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COUNTY OF MAUI

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI`I

HAWAI`I WILDLIFE FUND, a Hawai`i non-profit corporation, SIERRA CLUB-MAUI GROUP, a non-profit corporation, SURFRIDER FOUNDATION, a non-profit corporation, and WEST MAUI PRESERVATION ASSOCIATION, a Hawai`i non-profit corporation,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

CIVIL NO. CV 12-00198 SOM BMK

MEMORANDUM IN SUPPORT OF DEFENDANT COUNTY OF MAUI'S MOTION TO DISMISS COMPLAINT FILED APRIL 16, 2012

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MEMORANDUM IN SUPPORT OF DEFENDANT COUNTY OF MAUI'S MOTION TO DISMISS COMPLAINT FILED APRIL 16, 2012

I. INTRODUCTION

Neither the U.S. Environmental Protection Agency ("EPA") nor the State Department of Health ("DOH") has determined that the operation of injection wells at the Lahaina Wastewater Reclamation Facility ("Lahaina Facility") requires a National Pollutant Discharge Elimination System ("NPDES") permit. Yet Plaintiffs seek an injunction forcing the County of Maui ("County") to "secure, and comply with[,] the terms of an NPDES permit" (Complaint ¶ 6) that neither regulatory agency is in a position to issue at this time.

County disposes of treated wastewater through four injection wells at the Lahaina Facility pursuant to Underground Injection Control ("UIC") permits issued by EPA and DOH. Request for Judicial Notice, Exhibit "A", ¶¶ 15-27. The County of Maui's existing permits for the Lahaina Facility include UIC Permit No. HI596001, issued by the EPA. Id., ¶¶ 22-27. County made a timely application to EPA to renew its federal UIC permit on December 1, 2004. Id., ¶ 24. The federal permit has been administratively extended while EPA considers whether to renew the permit with the existing requirements intact, or whether to impose different terms and conditions. See id. Ongoing but not yet completed scientific studies may inform the permit renewal decisions of EPA and DOH. See id., Exhibit "A", ¶¶ 25-26; Exhibit "D". The Plaintiffs' complaint does not allege any violations of the EPA and DOH permits under which the County is currently operating.

The Clean Water Act, 33 U.S.C. § 1251 et seq., "generally prohibits the 'discharge of any pollutant' . . . from a point source' into the navigable waters of the United States." Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999)(citations omitted). Plaintiffs allege (without any citation to any legal authority) that "[t]he discharge of pollutants into subsurface water with a

hydrological connection to navigable waters is subject to the [Clean Water Act], including the NPDES permitting requirements." Complaint, ¶ 30. However, the current state of the law on this subject is far from clear.

Some courts have held that the Clean Water Act does not regulate any type of discharges into groundwater, including those where there is a hydrological connection to surface waters through which pollution reaches surface waters. See Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994) [migration of pollutants from defendant's retention pond through soil and groundwater into surface waters did not violate the Clean Water Act]; Kelley for and on Behalf of People of State of Mich. v. U.S., 618 F.Supp. 1103 (D.C.Mich. 1985); Umatilla Waterquality Protection Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F.Supp. 1312 (D. Or. 1997) [groundwater discharges not subject to Clean Water Act jurisdiction, despite a hydrologic connection]; see also Town of Norfolk v. US Army Corps of Engineers, 968 F.2d 1438, 1450-1451 (1st Cir. 1992) [deferring to the U.S. Army Corps of Engineers' definition of "waters of the United States" as excluding groundwater]; cf. Exxon Corp. v. Train, 554 F.2d 1310, 1312 (5th Cir. 1977)[holding that EPA cannot regulate groundwater pollution, but expressing "no opinion" on whether the Clean Water Act applies to wastes disposed of into injection wells that migrate from there into surface waters].

Other courts have reached the opposite conclusion, holding that if there is a hydrological connection to surface waters and the discharge to groundwater adversely affects surface water, the discharge requires an NPDES permit. See Williams Pipe Line Co. v. Bayer Corp., 964 F.Supp. 1300, 1319 (S.D. Iowa 1997); Washington Wilderness Coalition v. Hecla Mining Co., 870 F.Supp. 983 (E.D. Wash. 1994) [hydrological connection brings groundwater discharges within jurisdiction of the Clean Water Act].

