EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 28, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mayor Alan M. Arakawa
Office of the Mayor, Maui County
200 S. High Street
Kalana O Maui Building, 9th Floor
Wailuku, HI 96793

Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Kyle Ginoza
Director
Maui County
Department of Environmental Management
2200 Main Street
One Main Plaza Building, Suite 100
Wailuku, HI 96793

Jared Blumenfeld
Regional Administrator
U. S. Environmental Protection Agency
Region 9
75 Hawthorne Street
Mail Code: ORA-1
San Francisco, CA 94105

Loretta J. Fuddy
Director
State of Hawai'i
Department of Health
1250 Punchbowl Street
Honolulu, HI 96813

RE: Notice of Intent to Bring Civil Suit For Violations of the Federal Clean Water Act

I am writing on behalf of the West Maui Preservation Association, Surfrider Foundation's Maui Chapter, Sierra Club-Maui Group, and Hawai'i Wildlife Fund (collectively, the "Community Groups") to notify you of serious and ongoing violations of the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1387, at Maui County's ("the County's") Lahaina Wastewater Reclamation Facility ("LWRF") in Lahaina, Maui. The purpose of this letter is to provide notice of the Community Groups' intent to file a civil action against the County for these violations, at least sixty days after the date of this letter, pursuant to section 505(b)(1)(A) of the

223 SOUTH KING STREET, SUITE 400, HONOLULU, HI 96813-4501
T: 808 599-2436 F: 808 521-6841 E: mpoffice@earthjustice.org W: www.earthjustice.org

Clean Water Act ("CWA"), 33 U.S.C. § 1365(b)(1)(A), which requires sixty days notice of alleged violations prior to commencement of a citizens' suit.

It has come to our attention that since the LWRF began using injection wells in 1982, the LWRF has been continuously discharging wastewater from its injection wells into the nearshore ocean waters via groundwater that is hydrologically connected to the navigable waters of the Lahaina coast. Such point source discharges constitute continuing violations of the CWA and are in direct violation of National Pollution Discharge Elimination System ("NPDES") permitting requirements. See 33 U.S.C. § 1342(b)(1)–(2). The County, as the owner and operator of these injection wells, is responsible for these violations and for remedying them.

We hope that this letter will convince the County to immediately investigate and correct these ongoing violations. To come into compliance with the CWA, the County must acquire an NPDES permit for the LWRF's point source discharge of pollutants to navigable waters. 33 U.S.C. § 1311(a). Until the County obtains an NPDES permit, these violations subject it to civil penalties under the CWA.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

In accordance with 40 C.F.R. § 135.3, notice is hereby given of the Community Groups' full names, addresses, and telephone numbers, as well as the full name, address, and phone number of their legal counsel:[1]

Community Groups:

West Maui Preservation Association
P. O. Box 11150
Lahaina, HI 96761
(808) 662-0432

Legal Counsel:

Earthjustice
Paul Achitoff
223 S. King Street, Suite 400
Honolulu, HI 96813
(808) 599-2436

[1] Please note that the Community Groups are represented by the undersigned counsel in this matter. You are hereby requested to contact Paul Achitoff of Earthjustice if you would like to discuss the contents of this letter.

Surfrider Foundation's Maui Chapter
P.O. Box 790549
Paia, HI 96779
(808) 575-2716

Sierra Club-Maui Group
P.O. Box 791180
Paia, HI 96779
(808) 579-9442

Hawai'i Wildlife Fund
P.O. Box 790637
Paia, HI 96779
(808) 280-8124

In November 2008, the U.S. Environmental Protection Agency ("EPA") held a public hearing on the County's Underground Injection Control ("UIC") permit application for continued injection of wastewater at the LWRF. Members and supporters of the Community Groups testified in favor of requiring the LWRF to obtain an NPDES permit to control its discharges, ultimately phasing out the injection wells, and redirecting treated wastewater for beneficial use on land. On May 22, 2009, then-Maui County Mayor Charmaine Tavares publicly announced the County's goal of phasing out injection wells, stating, "[o]ur goal is to use all of the water that's produced by our treatment plants and not put it down any injection wells."

