

No. 15-17447

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**HAWAI'I WILDLIFE FUND; SIERRA CLUB – MAUI GROUP;
SURFRIDER FOUNDATION;
WEST MAUI PRESERVATION ASSOCIATION**

Plaintiffs/Appellees,

v.

COUNTY OF MAUI

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR HAWAI'I, HONOLULU

D.C. NO. 1:12-CV-00198-SOM-BMK, HONORABLE SUSAN OKI MOLLWAY

COUNTY OF MAUI'S OPENING BRIEF ON APPEAL

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28, Defendant/Appellant County of Maui hereby certifies that it does not issue stock and that no stock is owned, either in whole or in part, by any publicly held corporation.

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CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
HDOH	Hawai‘i Department of Health
NPDES	National Pollution Discharge Elimination System
RCRA	Resource Conservation and Recovery Act
SDWA	Safe Drinking Water Act
UIC	Underground Injection Control
USGS	United States Geological Survey

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiffs' federal CWA claim pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the appeal from the district court's November 17, 2015 final judgment pursuant to 28 U.S.C. § 1291. The County filed a notice of appeal on December 14, 2015.

STATEMENT OF ISSUES

By requiring an NPDES permit for the County of Maui's Lahaina facility UIC wells, the district court fundamentally alters the organizational structure and scope of the CWA. The CWA limits NPDES permitting to the discharge of pollutants from a point source to navigable water. The district court impermissibly expands NPDES permitting in two ways. It requires a permit for the County's disposal into groundwater—a non-navigable water. It also requires a permit for a non-point source discharge simply because groundwater containing the County's wastewater eventually reaches the ocean.

Since the Lahaina facility was designed in the early 1970s, EPA and HDOH knew wastewater from the Lahaina wells travels with groundwater and reaches the ocean. The agencies relied on their respective SDWA authority, rather than the CWA, to issue UIC permits to govern operation of the wells. HDOH, the agency that administers the NPDES program in Hawai'i, repeatedly said the wells did not require an NPDES permit. Similarly, despite multiple opportunities to do so, EPA

waited until 2015 to take a position. The agencies' actions are consistent with the plain language of the CWA, explicit congressional intent and appellate case law. All exclude the Lahaina wells from NPDES permitting. Notwithstanding all of this, the district court concludes the County had fair notice an NPDES permit was required.

Issue 1: Did the district court err in holding that an NPDES permit is required for the Lahaina wells because groundwater containing wastewater eventually reaches navigable water?

Issue 2: Did the district court err in holding the County had fair notice that an NPDES permit is required?

STATEMENT OF THE CASE

A. The Lahaina UIC Wells

The County owns and operates the Lahaina Wastewater Reclamation Facility. Excerpts of Record ("ER") 694 (¶ 15). The facility is the principal municipal wastewater treatment plant for the western part of the Island of Maui.

Since the 1980s, Lahaina facility wastewater (referred to as "effluent") has been disposed of in four UIC wells known as Wells 1, 2, 3 and 4. *Id.*; ER 381-382. The wells are classified as Class V wells under the federal and Hawai'i SDWA permit programs. *See* 40 C.F.R. §§ 144.6(e), 144.81; Haw. Code R. § 11-23-06(b). There are Class V wells in virtually every state with more than 686,000 such wells

nationally.¹ Such things as agricultural field runoff, sanitary sewage, water for aquifer storage/recharge, and geothermal wastes are injected into Class V wells. 40 C.F.R. § 144.81; Haw. Code R. § 11-23-06(b).

The Lahaina wells exclusively dispose of treated effluent. See generally ER 152-163, 365. The effluent undergoes three levels of treatment and UV disinfection before injection. ER 420, 530, 550 (¶ 9), 560-562 (¶¶ 28-29). The effluent meets R-1 standards, Hawai‘i’s highest water reuse standard. Haw. Code R. § 11-62-26; ER 530, 699 (¶ 52). Not all effluent is injected—some is used to irrigate nearby resorts and golf courses. ER 530, 625-626 (¶¶ A.8.c., e.).

The effluent enters groundwater through approximately 100-foot well openings. ER 480 (¶ 18). Total well depths range between 180 to 255 feet below ground, with the openings beginning at depths between 85 and 120 feet, depending on the well. ER 695 (¶¶ 18-21). Upon injection, effluent from the well immediately mixes with groundwater and disperses both vertically and horizontally. ER 404, 434-435, 696-697 (¶¶ 31-32).

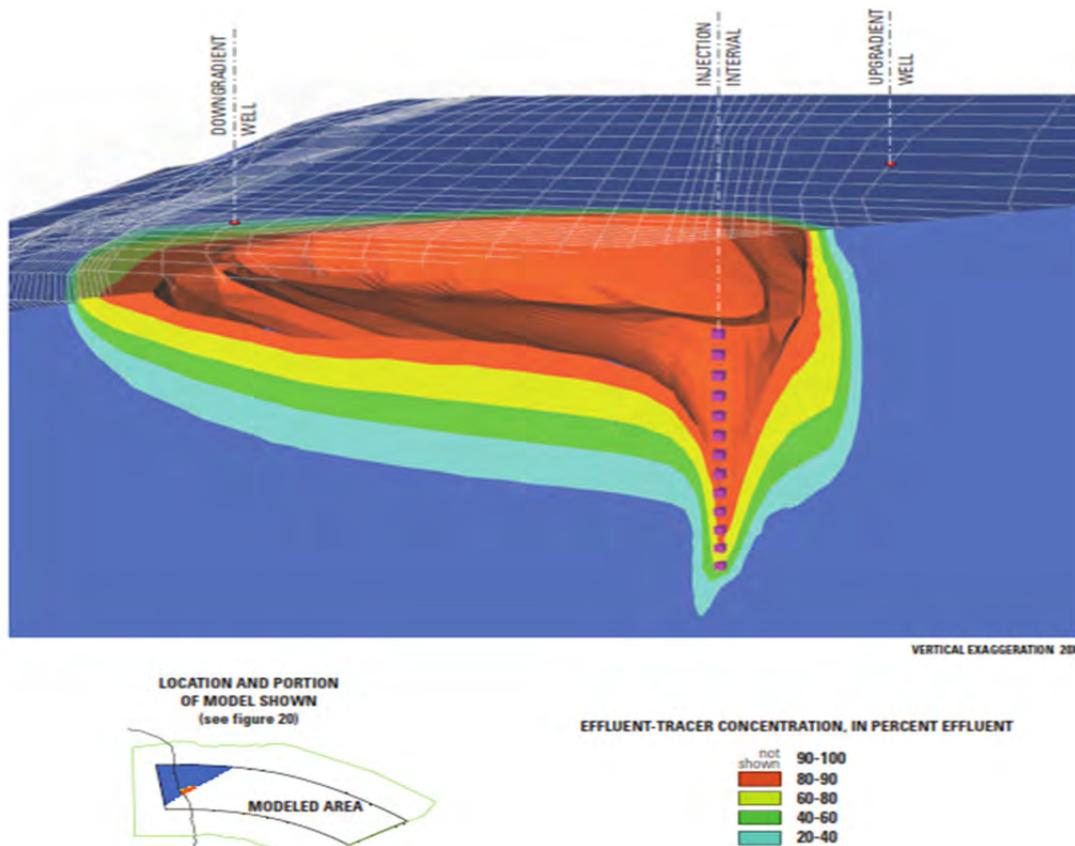
B. Groundwater Flow From The Lahaina Wells To The Ocean

Like groundwater does in Hawai‘i, groundwater in the vicinity of the Lahaina wells flows toward the ocean. ER 423. The groundwater/effluent mixture

¹ See EPA, The Class V Underground Injection Control Study, Volume 1 Study Approach and General Findings, 1 (Sept. 1999), available at http://www.epa.gov/sites/production/files/2015-07/documents/class_v_volume1_execsumm.pdf.

diffusely enters the ocean along as much as two miles of coastline, including off Kahekili Beach. ER 429, 479-480 (¶ 14).

Both sides' experts and EPA agree the USGS figure below generally depicts Lahaina effluent dispersal as groundwater flows toward the ocean. ER 406, 435, 471, 508 (¶ 35), 697 (¶ 32).



Groundwater usually enters coastal waters in Hawai'i through submarine groundwater discharge. In near-shore waters off Kahekili Beach, the submarine groundwater discharge is composed of more than 90% diffuse flow and less than 10% flow through seeps. ER 493 (¶ 48), 534. Diffuse flow has no identifiable ocean entry point. ER 410. Seep flow is identifiable by the shimmering of the less

dense submarine groundwater discharge as it enters the ocean. ER 540, 544, 599-601 (¶¶ 37-39).

Seeps are generally very small. Seeps off Kahekili Beach are on average only 3.2 cm long and 1.7 cm wide.² They also are ephemeral. Located near the shore, they are easily covered by sand and become undetectable. ER 534, 537, 544, 593 (¶ 24), 599-601 (¶ 37). A long narrow coral reef sits in the near-shore waters off Kahekili Beach. ER 539, 543, 552 (¶ 14), 597-598 (¶ 32), 599-601 (¶ 37), 619.

It is unknown where effluent from Wells 1 and 2 enters the ocean. ER 427-428, 435-436. No studies have been performed on Well 1. ER 442. Two tracer dye studies have been done on Well 2. The studies entailed injecting dye into Well 2 and then waiting for the dye to appear in the ocean. The first study, conducted on behalf of EPA, injected dye for 58 days in 1993. ER 442, 518-519, 521. The second study, conducted with EPA and HDOH funding and referred to as the “Tracer Study,” occurred between 2011 and 2013. ER 409, 412, 529. This study

² See Craig R. Glenn et al., Lahaina Groundwater Tracer Study – Lahaina, Maui, Hawai‘i, Final Report, 2-8 (2013), available at <https://www3.epa.gov/region9/water/groundwater/uic-pdfs/lahaina02/lahaina-gw-tracer-study-final-report-june-2013.pdf>. Per Hawai‘i District Court Local Rule 10.2(d), portions of this Study were filed in the district court at DE 73-10, 79-20, 89-4, 127-2, 129-3, 137-4, 139-10, 141-7, 155-5, 173-34, 217-5. As noted in footnote 1 of DE 127-1, a complete copy of the study was available to the district court upon request.

injected dye for 1 day. ER 526. No dye injected into Well 2 was found in the ocean from either test. ER 427, 484 (¶ 28), 496-497 (¶ 53), 526.