The Ninth Circuit Court of Appeals has not addressed the issue in connection with injection wells, but in a somewhat analogous wetlands case has ruled that a pond that was part of a larger wetland adjacent to a navigable river could be regulated as a "water of the United States" under the Clean Water Act if there was a "substantial nexus" between the wetland and the navigable waterway. N. Calif. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007). In Healdsburg, cert. denied, 552 U.S. 1180 (2008), there was "an actual surface connection" between the pond in question and the Russian River. Id., 496 F.3d at 1000. The opinion also noted that "a change in the water level in one immediately affect[ed] the water level in the other." Id.

In Rapanos v. U.S., 547 U.S. 715 (2006), which also involved wetlands rather than injection wells, the U.S. Supreme Court split 4-4-1 in addressing how the term "navigable waters" should be construed under the Clean Water Act. The plurality opinion, written by Justice Scalia for four members of the Court, would have interpreted the term "waters of the United States" to include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geologic features' that are described in ordinary parlance as 'streams[,] . . . oceans rivers, [and] lakes.'" Id., 547 U.S. at 739. The dissenting opinion, written by Justice Stevens for four members of the Court, expressed the view that wetlands that were not directly adjacent to navigable waters, but which were adjacent to tributaries of navigable waters, should be protected under the Clean Water Act, reasoning that "wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditional navigable waters downstream." Id., 547 U.S. at 807-808. Justice Kennedy wrote a concurring opinion. In his view, wetlands that are adjacent to a non-navigable tributary of a navigable waterway can be regulated under the Clean Water Act only if there is a "significant nexus" between the wetlands and the navigable waterway. Id., 547 U.S. at 786.

Unlike the factual circumstances out of which Healdsburg and Rapanos arose, the thorny legal issue in the instant case is whether a discharge into the ground that may reach groundwater that may eventually seep into the ocean requires an NPDES permit in addition to federal and state UIC permits already in place. The EPA grants considerable leeway to itself and to state regulatory agencies to determine whether discharges to groundwater require an NPDES permit:

> "As a general matter, groundwater is not considered a water of the United States; therefore, discharges to groundwater are not subject to NPDES requirements. If, on the other hand, there is a discharge to groundwater that has a "hydrological connection" to a nearby surface water, the discharger may be required to apply for an NPDES permit because the discharge is then considered a water of the United States. States may choose to require NPDES permits for discharges to groundwater; jurisdiction over groundwater resources is maintained by States." [1]

To date, the EPA has not required County to apply for an NPDES permit and the State of Hawaii has not chosen to require an NPDES permit for disposal of treated wastewater into the Lahaina Facility's injection wells. See Complaint, ¶ 9; Request for Judicial Notice, Exhibit "D".

As interesting and cutting-edge as the issue may be, this Court need not decide at this time whether Plaintiffs' First Claim for Relief states a claim upon which relief may be granted, because the question is not ripe, and as a result, the Court lacks subject matter jurisdiction over the controversy. The EPA and DOH

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[1] EPA Office of Wastewater Management Publication, *Water Permitting 101*, a copy of which is attached to County's Request for Judicial Notice as Exhibit "B". The cited language is found at Exhibit "B", p. 6, emphasis added.

are currently in the process of renewing the permits under which the Lahaina Facility operates. See Request for Judicial Notice, Exhibit "A", ¶ 25–26. Scientific studies that might provide a factual foundation for any future agency decision on the subject are not yet complete. See Request for Judicial Notice, Exhibits "C", "D". [EPA official quoted in the press as saying that scientific studies[2] will be completed by the end of the year; that the studies will provide "a much clearer picture" about the situation, allowing regulators to base their decisions on "the best science we can to make whatever further decisions need to be made"; and that EPA has not yet determined whether preliminary results from the studies are enough to trigger an NPDES permit.][3]

Until ongoing scientific studies are concluded, the necessary factual record will not be complete enough to allow this Court to determine whether disposal of treated wastewater in Lahaina through injection wells operating under state and federal permits is a "direct discharge" from a "point source" into the "navigable waters of the United States" or the "waters of the United States" as those terms are

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[2] These ongoing studies were referenced in ¶ 58 of Plaintiffs' complaint, but the complaint does not mention that the studies have not yet been completed. See Request for Judicial Notice, Exhibits "C" and "D."