In December 2009, representatives of the Community Groups, the EPA Region 9's Water Division Director, Alexis Strauss, and the undersigned met with Mayor Tavares to further urge the County to move expeditiously towards its announced goal of phasing out injection wells. The Community Groups have also had multiple discussions with the current Maui County administration after Mayor Arakawa took office in January 2011. Unfortunately, to date, the County has done virtually nothing to make its promises a reality, and the discharge of pollutants into Maui's nearshore waters in violation of the CWA continues unabated. The Community Groups therefore intend to initiate a civil action and seek judicial intervention unless the County ceases its violations by immediately obtaining an NPDES permit.

II. FACTUAL BACKGROUND

A. Lahaina Wastewater Reclamation Facility Injection Wells

The Maui County Department of Environmental Management, Wastewater Reclamation Division, operates the County's Wastewater Reclamation Facilities ("WWRFs"), which dispose of the majority of the wastewater they receive into injection wells. The LWRF receives wastewater generated by the West Maui communities and injects the majority of that wastewater into four injection wells. Injection wells have been in use at the LWRF since 1982. Although the LWRF is one of the largest wastewater recipients on Maui, the EPA does not currently require a particular level of disinfection for the wastewater injected into the injection wells. Wastewater that flows from the injection wells through groundwater and out to the nearshore waters receives minimal chlorination treatment, intended to prevent the undesirable clumping of bacteria and other organisms in the wells, not to achieve any particular level of disinfection. The effluent also undergoes some nitrogen removal, however the effluent injected into the wells still contains high levels of nutrients and pathogens.

Currently, the County holds an Underground Injection Control ("UIC") Program Permit for the LWRF, issued by EPA Region 9. LWRF's current UIC permit expired in June 2005, but the facility continues to operate under its previous permit's limits while the EPA considers the renewal terms for an updated, final UIC permit. 40 C.F.R. § 144.37. The final UIC permit has not yet been issued, nor has the County obtained its required CWA § 401 water quality certification for the UIC permit, and so the LWRF is still operating under its expired UIC permit limits which do not require adequate nutrient removal or satisfactory disinfection of the wastewater. Furthermore, when the final UIC permit is issued it will be insufficient to protect water quality because the requirements of the UIC permitting program do not take into account the designated uses or existing impairment of the nearshore West Maui waters, nor do they

require that permit limits be based on the water quality criteria of the receiving water, unlike an NPDES permit. The County must obtain and comply with an NPDES permit for the LWRF's ongoing discharges of pollutants into West Maui's nearshore waters in order to comply with the CWA. 33 U.S.C. § 1311(a).

C. Wastewater Discharges from LWRF Along The Maui Coastline

In the summer of 2007, a team from the University of Hawai'i at Mānoa conducted a survey of intertidal algae near the LWRF, looking for evidence of wastewater effluent on the coral reef and in surrounding waters. *See* Meghan Dailer, et al., Using $\delta^{15}N$ Values in Algal Tissue to Map Locations and Potential Sources of Anthropogenic Nutrient Inputs on the Island of Maui, Hawai'i, USA, 60 Marine Pollution Bull. 655–71 (2010) (hereinafter "Dailer Study").[2] The data collected in the study found highly elevated $\delta^{15}N$ levels in the algae in areas adjacent to the LWRF, demonstrating that the effluent followed a path from the injection wells into the nearshore coastal waters, where it was incorporated into algal tissue. Id. Algal blooms were also found at the sites near the LWRF. Id. at 12.