The Tracer Study also injected dye into Wells 3 and 4 for one day. ER 486 (¶ 34), 525. Dye from these wells was detected in the ocean after a considerable delay and emerged over an extended period. Dye first appeared in coastal waters off Kahekili Beach roughly a half-mile southwest of the Lahaina facility about three months after injection. ER 411, 419, 486 (¶ 33). The average transit time of the dye was 15 months. ER 411. The Tracer Study estimates the trailing edge of the dye plume will take over four years to enter the ocean. Id.

The Tracer Study also shows that submarine groundwater discharge off Kahekili Beach has a different chemical composition than injected effluent. ER 447-461. Submarine groundwater discharge has noticeably different nitrogen and phosphorus levels than effluent. ER 447-448, 556 (¶ 19), 558-559 (¶¶ 26-27). Submarine ground discharge temperature is also as much as five degrees higher than the maximum effluent temperature. ER 500 (¶ 63).

The differences are due, in part, to chemical modifications that naturally occur as groundwater migrates. ER 423, 554 (¶ 17), 558 (¶ 26). Other sources of nutrients in groundwater, such as agricultural fertilizer, and cesspool and septic tank waste, also account for the difference. ER 404, 514, 535. Once mixed in groundwater, nutrient sources are indistinguishable. ER 436, 451. In fact, nutrient

concentrations measured in the Tracer Study were consistent with groundwater quality measured at control locations that did not contain Lahaina effluent. ER 569-570 (§§ 42-43).

Additional Tracer Study conclusions pertinent to this appeal include:

- The submarine groundwater discharge containing effluent from Wells 2, 3 and 4 is modeled to enter the ocean across as much as two miles of coastline depending on which wells are operating and the volume of effluent injected into each well. ER 429, 479-480 (§ 14). This modeling is uncertain and does not account for discharge occurring outside of the study area. ER 430.
- Substantial mixing occurs when the submarine groundwater discharge enters the ocean. The discharge is diluted 10 to 40 fold between the seafloor and ocean surface. ER 460.
- There are “significant uncertainties” with the Tracer Study calculations of the amount of effluent from Wells 3 and 4 that enters the ocean off Kahekili Beach. ER 424-425, 440, 466-469. Wells 3 and 4 flow may also occur “at deeper water depths and further from shore.” ER 526.

The Tracer Study’s conclusion that 64% of effluent from Wells 3 and 4 enters the ocean off Kahekili Beach is disputed because of multiple assumptions used in the calculations. ER 413, 424-425, 440, 463-467. For example, the study assumes a constant rate for the submarine groundwater discharge even though the

rate varies by season and tide. ER 424-425, 465. The study also assumes the effluent concentration is the same in the diffuse flow as the seeps, even though measured diffuse flow concentrations were lower. ER 440, 464-465. The County's expert, using other plausible assumptions, estimates that only 11-12% of the injected effluent enters the ocean off Kahekili Beach. ER 440, 467.

Also disputed is the Tracer Study's conclusion that 62% of the submarine groundwater discharge entering the ocean off Kahekili Beach is composed of Well 3 and 4 effluent. ER 440, 463-469. This conclusion is based on limited data sets—18 in all. Half of these data sets were rejected because they yield nonsensical effluent concentration results (<0 or >100%). ER 468-469. Of the remaining nine data sets, effluent percentages range between 12-96%, with the average being 62%. ER 468. The County's expert considers the Tracer Study methodology unreliable and the effluent percentage range too broad to be meaningful. ER 469.

Whether effluent from the Lahaina facility affects the ocean off Kahekili Beach is also disputed. Plaintiffs' experts contend the effluent adversely affects the Kahekili Beach coral reef. The County's experts disagree. ER 498-500 (¶¶ 57-63), 569 (¶ 41), 584-585 (¶ 10), 608-609 (¶ 51). One of the County's experts disputes effluent impacts given Kahekili Beach ocean water meets Hawai'i nutrient water quality criteria, and the pH of submarine groundwater discharge meets

Hawai‘i water quality standards. ER 384-386, 459-463, 498-499 (¶¶ 57-59). He also maintains the temperature, salinity and dissolved oxygen differences between the submarine groundwater discharge and the ocean water are attributable to unrelated phenomena. ER 499-500 (¶¶ 60-63). Relying on Kahekili Beach water quality sample results from multiple sources and an April 2014 recognizance dive, another of the County’s experts concludes the reef off Kahekili Beach is “thriving . . . with no evidence of any damage from the seep discharges.” ER 539, 541-542, 602-603 (¶¶ 41-42), 608-609 (¶ 51).

C. EPA And HDOH’s Permitting Of The Lahaina Wells

Both EPA and HDOH regulate the Lahaina wells under UIC permits issued pursuant to their respective SDWA programs. 42 U.S.C. § 300h-1(c); Haw. Rev. Stat. § 340E-2. The state permit dates back to at least 1986. ER 381-382. The federal permit dates back to 1995. ER 204-208. The agencies have reissued and extended the permits multiple times. ER 138, 143 (¶ 10), 146 (¶ 20), 152-163, 365, 695 (¶ 24).³ The permits regulate the effluent volume, rate, and constituent concentrations the County can inject. ER 152-163, 381-382. HDOH also annually inspects the Lahaina facility. ER 209-219, 227 (¶ 4).

³ In September 2015, following the summary judgment rulings below, HDOH again administratively extended the Lahaina Facility’s state permit to September 2016. A copy of this Letter is attached as Exhibit A to the Declaration of Michael R. Shebelskie in Support of the County’s Motion to Take Judicial Notice and/or Supplement the Record (“Shebelskie Dec.”).

EPA and HDOH have always known that Lahaina facility effluent reaches the ocean. See, e.g., ER 261-265, 280-282, 363-364, 372-373, 377-380. Both received the 1973 pre-construction environmental impact statement explaining injected effluent would “eventually reach the ocean” ER 342. A subsequent 1991 environmental review reaffirmed this conclusion, finding the effluent “flows toward the ocean” and “probably enters the ocean with the fresh groundwater.” ER 325, 328; see also ER 696 (¶ 31). In 1994, both agencies understood that “all experts agree that the wastewater does enter the ocean.” ER 369.

Decades before Plaintiffs filed this lawsuit, EPA said the SDWA—not the CWA—is the correct program to regulate UIC wells. 43 FR 37078, 37081 (Aug. 21, 1978). Consistent with this, EPA and HDOH maintain the Lahaina UIC permits protect ocean water quality.⁴ In fact, both agencies’ permits impose a nitrogen limit on injected effluent. ER 152-156, 365; see generally ER 157-163. In 2008, EPA proposed further permit conditions to protect ocean water quality. ER 305. Recognizing Hawai‘i’s UIC program provides “latitude” to “implement wastewater and clean water requirements[,]” EPA supported HDOH imposing similar protective restrictions. ER 249, 277. HDOH’s 2014 draft UIC permit also includes ocean water quality monitoring and effluent nutrient management requirements. ER 132-135, 149 (¶ 29), 351-354.

⁴ ER 130-131, 136-137, 142-144 (¶¶ 7, 11, 13-15), 147-149 (¶¶ 26-28), 228, 249, 277, 305, 312, 316, 318, 322, 354, 361, 365-368, 374-376.

D. HDOH Never Required An NPDES Permit For The Lahaina Wells

HDOH administers Hawai‘i’s EPA-approved NPDES program. Haw. Rev. Stat. § 342D-50; 39 FR 46759 (Dec. 18, 1974). As the authorized permitting authority, HDOH has consistently said the Lahaina wells do not require an NPDES permit.⁵ HDOH maintains that NPDES permitting only applies to discharges to navigable water, and the County’s injection into groundwater is not to navigable water. ER 123, 127, 150 (¶ 32). HDOH did not require an NPDES permit for the wells even though it required one for possible reservoir overflows associated with early Lahaina facility operations. ER 141 (¶ 4), 223-224. Similarly, as early as 1994, HDOH’s inspection forms describe the “NPDES Permit Status” of the wells as “N/A” or “Not applicable.” ER 211, 215.

HDOH also told EPA the Lahaina UIC permit can act as an “equivalent control document.” ER 136-137, 147-149 (¶¶ 26-28), 228-232, 353-354, 361. The Hawai‘i NPDES program authorizes an equivalent control document in lieu of an NPDES permit. Haw. Code R. § 11-55-01.

Following the district court’s 2012 denial of its motion to dismiss, the County submitted an NPDES permit application to allow HDOH to make a permit applicability determination. ER 147 (¶ 25), 620-643. Within weeks of receipt,

⁵ ER 120, 123, 127, 136-137, 141 (¶ 4), 146-150 (¶¶ 19-30, 32), 241-242, 259-260, 276, 359-362.

HDOH told EPA the County's application had deficiencies. ER 242. HDOH said nothing to the County despite the County's numerous inquiries on the application's status. ER 136-137, 147-150 (¶¶ 26-28, 30, 32), 359-362. In September 2014, HDOH refused to discuss the application with the County, and in May 2015, it said the district court's ruling is unprecedented. ER 149-150 (¶¶ 30, 32).

Finally, in February 2016, HDOH responded.⁶ Even with the district court's rulings, HDOH's position remains unchanged. Discharges into groundwater do not require an NPDES permit. ER 625-626 (¶¶ A.8a., e.).⁷

HDOH's position is consistent with its treatment of the other approximately 5,600 UIC wells, 88,000 cesspools and 21,000 septic tanks in Hawai'i. ER 356.⁸ HDOH has not required an NPDES permit for any of them. ER 362.⁹ Hawai'i classifies effluent from the Lahaina wells, groundwater, cesspools, and septic systems as "nonpoint source" pollution. ER 388, 396-398, 514.¹⁰

⁶ In February 2016, HDOH informed the County its NPDES Application for the Lahaina Facility was incomplete. A copy of this Letter is attached as Exhibit B to the Shebelskie Dec.