[3] County offers these hearsay statements pursuant to Rule 807 of the Federal Rules of Evidence. As shown in the accompanying Declaration of Jane E. Lovell, pursuant to 40 C.F.R. § 2.401 et seq., the EPA has denied permission to the hearsay declarant, David Albright, to provide a sworn declaration in this action. As a result, County hereby gives notice to Plaintiffs of County's intent to rely on Mr. Albright's hearsay statements. County further gives notice that Mr. Albright's contact information is c/o USEPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, telephone number 415-972-3971, fax number 415-947-

used in the Clean Water Act, 33 U.S.C. § 1362. Moreover, § 401 of the Clean Water Act, 33 U.S.C. § 1341, provides that no federal permit or license can be issued that may result in a discharge to waters of the United States unless the state certifies that the discharge is consistent with standards and other water quality goals . Unless the state waives the requirement, an entity without a § 401 certification from the state cannot obtain a federal NPDES permit.

The County submitted a § 401 certification application to DOH in May 2010. That application is currently under review by the DOH's Clean Water Branch. Request for Judicial Notice, Exhibit "A", ¶ 26.

While the EPA and DOH are actively reviewing County's existing UIC permits, while the DOH awaits the results of ongoing scientific studies to reach a decision on County's pending § 401 certification application, and while EPA considers whether the County needs an NPDES permit, judicial intervention in the regulatory process is unwarranted. Under these circumstances, the Court may determine that it should abstain from taking action on Plaintiffs' complaint pursuant to the primary jurisdiction doctrine, because the two regulatory agencies with specialized expertise, EPA and DOH, are currently assessing whether the County needs an NPDES permit.

Furthermore, although the Plaintiffs seek an order from this Court "requiring defendant immediately to apply for and comply with the terms of an NPDES permit" (Complaint, Prayer for Relief, ¶ 3), County cannot issue an NPDES

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permit to itself. DOH is the permitting authority in the State of Hawaii. See 33 U.S.C. § 1342(b); Save Our Bays & Beaches v. City & Cnty. of Honolulu, 904 F.Supp. 1098, 1105 (D. Haw. 1994). Neither EPA nor DOH has been named as a party to this action. Without the active participation of DOH and EPA, "the court cannot accord complete relief among existing parties." Rule 19(a)(1)(A), Federal Rules of Civil Procedure ("Fed.R.Civ.P.") Therefore, the Plaintiffs' complaint should be dismissed on the additional ground of failure to join indispensable parties, without prejudice to filing an amended complaint adding these parties if the matter should ever become ripe.

Finally, should the Court decide that the controversy is ripe, the Plaintiffs' complaint does not state a claim for relief because of the EPA's "diligent prosecution" of the County, 33 U.S.C. § 1365(b)(1)(B), resulting in the entry of a Consent Agreement occurring between the time that the Plaintiffs' notice of intent to sue letter was sent and the date on which their complaint was filed. Request for Judicial Notice, Exhibits "A", "E". In addition, the Plaintiffs' Second Claim For Relief fails to state a claim, because there is no private right of action or separate claim for relief under the Clean Water Act for a failure to apply for an NPDES permit. See 33 U.S.C. §§ 1365(a)(1)(A) and (B); Envt'l Protection Information Center v. Pacific Lumber Co., 469 F.Supp. 2d 803, 826-827 (N.D. Cal. 2007); see also Service Oil v. EPA, 590 F.3d 545, 551 (8th Cir. 2009)[EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit

application]. Therefore, County seeks, in the alternative, an order from this Court dismissing the action pursuant to Rule 12(b)(6), Fed.R.Civ.P.

