concerns about Defendant's CWA compliance if its injection wells were contributing to "the algae bloom off of Lahaina." ER 379.

Defendant tries to downplay the significance of EPA's invocation of CWA authority to investigate the injection wells, but EPA could not take those actions unless it concluded Defendant might be violating the CWA's prohibition on unpermitted point source discharges. Noting "substantial evidence that injected effluent" is reaching the ocean, EPA issued its January 2010 order for Defendant to conduct sampling and reporting to determine whether its injection wells are violating the CWA "pursuant to section 308(a)." SER 5. That section applies only to "the owner or operator of [a] point source." 33 U.S.C. § 1318(a)(A). By definition, Defendant can be an "[o]wner or operator" only if its activities are "subject to regulation under the NPDES program." 40 C.F.R. § 122.2 (emphasis added).

EPA's March 2010 order requiring CWA section 401 certification was likewise based on a determination that "operation of the [LWRF] may result in a discharge into navigable waters." ER 122. Defendant's argument section 401 "applies regardless of whether there is a point source discharge" is baseless. Op. Br. at 55. This Court has held "the certification requirement of § [401] was meant

to apply only to point source releases." Or. Natural Desert Ass'n. v. Dombeck, 172 F.3d 1092, 1094 (9th Cir. 1998).

In S.D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006), the Supreme Court affirmed that section 401 certification applies to discharges from point sources into navigable waters, whether or not the discharges add pollutants. Id. at 375-78. While the NPDES permit requirement has a "more specific focus" – discharges that add pollutants – the common trigger for both regulatory schemes is the discharge from a point source to navigable waters. Id. at 380. Here, Defendant has long known injected effluent reaches the ocean through groundwater. EPA's determination the LWRF injection wells were "subject to the section 401 water quality certification requirement" put Defendant on notice its operations can constitute point source "discharge into navigable waters." ER 122.

Having received the EPA's orders, Defendant cannot claim ignorance of its potential liability. See United States v. Hoecht Celanese Corp., 128 F.3d 216, 227-28 (4th Cir. 1997) (EPA letter stating defendant "may be subject" to regulation and seeking more information "unequivocally set[] forth the agency's interpretation"). Defendant's claim EPA's views are irrelevant ignores that "Congress preserved for [EPA] broad authority to oversee state permit programs." Arkansas v. Oklahoma, 503 U.S. 91, 105 (1992) (citing 33 U.S.C. § 1342(d)(2)); see also United States v.

ITT Rayonier, Inc., 627 F.2d 996, 1002 (9th Cir. 1980) ("If the EPA is dissatisfied with state enforcement efforts or the lack thereof it can revoke permit-issuing authority or bring an independent action in federal court"). EPA's interpretations of the CWA are entitled to deference. Pronsolino, 291 F.3d at 1133-35.

In both regulatory pronouncements and communications targeted to Defendant, EPA put Defendant on notice that unpermitted discharges of pollutants through groundwater could subject Defendant to CWA liability. "The fair notice doctrine does not save parties who take calculated risks." United States v. S. Ind. Gas and Elec. Co., 245 F. Supp. 2d 994, 1023 (S.D. Ind. 2003); see also Maynard v. Cartwright, 486 U.S. 356, 361 (1988) (lack of notice claim "may be overcome in any specific case where reasonable persons would know that their conduct is at risk").

VII. CONCLUSION

For the foregoing reasons, the CWA requires an NPDES permit for Defendant's daily discharges of millions of gallons of effluent to the ocean via hydrologically connected groundwater, and due process permits imposing civil penalties for Defendant's ongoing violations. The district court's judgment in favor of Citizens should be affirmed.

Dated at Honolulu, Hawai‘i, May 23, 2016.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants Hawai‘i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation and West Maui Preservation Association state they are not aware of any related cases pending in this Court.

Dated at Honolulu, Hawai‘i, May 23, 2016.

/s/ David L. Henkin
David L. Henkin

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a), this brief is proportionately spaced, has typeface of 14 points or more and contains 13,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated at Honolulu, Hawai‘i, May 23, 2016.

/s/ David L. Henkin
David L. Henkin

ADDENDUM

ADDENDUM

TABLE OF CONTENTS

Page Number(s)

FEDERAL STATUTES

Page Number(s)

FEDERAL REGULATIONS

HAWAI‘I ADMINISTRATIVE RULES

33 U.S.C. § 1251

§ 1251. Congressional declaration of goals and policy

[Clean Water Act § 101]

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. § 1311

§ 1311. Effluent limitations

[Clean Water Act § 301]

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1314

§ 1314. Information and guidelines

[Clean Water Act § 304]

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including **(1)** guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and **(2)** processes, procedures, and methods to control pollution resulting from--

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

33 U.S.C. § 1318

§ 1318. Records and reports; inspections

[Clean Water Act § 308]

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title--

> **(A)** the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require … .

