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 REPLY BRIEF ON APPEAL

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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

INTRODUCTION

Forcing NPDES permitting on the Lahaina UIC wells requires this Court to rewrite legislative history, ignore the plain language and structure of the CWA, disregard the states' exclusive control over groundwater, and reject controlling precedent. Plaintiffs and EPA give this Court no reason to do any of this. This Court can simply apply the CWA's statutory distinction between "discharge of pollutants" (which requires an NPDES permit) and "disposal of pollutants into wells" (which does not). This distinction mandates reversal of the district court's summary judgment rulings and a ruling in the County's favor as a matter of law.

The district court found the County liable for violating the NPDES permit requirement based on its newly-minted "conduit theory." Under the theory, a permit is required because pollutants injected into the County's wells eventually reach navigable waters. How pollutants reach navigable waters is irrelevant.

EPA's amicus brief rejects the district court's rationale but supports the result because it is consistent with EPA's "direct hydrological connection" theory. This theory requires an initial point source followed by nonpoint source flow to navigable waters. EPA's theory applies only to "direct" nonpoint source flow. "General" nonpoint source flow or a "mere hydrological connection" is excluded. EPA's brief establishes a new "without significant interruption" test—articulated for the first time as part of this litigation—to distinguish between direct and

general flow. Confirming similarities between the theories, Plaintiffs rely on EPA's theory to support the conduit theory.

Neither theory warrants liability against the County. Nothing in the CWA statute, regulations or legislative history supports either one. Likewise, no binding precedent advances either theory. More damning though is the theories' exponential expansion of NPDES permitting well beyond anything Congress contemplated or the CWA authorized.

Notwithstanding these obstacles, Plaintiffs and EPA claim the County had fair notice the wells required an NPDES permit. Their argument contradicts the undisputed facts. EPA and HDOH knew effluent reached the ocean before the Lahaina facility construction commenced with agency approval and funding. Neither told the County nor environmental groups the wells needed an NPDES permit despite their 40-plus years overseeing Lahaina operations and issuing UIC permits for the wells. Yet now Plaintiffs and EPA contend two 2010 EPA letters that do not reference NPDES permitting provide fair notice. The undisputed facts refute this. After these letters, EPA admitted NPDES applicability was unknown. EPA needed additional testing first. It funded the Tracer Study to assist the decision-making. It was not until 2015, two years after completion of the Tracer Study, that EPA told HDOH the wells require an NPDES permit. It was not until EPA's brief that EPA outlined its rationale for a "direct hydrological connection."

This record does not support fair notice of the need for an NPDES permit. Accordingly, this Court should reverse the district court's fair notice ruling and rule in the County's favor as a matter of law.

ARGUMENT

I. NPDES PERMITTING EXCLUDES UIC WELL DISPOSAL

The CWA's fundamental distinction between "discharge" and "disposal" mandates a ruling in the County's favor without ever considering the district court's or EPA's theories. The Lahaina wells do not need an NPDES permit regardless of whether effluent eventually reaches the ocean. The disposal of pollutants into wells does not require an NPDES permit—period.

An NPDES permit is required for the "discharge of any pollutant." 33 U.S.C. §§ 1311(a), 1342(a). Effluent injection into groundwater via a well, however, is not a discharge of pollutants. The CWA refers to such injections as the "disposal of pollutants into wells." Id. § 1342(b)(1)(D).

This distinction must be given effect. Congress' deliberate decision to classify well injection as "disposal" rather than "discharge" means NPDES permits are not required for such injections. City of Burbank v. Gen. Elec. Co., 329 F.2d 825, 832 (9th Cir. 1964) ("[W]here Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.").

As the Seventh Circuit recognizes in Inland Steel Co. v. EPA, 901 F.2d 1419 (7th Cir. 1990), ignoring the discharge/disposal distinction wreaks havoc with environmental laws. If the words are interchangeable, it "create[s] a senseless regulatory gap" where EPA cannot regulate underground injection of hazardous waste under RCRA. Id. at 1424. See Pom Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."); Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 739 (1989) (Scalia, J., concurring) (similar statutory "subjects should be interpreted harmoniously.").

Plaintiffs and EPA ignore this fundamental CWA distinction. Neither discusses § 1342(b)(1)(D)'s text, much less demonstrates a different meaning for the discharge/disposal distinction. None of their cases do either. No case they cite holds that well disposal of pollutants into groundwater is subject to NPDES permitting. Likewise, the NPDES permits EPA references on page 30 of its brief do not involve UIC wells.