II. STANDARD OF REVIEW

The Court may dismiss a complaint for lack of subject matter jurisdiction either because the allegations of the complaint are insufficient to confer subject matter jurisdiction on the court, or because subject matter jurisdiction is lacking in fact. Thornhill Publ'g Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.1979), overruled on other grounds by Hartford Fire Ins. Co. v. California, 509 U.S. 794, 799 (1993).

While a dismissal based on the insufficiency of the allegations of the complaint requires the court to consider all allegations of material fact to be true, and to construe them in the light most favorable to the nonmoving party, Federation of African Amer. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir.1996), when a court examines whether there is subject matter jurisdiction in fact, the court need not presume that the plaintiff's factual allegations are true. Instead, the trial court evaluates for itself the existence of subject matter jurisdiction, Thornhill, supra, 594 F.2d at 733, and may consider evidence outside of the pleadings in doing so. McCarthy v. U.S., 850 F.2d 558, 560 (9th Cir. 1988). As they are the parties invoking federal jurisdiction, plaintiffs have the burden of establishing their entitlement to sue. Rattlesnake Coalition v. EPA, 509 F.3d 1095, 1102 n. 1 (9th Cir. 2007). Therefore, once a defendant presents evidence challenging the existence of subject matter jurisdiction, the plaintiffs must

present affidavits or other evidence to satisfy their burden of proving that the court does in fact possess subject matter jurisdiction. Colwell v. Dept. of Health and Human Servs., 558 F.3d 1112, 1121 (9th Cir. 2009).

In ruling on a motion to dismiss brought pursuant to Rule 12(b)(1), Fed.R.Civ.P., the court must first inquire whether it has jurisdiction over the matters raised in the complaint. That jurisdictional inquiry begins with Article III, section 2, of the U.S.Const., which limits federal courts to deciding cases or controversies. Plaintiffs must show that an actual controversy exists at all stages of the case in order to avail themselves of adjudication by a federal court. Arizonans for Official English v. Arizona, 520 U.S. 43, 63 (1997). No case or controversy exists if the dispute is not ripe. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.), cert. denied, 493 U.S. 993 (1989) [whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction].

Inasmuch as subject matter jurisdiction is a threshold issue governing the court's power to hear the case, a Rule 12(b)(1) challenge should be decided before other grounds for dismissal, because the other grounds will become moot if dismissal is granted. Alvares v. Erickson, 514 F.2d 156, 160 (9th Cir. 1975), cert. denied, 423 U.S. 874.

Rule 12(b)(6) authorizes dismissal of a complaint that fails "to state a claim upon which relief can be granted." 12(b)(6), Fed.R.Civ.P. Under Rule 12(b)(6), review is ordinarily limited to the contents of the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). A 12(b)(6) motion is treated as

a motion for summary judgment if matters outside the pleadings are considered. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996). However, courts may "consider certain materials -- documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice -- without converting the motion to dismiss into a motion for summary judgment." U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). In addition, courts may consider evidence necessarily relied upon by the complaint if "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). Such a document may be treated as part of the complaint and the court may thus assume its contents are true for the purposes of a 12(b)(6) motion to dismiss. Id., 450 F.3d at 448.

III. ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction Because The Case Is Not Ripe.

In the United States Supreme Court's leading case on the ripeness doctrine, the court articulated a two-part test for determining whether a controversy is "ripe" for judicial resolution. The court must (1) evaluate the fitness of the issues for judicial decision and (2) consider the hardship to the parties of withholding court consideration. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977). As Justice Stevens has observed, both aspects of the inquiry involve the exercise of judgment, rather than the application of hard and fast black-letter law, but the

first prong is the more important consideration. Nat'l Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803, 814 (2003)(Stevens, J., concurring).

1. The Issues Raised In Plaintiffs' Complaint Are Not Fit For Judicial Decision.

The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190, 200-01(1983) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967)). Moreover, a claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. U.S., 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580-81 (internal quotation marks omitted)).

In Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC, 531 F.Supp.2d 747 (S.D.W.Va. 2008), the court held that a Clean Water Act citizen suit was ripe for adjudication. The complaint alleged that discharge of selenium from mining operations violated the defendant's original NPDES permit issued by a state agency. Although plaintiffs contended that the agency's modification of permits was invalid, the original permits and compliance orders which purported to modify the permits had been finalized by the agency.