* * *

33 U.S.C. § 1319

§ 1319. Enforcement

[Clean Water Act § 309]

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, ,[1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

[Clean Water Act § 402]

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

* * *

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

33 U.S.C. § 1362

§ 1362. Definitions

[Clean Water Act § 502]

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means 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. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means 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. § 1365

§ 1365. Citizen suits

[Clean Water Act § 505]

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

except that such action may be brought immediately after such notification in the case of

an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

33 C.F.R. § 328.3

§ 328.3 Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

(2) All interstate waters including interstate wetlands.

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

40 C.F.R. § 122.2

§ 122.2 Definitions

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

* * *

Best management practices ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

* * *

Contiguous zone means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

* * *

CWA and regulations means the Clean Water Act (CWA) and applicable regulations promulgated thereunder. In the case of an approved State program, it includes State program requirements.

* * *

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

* * *

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.
EPA means the United States "Environmental Protection Agency."

Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

* * *

General permit means an NPDES "permit" issued under § 122.28 authorizing a category of discharges under the CWA within a geographical area.

* * *

Indirect discharger means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

* * *

Municipality means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA.

* * *

National Pollutant Discharge Elimination System (NPDES) means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

* * *

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 123 and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Point source means 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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located,

and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

Note: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).

* * *

Waters of the United States or waters of the U.S. means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * *

40 C.F.R. § 122.21

§ 122.21 Application for a permit (applicable to State programs, see § 123.25)

* * *

(j) *Application requirements for new and existing POTWs*. Unless otherwise indicated, all POTWs and other dischargers designated by the Director must provide, at a minimum, the information in this paragraph to the Director, using Form 2A or another application form provided by the Director. Permit applicants must submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the Director. The Director may waive any requirement of this paragraph if he or she has access to substantially identical information. The Director may also waive any requirement of this paragraph that is not of material concern for a specific permit, if approved by the Regional Administrator. The waiver request to the Regional Administrator must include the State's justification for the waiver. A Regional Administrator's disapproval of a State's proposed waiver does not constitute final Agency action, but does provide notice to the State and permit applicant(s) that EPA may object to any State-issued permit issued in the absence of the required information.

(1) Basic application information. All applicants must provide the following information:

*** * ***

(viii) Outfalls and other discharge or disposal methods. The following information for outfalls to waters of the United States and other discharge or disposal methods:

(A) For effluent discharges to waters of the United States, the total number and types of outfalls (e.g, treated effluent, combined sewer overflows, bypasses, constructed emergency overflows);

(B) For wastewater discharged to surface impoundments:

(1) The location of each surface impoundment;

(2) The average daily volume discharged to each surface impoundment; and

(3) Whether the discharge is continuous or intermittent;

(C) For wastewater applied to the land:

(1) The location of each land application site;

(2) The size of each land application site, in acres;

(3) The average daily volume applied to each land application site, in gallons per day; and

(4) Whether land application is continuous or intermittent;

(D) For effluent sent to another facility for treatment prior to discharge:

(1) The means by which the effluent is transported;

(2) The name, mailing address, contact person, and phone number of the organization transporting the discharge, if the transport is provided by a party other than the applicant;

(3) The name, mailing address, contact person, phone number, and NPDES permit number (if any) of the receiving facility; and

(4) The average daily flow rate from this facility into the receiving facility, in millions of gallons per day; and

(E) For wastewater disposed of in a manner not included in paragraphs (j)(1)(viii)(A) through (D) of this section (e.g., underground percolation, underground injection):

(1) A description of the disposal method, including the location and size of each disposal site, if applicable;

(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;

*** * ***

(3) Information on effluent discharges. Each applicant must provide the following information for each outfall, including bypass points, through which effluent is discharged, as applicable:

(i) Description of outfall. The following information about each outfall:

(A) Outfall number;

(B) State, county, and city or town in which outfall is located;

(C) Latitude and longitude, to the nearest second;

(D) Distance from shore and depth below surface;

(E) Average daily flow rate, in million gallons per day;

(F) The following information for each outfall with a seasonal or periodic discharge:

(1) Number of times per year the discharge occurs;

(2) Duration of each discharge;

(3) Flow of each discharge; and

(4) Months in which discharge occurs; and

(G) Whether the outfall is equipped with a diffuser and the type (e.g., high-rate) of diffuser used;

(ii) Description of receiving waters. The following information (if known) for each outfall through which effluent is discharged to waters of the United States:

(A) Name of receiving water;

(B) Name of watershed/river/stream system and United States Soil Conservation Service 14–digit watershed code;

(C) Name of State Management/River Basin and United States Geological Survey 8–digit hydrologic cataloging unit code; and

(D) Critical flow of receiving stream and total hardness of receiving stream at

critical low flow (if applicable);

(iii) Description of treatment. The following information describing the treatment provided for discharges from each outfall to waters of the United States:

(A) The highest level of treatment (e.g., primary, equivalent to secondary, secondary, advanced, other) that is provided for the discharge for each outfall and:

(1) Design biochemical oxygen demand (BOD_5 or $CBOD_5$) removal (percent);

(2) Design suspended solids (SS) removal (percent); and, where applicable,

(3) Design phosphorus (P) removal (percent);

(4) Design nitrogen (N) removal (percent); and

(5) Any other removals that an advanced treatment system is designed to achieve.