Avoiding pertinent statutory text, Plaintiffs and EPA stress one of the CWA's purposes is to protect the Nation's waters. 33 U.S.C. § 1251(a). This generalized purpose does not trump the Act's express terms and override the discharge/disposal distinction Congress enacted. Their argument also ignores the

CWA's other fundamental purpose—preservation of state regulation over groundwater. Id. § 1251(b). This purpose is implemented through the statutorily-mandated exclusion of the disposal of pollutants into wells from NPDES permitting. Recognizing this exclusion adheres to basic rules of statutory construction that require words to be read in the context of the overall statutory scheme and meaning to be given to each part of the statute. United States v. Neal, 776 F.3d 645, 652 (9th Cir. 2015); Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1060-1061 (9th Cir. 2003). See also Util. Act Regulatory Grp. ("UARG") v. EPA, 134 S. Ct. 2427, 2442 (2014) (A reasonable statutory interpretation must account for "'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'") (internal citation omitted).

Also unavailing is Plaintiffs and EPA's assertion that Congress intended to carve out only the disposal of pollutants in "isolated" groundwater. They cite nothing in the legislative history or CWA text that draws this limitation.

In fact, the legislative history shows just the opposite. EPA expressly sought NPDES permitting authority over groundwater during the 1971 CWA amendment hearings. EPA told Congress it wanted such authority precisely because pollutants can travel through groundwater to navigable waters. Congress rejected EPA's proposal and left authority over the disposal of pollutants in groundwater to the

states. No groundwater language—let alone isolated groundwater language—was added to the NPDES provisions. Op. Br. at 21-23.

Congress likewise rejected an amendment by Senator Aspin the following year attempting to extend NPDES permitting to groundwater. Concern that pollutants in groundwater are not isolated and affect surface waters was the reason behind the amendment. Id. at 22-23.

Plaintiffs and EPA ignore this legislative history, yet it defeats their argument that Congress was concerned solely with isolated groundwater when enacting the discharge/disposal distinction. Congress knew pollutants in groundwater can travel to navigable waters but excluded all disposal of pollutants into wells from NPDES permitting, regardless of any hydrological connection to navigable waters.

Plaintiffs and EPA also misspeak about "absurd" and "deleterious" results that will occur if this Court gives effect to Congress' discharge/disposal distinction. UIC well disposal is not unregulated. The Lahaina wells are subject to federal and state UIC permits regulating the content of the effluent disposed in them. These limits include standards for ocean water quality protection. Id. at 9-10.

EPA notes the SDWA "does not preclude or displace" the CWA. EPA Br. at 21-22. The County agrees. It does not argue it should prevail because the

SDWA preempts the CWA. But this does not mean NPDES permitting applies to UIC wells. Rather, the point is that enforcing the CWA discharge/disposal distinction does not allow the uncontrolled disposal of pollutants into UIC wells.

It is Plaintiffs and EPA that advocate absurd and unreasonable results. Hawai‘i alone has roughly 5,600 UIC wells, 88,000 cesspools, and 21,000 septic tanks. Given groundwater flows toward the ocean, making permitting decisions for all these sources is daunting, if not impossible. This is particularly true because HDOH has never regulated any of these under its NPDES program. Op. Br. at 12. Similarly, EPA has not issued NPDES permits for any of the hundreds of thousands of UIC wells country-wide. Id. at 2-3 (ER 355-356).

Plaintiffs and EPA urge this Court to turn a blind eye to these real world consequences. But they cannot be ignored. An interpretation that upends more than 40 years of settled understanding and imposes overwhelming burdens on the permitting agencies cannot be correct. UARG, 134 S. Ct. at 2444 (“[P]lainly excessive demands on limited governmental resources is alone a good reason for rejecting [EPA’s interpretation] . . . . [A]n enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization[]” is “unreasonable[.]”); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (Courts “must be guided to a degree by common sense as to the manner

in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

II. THERE IS NO INDIRECT DISCHARGE

A. The Indirect Discharge Rationale Requires A Point Source Where Pollutants Enter Navigable Waters

Plaintiffs and EPA place considerable weight on Justice Scalia's opinion in Rapanos v. United States, 547 U.S. 715 (2006), but the opinion does not concern the discharge/disposal distinction. Rather, it addresses the unrelated question of whether wetlands adjacent to point source "ditches or man-made drains" intermittently flowing into navigable waters constitute waters of the United States. Id. at 729, 733. Bewailing "the immense expansion" of the CWA through agency interpretation "without any change in the governing statute[,]" Justice Scalia concludes these waters are outside NPDES requirements. Id. at 722. This refutes any contention that Justice Scalia endorses the conduit or direct hydrological connection theories—neither of which can be found within CWA text and both of which drastically expand the NPDES program.