Here, by contrast, the regulatory agencies are in the process of reviewing and renewing the Lahaina Facility's existing permits. Request for Judicial Notice, Exhibit "A", ¶¶ 24-26. Once DOH and EPA have concluded the permitting process, and issued new permits (potentially with new terms and conditions), Plaintiffs' concerns may be allayed. Furthermore, waiting until the existing permits are re-issued before mandating compliance with a different permitting scheme will spare the County from potentially conflicting permit requirements.

2. The Hardship To County, EPA, and DOH Of Allowing This Case To Proceed Outweighs Any Hardship To Plaintiffs If The Case Is Dismissed.

In their complaint, Plaintiffs suggest that the Lahaina Facility's injection wells are contributing "non-toxic pollutants" (including enterococcus bacteria) to the ocean. See Complaint, ¶ 13. The Consent Agreement and Final Order entered into between the County and EPA effective September 28, 2011 requires the County to take a number of immediate steps, including monitoring and treating all injected effluent to DOH's R-2 standards. Request for Judicial Notice, Exhibit "A", ¶¶ 46-50. By December 31, 2013, County must have an approved non-chlorine disinfection method in place to treat any treated wastewater to be disposed of through injection wells. Id., ¶¶ 51-52. Therefore, the Court can be reassured that under the supervision of the EPA, the County is protecting the public from any potential harmful contact with bacteria in wastewater treated at the Lahaina Facility.

Plaintiffs' complaint also expresses concern over the health of the coral reefs in the vicinity of the Lahaina Facility, and in particular, allege that the Lahaina Facility's injection wells are responsible for "[e]xcess input of nutrients like nitrogen and phosphorus" that "accelerate the growth of . . . nuisance algae that form harmful blooms in the West Maui marine waters . . . ." Complaint, ¶ 54. The complaint mentions, without citations, two studies in support of their claims in this regard.

The USGS study mentioned in paragraphs 51 through 53 of the complaint notes that nitrogen and phosphorus can enter the marine environment through a number of pathways, including "stormwater run-off, sewage effluents (injected, septic, cesspool, leaking sewer lines, and spills at transfer stations), agricultural and urban fertilizers, and nonpoint background sources such as natural soil fixation, decomposition of forest litter, and atmospheric deposition." Request for Judicial Notice, Exhibit "F," p. 3. Other potential sources contributing to algal growth and degradation of coral reefs are, according to USGS, "introduction of alien algae species [and] population reductions in algal grazers such as fish and urchins". Id. The USGS report contains a specific caveat that it "does not determine causes of macroalgal blooms nor the role of nutrients in macroalgal growth." Id., p. 4. Indeed, the report notes that "moderate to large accumulations of algae have been documented at beaches spanning tens of miles of coastline on Maui, a much greater extent than that of the relatively limited municipal injection plumes." Id., citations omitted.

In light of these factors, imposing onerous permit requirements on the County in the absence of a complete factual record will not guarantee the health of coral reefs or eradicate periodic algae blooms. However, requiring the County to "apply for and obtain" an NPDES permit now, while DOH and EPA are considering County's UIC permit renewal applications, may lead to inconsistent or duplicative conditions and requirements, as well as potentially needless expenditure of millions of dollars from public funds. In the absence of a full factual record that can only be supplied by scientific studies that have not yet been completed, the Court cannot be assured that particular permit conditions, let alone the assessments of fines and penalties, are warranted.

Therefore, the hardship to the County, the EPA, and DOH of allowing the case to proceed outweighs any hardship to Plaintiffs if the case is dismissed due to lack of subject matter jurisdiction based on the ripeness doctrine.

B. EPA And DOH Have Primary Jurisdiction.

In the alternative, the Court may determine that it should abstain from taking action on Plaintiffs' complaint pursuant to the primary jurisdiction doctrine, while the two regulatory agencies with specialized expertise, EPA and DOH, assess whether the County needs an NPDES permit in addition to the UIC permits currently in effect. The regulatory agencies' decisions may ultimately render much, if not all, of the relief sought by Plaintiffs moot.