⁷ *Id.* at ¶ 2.

⁸ Hawai'i's Nonpoint Source Management Plan, 2015 to 2020, 11-12, available at <http://health.hawaii.gov/cwb/files/2013/05/2015-Hawaii-NPS-Management-Plan.pdf>.

⁹ *Id.*

¹⁰ See generally Hawai'i Nonpoint Source Management Plan, *supra* note 8.

E. EPA Never Required An NPDES Permit For The Lahaina Wells

EPA has been involved with the Lahaina facility since planning began more than four decades ago. ER 120. EPA never raised the need for, let alone directed, the County to obtain an NPDES permit for the wells. Id.; 141-145 (¶¶ 4-17). This is true even though by 2008, EPA was “thinking out [its] options under NPDES.” ER 288-289; see also ER 280-282.

EPA’s involvement began with CWA funding for facility construction. ER 141 (¶ 3). To use this funding, EPA had to determine the Lahaina facility was CWA compliant. See 33 U.S.C. § 1298(a). Consistent with this mandate, an NPDES permit was required for certain early facility operations but not for the wells. ER 141 (¶¶ 4-5), 223-224.

EPA did not raise NPDES permitting for the wells even after its 1985 Lahaina facility NPDES program compliance inspection. ER 141 (¶ 4), 220-222. EPA found no violations while fully aware that wastewater was being injected. Id. In fact, EPA notes there was no unpermitted “discharge to receiving waters. All effluent to injection wells or irrigation.” ER 222.

EPA likewise did not raise NPDES permitting with the County when issuing, renewing or extending its federal UIC permit. ER 138, 142-143 (¶¶ 7, 10), 152-156, 204-208, 302-322, 365-368. EPA did not say an NPDES permit was required even after receiving public comments outlining the NPDES applicability

argument Plaintiffs assert now. ER 143-144 (¶¶ 11, 13-14), 172-200, 279, 305. Instead, EPA required merely a CWA § 401 water quality certification before it could reissue the federal UIC permit. ER 121-122, 144 (¶ 15), 183, 256, 696 (¶ 25).

EPA did not require an NPDES permit for the wells when it, along with the State, sued the County in 1999, alleging the County violated the CWA by “discharging wastewater from its publicly owned treatment works . . . to waters of the United States without authorization from a[n NPDES] permit” ER 294. The lawsuit followed a comprehensive inspection of the County’s wastewater treatment facilities, including the Lahaina facility. ER 142 (¶ 8), 298.

The lawsuit was resolved through a consent decree spanning 54 pages with 107 operative provisions (not counting subparts). ER 142 (¶ 8), 299. It imposes numerous obligations to “ensure that the County continues to improve its efforts to come into and maintain compliance with the CWA” and to “further the [Act’s] goals and objectives” ER 296.

While acknowledging the County uses “underground injection wells for wastewater disposal[,]” neither the complaint nor the consent decree allege the Lahaina wells violate the CWA. ER 142 (¶ 8), 295.

A subsequent consent agreement between EPA and the County in 2011 is to the same effect. ER 145 (¶ 17), 691-706. The Lahaina wells are the focus of the

agreement. It obligates the County to further disinfect effluent prior to injection. ER 699-700 (¶¶ 50-52). As with the 1999 consent decree, EPA did not raise the need for an NPDES permit during consent agreement negotiations or in the agreement itself. ER 145 (¶ 17), 691-706.

EPA did not say an NPDES permit was required when asked point blank its position. In response to 2008 public comments, the County asked whether EPA believed an NPDES permit was required for the wells. ER 143-144 (¶¶ 11-13). EPA directed the County to HDOH. ER 143 (¶ 12).

EPA similarly did not tell Plaintiffs an NPDES permit was required in response to 2008, 2009, and 2011 public comments claiming one was necessary, including detailed letters outlining alleged NPDES permit applicability. ER 164-171, 185, 199-200, 305. EPA also did not say an NPDES permit was needed when HDOH and the County told EPA no NPDES permit was required because the wells injected into groundwater. ER 123-127, 143-147 (¶¶ 11, 13-14, 16, 22), 201-203, 252-254.

By 2011, EPA said its “goal is not to force an NPDES permit action[.]” ER 253. EPA did not say an NPDES permit was required even after Plaintiffs filed this lawsuit in 2012. Rather, EPA said it was “steering clear” of any NPDES permit determination, and waiting on the “sideline.” ER 233, 243.

EPA claimed it still lacked sufficient data to make a permitting decision after the November 2012 publication of the interim Tracer Study. ER 239-240, 300-301. Even with the June 2013 publication of the final Tracer Study, EPA did not say an NPDES permit was required. ER 237-238. It was not until January 2015, in comments on the State's draft UIC permit, that EPA told HDOH the wells require an NPDES permit. ER 357-358.

F. District Court Proceedings

The district court made three summary judgment rulings that are the subject of this appeal:

1. It granted Plaintiffs' summary judgment motion on Wells 3 and 4, Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980 (D. Haw. 2014) ("COM I") (ER 39-97);
2. It denied the County's summary judgment motion on Wells 1 and 2, and granted Plaintiffs' cross-motion regarding those wells, Haw. Wildlife Fund v. Cnty. of Maui, Civil No. 12-00198 SOM/BMK, 2015 WL 328227 (D. Haw. Jan. 23, 2015) ("COM II") (ER 23-38); and
3. It denied the County's summary judgment motion on fair notice, Haw. Wildlife Fund v. Cnty. of Maui, Civil No. 12-00198 SOM/BMK, 2015 WL 3903918 (D. Haw. June 25, 2015) ("COM III") (ER 3-22).

After the last ruling, the parties agreed on a penalty consisting of \$100,000 and environmental project(s) in lieu of further monetary penalties if the district court's summary judgment rulings are affirmed. ER 106-108 (¶¶ 9-13). The district court entered a final order assessing this penalty. ER 1-2. The parties' agreement preserves the County's right to appeal the summary judgment rulings. ER 104 (¶ 2).

SUMMARY OF ARGUMENT

The district court upends the CWA with its reliance on the “conduit theory” to find the Lahaina wells require an NPDES permit. This unprecedented theory triggers NPDES permitting simply because groundwater containing Lahaina well effluent reaches the ocean. The conduit theory establishes a new standard for NPDES permitting that is unsupported by CWA text and appellate case law, and contradicts express congressional intent. It also eliminates two defining features of the CWA—the distinction between point source and nonpoint source pollution, and the differentiation between the “discharge of any pollutant” and the “disposal of pollutants into wells.”

The CWA requires an NPDES permit for “the discharge of any pollutant.” 33 U.S.C. §§ 1311(a), 1342(a)(1). The “discharge of a pollutant” is defined as “any addition of any pollutant *to* navigable waters *from* any point source.” 33 U.S.C. § 1362(12) (emphasis added). The Lahaina wells do not meet this test

because there is no discharge *to* navigable waters *from* a point source. Effluent is injected into groundwater. Groundwater is not a navigable water. Groundwater is also not a point source. The CWA defines a point source as a “discernible, confined and discrete conveyance.” Id. § 1362(14). Diffusely flowing groundwater containing Lahaina effluent is not a point source discharge to navigable water. Instead, it is nonpoint source pollution that does not require an NPDES permit. This is especially true here, where the effluent’s entry into the ocean is either unknown (Wells 1 and 2) or based on “significant uncertainties” (Wells 3 and 4). The district court’s conduit theory conflates point source and nonpoint source pollution and subjects both to NPDES permitting, in direct contravention of the CWA.

The CWA differentiates between the “discharge of a pollutant” (which requires an NPDES permit) and the “disposal of pollutants into wells” (which does not). Compare 33 U.S.C. § 1342(a) with 33 U.S.C. § 1342(b)(1)(D); see also 33 U.S.C. §§ 1314(f)(2)(D), 1362(12). Congress intentionally created this divide to ensure states retain control over groundwater—a guiding principle underlying the CWA. EPA recognizes the distinction and excludes pollutants disposed of into wells from NPDES permit calculations. By requiring an NPDES permit for the Lahaina wells, the district court destroys this distinction, contravenes congressional intent and tramples on states’ rights.

The district court acknowledges it cannot find support for its conduit theory in the CWA's text or appellate decisions. This is because the theory is wrong. The ramifications from the theory are significant. It exponentially expands the NPDES program, potentially requiring NPDES permits for EPA-promoted green infrastructure and water reuse practices, like use of the County's effluent for irrigation.

Also erroneous is the district court's ruling that the County had fair notice that the Lahaina wells require an NPDES permit. EPA and HDOH approved the Lahaina facility construction. The agencies understood effluent would mix with groundwater and reach the ocean. During their four decades overseeing the Lahaina facility, neither agency told the County the wells needed an NPDES permit. To the contrary, HDOH, which oversees the NPDES program in Hawai'i, repeatedly told the County an NPDES permit was not required.

EPA and HDOH relied on their respective SDWA programs to regulate the Lahaina wells via UIC permits. Both agencies maintain that UIC permits can protect ocean water quality.

None of the district court's rationales provide fair notice. The district court relies on the "plain language" of the CWA. But a straightforward reading of the Act demonstrates the opposite of fair notice. The CWA includes disposal of pollutants into wells and the movement and flow of groundwater as examples of

nonpoint source pollution. 33 U.S.C. § 1314(f)(2)(D), (F). The district court also relies on Plaintiffs' statements to provide fair notice. This violates the fundamental tenet that fair notice comes from government action. Additionally, the district court relies on a single letter related to reissuance of EPA's UIC permit, *not* an NPDES permit, to provide fair notice. The district court fails to consider the multiple times EPA did not raise the need for an NPDES permit for the Lahaina wells, including during an NPDES facility inspection, a comprehensive County-wide CWA enforcement action and when asked directly about NPDES permit applicability. Finally, the district court relies on its conduit theory to support fair notice. The County cannot have had fair notice based on a theory that, by the district court's acknowledgement, has no support in the CWA text or appellate decisions. This is particularly the case here, where HDOH repeatedly told the County it did not need an NPDES permit. A more clear instance of lack of fair notice is hard to imagine.

