3RD CIVIL NO. C067130

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

ALBERT GARLAND
Plaintiff and Appellant,

v.

CENTRAL VALLEY REGIONAL WATER CONTROL BOARD
Defendant and Respondent.

On Appeal From The Superior Court Of SACRAMENTO County
Case No. 149654
The Honorable Stephen E. Benson

APPELLANTS OPENING BRIEF

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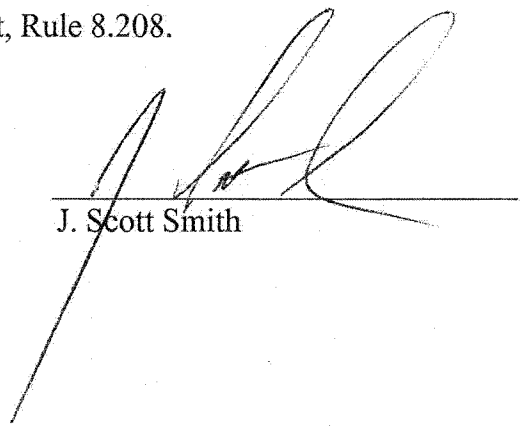
Appellant states they know of no other interested parties within the meaning of California Rules of Court, Rule 8.208.



J. Scott Smith

I. INTRODUCTION AND SUMMARY

At issue in this appeal is whether ephemeral drainage swales, ditches, and culverts can be found to be "waters of the United States" governed by the federal Clean Water Act, based on nothing more than a finding that the drainages eventually connect with a navigable waterway during high rain events. The answer to that question is indisputably no.

This is an appeal from an order denying a Petition for writ of Mandate brought by Albert Garland and Tehama Market Associates, LLP (hereinafter Petitioners), which challenged a Administrative Civil Liability (ACL) order issued by the Central Valley Regional Water Quality Control Board (hereinafter the Regional Board). The Regional Board assed a $250,000.00 fine based on a claimed violations of the Clean Water Act arising out of two storm events occurring in February of 2004. (AR Pt. I, p. 500014-500013.) According to the challenged order, sediment laden storm water flowed off of land Petitioners were in the process of developing and entered ephemeral drainages and ditches. (AR Pt. I p. 500018.) However, the Clean Water Act governs only discharges of pollutants into "waters of the United States." The ACL order found the ephemeral drainages to be waters of the United States simply because water flowing through these drainages during storm events connects with other drainages and eventually enters a navigable water way over a mile away. (AR Pt. II p500021-500023.) This finding was based on a flawed understanding of the reach of

the Clean Water Act and is contrary the Supreme Court's most recent case discussing this issue, *Rapanos v. United States* (2006) 547 U.S. 715.

The trial court here upheld the Board's decision by agreeing that any drainage which is "tributary" to a navigable water in the sense that during a storm event water can flow through drainage and eventually end up in a navigable water way is itself a water of the Untied States. (AR Pt. I p. 500282.) However, in *Rapanos* a majority of the Supreme Court rejected this very notion. Although *Rapanos* was a plurality decision and the court was badly fractured as to what constitutes such a water of the United States, the one point where the plurality and concurring opinions agree is that a mere transient connection to a navigable water is, in and of itself, not enough to find any ditch or swale a navigable water. The four justice plurality opinion was the most restrictive, holding that only relatively permanent bodies of water are waters of the United States. Justice Kennedy's concurring opinion held that the question of whether a watercourse is a protected water requires finding a substantial nexus between the watercourse and a navigable waterway. For this purpose, a substantial nexus requires a showing of the impact of the non-navigable water on the biological or chemical integrity of a navigable water.

The decisions of the Regional Board and the trial court fail under either test. There was no finding that any of the ephemeral drainages constitute relatively permanent flowing bodies of water. Nor was there a

finding of a substantial nexus in terms of a biological, ecological or chemical impact of the drainages on drainages and a navigable waterway. Since both the decisions of both trial court and the Regional Board were based on a fundamentally flawed view of the scope of the Clean Water Act, the judgment must be reversed.