"The common law doctrine of primary jurisdiction provides courts with flexible discretion to refer certain matters to the specialized competence of an

administrative agency which . . . is exercising continuing jurisdiction over those matters. Specifically, primary jurisdiction abstention is appropriate when the agency and the court entertaining Plaintiffs' claims have concurrent jurisdiction, and the claims are properly cognizable in federal court, but the court believes it prudent to decline to exercise its jurisdiction in favor of the agency's expertise." Friends of Santa Fe County v. LAC Minerals, Inc., 892 F.Supp. 1333, 1349 (D. N.M. 1995).

"Normally, where a court refrains from exercising jurisdiction on primary jurisdiction grounds, judicial proceedings are simply stayed until the administrative agency has had an opportunity to consider the issues. However, dismissal may be warranted in some cases, particularly where no party is prejudiced thereby." Montgomery Envtl. Coal. Citizens Coordinating Comm. on Friendship Heights v. Wash. Suburban Sanitary Comm'n, 607 F.2d 378, 382 (D.C. Cir. 1979).

In Montgomery, the court invoked the primary jurisdiction doctrine in affirming the trial court's dismissal of a citizen suit where an NPDES proceeding was currently pending before the EPA. The court reasoned that that letting the EPA complete the permit process would "allow[] the agency to bring its expertise to bear before the court reaches a final decision[.]" Id., 607 F.2d at 381. The court noted that the principal issue pending before the EPA was "the appropriate level and quality of discharge from [defendant's sewage treatment plant], the same discharge which [plaintiff] seeks to abate in this action." Id. at 381-382. The

court also observed that the effect of the defendant's discharge on the water quality of the Potomac River would be the focus of the permit proceedings. Id. at 382. Therefore, the court determined, the conclusions reached in the ongoing EPA proceedings were likely to be highly relevant to the issues raised in plaintiff's complaint, and the resolution of the ongoing permit proceedings might render unnecessary any decision in the federal court. Id. at 382.

Here, as in Montgomery, the EPA is currently reviewing the County's application for renewal of the County's existing UIC permit, and administrative proceedings are pending on technical issues concerning the permit. See Request for Judicial Notice, Exhibit "A", ¶¶ 25–26. Of necessity, those proceedings will determine the appropriate level and quality of discharge from the County's wastewater treatment facility into the County's injection wells, the same discharge that Plaintiffs seek to abate in this action. The regulatory agencies are also currently considering whether to issue an NPDES permit to the County. See id.; see also Exhibits "C" and "D". Under these circumstances, it would be appropriate for the Court to defer to the administrative agencies' primary jurisdiction.

C. The Complaint Should Be Dismissed Due To Plaintiffs' Failure To Join Indispensable Parties.

A party is necessary or indispensable if in its absence, "the court cannot accord complete relief among existing parties," or the party has "an interest relating to the subject of the action" and its absence may "impair or impede its ability to protect that interest" or "leave an existing party subject to a substantial

risk of incurring double, multiple, or otherwise inconsistent obligations . . . ." Rule 19(a)(1)(A)(B), Fed.R.Civ.P. Rule 12(b)(7), Fed.R.Civ.P. allows a defendant to seek dismissal of an action if the plaintiffs fail to join an indispensable party as defined by Rule 19.

Here, EPA and the state DOH are indispensable parties, because the relief sought by the Plaintiffs cannot be obtained with their active participation. In Hawaii, EPA has delegated the responsibility for administering Hawaii's NPDES program to DOH. 33 U.S.C. § 1342(b); Save Our Bays & Beaches v. City & Cnty. of Honolulu, supra, 904 F. Supp. at 1105. DOH is currently processing the County's § 401 water quality certification application. Request for Judicial Notice, Exhibit "A", ¶ 26. No federal permit or license can be issued that may result in a discharge to waters of the United States unless the state certifies that the discharge is consistent with standards and other water quality goals. Clean Water Act, § 401, 33 U.S.C. § 1341. Likewise, the EPA has not yet determined whether the County's Lahaina Facility requires an NPDES permit. Request for Judicial Notice, Exhibit "A", ¶ 25; Exhibits "C" and "D".