STANDARD OF REVIEW

De novo review applies to the district court's interpretation of the CWA and its summary judgment rulings. Nw Env'tl. Def. Ctr. v. Brown, 640 F.3d 1063, 1069 (9th Cir. 2011), rev'd on other grounds, 133 S. Ct. 1326 (2013); League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002).

ARGUMENT

I. THE LAHAINA WELLS DO NOT REQUIRE AN NPDES PERMIT BECAUSE THEY DO NOT DISCHARGE POLLUTANTS TO NAVIGABLE WATERS

The CWA expressly limits the reach of NPDES permitting. NPDES permits are only required for “the discharge of any pollutant.” 33 U.S.C. §§ 1311(a), 1342(a)(1). A “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12). The Lahaina wells do not satisfy these requirements as a matter of law because they do not entail a discharge *from* a point source *to* navigable waters.

A. Injection Into Groundwater Is Not Regulated Under The CWA

1. Groundwater Is Excluded From NPDES Permitting

It is settled law that groundwater is not navigable water under the CWA. The Act’s definition of navigable waters—“waters of the United States, including the territorial seas”—excludes groundwater. *Id.* § 1362(7). Federal regulations likewise exclude groundwater from navigable waters. 40 C.F.R. §§ 122.2, 230.3(o), 33 C.F.R. § 328.3(a). See also 79 FR 22188, 22218 (Apr. 21, 2014) (“The agencies have never interpreted ‘waters of the United States’ to include groundwater.”).

The CWA’s legislative history reflects this exclusion. See e.g., Water Pollution Control Legislation 1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. On Public Works, 92nd Cong. 742

(1971) (EPA without jurisdiction over groundwater because groundwater “cannot be classified as navigable waters.”).

In fact, Congress explicitly rejected attempts to amend the CWA to include groundwater under the NPDES program. Recognizing the Act as drafted excluded groundwater from NPDES permitting, then-EPA Administrator Ruckelshaus sought such authority when testifying to Congress:

The only reason for the request for Federal authority over ground waters was to assure that we have control over the water table in such a way as to insure that our authority over interstate and navigable streams cannot be circumvented, so we can obtain water quality by maintaining a control over all the sources of pollution, *be they discharged directly into any stream or through the ground water table.*

Id. at 230 (emphasis added). Congress did not amend the Act in response to this testimony.

Representative Aspin additionally proposed extending NPDES permitting to groundwater, saying “[i]f we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.” 118 Cong. Rec. 10,666 (1972). This proposal was rejected. Id. at 10,669. See also S. Rep. No. 92-414, at 73 (1971), reprinted in S. Comm. on Public Works, 93rd Cong., Legislative History of the Water Pollution Control Act Amendments of 1972, at 1491 (1973) (“Several bills pending before the Committee provided

authority to establish Federally approved standards for groundwaters Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.”).¹¹

Nor should NPDES permitting be judicially extended to cover groundwater. The CWA repeatedly differentiates between groundwater and navigable/surface water. Six provisions refer to the former; 24 refer to the latter.¹² None of the groundwater references appear in the NPDES provisions, reflecting Congress’ deliberate decision to omit groundwater from the reach of this program. “Where a [statutory] term has been carefully employed in one place and excluded in another, it should not be implied where excluded.” United States v. Gray, 448 F.2d 164, 168 (9th Cir. 1971).

Adherence to this principle is particularly important given the exclusion of groundwater from the definition of navigable waters reflects an overarching goal of the CWA—maintaining state authority over groundwater. 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . of land and water resources”). To effectuate this policy, Congress excluded

¹¹ See Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1316-1319 (D. Or. 1997), for a detailed CWA legislative history discussion.

¹² Compare 33 U.S.C. §§ 1252, 1256, 1274, 1282, 1288, 1314, with 33 U.S.C. §§ 1252, 1254, 1256, 1272, 1274, 1282, 1288, 1291, 1293a, 1311-1315, 1321, 1322, 1324, 1329, 1341, 1342, 1344, 1345, 1362, 1371.

groundwater from NPDES permitting and left groundwater control to the states. See e.g., 118 Cong. Rec. 10,667 (1972) (Congress clarifies that groundwater is protected by state programs). See also Pronsolino v. Nastri, 291 F.3d 1123, 1126-1127 (9th Cir. 2002) (CWA authority over land and water resources left to the states). EPA confirms “jurisdiction over groundwater resources is maintained by States.” ER 685

HDOH too recognizes the limits of the NPDES program. It told the County and EPA the Lahaina wells do not require an NPDES permit because they inject into groundwater. HDOH repeated this position as recently as February 2016. See pages 11-12 above.

Just because groundwater is not regulated under the NPDES program does not mean groundwater pollution goes unchecked. To the contrary, states are charged with protecting groundwater. In Hawai‘i, HDOH has this responsibility. See Haw. Rev. Stat. § 321-1. HDOH exercises its authority through various regulatory programs. See e.g., Haw. Code R. §§ 11-58.1-16, 11-264-100, 11-281-79, 11-23-01, et seq.

2. States Control The Disposal Of Pollutants Into Wells

The CWA differentiates between the “discharge of any pollutant” and the “disposal of pollutants into wells.” Compare 33 U.S.C. § 1342(a) with 33 U.S.C. § 1342(b)(1)(D); see also 33 U.S.C. §§ 1314(f)(2)(D), 1362(12). The former

requires an NPDES permit; the latter does not. See Inland Steel Co. v. EPA, 901 F.2d 1419, 1423-1424 (7th Cir. 1990).

The CWA recognizes the disposal of pollutants in wells remains the province of state law. It requires states have “adequate authority” to “control the disposal of pollutants into wells” before EPA delegates NPDES program administration. 33 U.S.C. § 1342(b)(1)(D).

Approval of state programs is the extent of EPA’s CWA authority over the disposal of pollutants in wells—a limitation EPA acknowledges. 44 FR 32870, 32877 (June 7, 1979) (“Section 402(b)(1)(D) of the Act specifically requires States to have this authority, although EPA lacks similar authority under the Act.”). EPA also acknowledges that well disposal is better addressed through the SDWA, as SDWA “authority will provide more comprehensive regulation of well disposal practices than would be possible under the NPDES program.” 43 FR at 37081.

EPA’s NPDES regulations even require permit limit adjustments to exclude wastewater disposed of through well injection. 40 C.F.R. § 122.50(a). In proposing this regulation, EPA acknowledges it lacks CWA authority over well injection:

The proposed regulations will, however, require EPA and the States to apply technology-based effluent limitations and standards to waste streams which are discharged to surface waters, but not to waste streams that are . . . injected into wells *EPA does not have direct*

authority to apply the Act's regulatory requirements to these waste streams.

43 FR at 37081-37082 (emphasis added). See also 40 C.F.R. § 122.21(j)(1)(viii)(E) (requiring identification of disposal methods that are not a discharge of a pollutant, including “wastewater disposed of” via “underground injection.”).

The discharge/disposal distinction is the very position EPA advocates and prevails on in Inland Steel. This case concerns Class I UIC wells and the RCRA exclusion from hazardous waste management requirements for point source discharges requiring an NPDES permit. 42 U.S.C. § 6903(27). The well operators argue their injection constitutes the discharge of pollutants requiring an NPDES permit, thereby excluding the wells from RCRA. Inland Steel, 901 F.2d at 1422. Disagreeing, EPA “urges a distinction between ‘discharge’ and ‘disposal[.]’” It argues that while “all ‘discharges’ are ‘disposals,’ . . . not all ‘disposals’ are ‘discharges’; some are ‘injections[.]’” and “what deep injection wells do is better described as ‘disposal,’” which does not require an NPDES permit. Id.

The Seventh Circuit agrees with EPA. It highlights the CWA’s distinction between “discharge” and “disposal,” holding the terms are not synonymous. The court further concludes that conflating disposal and discharge “would create a senseless regulatory gap,” where hazardous waste could be disposed of into Class I

wells without RCRA compliance. Id. at 1424. It thus holds injection into UIC wells is not a discharge of pollutants requiring an NPDES permit.

The district court upends this established statutory structure. It extends NPDES permits to the disposal of pollutants in wells, contrary to the CWA.

B. Groundwater Here Is Not A Point Source

The Supreme Court explains in Rapanos v. United States, 547 U.S. 715 (2006), that a point source does not need to discharge directly into navigable waters to trigger NPDES permitting. An NPDES permit is also required if pollutants “pass ‘through conveyances’ in between” the initial point source and navigable water. Rapanos, 547 U.S. at 743 (internal citation omitted).

For an NPDES permit to be required under this rationale however, the intermediate conveyances themselves must be point sources. The cases cited by Rapanos confirm this. Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141 (10th Cir. 2005) (permit required for a mineshaft discharge through a tunnel to navigable waters); United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) (permit required for a chemical facility discharge through a municipal storm sewer into navigable waters); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 104 (2004) (permit required for pump station discharge through a canal into navigable waters); United States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005) (permit required for an industrial facility toilet

discharge to a storm drain into navigable waters); Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2d Cir. 1991) (permit required for landfill seepage discharge through a culvert into navigable waters) rev'd on other grounds, 505 U.S. 557 (1992); Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994) (permit required for farm vehicle discharge through a swale, pipe and ditch into navigable waters).

The Lahaina wells do not need an NPDES permit even under the Rapanos rationale. The groundwater that transports the wells' effluent does not meet the point source definition. The CWA defines point source as a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The defining characteristic of a point source is its channeling or collection of pollutants. See, e.g., Ecological Rights Found. v. Pac. Gas and Elec. Co., 713 F.3d 502, 510 (9th Cir. 2013); Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1152 (9th Cir. 2010); Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 308-309 (9th Cir. 1993). Accord Nw Envtl. Def. Ctr., 640 F.3d at 1070 (unchanneled or uncollected stormwater is nonpoint source pollution).