Additional scientific studies on the LWRF have reached the same conclusion. The United States Geological Survey ("USGS") conducted a study of the injection wells at Lahaina in 2009 that detected wastewater plumes in the West Maui coastal waters. Charles D. Hunt, Jr. and Sarah N. Rosa, A Multitracer Approach to Detecting Wastewater Plumes from Municipal Injection Wells in Nearshore Marine Waters at Kihei and Lahaina, Maui, Hawaii, U.S. Geological Survey Scientific Investigations Report 2009-5253 (hereinafter "USGS Study"). The USGS Study tested for a variety of different pollutants in the coastal waters and, like the Dailer Study, found significantly higher levels of $\delta^{15}N$ in algae suspended in the injected wastewater

[2] "$\delta^{15}N$" refers to a nitrogen isotope ratio used to distinguish between naturally-occurring nitrogen or nitrogen from fertilizer, and nitrogen derived from sewage. Naturally-occurring nitrogen and nitrogen from fertilizer have low levels of $\delta^{15}N$, while sewage has notably higher levels, especially if the facility where the sewage is handled employs biological nitrogen removal. Dailer Study at 1, 4.

plume than in other algae in the surrounding water. Id. at 68. USGS also concluded that there were other unique pollutants present at the Lahaina survey sites that originated at the LWRF. Id. at 68.

These scientific investigations leave no doubt: wastewater and its constituent pollutants are flowing from the point sources of the LWRF and discharging into West Maui's coastal waters.

Importantly, the County knows that the LWRF is discharging to nearshore waters because the discharge was part of the original design of the injection wells. A transcript from a public meeting in 1972 on the original Environmental Impact Statement conducted for the construction of the LWRF reveals that part of the engineering design for the plant acknowledged that wastewater would "eventually reach the ocean some distance from shore." Dept. of Public Works, County of Maui, Final Environmental Impact Statement for Construction of Sewer Collection System and Wastewater Reclamation Plant, Lahaina, Maui, Hawaii (prepared by Park Engineering, Inc.), March 27, 1973, p. 91. A decade later, the County responded to a public comment letter analyzing a 1983 Environmental Impact Statement for additional construction at the facility, referencing the "percolation" of water from the injection wells out into the ocean. Furthermore, in 1991, in an Environmental Assessment conducted for a proposed upgrade to the LWRF, the Department of Public Works for Maui County reported,

> [e]ffluent from the Lahaina Wastewater Reclamation Facility currently is discharged via injection wells to fractures in the underlying basalt. This effluent, via gravity and the pressure from up-gradient groundwater, flows toward the ocean. Treatment plant effluent contributes various constituents, including but not limited to, suspended solids, dissolved oxygen, and nutrients such as nitrogen and phosphorous to the ocean.

Dept. of Public Works, County of Maui, Lahaina Wastewater Reclamation Facility Stage 1 Design Environmental Assessment and Negative Declaration (prepared by Brown and Caldwell Consultants), September 1991, pp. 6-2–6-3.

The County has known about the contribution of pollutants from the LWRF injection wells to nearshore waters for decades and has knowingly refused to apply for an NPDES permit to limit the quantity and improve the quality of its discharge. This failure to obtain and comply with a permit has had significant, detrimental effects on West Maui ocean water quality and nearshore habitat.

D. Impact on the Offshore Environment

The wastewater currently being injected into the Lahaina injection wells undergoes some nutrient removal, but the treatment process fails to adequately remove nitrogen, phosphorous, and other pollutants. The excess nitrogen and phosphorous in the wastewater that flows out to sea is incorporated into algal tissue, promoting growth that smothers and degrades coral reefs. In 2006, the State Department of Health (DOH) reported to EPA and the U.S. Congress that the water quality at sites offshore from LWRF at Kahekili Beach, Maui and from Honokowai Point to Ka'anapali, Maui, were not meeting state water quality standards for turbidity, Total Nitrogen, Total Phosphorous, nitrates, and ammonia. See 2006 State of Hawaii Water Quality Monitoring and Assessment Report: Integrated Report to the U.S. Environmental Protection Agency and the U.S. Congress Pursuant to Sections 303(d) and 305(b), Clean Water Act (P.L. 97-117), 33 U.S.C. 1313(d) and 33 U.S.C. 1315(b), 178 (hereinafter "2006 Water Quality Monitoring and Assessment Report").

