

DAVID L. HENKIN #6876
MAHESH CLEVELAND #11023
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai‘i 96813
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: dhenkin@earthjustice.org
mcleveland@earthjustice.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

HAWAI‘I WILDLIFE FUND, a	)	CIVIL NO. 12-00198 SOM KJM
Hawai‘i non-profit corporation,)	
SIERRA CLUB - MAUI GROUP, a	)	PLAINTIFFS’ STATEMENT RE:
non-profit corporation, SURFRIDER	)	ENVIRONMENTAL PROTECTION
FOUNDATION, a non-profit	)	AGENCY’S <i>COUNTY OF MAUI</i>
corporation, and WEST MAUI	)	GUIDANCE; CERTIFICATE OF
PRESERVATION ASSOCIATION, a	)	COMPLIANCE; DECLARATION OF
Hawai‘i non-profit corporation,	)	DAVID L. HENKIN; EXHIBITS “A”
	)	– “C”
Plaintiffs,)	
)	
v.	)	<u>Judge:</u> Hon. Susan Oki Mollway
)	
COUNTY OF MAUI,	)	<u>Related to ECF No. 471</u>
)	
Defendant.)	
)	
)	

PLAINTIFFS’ STATEMENT RE: ENVIRONMENTAL PROTECTION AGENCY’S *COUNTY OF MAUI* GUIDANCE

The Environmental Protection Agency's ("EPA's") guidance expressly states that it "does not have the force and effect of law" and "does not bind the public in any way." Guidance at 1 n.1. Moreover, EPA is considering overhauling this guidance, which the last administration issued during its final week. *See* Ex. A. There is no need to amend the summary judgment order to address this nonbinding, short-lived, unpersuasive guidance, particularly as no party cited it.

EPA's identification of an eighth "functional equivalent" factor—focusing on "the design and performance of the system or facility"—represents an impermissible attempt by the last administration, after losing in the Supreme Court, to reopen the loophole that *County of Maui* shut. Guidance at 7. The Clean Water Act ("CWA") imposes "strict liability." 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting). Liability turns on the consequences of a facility's discharge, not whether the polluter intended those consequences. None of the factors the Supreme Court listed as potentially relevant requires consideration of the polluter's intent. For time and distance, generally "the most important factors," the relevant facts are how far and how quickly pollutants travel through groundwater to navigable waters, not whether the polluter intentionally designed its system to lengthen or shorten the time or distance somewhat. *Id.* at 1477.

This is not to say that intent is never relevant. Where, as here, a polluter intentionally designs its facility to use groundwater as a sewer to convey pollutants

to navigable waters, that fact supports finding that the discharge pipe “can properly be considered the origin of pollution that travels through groundwater,” triggering liability. *Id.* at 1476; *see* ECF No. 431-1, PageID# 10352-54; ECF No. 432 ¶ 3; ECF No. 443, PageID# 11377; ECF No. 458 ¶ 11(a). The lack of such intent, however, does not negate liability. By including its new, intent-based factor, EPA’s guidance violates the CWA and risks creating a new loophole for polluters to exploit. *See* 140 S. Ct. at 1477 (EPA guidance must be “within statutory boundaries”).¹

Even if EPA’s guidance were valid, the record contains no evidence that Defendant “engineered” its wells to “affect” any of the *County of Maui* factors. Guidance at 7. Defendant designed its wells to “to discharge pollutants from a point source through groundwater and into [navigable waters],” *id.* at 8, without any of the design components that could affect how quickly pollutants reach the ocean, over what distance, through what material, at what level of dilution or chemical change, or over what area. *See id.* (listing design components that abate pollution); Ex. C: ECF No. 432-4, PageID# 10392-93, 10397.² It is undisputed that

¹ Plaintiffs and other conservation groups commented on this illegality. Ex. B.

² This Court gave Defendant full credit for the naturally occurring “nature-of-material and dilution/chemical-change.” ECF No. 468, PageID# 13475.

the wells' design results in 100 percent of injectate reaching the ocean, where it maintains its specific identity. ECF No. 468, PageID# 13467, 13469-70.

Nothing in the EPA guidance should affect this case's outcome.

Dated: Honolulu, Hawai'i, July 21, 2021.

/s/ Mahesh Cleveland

David L. Henkin

Mahesh Cleveland

EARTHJUSTICE

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify that the foregoing statement contains 500 words, exclusive of the caption and signature block. I have relied upon Microsoft Word to determine the word count.

Dated: Honolulu, Hawai‘i, July 21, 2021.

/s/ Mahesh Cleveland

David L. Henkin

Mahesh Cleveland

EARTHJUSTICE

Attorneys for Plaintiffs