Plaintiffs and EPA note Justice Scalia's explanation of the "indirect discharge" rationale, where discharges from point sources that "do not emit 'directly into' covered waters, but pass 'through conveyances' in between[]" can require an NPDES permit. Id. at 743. His statement, however, does not concern groundwater. It in no way purports to hold that groundwater is a qualifying

conveyance or that disposal of pollutants into groundwater via wells is subject to NPDES permitting.

More broadly, it does not dispense with the requirement that intervening conveyances must be point sources. The cases Justice Scalia cites demonstrate that intervening conveyances must themselves be point sources. Op. Br. at 27-28.

This Court's decisions do as well. This Court recognizes that ***how*** pollutants reach navigable waters matters for NPDES permitting. Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1152-53 (9th Cir. 2010); Trs. for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984).

This Court's explanation of other Court of Appeal decisions also confirms point sources ***must*** be how pollutants enter navigable waters for NPDES permitting to apply. For example, this Court cites United States v. Plaza Health Labs., Inc., 3 F.3d 643, 646 (2d Cir. 1993), for the proposition that "'point sources' are 'physical structures and instrumentalities that systematically act as a means of conveying pollutants ***from*** an industrial source ***to*** navigable waterways[.]'" Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 510 (9th Cir. 2013) (emphasis added).

Additionally, this Court cites Sierra Club v. Abston Constr. Co., 620 F.2d 41 (5th Cir. 1980), for the proposition that "point source 'conveyances' are 'the means by which pollutants are ***ultimately*** deposited into a navigable body of water[.]'"

Ecological Rights, 713 F.3d at 509 (emphasis added). EPA incorrectly claims Abston held an NPDES permit is required if a point source discharge travels via nonpoint source flow to navigable waters. EPA Br. at 15 n.3. Abston specifically rejects any argument that "would merely require a showing of the original sources of the pollution to find a statutory point source, regardless of how the pollutant found its way from that original source to the waterway." Abston, 620 F.2d at 44. Instead, it holds that "surface runoff collected or channeled . . . constitutes a point source discharge." Id.

It is undisputable—the Lahaina wells do not require an NPDES permit even under the indirect discharge rationale. Like the district court, EPA concedes groundwater is not a point source. EPA Br. at 2, 11. Because pollutants from the Lahaina wells reach navigable water through nonpoint source groundwater, the Rapanos indirect discharge rationale is inapplicable.

B. Plaintiffs' And EPA's Cases Are Inapplicable

Trying to force the indirect discharge rationale onto the County's well disposal, Plaintiffs claim two cases cited in Rapanos require an NPDES permit when pollutants enter navigable waters from nonpoint sources. Ans. Br. at 30-33. They misread both cases.

Plaintiffs imply that in Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005), the Tenth Circuit held an NPDES permit is required for

pollutants released from an elevator shaft into an underground drainage tunnel that releases pollutants into navigable waters even though the tunnel is not a point source. But in actuality, the Tenth Circuit ***reversed*** the grant of summary judgment, holding there were genuine disputes of material fact regarding NPDES permit applicability. Id. at 1149-1150. Furthermore, the Tenth Circuit views the tunnel as a point source, writing "[w]e stress, again, that it is the combination of the El Paso shaft, a point source, and the Roosevelt Tunnel, ***another point source***, that establishes the connection to a navigable stream. This system of infrastructure distinguishes our case from the migration and seepage cases." Id. at 1146 n.6 (emphasis added).

Plaintiffs similarly misstate the holding of Concerned Area Residents for Env't ("CARE") v. Southview Farm, 34 F.3d 114 (2d Cir. 1994). This case concerns CWA liability for the discharge of liquefied manure from a truck onto a field that flows into navigable waters. Plaintiffs incorrectly contend that whether the fields were themselves point sources is irrelevant to the holding. Ans. Br. at 32-33. But the Second Circuit explains a point source on the field is critical. "[T]he swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source." CARE, 34 F.3d at 118. It does not matter whether the truck is a point source discharge because run off collecting in the swale and pipe is. Id. at 118-119.

For its part, EPA cites Rapanos cases where CWA liability attaches even though the defendant did not own the point source discharging pollutants into navigable waters. The County's position, however, is not premised on its lack of control over groundwater. The indirect discharge rationale does not apply because it still requires the discharge ***to*** navigable waters be ***from*** a point source regardless of ownership.

EPA's other citations are no better. EPA argues CWA liability attaches "where discharges of pollutants have moved from a point source to navigable waters over the surface of the ground or by some other means." EPA Br. at 14. However, the two cases EPA cites neither address disposal of pollutants into wells nor refute that it matters ***how*** pollutants reach navigable waters.