(B) A description of the type of disinfection used, and whether the treatment plant dechlorinates (if disinfection is accomplished through chlorination).

40 C.F.R. § 122.45

§ 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see § 123.25)

(a) *Outfalls and discharge points*. All permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.44(k) (BMPs where limitations are infeasible) and paragraph (i) [sic] of this section (limitations on internal waste streams).

* * *

(h) *Internal waste streams*.

(1) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by § 122.48 shall also be applied to the internal waste streams.

(2) Limits on internal waste streams will be imposed only when the fact sheet under § 124.56 sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible (for example, under 10 meters of water), the wastes at the point of discharge are so diluted as to make monitoring impracticable, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

40 C.F.R. § 122.50

§ 122.50 Disposal of pollutants into wells, into publicly owned treatment works or by land application (applicable to State NPDES programs, see § 123.25)

(a) When part of a discharger's process wastewater is not being discharged into waters of the United States or contiguous zone because it is disposed into a well, into a POTW, or by land application thereby reducing the flow or level of pollutants being discharged into waters of the United States, applicable effluent standards and limitations for the discharge in an NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(1) If none of the waste from a particular process is discharged into waters of the United States, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(2) In all cases other than those described in paragraph (a)(1) of this section, effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the United States, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted under part 125, subpart D to make them more or less stringent if discharges to wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters. This method may be algebraically expressed as:

$$P = (E \times N)/T$$

where P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total wastestream, N is the wastewater flow to be treated and discharged to waters of the United States, and T is the total wastewater flow.

40 C.F.R. § 135.3

§ 135.3 Contents of notice

(a) Violation of standard, limitation or order. Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

(b) Failure to act. Notice regarding an alleged failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.

(c) Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

40 C.F.R. § 230.3

§ 230.3 Definitions

For purposes of this part, the following terms shall have the meanings indicated:

* * *

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Haw. Admin. Rules § 11-54-6

§ 11-54-6. Uses and specific criteria applicable to marine waters

* * *

(b) Open coastal waters.

* * *

(3) The following criteria are specific for all open coastal waters, excluding those described in subsection (d). (Note that criteria for open coastal waters differ, based on fresh water discharge.)

Parameter	Geometric mean not to exceed the given value	Not to exceed the given value more than ten per cent of the time	Not to exceed the given value more than two per cent of the time
Total Nitrogen (ug N/L)	150.00* 110.00**	250.00* 180.00**	350.00* 250.00**
Ammonia Nitrogen (ug NH_4-N/L)	3.50* 2.00**	8.50* 5.00**	15.00* 9.00**
Nitrate + Nitrite Nitrogen (ug [NO_3+NO_2]-N/L)	5.00* 3.50**	14.00* 10.00**	25.00* 20.00**
Total Phosphorus (ug P/L)	20.00* 16.00**	40.00* 30.00**	60.00* 45.00**
Light Extinction Coefficient (k units)	0.20* 0.10**	0.50* 0.30**	0.85* 0.55**
Chlorophyll a ug/L)	0.30* 0.15**	0.90* 0.50**	1.75* 1.00**
Turbidity	0.50*	1.25*	2.00*

Parameter	Geometric mean not to exceed the given value	Not to exceed the given value more than ten per cent of the time	Not to exceed the given value more than two per cent of the time
(N.T.U.)	0.20**	0.50**	1.00**

* “Wet” criteria apply when the open coastal waters receive more than three million gallons per day of fresh water discharge per shoreline mile.

** “Dry” criteria apply when the open coastal waters receive less than three million gallons per day of fresh water discharge per shoreline mile.

Applicable to both “wet” and “dry” conditions:

pH Units - shall not deviate more than 0.5 units from a value of 8.1, except at coastal locations where and when freshwater from stream, stormdrain or groundwater discharge may depress the pH to a minimum level of 7.0.

Dissolved Oxygen - Not less than seventy-five per cent saturation, determined as a function of ambient water temperature and salinity.

Temperature - Shall not vary more than one degree Celsius from ambient conditions.

Salinity - Shall not vary more than ten per cent from natural or seasonal changes considering hydrologic input and oceanographic factors.

k units = the ratio of light measured at the water’s surface to light measured at a particular depth.

L = liter

Light Extinction Coefficient is only required for dischargers who have obtained a waiver pursuant to section 301(h) of the Federal Water Pollution Control Act of 1972 (33 U.S.C. 1251), as amended, and are required by EPA to monitor it.

N.T.U. = Nephelometric Turbidity Units. A comparison of the intensity of light scattered by the sample under defined conditions with the intensity of light scattered by a standard reference suspension under the same conditions. The higher the intensity of scattered light, the higher the turbidity.

ug = microgram or 0.000001 grams