The County cannot issue an NPDES permit to itself; the permit must be issued by DOH after it acts on the County's pending § 401 water quality certification application. Without the active participation of the regulating agencies in the lawsuit, Plaintiffs cannot obtain the relief they seek. Any conditions imposed by court order may subject the County to multiple or inconsistent obligations. Therefore, the Court should either require Plaintiffs to

amend their complaint to name the EPA and DOH as parties, or, in the alternative, the County requests the Court to dismiss the complaint for failure to name indispensable parties.

D. The Complaint Fails To State Claims Upon Which Relief May Be Granted

Should the Court determine that it has subject matter jurisdiction over the controversy, the Court should nonetheless dismiss the Plaintiffs' complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. because it fails to state claims upon which relief may be granted.

1. The Plaintiffs' Claims Are Barred By EPA's Diligent Prosecution Against County's Lahaina Facility.

A citizen suit under the Clean Water Act is barred if the EPA or a state regulatory agency "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(B). "The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987). The Supreme Court noted that the "legislative history of the Act reinforces this view of the role of the citizen suit." Id. The Senate Report stated that "'[t]he Committee intends the great volume of enforcement actions [to] be brought by the State,'" and that citizens are allowed to bring suit only "'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" Id., quoting S. REP. No.

92-414, p. 64 (1971). Therefore, as the Supreme Court explained, a citizen's role in enforcing the Act is "interstitial" and should not be "intrusive." Id., 484 U.S. at 61.

The plaintiff in a citizen suit bears the burden of proving the regulatory agency's prosecution was not diligent. Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 890 F.Supp. 470, 486–87 (D.S.C.1995). The burden is heavy, because the enforcement agency's diligence is presumed. Id., 890 F.Supp. at 487.

Here, the Plaintiffs' notice of intent to sue letter was mailed to the County, the Director of the State Department of Health, and to the EPA on June 28, 2011. Request for Judicial Notice, Exhibit "E". On September 28, 2012, the EPA entered a Final Order and Consent Agreement,[4] pursuant to which the County agreed to install costly upgrades at the Lahaina Facility by December 31, 2013. Request for Judicial Notice, Exhibit "A", ¶¶ 51-52. In entering into the Consent Agreement, the Director of the EPA's Water Division noted that the County had submitted a timely application for renewal of the federal UIC permit for the Lahaina Facility on December 1, 2004. Id., ¶24. The Consent Agreement recites that the conditions of the permit that expired on June 11, 2005 remain in force until the effective date of the new permit. Id. The Consent Agreement further provides that "[a]s of June 1, 2011, EPA has not issued a final decision on

[4] The Consent Agreement was largely based on the Safe Drinking Water Act, 42 U.S.C. § 300f et seq., the federal law directly governing the operation of injection wells. The Consent Agreement noted that EPA is still considering the County's permit renewal application, and that the EPA's decision cannot be made until after DOH finishes processing the County's Clean Water Act Section 401 water quality

[County's] permit application, in part, because EPA has determined that [County] must obtain a Clean Water Act Section 401 water quality certification from the State in order for EPA to grant a permit." Id., ¶ 25. The Consent Agreement acknowledged that the County had submitted an application to DOH for a Section 401 water quality certification on May 7, 2010, and that DOH "is currently processing the application." Id., ¶ 26.

The Consent Agreement and related ongoing agency consideration of the County's § 401 water quality certification should not be intruded upon by the Plaintiffs. Instead, the Court should dismiss the suit pursuant to Rule 12(b)(6), Fed.R.Civ.P. and 33 U.S.C. § 1365(b)(1)(B) in order to allow EPA and DOH to enforce the Consent Agreement and to complete the scientific studies that will allow the regulatory agencies to determine whether the Lahaina Facility requires an NPDES permit in addition to the state and federal permits already in effect.