Surveys along the coastline in areas of high recreational use and heavy algal nitrogen signatures reveal consistent results: wastewater effluent is present in the Lahaina coastal environment. Dailer Study at 14. As the prevalence of algal blooms has increased, coral cover in the area has declined, from 55% to 33% over the past decade alone. Id. According to the Dailer Study, the levels of $\delta^{15}N$ found in the algae near freshwater seeps adjacent to the LWRF are the highest algal levels of $\delta^{15}N$ ever reported anywhere in the world. Id.

In addition to the detrimental effects the wastewater has on the physical environment, a USGS study has found that, "[e]xcessive growth of macroalgae interferes with the coral-reef ecosystem, and seaweed accumulation and odor nuisance on Maui beaches cause $20 million annual economic loss in removal expense and lost tourism." Charles D. Hunt, Jr., Ground-Water Nutrient Flux to Coastal Waters and Numerical Simulation of Wastewater Injection at Kihei, Maui, Hawaii, U.S. Geological Survey Scientific Investigations Report 2006-5283, 69 (2007). The wastewater discharge is having a costly, negative impact on tourism and recreational use of the West Maui waters. It is extremely expensive for the County to refuse to remedy these violations, and Maui residents and visitors are left with the adverse environmental and financial consequences.

E. Applicable State Water Quality Standards for the West Maui Coast

Importantly, per Hawai'i statute no person or public body is authorized to discharge pollutants to state waters except in compliance with the state's water pollution regulations. HAW. REV. STAT. § 342D-50(a); H.A.R. § 11-55-03. Pursuant to the federal Clean Water Act, all waters are required to be assigned designated uses that water quality standards are designed to support. 33 U.S.C. § 1313. The Hawai'i DOH, the state agency charged with setting state water quality standards, has designated the waters off the West Maui coast as Marine Class AA. The DOH's regulations provide:

> It is the objective of class AA waters that these waters remain in their natural pristine state as nearly as possible with an absolute minimum of pollution or alteration of water quality from any human-caused source or actions... The uses to be protected in this class ... are oceanographic research, the support and propagation of shellfish and other marine life, conservation of coral reefs and wilderness areas, compatible recreation, and aesthetic enjoyment.

H.A.R. §11-54-3.

The coastal waters of West Maui are also designated as a National Marine Whale Sanctuary by the U.S. Marine Protection, Research and Sanctuaries Act. 16 U.S.C. §1431–1445; 15 C.F.R. §922.181. The LWRF's current operations are incompatible with these designated uses and the area's status as a protected humpback whale sanctuary. The limits currently imposed in LWRF's UIC permit are not protective of the numeric water quality criteria assigned to these waters under H.A.R. §11-54-6(b). According to the LWRF's most recent UIC permit application reporting data, its wastewater effluent concentrations for Total Nitrogen, Ammonia, and Nitrate+Nitrite far exceed the levels allowable under state water quality regulations for open coastal waters, as set forth in H.A.R. §11-54-6(b). In addition, Hawai'i has a policy of water quality antidegradation that states, "[e]xisting uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." H.A.R. §11-54-1.1(a). Without an NPDES permit that regulates LWRF's discharges to nearshore waters, the detrimental effects on the existing designated uses and water quality will continue unabated.

The County must obtain an NPDES permit to regulate and monitor its discharge of pollutants from the LWRF to these coastal waters to avoid these violations of the Clean Water Act and applicable provisions of Hawai'i law. 33 U.S.C. § 1311(a). Despite the high quality designated uses and stringent water quality standards set for the marine waters on the West Maui coast, these waters are listed as impaired, and the LWRF is contributing to the waters' failure to meet designated water quality standards.

