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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAWAI'I WILDLIFE FUND,
SIERRA CLUB – MAUI GROUP,
SURFRIDER FOUNDATION, AND
WEST MAUI PRESERVATION
ASSOCIATION,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

CIVIL NO. 12-cv-00198 SOM-KJM

DEFENDANT COUNTY OF
MAUI'S ANALYSIS ON EPA
GUIDANCE MEMORANDUM
DATED JANUARY 14, 2021;
EXHIBITS D-58 and D-59;
CERTIFICATE OF SERVICE

The Honorable Susan Oki Mollway

September 8, 2021

**DEFENDANT COUNTY OF MAUI'S
ANALYSIS ON EPA GUIDANCE MEMORANDUM
DATED JANUARY 14, 2021**

The District Court has allowed counsel to submit supplemental briefs addressing pages 7 and 8 of the January 14, 2021 EPA Guidance Memorandum (“Guidance”) received from the court on July 16, 2021. (ECF No. 471). *See* attached **Exhibits D-58 and D-59**.

The EPA Guidance points out that, where an agency’s interpretation differs from that of a court, the agency “remains the authoritative interpreter of the statutes it administers.” **Exhibit D-59**, page 7. One factor “routinely considered” by the EPA concerns “design and performance” of the system where pollutants may be released, so that the “scope and extent” of the “functional equivalent analysis . . . and factors” can be identified. *Id.*

The extensive record in this case has established that system design and performance of the Lahaina Wastewater Reclamation Facility (“LWRF”) does operate as: **1)** a water reclamation, reuse, and recycling facility, providing significant treatment and disinfection of wastewater,¹ **2)** integrally in conjunction with an injection regime that also provides substantial attenuation to pollutants and further treatment to the wastewater after injection.

The LWRF components include treatment and containment systems, and storage of treated wastewater for extensive reuse in irrigation, in addition to injection

¹ *See* ECF No. 259 (Settlement Agreement and Order re Remedies); *see also* Maui, 140 at 1483-84; ECF Nos. 173-7; 173-10; 173-28, PageID # 6077; 173-36, 173-42; 204-4; 204-5, and 204-9.

wells. (footnote 1). The capacity and operation of these system components for the abatement of discharges of pollutants is already a matter of record. Id. Based on the EPA Guidance, review of the LWRF facility itself is relevant to the analysis on whether the “. . . system is the ‘functional equivalent’ of a direct discharge from a point source to a water of the United States.” **Exhibit D-59**, page 8. The design and performance of the LWRF’s subsurface injection and attenuation regime are also already an undisputed matter of record. ECF Nos. 440-21, ¶¶ 10 through 14; 440-28; and 440-29, not exclusively.

The record clearly supports a finding that the LWRF does in fact “promote dilution, adsorption or dispersion,” “operate[s] to treat or attenuate pollutants, [and] uses the . . . subsurface to treat, provide uptake or, or retain pollutants” as discussed in the EPA Guidance Memorandum. **Exhibit D-59**, p. 7-8; *see also* ECF No. 440-3, ¶¶ 15 through 20, not exclusively. Most important here, undisputed discharge data in evidence demonstrates *removal of 86% of nitrogen* from injected treated wastewater, the primary pollutant which as a matter of record *both* the Plaintiffs and the District Court have expressly concerned themselves with as the alleged agent of harm to West-Maui’s nearshore reefs.

Given the LWRF’s inceptive and historical water reuse and recycling program, in conjunction with the undisputed evidence demonstrating the injection regime’s promotion of profound changes to the chemistry, specific identity, and

further removal of pollutants from wastewater introduced into the subsurface, the EPA Guidelines clearly favor not requiring an NPDES permit in this case.

The County respectfully submits the Court should follow EPA Guidance.

DATED: Wailuku, Maui, Hawai'i, July 21, 2021.

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