2. There Is No Private Right Of Action For Failure To Apply For An NPDES Permit.

The Clean Water Act contains a citizen suit provision, which authorizes any citizen to file a civil action to enforce an effluent standard in an NPDES permit, subject to certain limitations. 33 U.S.C. § 1365(a), (b). Subsection (a) of the citizen suit provision, entitled "Authorization; jurisdiction," provides that, "[e]xcept as provided in subsection (b) of this section . . . , any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter."

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certification application. Request for Judicial Notice, Exhibit "A", ¶ 25-26.

The Clean Water Act specifies the exclusive statutory and regulatory violations upon which a citizen suit may be based. 33 U.S.C. § 1365(a)(1). "Federal Courts may not imply a private right of action under any provision of the Clean Water Act not expressly referenced in the statute's citizen suit provision." Bd. Of Trustees of Painesville Tp. v. City of Painesville, Ohio, 200 F.3d 396, 399 (6th Cir. 1999), citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981).

The Clean Water Act allows citizens to sue private defendants for violation of "an effluent standard or limitation", 33 U.S.C. § 1365(a)(1)(A), or "an order issued by the Administrator of a State with respect to such a standard or limitation", 33 U.S.C. § 1365(a)(1)(B). The citizen suit provisions of the Clean Water Act do not provide for a private right of action based on a theory that the defendant failed to apply for an NPDES permit, the basis of Plaintiffs' Second Claim for Relief.

In Pacific Lumber, supra, private plaintiffs brought a claim for unpermitted discharges under 33 U.S.C. § 1311(a), and another claim under 33 U.S.C. § 1342 for "failing to apply for and obtain" NPDES and state industrial stormwater permits. Plaintiff sought summary judgment on the § 1342 claims based on defendant's admission that it had no NPDES permit during the relevant time period. Id., 469 F.Supp.2d at 824-827. The court denied the motion, holding, inter alia, that §1342 "confers no independent cause of action" other than for noncompliance with an existing NPDES permit." Id., 469 F.Supp.2d at 827.

In Service Oil, supra, the court held that while 33 U.S.C. § 1342 implements the NPDES permitting program, the citizen suit provision of the Clean Water Act does not afford any relief "until a permit issues." Service Oil, 590 F.3d at 551.

Therefore, County asks that the Plaintiffs' Second Claim for Relief be dismissed pursuant to Rule 12(b)(6), Fed.R.Civ.P. because it fails to state a claim upon which relief may be granted.

IV. CONCLUSION

The issues raised by Plaintiffs' complaint are not ripe, and as a result, the Court lacks subject matter jurisdiction over the controversy. The EPA and DOH are currently in the process of renewing the existing UIC permits under which the Lahaina Facility operates, and scientific studies that might provide a factual foundation for any future agency decision are not yet concluded. Until ongoing scientific studies are concluded, the necessary factual record will not be complete enough to allow this Court to determine whether disposal of treated wastewater in Lahaina through injection wells operating under state and federal UIC permits is a "direct discharge" from a "point source" into the "navigable waters of the United States" or the "waters of the United States" as those terms are used in the Clean Water Act.

Because the EPA and DOH are actively reviewing County's existing UIC permits, the DOH is waiting for the results of ongoing scientific studies to reach a decision on County's pending § 401 certification application, and EPA has not yet determined whether the County needs an NPDES permit, the Court may abstain

from taking action on Plaintiffs' complaint pursuant to the primary jurisdiction doctrine. Moreover, the relief sought by Plaintiffs cannot be obtained without the active participation of EPA and DOH, who are indispensable parties to the action.

If the Court should decide that it does have subject matter jurisdiction, the case should be dismissed on the alternative ground that the complaint fails to state a claim for relief due to the EPA's "diligent enforcement" efforts against the County as evidenced by the Consent Agreement entered into by the EPA and the County subsequent to the Plaintiffs' notice letter, but before suit was filed. Moreover, there is no private right of action for failure to apply for an NPDES permit.

Therefore, for the reasons stated above, the County respectfully requests the Court to grant the County's motion to dismiss.

DATED: Wailuku, Maui, Hawaii, May 9, 2012.

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COUNTY OF MAUI

By /s/ Jane E. Lovell
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