Friends of Sakonnet v. Dutra, 738 F. Supp. 623 (D.R.I. 1990), does not speak to whether a point source must be the means by which pollutants discharge to navigable waters. The case concerns raw sewage from a failed septic system flowing into a river. Dismissing arguments that others were responsible (*e.g.*, the homeowners), the Dutra court concludes the septic system owners need an NPDES permit because their system qualifies as a "privately owned treatment works." Id. at 629-630.

O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981), involves pollutants from landfill pond overflows, collection-tanks, and broken

berms that discharge to a neighboring creek. Unremarkably, the court concludes these are point sources. Id. at 655. How pollutants reach the creek is not at issue. Nonetheless, the court notes a swale connecting to a stream near the landfill and a stream running below the landfill, with both streams feeding the creek. Id. at 652. Thus, like the other indirect discharge cases, O'Leary involves an initial point source that discharges to navigable waters through other point sources.

Bottom-line, the indirect discharge cases support the County. They teach that if pollutants are not discharged directly into navigable waters, they must be conveyed to navigable waters through a point source to come within the indirect discharge theory of liability. Because groundwater is a nonpoint source, the indirect discharge theory is inapplicable to the Lahaina wells.

III. EPA'S DIRECT HYDROLOGICAL CONNECTION THEORY DOES NOT TRIGGER NPDES PERMITTING

Disavowing the district court's reasoning, EPA urges adoption of its "direct hydrological connection" theory. This theory requires an NPDES permit when pollutants from a point source move "directly" (as opposed to "generally") through groundwater to navigable waters. Like the conduit theory, however, EPA's theory appears nowhere in the CWA legislative history, statute, or regulations. It is a theory EPA conceived two decades after the CWA amendments and "would bring about an enormous and transformative expansion in EPA's regulatory authority

without clear congressional authorization." UARG, 134 S. Ct. at 2444. This Court should reject it as an alternative basis for affirmance.

A. EPA's Theory Does Not Apply To Well Disposal

This Court should reject EPA's theory because it does not apply to the disposal of pollutants into wells. None of the Federal Register preambles Plaintiffs and EPA cite concern well disposal or the discharge/disposal distinction. EPA also has not applied its theory in practice—EPA has not required an NPDES permit for any UIC well nationwide.

Rather, EPA's view has consistently been that well disposal falls outside its CWA jurisdiction. As discussed in the County's Opening Brief (Op. Br. at 25-26), EPA acknowledged its lack of jurisdiction immediately after enactment of the CWA. EPA's view is reflected in its NPDES regulation requiring permit limit adjustments to exclude injection well disposal because EPA lacks CWA authority over the disposal of pollutants into wells. 40 C.F.R. § 122.50(a). EPA's reference to prior NPDES permits does not change this. Neither permit it cites (EPA Br. at 30) involves UIC well disposal.

EPA's 1979 Federal Register response to comments about the NPDES permit limit exclusion for well disposal (then § 122.41, now § 122.50) confirms EPA lacks CWA authority over well disposal.

> The provision does not regulate well injection, directly or indirectly, nor does it place any limit on the amounts

> which may be injected, the rates of injection, or the design and operation of injected wells. Instead, § 122.41 focuses on the remaining wastes which are being discharged into waters of the United States. The purpose of the regulation is to ensure that the Act's treatment requirements are met for discharges into surface waters.

44 FR 32854, 32870 (June 7, 1979).

EPA reiterates this identical position again in 1984.

> The regulation does not regulate, directly or indirectly, the wastewater that is diverted. No limits are placed on the amount of wastewater that may be diverted, nor upon how that waste is treated or disposed of. Generally, such activities are outside the scope of the NPDES program.

49 FR 37998, 38022 (Sept. 16, 1984).

EPA's brief does not acknowledge § 122.50(a) or EPA's contemporaneous statements that well disposal is outside the scope of NPDES permitting. Plaintiffs do, but provide a muddled response. They cite a Federal Register discussing water quality standards on Indian reservations having nothing to do with § 122.50(a). Ans. Br. at 37. They also claim EPA's reference to Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977), when proposing § 122.50(a), somehow means well disposal can be an "indirect" discharge requiring an NPDES permit. Ans. Br. at 37-38. Plaintiffs are wrong. Exxon does not address well disposal into groundwater with a connection to surface water. In fact, the Fifth Circuit notes EPA did not argue this, and "express[es] no opinion on what the result would be if that were the state of facts." Exxon, 554 F.2d at 1312 n.1.

Plaintiffs' additional argument that the lack of defined outfalls for the effluent's entry into the ocean does not matter because NPDES permit requirements can be waived or adjusted is tantamount to saying the NPDES program is inapplicable to well disposal. In NPDES parlance, an outfall is where pollutants discharge to navigable waters. See, e.g., 40 C.F.R. § 122.26(b)(9) ("Outfall means a point source as defined by 40 CFR 122.2 [to mean "a discernible, confined and discrete conveyance"] . . . where a municipal separate storm sewer discharges to waters of the United States . . . ."). If outfall requirements are waived, there is no discharge of a pollutant requiring an NPDES permit.