The groundwater here does not channel or collect the wells' effluent. Effluent diffusely enters groundwater through roughly 100-foot well openings and immediately rises, spreading laterally and vertically. See pages 2-3 above. The groundwater carries the effluent the half-mile between the Lahaina wells and the

coast taking approximately three months to more than four years for a one-time injection to reach the ocean. Based on Tracer Study modeling, groundwater containing effluent from Wells 2, 3 and 4 spreads across as much as two miles of coastline depending on which wells are operating and the volume of effluent injected. Lacking modeling or dye testing, it is unknown where Well 1 enters the ocean. See pages 3-9 above. This is the antithesis of a “discernible, confined and discrete conveyance.”

II. THE DISTRICT COURT’S NOVEL “CONDUIT THEORY” FUNDAMENTALLY REWRITES THE CWA

With no discharge from a point source to navigable water, the district court fashions a new NPDES standard—what it calls the “conduit theory.” Under this theory, an NPDES permit is required whenever (1) pollutants are released somewhere into the environment from some identifiable point source and (2) the pollutants eventually reach navigable water. COM I at 996 (ER 72), 1000 (ER 82); COM II at *6 (ER 36). The district court concedes it “cannot point to controlling appellate law or a statutory text expressly allowing” the conduit theory. COM I at 996 (ER 73). This is because there is none. The theory contradicts CWA text and appellate court decisions. It also disregards express congressional intent.

A. The Conduit Theory Ignores Two Of The CWA's Four Requirements For An NPDES Permit

This Court recognizes that the CWA imposes four requirements for an NPDES permit. There must be “(1) [a] discharge[] (2) [of] a pollutant (3) *to* navigable waters (4) *from* a point source.” Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001) (emphasis added); Mokelumne River, 13 F.3d at 308.

The district court's unprecedented conduit theory dispenses with two of these elements. It eliminates the requirements that a discharge *to* navigable waters be *from* a point source. Under the theory, a point source does not need to discharge to navigable waters. An NPDES permit is required merely if a point source somewhere discharges pollutants that ultimately reach navigable water, “regardless of *how* they get there.” COM I at 1000 (ER 82).

According to the district court, “[t]he County’s discharge of effluent into the injection wells satisfies the point source requirement, the only disputed issue before this court” COM II at *6 (ER 36). This is error. As amici in Sierra Club v. Abston Const. Co., 620 F.2d 41 (5th Cir. 1980), EPA argues, and the Fifth Circuit agrees, it is not sufficient to focus exclusively on the original pollutant source to determine whether an NPDES permit is needed. How pollutants travel from the original point source to navigable water matters. They must travel to navigable water through a “discernible, confined and discrete conveyance,” *i.e.*, a

point source. Id. at 44-45 (point source discharge is a combination of the pollutants from the spoil pile and the flow through ditches and gullies that collect and convey pollutants to navigable waters).

B. The Conduit Theory Eliminates The Distinction Between Point Source and Nonpoint Source Pollution

The conduit theory re-writes the CWA in yet another way—it obliterates the distinction between “point source” and “nonpoint source” pollution. Congress made the “disparate treatment of discharges from point sources and nonpoint sources [] an organizational paradigm of the Act.” Or. Nat. Desert Ass’n v. U.S. Forest Serv., 550 F.3d 778, 780 (9th Cir. 2008); see also Or. Nat. Res. Council v. U.S. Forest Serv., 834 F.2d 842, 849 (9th Cir. 1987) (Congress “drew a distinct line between point and nonpoint pollution sources.”). The CWA, in fact, differentiates between point and nonpoint sources no less than 11 times.¹³

Point sources are subject to direct federal regulation and enforcement through NPDES permits. 33 U.S.C. § 1342(a); see Or. Nat. Res. Council, 834 F.2d at 849; Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 220 (2d Cir. 2009). Nonpoint sources are regulated by the states. Nat. Res. Def. Council, Inc., v.

¹³ See 33 U.S.C. §§ 1251, 1255, 1270, 1281, 1285, 1311, 1314, 1319, 1324, 1330, 1346.

Train, 396 F. Supp. 1393, 1395 (D.D.C. 1975), aff'd, 568 F.2d 1369 (D.C. Cir. 1977); see also Or. Nat. Res. Council, 834 F.2d at 849 n.12.¹⁴

The method by which pollutants enter navigable waters is the key determinant. As this Court previously said, the distinction between point and nonpoint sources depends on “whether the pollution reaches the water through a confined, discrete conveyance.” Trs. for Alaska v. EPA., 749 F.2d 549, 558 (9th Cir. 1984). Neither the kind of pollution nor the activity causing the pollution are relevant. Id. at 558.

This Court highlights the distinction when it explains the difference between “two potential discharges where polluted water enters the ground and, eventually, surface water.” Greater Yellowstone, 628 F.3d at 1152. When rainwater runoff collects in a storm drain prior to reaching surface water, it is a point source discharge; when it filters through pits and the ground prior to reaching surface water, it is nonpoint source pollution. Id. at 1152-53.

The “conduit theory” dispenses with the need for pollutants to enter navigable water through a “confined, discrete conveyance.” The district court explains away the requirement by saying “[w]hile any conduit that is a ‘confined

¹⁴ As the Court notes in Or. Nat. Desert Ass’n., 550 F.3d at 780, 1987 CWA amendments added more federal review of nonpoint source pollution. 33 U.S.C. §§ 1288, 1329. These amendments, however, do not alter the CWA’s distinction between point and nonpoint source pollution and its restriction of NPDES permitting to point source pollution.

and discrete conveyance’ is a point source, that does not mean that all conduits must be ‘confined and discrete conveyances.’” COM I at 999 (ER 79). Accordingly, “the groundwater acting as a conduit need not also be ‘confined and discrete.’” Id. It is sufficient to require an NPDES permit, according to the district court, “when pollutants find their way to navigable-in-fact waters.” Id. at 996 (ER 72).

The district court “eviscerates” the distinction between point sources and nonpoint sources. Cordiano, 575 F.3d at 224. By requiring an NPDES permit when pollutants do not travel via a “confined and discrete conveyance,” the conduit theory impermissibly “transform[s] a nonpoint source into a point source.” Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976).

A basic rule of statutory construction requires words be read in context of the overall statutory scheme. Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1060-1061 (9th Cir. 2003); United States v. Neal, 776 F.3d 645, 652 (9th Cir. 2015). By reading the term “conduit” to conflate point sources and nonpoint sources, the district court violates this rule, and renders significant “provisions of the [CWA] inconsistent, meaningless or superfluous.” Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991) (cannot construe CWA concepts in a manner that results in conflict or superfluity). See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs (“SWANCC”), 531

U.S. 159, 172 (2001) (“[I]t is one thing to give a word limited effect and quite another to give it no effect whatever.”).

C. The District Court’s Rationale Does Not Support The Conduit Theory

1. Policy Does Not Support The Conduit Theory

Lacking statutory text and appellate case law to support its conduit theory, the district court resorts to a policy argument. “[I]t would make no sense,” the district court writes, to exempt a polluter from NPDES permitting requirements “simply because its pollution passes through a conduit” that is not a point source. COM I at 998 (ER 77).

This reasoning is plain error. A court cannot rewrite a statute to comport with its notion of how Congress ought to have written it. Lewis v. City of Chi., Ill., 560 U.S. 205, 215 (2010) (“It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”) (internal citations omitted). Courts “may not rewrite a statute, but instead simply ‘construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.’” Resident Councils of Wash. v. Leavitt, 500 F.3d 1025, 1031 (9th Cir. 2007) (internal citation omitted).

Moreover, the protection of navigable water is just *one* of the CWA’s purposes. A co-equal goal is the preservation of the states’ authority over the

regulation of groundwater. SWANCC, 531 U.S. at 166-67 (Congress chose to protect the Nation's waters while simultaneously preserving states' rights over land and water resources); 33 U.S.C. §§ 1251(a)-(b). The CWA's text and structure reflect Congress' balance of these competing goals. Cordiano, 575 F.3d at 224. Courts cannot override this congressional decision to further the goal they think deserves priority. In re Cavanaugh, 306 F.3d 726, 731-732 (9th Cir. 2002) ("Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals.").

2. Case Law Does Not Support The Conduit Theory

The district court claims there is no controlling appellate case law to support the conduit theory. COM I at 996 (ER 73). This is misleading. The three appellate courts that have considered the issue conclude that discharges into groundwater do not require an NPDES permit regardless of any hydrologic connection between groundwater and navigable water. Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F. 3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters. The omission . . . is not an oversight Congress elected to leave the subject to state law"); United States v. Johnson, 437 F. 3d 157, 960 n.4 (1st Cir.) vacated on

other grounds, 467 F.3d 56 (1st Cir. 2006); Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) (citing legislative history, it excludes groundwater from navigable waters). See also Umatilla, 962 F. Supp. at 1318 (As written and as Congress intended, the CWA “does not regulate even hydrologically-connected groundwater.”).

Likewise, appellate decisions that focus on the point source requirement hold that migration through soil and groundwater is nonpoint source pollution that is outside the scope of the NPDES permit program. Greater Yellowstone, 628 F.3d at 1152-53 (precipitation percolating through a pit to the ground that eventually reaches surface water is nonpoint source pollution); El Paso Gold Mines, 421 F.3d at 1141 n.4 (groundwater seepage traveling through fractured rock is nonpoint source pollution).

To support its conduit theory, the district court cites Wash. Wilderness Coal. v. Hecla Min. Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) and Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997)—two district court cases that hold an NPDES permit can be required when pollutants enter navigable water through groundwater. COM I at 995 (ER 70-71). Neither is persuasive. Like the district court here, they disregard the CWA’s point source requirement and rely on policy arguments. They narrowly focus on the CWA’s goal to protect the Nation’s waters, without regard to the limits on the NPDES

program Congress enacted. They also fail to reconcile their policy argument with the CWA's competing goal to leave groundwater regulation to the states. SWANCC, 531 U.S. at 166-67; 33 U.S.C. §§ 1251(a)-(b).