III. VIOLATIONS OF THE FEDERAL CLEAN WATER ACT

The County is discharging pollutants to navigable waters from the LWRF point sources without an NPDES permit in violation of the CWA. 33 U.S.C. § 1311(a). The CWA strictly regulates the discharge of pollutants into the waters of the United States by prohibiting "any

addition of any pollutant to navigable waters from any point source" in the absence of an NPDES permit. Id. § 1362(12); see also id. §§ 1311(a), 1342. The CWA defines "pollutant" to include the "sewage" and "municipal ... waste" that flow from the LWRF, id. § 1362(6), and the term "navigable waters" encompasses "the waters of the United States, including the territorial seas." Id. § 1362(7). A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to any . . . conduit, well, discrete fissure." Id. § 1362(14).

In the State of Hawai'i, DOH has been delegated authority by the U.S. EPA to issue NPDES permits pursuant to Section 402(b) of the Act. 33 U.S.C. § 1342(b). DOH sets forth requirements for applying for and obtaining an individual NPDES permit in Hawai'i. H.A.R. § 11-54-04. Notably, H.A.R. § 11-54-04(a) requires that a facility apply for an NPDES permit before the facility begins discharging pollutants, which the County failed to do for the LWRF before beginning to discharge pollutants from the injection wells into nearshore ocean water.

The Ninth Circuit Court of Appeals has held that a waste treatment facility violated the Clean Water Act by discharging pollutants from a pond without an NPDES permit when that pond was linked by an underground aquifer to a nearby river. Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 1000-01 (9th Cir. 2007). The Ninth Circuit stated, "[t]here is also an underground hydraulic connection between the two bodies ... thus there are several hydrological connections between the [p]ond's wetlands and the [river] that affect the physical integrity of the [r]iver." Id. at 1001; see also Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d. 175, 181 (D.P.R. 2009); Idaho Rural Council v. Bosma, 143 F. Supp. 2d. 1169, 1179-80 (D. Idaho 2001) ("Congress intended to regulate the discharge of pollutants that could affect surface waters of the United States, whether it reaches the surface water directly or through groundwater. ... [W]hether pollution is introduced by a visible, above-ground conduit or enters the surface

water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation to our nation's rivers and streams."); U.S. Steel Corp. v. Train, 556 F.2d 822, 852 (7th Cir. 1977); Washington Wilderness Coalition v. HECLA Mining Co., 870 F. Supp. 983, 990 (E.D. Wa. 1994) ("since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit."); Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("discharge of any pollutant into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater").

The County is in ongoing violation of the Clean Water Act and NPDES permitting regulations by discharging its wastewater into the nearshore marine environment in the absence of an NPDES permit. These violations are harming Maui residents and visitors alike by contributing to the failure of West Maui waters to support its designated uses: "propagation of shellfish and other marine life, conservation of coral reefs and wilderness areas, compatible recreation, and aesthetic enjoyment". H.A.R. §11-54-3.

IV. NOTICE OF INTENT TO SUE FOR VIOLATIONS OF THE CLEAN WATER ACT

By this letter, pursuant to CWA section 505, 33 U.S.C. § 1365, the Community Groups hereby put you on notice that after the expiration of sixty (60) days from the date of service of this notice, the Community Groups intend to file an enforcement action in federal court against the County to address its violations of the Clean Water Act at the LWRF. The Community Groups intend to seek civil penalties for past violations, injunctive relief to prevent further illegal discharges, and such other relief as is permitted by law. 33 U.S.C. §§ 1365(a) & (d). Pursuant to CWA section 309(d) and its implementing regulations, each of the above-described CWA violations subjects the County to a penalty of up to $32,500 per day per violation for all

violations prior to January 12, 2009, and civil penalties of up to $37,500 per day per violation for all violations occurring thereafter. Id. § 1319(d); 40 C.F.R. § 19.4.

The Community Groups are open to resolving this matter without the need for litigation. If you wish to pursue such discussions, we urge you to contact us promptly. Due to the serious, ongoing harm to West Maui waters from the LWRF's illegal discharges, we are unwilling to hold off on pursuing a judicial resolution of this matter if the parties are unable to reach agreement during the sixty-day notice period.

Sincerely,

Paul H. Achitoff
Attorney for the Community Groups