EPA's SDWA UIC well regulations are also consistent with the exclusion of well disposal from NPDES permitting. In 1999, EPA published its Class V UIC well study. 66 FR 22971 (May 7, 2001). Hawai'i's sewage treatment effluent wells were evaluated as part of the study. Id. at 22978. Although the study identified concerns with "[n]utrient enrichment of surface waters, with resulting algal blooms" in off-shore waters near injection wells, EPA determined "no additional Federal regulation" of the wells, beyond Class V UIC permits, is "needed." Id.

In short, EPA's direct hydrological connection theory does not provide an alternative basis for upholding the district court's judgment. The theory does not apply to the disposal of pollutants into UIC wells.

B. EPA's Theory Is Not Entitled To Deference

This Court should also reject the direct hydrological connection theory because it is not entitled to deference. Chevron deference is appropriate only when a statutory ambiguity or gap requires agency input. Chevron USA., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-844 (1984). EPA never identifies any gap or ambiguity in the CWA that its theory fills. This is because there is none. The statutory language is clear. "Discharge of pollutant" is a defined term requiring "addition of any pollutant ***to*** navigable waters ***from*** any point source . . . ." 33 U.S.C. § 1362(12) (emphasis added). The term excludes disposal of pollutants into wells. Because Congress has spoken directly to the issue and its intent is clear, Chevron mandates adherence to the statute as written and forecloses further inquiry. Chevron, 467 U.S. at 842-843; UARG, 134 S. Ct. at 2445 ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

EPA also has not offered a reasoned explanation for its interpretation. Encino Motorcars, LLC v. Navarro, No. 15-415, 2016 WL 3369424, at *7 (U.S. June 20, 2016) ("One of the basic procedural requirements of administrative

rulemaking is that an agency must give adequate reasons for its decisions."). Likewise, EPA offers no explanation how its interpretation fits within the statutory scheme. The preambles EPA references do not ground the theory in the CWA's text and contradict one another with respect to legislative history. EPA's 1991 preamble acknowledges the "strong" legislative history refuting its theory. The 2001 preamble claims Congress never addressed groundwater hydrologically connected to surface water. Despite the various preamble references, no regulation incorporates the direct hydrological connection language. Accordingly, EPA deference is inappropriate because there is no final agency action to review.[1] Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997).

Further, EPA's litigation position here is at odds with its regulatory pronouncements that it lacks CWA authority over disposal of pollutants into wells. Indeed, EPA consistently renewed UIC permits for the Lahaina wells (Op. Br. at 9) without requiring an NPDES permit at the same time its preambles announced the direct hydrological connection theory. An "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice[]' . . . . and receives no Chevron

[1] Relying on Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002), Plaintiffs suggest Skidmore deference may be applicable. Because EPA has not included its theory in any regulations, it is not.

deference." Encino Motorcars, 2016 WL 3369424, at *7 (internal citation omitted).

EPA also has not explained in any intelligible way the distinction between a "direct" hydrological connection (which requires an NPDES permit) and a "general" one (which does not). "Direct hydrological connection" is "not [a] term[] as to which there can be but one view of the law. Indeed, [it] fairly exude[s] ambiguity and invite[s] debate." Vigil v. Leavitt, 381 F.3d 826, 834 (9th Cir. 2004).

EPA's brief compounds this ambiguity. Notwithstanding its supposedly "longstanding policy," for the first time ever, EPA articulates a new test to identify a direct hydrological connection. Under EPA's test, a "direct" connection exists when pollutants "proceed from the point of injection to the surface water without significant interruption." EPA Br. at 26.

Agency litigation positions announced for the first time in an appeal are not entitled to deference. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-213 (1988). This is especially the case here given EPA's test is incoherent.

EPA says a relevant distinguishing factor under its new test is "the type of pollutant" being transported. EPA Br. at 26. This makes no sense. The CWA does not differentiate based on the type of pollutant. It requires an NPDES permit for "the discharge of ***any*** pollutant." 33 U.S.C. § 1311(a) (emphasis added). The

type of pollutant cannot meaningfully differentiate between a direct and general connection. EPA certainly does not explain how it can.

EPA says the distance pollutants travel also matters under its test. EPA Br. at 26. EPA fails to explain the divider between direct distance and general distance. Here, effluent appears in the ocean roughly a half-mile southwest of the Lahaina facility with a 15 month average transit time. Op. Br. at 6. The groundwater/effluent mixture is modeled to enter the ocean over as much as two miles of coastline depending on which wells operate, with more than 90% entering the ocean as diffuse flow with no identifiable entry point. Id. at 3-7. EPA fails to explain why this qualifies as a direct discharge rather than a general one.