In contrast, district court cases focusing on the point source requirement generally find NPDES permits inapplicable to subsurface discharges because soil and groundwater migration are nonpoint source pollution. Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011) (groundwater migration is not point source pollution); Pennenv't v. PPG Indus., Inc., 964 F. Supp. 2d 429, 454-455 (W.D. Pa. 2013) (discharge through groundwater and soil is nonpoint source pollution); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 1359 (D.N.M. 1995) (shallow seeps with trace pollutants emerging through soil are nonpoint source "carriers of water from the alluvium to the surface."); Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) (no point source discharge when storage tank pollutants migrate through soil to groundwater to navigable water). Accord Nw Env'tl. Def. Ctr., 640 F.3d at 1070 (Stormwater runoff that "dissipates in a natural and unimpeded manner, is not a discharge from a point source."). Hawai'i follows this line of case law, designating groundwater as nonpoint source pollution. See pages 11-12 above.

3. EPA Statements Do Not Support The Conduit Theory

Finally, the district court claims the conduit theory is consistent with EPA 1991 and 2001 preamble “pronouncements.” COM I at 995-96 (ER 71-72). In these, EPA writes that “affected ground waters” are regulated “because such discharges are effectively discharges to the directly connected surface waters,” 56 FR 64876, 64892 (Dec. 12, 1991) and “collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act.” 66 FR 2960, 3017 (Jan. 12, 2001).

These statements do not bear the weight the district court gives them. First, they do not support the district court’s conduit theory. EPA’s approach requires proof of pollutants in navigable water. See e.g., id. The district court takes the conduit theory a step further, imposing liability for Wells 1 and 2 even though there is no known ocean entry point for these wells’ effluent. COM II at *6 (ER 37); see pages 3-9 above.

Furthermore, the district court overlooks that the preambles are at odds with EPA’s longstanding authoritative position that discharges to groundwater are *not* subject to NPDES permitting requirements even if there is a connection to surface water. In 1973—shortly after enactment of the CWA—EPA explained that Congress defined a “discharge of a pollutant” “to include only discharges into navigable waters *Discharges into ground waters are not included.*”

Accordingly, [NPDES] permits may not be issued” In Re E.I. Dupont De Nemours & Co., Op. No. 6, 1975 WL 23850, at *3 (E.P.A.G.C. Apr. 18, 1975) (attaching 1973 EPA Office of General Counsel Memorandum) (emphasis added).

EPA’s 1991 preamble statements ignore this position and fail to explain how the CWA text supports its new position. EPA admits its new position conflicts with congressional intent. 56 FR at 64892 (“Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters”). Instead, without citation to authority, EPA proclaims “most courts” agree EPA has authority over discharges into groundwater when necessary to protect surface water. Id. at 64802. The case law EPA apparently relies on does not bear out its statement. Previously, EPA cited Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977), and McClellan Ecological Seepage Situation v. Weinberger (“MESS”), 707 F. Supp. 1182, 1193-1196 (E.D. Cal. 1988), vacated, 47 F.3d 325 (9th Cir. 1995). 55 FR 47990, 47997 (Nov. 16, 1990). But neither case stands for the proposition EPA claims.

The Exxon court limits its opinion to groundwater that did not reach surface water. Exxon, 554 F.2d at 1312 n.1. The Fifth Circuit subsequently clarifies Exxon, saying “[t]he law in this Circuit is clear that ground waters are not protected under the CWA.” Rice, 250 F.3d at 269. Like EPA, the MESS court admittedly ignores legislative history and the plain language of the statute. MESS,

707 F. Supp. at 1193-1196. Additionally, this Court's subsequent decision does not address NPDES permitting because of a controlling CERCLA response action. MESS, 47 F.3d at 330-331.

EPA's 2001 preamble statement is no better than its 1991 one. Ignoring the contrary legislative history discussed in pages 21-23 above, EPA wrongly asserts that "Congress has not spoken directly to the issue" of whether discharges to surface waters via hydrologically connected groundwater require an NPDES permit. 66 FR at 3015. Saying "[t]he Clean Water Act does not directly answer the question[,]" EPA cites the overall CWA goal of protecting the Nation's waters for its ostensible authority. Id. However, the "plain text and structure" of the CWA—not its "broad remedial purpose"—governs what it regulates. Cordiano, 575 F.3d at 224.

This is especially the case because the 2001 preamble language is not in the final rule. Rather than address the substantial public comment challenging EPA's authority over groundwater, EPA dropped any reference to it. 68 FR 7176, 7216 (Feb. 12, 2003).

In sum, EPA's preambles are not entitled to any weight. As the Seventh Circuit explains in disregarding EPA's preamble language asserting CWA authority over discharges into groundwater that reach surface water, "[c]ollateral reference to a problem is not a satisfactory substitute for focused attention in

rule-making” Oconomowoc, 24 F. 3d at 966. To be persuasive, an agency statement must explain “the validity of its reasoning [and] its consistency with earlier and later pronouncements” Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Pronsolino, 291 F.3d at 1131 (“Factors relevant to determining persuasiveness may include the agency’s . . . consistency . . . as well as the logic of the agency’s position.”) (internal citation omitted).

D. NPDES Permitting Under The Conduit Theory Is Unworkable And Has Adverse Unintended Consequences

Applying the conduit theory to require an NPDES permit for the Lahaina wells is like trying to fit a square peg into a round hole. It cannot be done. The objectives of NPDES permitting are not achievable because the discharge cannot be properly identified, monitored or regulated. These realities refute the district court’s assertion that common sense compels the conduit theory as a basis for liability. COM I at 996 (ER 73-74), 998 (ER 77).

NPDES permit applications require an outfall description, including location, distance from shore, and depth below surface. 40 C.F.R. § 122.21(j)(3)(i)(A-F). Similarly, permits require outfall monitoring to ensure compliance. Id. § 122.21(j)(4)(i). These requirements cannot be applied to Wells 1 and 2 effluent because it has no known ocean entry point. The submarine groundwater discharge associated with Wells 3 and 4 cannot meet the requirements either because it is a moving target, not a defined outfall. The seeps are ephemeral.

Where along the two mile stretch of coastline the discharge enters the ocean changes depending on well operations, the season and the tide. Moreover, Well 3 and 4 effluent could also enter the ocean deeper and further from shore. See pages 3-9 above.

Effluent dilutes and disperses as it exits the Lahaina wells, travels with groundwater, enters the ocean floor and migrates to the ocean surface. More than 90% of the submarine groundwater discharge off Kahekili Beach enters the ocean as unidentifiable diffuse flow. This flow is diluted 10 to 40 fold between the seafloor and the ocean surface. Hence, monitoring of the effluent in ocean waters off Kahekili Beach will be difficult, if not impossible. Moreover, only some Well 3 and 4 effluent comes out in near shore waters off Kahekili Beach. The Tracer Study estimates that roughly 36-38% of Well 3 and 4 effluent comes out in yet to be identified location(s). Based on the County's expert's alternative calculations, as much as 88% of Well 3 and 4 effluent enters the ocean elsewhere. It is also unknown where Well 1 and 2 effluent enters the ocean. See pages 3-9 above.

HDOH's February 2016 letter concludes the County's 2012 application is incomplete. HDOH's conclusion further highlights the problems with attempting to shoehorn the Lahaina wells into the NPDES program. HDOH questions whether Lahaina effluent could enter the ocean as far north as Honokowai Point

and as far south as Honolua-Lahaina¹⁵—an area substantially larger than the two miles of coastline estimated by the Tracer Study. See pages 3-9 above. Recognizing questions remain regarding nutrient contribution from other sources, HDOH asks the impossible—that the County identify the “other [nutrient source] contributors” to the seep water off Kahekili Beach.¹⁶

The “practical consequences” of the conduit theory’s unprecedented NPDES permitting expansion cannot be ignored. Umatilla, 962 F. Supp. at 1320. The breadth of the theory can potentially subject everyday things such as “parking lots, septic tanks, and sprinkler systems” to NPDES permits whenever groundwater discharges reach navigable water. Oconomowoc, 24 F.3d at 966 (concurring opinion). Accord Ecological Rights Found., 713 F.3d at 513 (run-off from commonplace things is not a point source discharge). The County’s effluent is also used to irrigate resorts and golf courses. ER 625-626 (¶¶ A.8.c., e.). Irrigation water could eventually move through soil to groundwater and migrate to the ocean.

Likewise, there are approximately 5,600 UIC wells, 88,000 cesspools and 21,000 septic tanks in Hawai‘i—all of which to date, have been considered nonpoint source pollution. See pages 11-12 above. Whether these types of groundwater discharges require an NPDES permit “add[s] a new level of uncertainty and expense to NPDES permitting and would expose potentially

¹⁵ HDOH February 2016 Letter, *supra* note 6, at ¶ 10.

¹⁶ Id. at ¶ 12.

hundreds of . . . permittees to . . . litigation and legal liability if they or [the agency] has happened to make the ‘wrong’ choice” Umatilla, 962 F. Supp. at 1320.

The theory can also result in the need for NPDES permits for EPA-promoted green infrastructure/stormwater retention and water reuse practices because pollutants can migrate through soil and groundwater and could eventually reach the ocean. See, e.g., EPA, National Management Measures to Control Nonpoint Source Pollution from Urban Areas 5-9, 5-10 (2005) (EPA encourages infiltration facilities, including ponds and lagoons, to capture runoff and “percolate it through surface soils into the ground water system” before it “recharge[s]” surface water).¹⁷

Finally, the connection between a groundwater discharge and navigable water may not be confirmed until after the discharge commences. EPA acknowledges this, saying “discharges from . . . surface water via a groundwater pathway are highly dependent on site-specific variables” 68 FR at 7216. Lahaina effluent is a prime example. As the USGS notes, the effluent “does not extend directly shoreward from the injection wells as would generally be expected Instead, the injected plume is diverted to the southwest” ER 401.