Also relevant according to EPA is whether the pollutant from a point source "can or does reach jurisdictional surface waters." EPA Br. at 26. This cannot distinguish between a "direct" or "general" connection either. In both instances pollutants can and do reach jurisdictional waters. If they did not, there would be no connection.

Plaintiffs and EPA also ignore that NPDES permitting cannot cover all of the County's injection. It is unknown where wells 1 and 2 enter the ocean (despite two dye tests on well 2). The Tracer Study recognizes wells 3 and 4 flow comes out in locations other than the submarine springs, and that more than 90% enters the ocean as unidentifiable diffuse flow. Op. Br. at 4-7. Plaintiffs and EPA cite no

authority for an NPDES permit covering only a "partial discharge" because there is none. The inability to identify all points of entry to navigable waters (*i.e.*, discernible, confined and discrete conveyance outfalls) confirms well disposal is properly excluded from NPDES permitting.

EPA's own actions underscore the impracticability of its theory. EPA has always known effluent from the wells reaches the ocean. Nonetheless, EPA funded and regulated the Lahaina facility since its inception and permitted the Lahaina wells since 1995. EPA also pursued two separate enforcement actions against the County—a county-wide sewer system CWA action and a Lahaina well specific action. Despite all this, EPA never said the Lahaina wells required an NPDES permit until January 2015, two years after completion of the Tracer Study. Op. Br. 9-10, 13-16. And it was not until filing its brief that EPA raised, let alone attempted to apply, its direct hydrological connection theory to the wells. Moreover, EPA has never applied its theory to the hundreds of thousands of UIC wells throughout the country.

An interpretation—like EPA's direct hydrological connection theory—that defies explanation and consistent application is not the product of reasoned analyses and not entitled to deference. As one court writes: "EPA has offered no formal or consistent interpretation of the CWA that would subject discharges to groundwater to the NPDES permitting requirement." Umatilla Waterquality

Protective Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1319 (D. Or. 1997).

C. Prior Case Law Does Not Support EPA's Theory

Plaintiffs and EPA cite district court cases they say hold that discharges to groundwater require NPDES permits. None of these cases, however, concern the disposal of pollutants into UIC wells. Instead they involve different types of point source releases into groundwater and uncritically apply EPA's "hydrological connection" theory. They are unpersuasive for the following reasons:

- They acknowledge, yet ignore, legislative history confirming Congress excluded groundwater from NPDES permitting. See Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175 (D.P.R. 2009); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1163 (D. Idaho 2001); McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988), vacated on other grounds, 47 F.3d 325 (9th Cir. 1995);

- They rely on EPA preambles that do not concern UIC wells and do not warrant deference. See Nw. Envtl. Def. Ctr. v. Grabhorn, Inc., No. CV-08-548-ST, 2009 WL 3672895 (D. Or. Oct. 30, 2009); Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, 141 F. Supp. 3d 428 (M.D.N.C. 2015);

- They exclusively cite the CWA's policy protecting the nation's waters without harmonizing it with the Act's fundamental policy of preserving states'

rights over groundwater. See Sierra Club v. Colo. Ref. Co., 838 F. Supp. 1428 (D. Colo. 1993); Friends of the Coast Fork v. Turner, No. 95-6105-TC, 1996 U.S. Dist. LEXIS 22083 (D. Or. July 8, 1996); N. Cal. River Watch v. Mercer Fraser Co., No. 04-4620 SC, 2005 WL 2122052 (N.D. Cal. Sept. 1, 2005); Coldani v. Hamm, No. Civ. S-07-660 RRB EFB, 2007 WL 2345016 (E.D. Cal. Aug. 16, 2007);

- They disregard the CWA's requirement that a discharge must be ***from*** a point source ***to*** navigable waters. See Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997); Wash. Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wash. 1994). They also fail to address cases that apply the point source discharge requirement and conclude discharges into groundwater that reach navigable waters do not require NPDES permitting (Op. Br. at 36); and/or

- They summarily cite cases listed above or the district court's decision here without further analysis. See Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc., 1:10-00084, 2011 WL 1357690 (M.D. Tenn. Apr. 11, 2011); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995); Martin v. Kan. Bd. of Regents, Civ. A. No. 90-2265-0, 1991 WL 33602 (D. Kan. Feb. 19, 1991); Sierra Club v. Va. Elec. & Power Co., No. 2:15cv112, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015); S.F. Herring Ass'n v. Pac. Gas & Elec. Co., 81 F. Supp. 3d 847 (N.D. Cal. 2015).

Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994), the seminal appellate case on point, explains why decisions cited by Plaintiffs and EPA are not persuasive. As the Seventh Circuit explains:

> 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 . . . . On several occasions the EPA has noted the potential connection between ground waters and surface waters, but it has left the regulatory definition alone . . . . Collateral reference to a problem is not a satisfactory substitute for focused attention in rule-making or adjudication. By amending its regulations, the EPA could pose a harder question.

Id. at 965-966. Both United States v. Johnson, 437 F.3d 157, 161 n.4 (1st Cir. 2001), vacated on other grounds, 467 F.3d 56 (1st Cir. 2006) and Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) rely on Oconomowoc to conclude releases into groundwater do not require NPDES permits.

Plaintiffs' citation to Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985), is irrelevant. Quivira merely affirms EPA regulation over defendant's operation because of "surface connection[s] with navigable waters independent of the underground flow." Id. at 129.

IV. FACTUAL DISPUTES PRECLUDE SUMMARY JUDGMENT

The County maintains its disposal of pollutants into wells is excluded from NPDES permitting and that the conduit and direct hydrological connection theories

conflict with CWA legislative history, statutory structure and language, and implementing regulations. Nonetheless, to the extent this Court believes either theory applies to the Lahaina wells, factual disputes dictate remand.

EPA's new "without significant interruption" test raises factual questions that cannot be determined on summary judgment. According to EPA, relevant evidence to determine whether a point source discharge reaches navigable waters "without significant interruption" "includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source." EPA. Br. at 26.

The Tracer Study amplifies the factual disputes that exist over whether effluent from the Lahaina wells reaches the ocean without significant interruption. It acknowledges "significant uncertainties" about where wells 3 and 4 flow enters the ocean, with flow potentially deeper and further off shore. Similarly, it could not identify where well 2 flow enters the ocean, and it did not evaluate well 1 flow. Op. Br. at 4-8. To date, it remains unknown where flow from wells 1 and 2 enter the ocean. Thus, time, distance, and traceability for much of the flow from the Lahaina wells has yet to be determined.

EPA excuses the lack of evidence for wells 1 and 2 (and ignores the wells 3 and 4 uncertainties) because the County acknowledged "'a hydrogeologic connection between wells 1 and 2 and the ocean.'" EPA Br. at 28. However, EPA

concedes a mere hydrological connection is insufficient to require an NPDES permit. Instead, under its theory, the connection must be "direct." Id. at 24, 30-33. The County ***never*** conceded there is a direct hydrological connection between any of the Lahaina wells and the ocean.

A critical fact underlying application of both theories is the Tracer Study's calculation of 64% of wells 3 and 4 flow entering the ocean in the vicinity of the submarine seeps. Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980, 998 (D. Haw. 2014) (ER 77-78); EPA Br. at 27. The County vigorously disputes the accuracy of this estimate, with its own expert calculating a maximum flow of 11-12%. Op. Br. at 7-8, 42. These factual disputes cannot be resolved on summary judgment. 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."); Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1037-1039 (9th Cir. 2000) (conflicting expert testimony establishes "genuine issues of fact" precluding summary judgment.).

V. THE COUNTY LACKED FAIR NOTICE OF NPDES PERMIT APPLICABILITY

The undisputed facts confirm the County lacked fair notice. Knowing effluent would reach the ocean even before facility construction, EPA:

- Required an NPDES permit for surface water discharges from the facility but not the wells;

- Relied on UIC permitting to conclude the facility complied with NPDES requirements;
- Issued UIC permits for the wells without requiring an NPDES permit at the same time EPA referenced "direct hydrological connection" in scattered Federal Register preambles;
- Resolved a County-wide enforcement action to stop discharges without an NPDES permit but did not require an NPDES permit for the wells;
- Received repeated inquiries from the County and environmental groups—before and after the 2010 EPA letters Plaintiffs and EPA cite—questioning NPDES applicability, yet never required an NPDES permit;
- Proceeded with a Lahaina well specific consent agreement after the 2010 letters and still did not require an NPDES permit; and
- Did not require an NPDES permit even after Plaintiffs sued.

Op. Br. at 9-15.

Moreover, neither Plaintiffs nor EPA contest that HDOH consistently told the County it did not need an NPDES permit. Only HDOH's views matter for fair notice because it administers Hawai'i's EPA-approved NPDES program. Plaintiffs' suggestion that EPA's "'broad authority to oversee state permit programs[]'" somehow trumps HDOH's authority is wrong. Ans. Br. at 63. EPA elected not to proceed with any enforcement options specifically provided for

under the CWA including notifying the County or HDOH of alleged violation, issuing a compliance order, or commencing a civil action. 33 U.S.C. § 1319(a).