¹⁷ Available at http://www.epa.gov/sites/production/files/2015-06/documents/2007_02_07_septics_urban_guidance.pdf.

III. THE DISTRICT COURT’S ALTERNATIVE BASES OF LIABILITY ARE WRONG AS A MATTER OF LAW

The district court raises two potential alternative bases of liability—groundwater itself is a point source and the submarine groundwater discharge entering the ocean off Kahekili Beach “significantly affects” the ocean. COM I at 999 (ER 79), 1004 (ER 92). Both theories are wrong as a matter of law.

A. Groundwater As A Point Source Is Not A Viable Theory

In COM I, the district court concludes that “nothing in the record suggests that the groundwater is not itself a ‘confined and discrete conveyance.’” Id. at 999 (ER 79). While this may be read to mean that groundwater itself is a point source, the district court subsequently clarifies that it “did not rely on the proposition that the groundwater in this case served as a point source.” COM III at *7 (ER 19).

To the extent the district court relies on the groundwater as a point source theory, it cannot support summary judgment as a matter of law. As discussed in pages 28-29 above, the groundwater here is not a discernible, confined and discrete conveyance. Moreover, the “significant uncertainties” with the Tracer Study’s calculations raise factual disputes that preclude summary judgment. See pages 3-9 above; O’Connor v. Boeing N. Am., Inc., 311 F.3d 1139, 1150 (9th Cir. 2002) (“When the evidence yields conflicting inferences, summary judgment is improper, and the action must proceed to trial.”).

B. Whether The County’s Effluent Significantly Affects The Ocean Is Irrelevant

Referring to N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), the district court notes that this Court adopts the Rapanos “significant effects” test to determine whether a water body is considered a water of the United States. This test is inappropriate here. See e.g., COM I at 997 (ER 75); COM II at *6 (ER 36). There is no dispute groundwater is not a water of the United States.

This case involves a point source analysis—whether a groundwater conduit meets the point source definition of a discernible, confined and discrete conveyance. As outlined at pages 28-34 above, this requires finding pollutants discharge to navigable water from a point source. Whether the County’s effluent has a significant effect on the ocean is irrelevant. COM II at *6 (ER 36) (harm is “irrelevant” to liability). Furthermore, summary judgment cannot be granted under this test because the parties’ experts dispute whether the Lahaina facility effluent significantly affects the ocean. See pages 8-9 above. See Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1037-1039 (9th Cir. 2000) (conflicting expert affidavits establish “genuine issues of fact” that prevent summary judgment).

IV. THE LACK OF FAIR NOTICE THAT THE COUNTY NEEDED AN NPDES PERMIT BARS ANY PENALTY

The Court should set aside the penalty imposed on the County regardless of the outcome of the challenge to the district court's liability rulings. The lack of fair notice that an NPDES permit is required for the Lahaina wells bars any penalty even if the district court's liability rulings are upheld.

A. The County Lacked Fair Notice

The Due Process Clause of the Constitution requires "fair notice of what conduct is prohibited before a sanction can be imposed." Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm'n, 142 F.3d 1179, 1182 (9th Cir. 1998) (quoting Newell v. Sauser, 79 F.3d 115, 117 (9th Cir. 1996)). In the absence of fair notice, a person may not be deprived of property through civil or criminal penalties. United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008).

To provide fair notice, "a statute or regulation must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" Id. This requires sufficient clarity "to warn a party about what is expected of it." Id. (quoting Trinity Broad. of Fla., Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 1995)). Accord Diamond Roofing Co., Inc. v. OSHA, 528 F.2d 645, 649 (5th Cir. 1976) (fair notice exists only if person acting in good

faith can “identify, with ascertainable certainty, the standards with which the [law] expects parties to conform”).

The district court’s liability rulings demonstrate this requirement is absent here. The district court concedes it “cannot point to controlling appellate law or statutory text expressly allowing” it. COM I at 996 (ER 73). This is the very definition of lack of fair notice.

HDOH’s actions further cement this conclusion. ER 120. HDOH administers the EPA-approved NPDES program in Hawai‘i. Haw. Rev. Stat. § 342D-50. It has never issued guidance saying NPDES permits are needed for UIC wells and has never required an NPDES permit for any of the roughly 5,600 UIC wells in Hawai‘i. To the contrary, Hawai‘i classifies effluent from the Lahaina wells and groundwater as nonpoint source pollution that are outside the reach of the NPDES permit program. HDOH also has the authority to issue an equivalent control document in lieu of an NPDES permit. Haw. Code R. § 11-55-01. HDOH has said the Lahaina UIC permit is intended to act as an equivalent control document. See pages 11-12 above.

While HDOH required an NPDES permit for other early facility operations, it did not require an NPDES permit for the Lahaina wells. For decades, HDOH has regulated the Lahaina wells through UIC permits issued under Hawai‘i’s SDWA program. HDOH is thoroughly familiar with the wells—including that their

effluent reaches the ocean—and has repeatedly told the County that NPDES permits are “Not Applicable” to those wells. See pages 9-12 above.

HDOH maintained this position even after a comprehensive CWA inspection of the County’s wastewater facilities conducted in conjunction with EPA. The inspection specifically looked for CWA violations, including discharges of pollutants without NPDES permits. The inspection found violations and led to an extensive consent decree to ensure CWA compliance. During the entire process, HDOH and EPA never identified the Lahaina wells’ lack of an NPDES permit as a CWA violation. This was not an oversight. The consent decree specifically references them. See pages 13-16 above.

HDOH maintained an NPDES permit is unnecessary for the Lahaina wells even in the face of concerns about the effect of effluent on the ocean. Indeed, HDOH said an NPDES permit is unnecessary even after the County submitted its permit application. HDOH’s belated February 2016 response to the County’s application confirms an NPDES permit is not required for effluent injected into groundwater.¹⁸ See pages 9-12 above.

The County was not on fair notice an NPDES permit was required in these circumstances. HDOH’s multiple representations—through both words and deeds—told the County the opposite and makes imposition of a fine impermissible.

¹⁸ HDOH February 2016 Letter, *supra* note 6, at ¶ 2.

Wis. Res. Prot. Council v. Flambeau Mining Co., 727 F.3d 700, 708-709 (7th Cir. 2013) (holding defendant lacked fair notice when state agency that administered program gave guidance that no NPDES permit was required); Gen. Electric Co. v. EPA, 53 F.3d 1324, 1331 (D.C. Cir. 1995) (that EPA “never” previously required a permit for subject activity evidences lack of fair notice that permit was required).

B. The District Court’s Contrary Holding Is Error

The district court held the County had fair notice of the need for an NPDES permit notwithstanding its novel liability theory and HDOH’s actions. This holding is unprecedented. Never before has a court held a person was on fair notice of the need for a permit when the permitting agency itself said the permit was inapplicable. The holding is as incorrect as it is unprecedented. None of the grounds the district court relies on overcome the constitutional infirmity in penalizing the County for following HDOH’s direction.

1. The CWA’s Text Does Not Provide Fair Notice

The district court relies in the first instance on what it calls the “plain language” of the CWA to support its previously unheard of conduit theory. COM III at *4 (ER 11-12). Discharges from the Lahaina facility, the district court writes, “implicate” the elements necessary to trigger an NPDES permit and “[i]t therefore makes no sense to say as a matter of law that the County lacked fair notice.” Id. (ER 12).

The district court's reasoning cannot be reconciled with its acknowledgement that there is no "statutory text expressly allowing" the conduit theory of liability. COM I at 996 (ER 73). Nor can it be reconciled with the CWA's text. That text, on its face, does not plainly require an NPDES for the Lahaina wells. Just the opposite. The statutory text can fairly be read to exclude the Lahaina wells from NPDES permit requirements.

The CWA requires an NPDES permit for discharges of pollutants into navigable waters from a point source. See pages 21-24 and 27-29 above. The CWA defines point source as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The CWA identifies examples of nonpoint sources (that do not require NPDES permits) including "pollution resulting from . . . the disposal of pollutants in wells" and "the movement, flow, or circulation of . . . ground waters" Id. § 1314(f)(2)(D), (F).

Nothing in these provisions self-evidently means effluent from the Lahaina wells that is injected into groundwater and travels to and enters the ocean in a broad and diffuse manner qualifies as a discharge into navigable waters from a point source. More logically, effluent fits within the above examples of nonpoint source pollution.

As outlined at pages 24-27 above, the CWA's differentiation between the discharge of pollutants into navigable waters (which requires an NPDES permit)

and the disposal of pollutants into wells (which does not) furthers this conclusion. EPA's recognition of this distinction confirms the CWA can fairly be read to treat the injection into wells as nonpoint source pollution.

The district court draws support for its contrary view from this Court's holdings in Nat. Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985 (9th Cir. 2000), and Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995). These decisions, however, do not concern the application of the CWA to UIC wells. Nor do they concern the fair notice doctrine. They concern a narrow question of statutory interpretation not at issue in this appeal—whether courts have discretion under CWA § 309(d), 33 U.S.C. § 1319(d) to impose fines for violations. This Court's conclusion that § 309(d) does not provide discretion has no bearing on the constitutional issue at hand.

The district court erroneously concludes differently. It writes that the Court's two opinions implicitly recognize that the CWA, “by listing the elements of a violation, provides the required notice.” COM III at *4 (ER 12). This is not what this Court held in Sw. Marine and Leslie Salt, implicitly or otherwise. Neither decision addresses whether the NPDES permit requirements are sufficiently clear as applied to UIC wells to make imposition of a penalty constitutional.

The district court's belief that the County had fair notice because the CWA lists the elements for an NPDES permit is not the relevant inquiry. The relevant question is whether these elements, as stated in the CWA, are sufficiently clear on their face to give the County fair notice that they apply to the Lahaina wells. They are not.

2. **Plaintiffs' Opinion Is Irrelevant**

Likewise misplaced is the district court's reliance on the 60-day notice of violation that Plaintiffs served before filing this lawsuit as well as statements from Plaintiffs' members expressing their belief that an NPDES permit is necessary. COM III at *5 (ER 14). Fair notice is grounded in the *Government's* obligation to "promulgate clear and unambiguous standards." United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995). Fair notice comes from the plain language of the statute or regulations, and agency communications. Shark Fins, 520 F.3d at 980 (statute or regulations provides fair notice); Gen. Electric, 53 F.3d at 1329 (regulations and agency public statements and correspondence provide fair notice); Flambeau, 727 F.3d at 708 (regulations and agency guidance provide fair notice).

Third party statements—no matter how earnest—do not fulfill the constitutional mandate for fair notice. Gates & Fox Company, Inc. v. OSHA, 790 F.2d 154, 156-157 (D.C. Cir. 1986) (rejecting argument that employer had fair notice of OSHA regulation applicability through warning by general contractor's

safety inspector; due process requires “authoritative interpretation” from agency); Hosp. of the Univ. of Pa. v. Sebelius, 847 F. Supp. 2d 125, 141 (D.D.C. 2012) (“that [third person] interpreted the Secretary’s statements in a particular way and informed plaintiffs of that interpretation cannot alter the fact that the notice given by the Secretary was inadequate”).

Indeed, if a private party’s view of a statute’s or regulation’s meaning is sufficient to impose a civil penalty, the inverse would also be true—a defendant could rely on a private party’s view of the law to avoid a civil penalty. This is not the law—the “responsibility to promulgate clear and unambiguous standards is on the” Government. Trident Seafoods, 60 F.3d at 559 (quoting Marshall v. Anaconda Co., 596 F.2d 370, 377 n.6 (9th Cir. 1979)). The Government cannot outsource this obligation to private litigants.

3. EPA’s Actions Do Not Provide Fair Notice

The district court also errs in relying on EPA’s 2010 instruction to the County to conduct sampling pursuant to CWA § 308(a), 33 U.S.C. § 1318(a), and apply for a water quality certification from Hawai‘i pursuant to CWA § 401, 33 U.S.C. § 1341. COM III at *5 (ER 14-15). EPA’s instruction does not bear the meaning the district court gives it.

EPA is not the agency responsible for administration of the NPDES program in Hawai‘i. HDOH is. 33 U.S.C. § 1342(c) (once a state has authority, its program

controls). So even if EPA's instruction expresses a view about NPDES permits, it is HDOH's views that matter—and HDOH maintains the County's wells do not require an NPDES permit. Flambeau, 727 F.3d at 708-709 (when EPA has approved state's NPDES program, state agency that administers program is “the proper, and only, CWA administrator with authority to issue NPDES” permits, and that agency's guidance must provide fair notice about need for NPDES permit); United States v. Hoechst Celanese Corp., 128 F.3d 216, 228-229 (4th Cir. 1997) (conflicting view of agency without responsibility for issuing permit “immaterial” to fair notice analysis); ER 276.

Moreover, EPA's 2010 direction is silent about the need for an NPDES permit. Section 401 of the CWA provides that no federal permit of any kind, under any program, can issue without a water quality certification from the relevant state if the permitted action “may” affect waters of the United States. 33 U.S.C. § 1341. This standard applies regardless of whether there is a point source discharge to waters of the United States.

EPA concluded that effluent from the Lahaina wells “may” affect ocean water and thus directed the County to obtain a § 401 certification from HDOH before it would reissue the federal UIC permit. See ER 121-122, 695-696 (¶¶ 24-25) (no decision on the County's federal UIC permit renewal application because “Section 401 water quality certification from the State [is needed] in order for EPA

to grant a permit.”). EPA’s direction has nothing to do with NPDES permits. Plaintiffs agree. See Pl. Opp. to Mot. to Dismiss at 12 (“EPA has required defendant to apply for section 401 water quality certification in connection with its federally issued UIC permit under the Safe Drinking Water Act The pendency of that certification has no bearing, however, on defendant’s ability to apply for, or secure a state issued NPDES permit.”).

Nor is the need for an NPDES permit a necessary corollary of EPA’s direction. This is because § 401’s requirements are distinct from NPDES requirements. As the Supreme Court explained in S.D. Warren Co. v. Maine Bd. Of Env’tl. Prot., 547 U.S. 370 (2006), a “discharge” requiring a § 401 certification is not “interchangeable” with a “discharge of a pollutant” from a point source requiring an NPDES permit under § 402. Section 401 has a “broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a discharge.” Id. at 376. Section 402 is more narrow: “the triggering statutory term . . . is not the word ‘discharge’ alone, but ‘discharge of a pollutant,’ a phrase made narrower by its specific definition requiring an ‘addition’ of a pollutant to the water.” Id. at 380-381.

An agency’s statement that something “may” be required does not provide fair notice it is required. Gen. Electric, 53 F.3d at 1333 (letter from agency stating that PCB solvent distillation “may” require a permit was not fair notice); Hoechst

Celanese, 128 F.3d at 227-228 (EPA letter stating that defendant “may be subject” to the Clean Air Act did not provide fair notice that EPA interpreted the Act as applicable). This principle is particularly compelling here because EPA had numerous opportunities over four decades to express a view on NPDES permit applicability to the Lahaina wells yet failed to say one was required.

- EPA did not say an NPDES permit was required when funding the Lahaina facility in the 1970s, which is significant because EPA cannot use CWA funds for a facility that is not CWA-compliant. 33 U.S.C. § 1298(a).

- EPA did not say a permit was required during its 1985 Lahaina facility NPDES compliance inspection. In fact, it said the opposite—noting that the facility complies with CWA requirements because effluent was being injected into groundwater and not discharged to navigable water.

- EPA never raised NPDES permitting as part of its UIC permitting process that began in the mid-1990s and continued through 2009, rather it said that ocean water quality concerns could be addressed through UIC permits.

- EPA did not say an NPDES permit was required in the late 1990s when it sued the County for CWA violations and entered a consent decree to resolve all CWA violations.

- EPA did not say an NPDES permit was required even though as early as 2008 it was “thinking out [its] options under NPDES.”

- EPA did not say an NPDES permit was required when environmental groups—including the Plaintiffs—told EPA in 2008, 2009, and 2011 they believed an NPDES permit was required.
- EPA expressed no disagreement when HDOH told EPA in 2009 that HDOH did not believe the Lahaina wells required an NPDES permit, nor did it do so when the County told them the same thing in 2010.
- EPA did not raise NPDES permitting when it required § 401 certification in 2010.
- EPA did not say an NPDES permit was required when negotiating a 2011 consent agreement focused exclusively on Lahaina facility effluent quality.
- After this lawsuit was filed in April 2012, EPA elected to “steer[] clear of the issue about whether an NPDES permit is required or not” and wait on the “sideline.”
- Even after the June 2013 release of the Tracer Study, EPA needed more information before it could take a position on NPDES permitting of the Lahaina wells. See pages 13-16 above for 1970-2013 references.

If EPA’s conduct is to be considered at all, it is EPA’s decades-long UIC permitting and enforcement actions—none of which required an NPDES permit—that matters. ER 120. Combined with EPA’s regulations, discussed at pages 24-26

above, that treat disposal of pollutants into wells as outside the purview of the NPDES permit program, EPA's conduct provides the exact opposite of fair notice.

Ignoring EPA's action with respect to the Lahaina wells, the district court observes that "EPA's intent" behind the instruction could be a potential factual dispute. COM III at*6 (ER 16). This is a red herring. What matters is what EPA told the County, not what EPA might have secretly thought. The County is not required to divine EPA's unspoken meaning. As this Court has held, the "responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibly have intended, but what [was] said." Trident Seafoods, 60 F.3d at 559 (quoting Marshall, 596 F.2d at 377 n.6). An agency has "both the opportunity and the obligation to state clearly in its regulations" what conduct is proscribed. Id.

4. **The District Court's Liability Ruling Is Not Fair Notice**

Finally, the district court states that fair notice is provided by its summary judgment ruling finding the County liable for not having an NPDES permit for Wells 3 and 4. COM III at *6 (ER 16). The district court cites no authority for this proposition, and it would eviscerate the fair notice doctrine if upheld. Due process requires fair notice of a legal requirement *before* a person is held to have violated it. This constitutional safeguard would be illusory if a court's finding of liability

under a novel theory is said to be fair notice, especially where, as here, the finding is interlocutory and subject to reversal on appeal.

CONCLUSION

The Court should reverse the judgment below and enter judgment for the County. The County did not violate the CWA because the Lahaina wells do not require an NPDES permit. Alternatively, the Court should reverse the ruling that the County had fair notice of the need for an NPDES permit for its Lahaina wells.

DATED: March 21, 2016

MICHAEL R. SHEBELSKIE

By: s/ Michael R. Shebelskie
Michael R. Shebelskie

Attorney for Defendant/Appellant
County of Maui

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant/Appellant County of Maui states that it is unaware of any related cases pending in this Court.

DATED: March 23, 2016

MICHAEL R. SHEBELSKIE

By: s/ Michael R. Shebelskie
Michael R. Shebelskie

Attorney for Defendant/Appellant
County of Maui

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)**

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a), the foregoing opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,599 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: March 23, 2016

MICHAEL R. SHEBELSKIE

By: s/ Michael R. Shebelskie
Michael R. Shebelskie

Attorney for Defendant/Appellant
County of Maui

CERTIFICATE OF SERVICE

CASE: Hawai'i Wildlife Fund, et al. v. County of Maui

CASE NO: United States Court of Appeals, 9th Circuit, Case No. 15-17447;
United States District Court for Hawai'i, Honolulu,
Case No. 1:12-CV-00198-SOM-BMK

I hereby certify that on March 21, 2016, I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

COUNTY OF MAUI'S OPENING BRIEF ON APPEAL

EXCERPTS OF RECORD, VOLUMES 1-4

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Further, I certify that on March 21, 2016, a copy of **County of Maui's Opening Brief on Appeal** and **Excerpts of Record, Volumes 1-4** was sent by Federal Express overnight delivery to the following:

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DATED: March 21, 2016

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