Plaintiffs and EPA's attempt to overcome all this by relying on January and March 2010 EPA letters that never mention NPDES permitting or reference "direct hydrological connection" is meritless. These letters provide notice "that the discharges ***might*** be covered by the CWA[]"—not fair notice. EPA Br. at 35 (emphasis added). EPA's actions confirm this. In July 2010, EPA agreed to Tracer Study funding to help evaluate whether an NPDES permit was warranted. In April 2011, EPA needed "coastal seep sampling"—the very issue raised in EPA's January 2010 letter—before any NPDES permitting decision could be made. Even after the 2013 Tracer Study's release, EPA could not say if an NPDES permit was necessary. It took EPA until 2015 to make this decision. Op. Br. at 10, 14, 16 (ER 261-266, 256, 237-238).

The letters' references to CWA §§ 308(a) and 401(a) do not provide fair notice. 33 U.S.C. §§ 1318(a); 1341(a). Both provisions address CWA requirements distinct from NPDES permitting. See Op. Br. at 56 (addressing § 401 water quality certification). Section 308(a) authorizes EPA to require testing for "any point source." 33 U.S.C. § 1318(a). EPA's authority is not tied to a "discharge" from a point source; the existence of a point source is sufficient. The

discharge/disposal distinction is at issue in this appeal, not whether a well itself can be a point source.

Plaintiffs likewise misread 40 C.F.R. § 122.2 when arguing an owner/operator of a point source is subject to § 308 only if it is "'subject to regulation under the NPDES program.'" Ans. Br. at 62. NPDES permitting applies to the owner/operator of a facility or activity "subject to regulation under the NPDES program." 40 C.F.R. § 122.2. Contrary to Plaintiffs' argument, someone can be an owner/operator of a point source without being subject to NPDES permitting, *e.g.*, an owner/operator of a point source that does not discharge to navigable waters.

Plaintiffs contend the CWA makes penalties mandatory irrespective of fair notice. Ans. Br. at 55. Taking a similarly extreme position, EPA contends lack of fair notice is merely a factor "informing a civil-penalty amount." EPA Br. at 35. Both attempts to kill the fair notice doctrine fail. Fair notice is a constitutional imperative under the Due Process Clause. Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm'n, 142 F.3d 1179, 1182 (9th Cir. 1998). Irrespective of the CWA's penalty provisions, a person cannot be fined absent fair notice. United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008).

The remainder of Plaintiffs' arguments—none of which EPA supports—are meritless as well.

- Cites for their "penalties-are-mandatory" argument do not address whether a party can be fined under the CWA though it lacks fair notice, much less hold that the CWA supersedes the Due Process Clause. Op. Br. at 52.

- The district court's opinion did not provide fair notice as Due Process requires fair notice prior to a lawsuit. Neither Plaintiffs nor the district court cite any case holding that a district court's liability ruling suffices because none exists. Id. at 59-60

- Plaintiffs' notice letter did not provide fair notice because fair notice is grounded in the Government's obligation to provide unambiguous standards, not third party statements. Id. at 53-54.

- Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002), is irrelevant. Without reference to fair notice, this Court says a CWA citizen suit can proceed even if the agency determines a permit is not necessary.

- Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998), also should be disregarded. In this case, this Court distinguishes between point source and nonpoint source pollution, concluding § 401 applies to the former but not the

latter. This holding in no way means the Lahaina wells need an NPDES permit because EPA required a § 401 certification before renewing its UIC permits.

Finally, EPA's aside that the County "would seemingly be precluded" from challenging the fair notice ruling because it stipulated to the penalty amount is off base. EPA Br. at 32. The settlement agreement and order expressly preserves the County's right to appeal all rulings. ER 1-2, 102-119. This preserves the County's appellate right. Slaven v. Am. Trading Transp. Co., 146 F.3d 1066, 1070 (9th Cir. 1998) (party may appeal judgment entered with its consent if appellate rights preserved); see also S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 704 (9th Cir. 2007) (stipulation providing remedies in the event of liability preserves appellate rights in CWA citizen suit).

CONCLUSION

This Court should reverse the district court's rulings and grant summary judgment in favor of the County. The district court obliterates the CWA's distinction between the "discharge" and "disposal" of pollutants. It radically expands the CWA and reverses 40 years of settled regulatory understanding. The practical consequences of its ruling on agency resources will be overwhelming. Its decision should not stand.

DATED: July 1, 2016

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CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a), the foregoing reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,994 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: July 1, 2016

MICHAEL R. SHEBELSKIE

By: s/Michael R. Shebelskie
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Attorney for Defendant/Appellant County of Maui

9th Circuit Case Number(s) 15-17447

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