II. STATEMENT OF THE CASE

A. Statutory Background

The federal Clean Water Act (CWA) prohibits any person from discharging pollutants "navigable waters" without a permit. (33 U.S.C. §§ 1311 subd. (a), 1342 subd. (b).) The term "discharge" is defined as "any addition of any pollutant to navigable waters from any point source." (33 U.S.C. § 1362(12).) A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C. § 1362(14).) Storm water runoff generally does not constitute a "point source" and thus the CWA does not regulate pollutants picked up from streets and other surfaces as storm water passes over it. (*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren* (9th Cir. 2002) 309 F.3d 1181, 1184.) However, when storm water runoff is collected into culverts and storm drains which then discharge the water into a navigable waterway,

those drains and culverts are point sources and which require permitting. (*Northwest Environmental Defense Center v. Brown* (9th Cir 2011) 640 F.3d 1063, 1071.)

The term "navigable waters" is defined to mean "the waters of the United States including territorial seas." (33 U.S.C. § 1362(7).) Thus, the CWA requires a permit before any pollutant can be discharged into a "water of the Untied States."

Permits for discharges covered by the CWA are issued pursuant to the National Pollutant Discharge Elimination System (NPDES). (33 U.S.C. § 1342 subd. (a).) The CWA authorizes states to adopt their own water quality standards, and where those standards are approved by the Environmental Protection Agency, the states are authorized to issue and enforce NPDES permits. (33 U.S.C. § 1342 subd. (b).) Pursuant to the Porter-Cologne Water Quality Control Act, (Cal. Water Code §§ 13000 et. seq.) California issues and enforces NPDES permits through a program administered by the State Water Resources Board and its nine Regional Water Quality Control Boards. (Cal. Water Code §§ 13372, 13377.) In accordance with this program, the regional boards are empowered to administratively impose fines for violations of the CWA. (Cal. Water Code § 13385 subd. (a)(5).)

Here, the Petitioners are alleged to have violated the Clean Water Act by discharging sediment laden storm water runoff into a water of the

United States without having been covered by an NPDES permit. (AR Pt. I p. 500020.)

B. The Property

Petitioner Tehama Market Associates was the owner of a parcel of property being developed for residential properties known as the Linkside Place Subdivision. (AR Pt. II p. The parcel is located in a rural area of Butt County outside the City of Oroville, California. (AR Pt. II, pp. 50-155.) Petitioner Albert Garland is named as the responsible corporate party. (AR Pt. I, pp. 500016-500017.) Development was to occur in three phases. Phase one consisted approximately 18 acres on the northern third of the property and in February of 2004 was the only portion of the property which had been partially developed. (AR Pt. II pp. 14, 141, 151.) The area had been cleared of vegetation, graded, and construction had begin on roadways and cul de sacs. (AR Pt. II p. 145.)

The site is bounded immediately to the north by highway 162. (AR Pt. II pp 150-151, 250.) To the north of Highway 162 is an area of open pasture land containing a number of drainage swales. (AR Pt. II pp 150-151, 250.) Immediately to the east of the property is a NEXRAD weather radar station, and immediately east of the NEXRAD station is the Table Mountain Golf Course. (AR Pt. II, pp. 150-151, 250.) To the east of the golf course is the Oroville airport. (AR Pt. II, Vol 1. pp. 250, 460, 4812.)

To the south and West of the property are additional pasture lands. (AR Pt. II, p. 4812.)

The State Water Resources Board has adopted a general NPDES permit for construction activities. (AR Pt. I p 500015.) In order for a constriction site to obtain coverage under the general permit, an operator must submit a Storm Water Pollution Prevention Plan (SWPPP) and a Notice of Intent to be covered by the permit. (AR Pt. I pp. 500015-500016.) Once the State Water Resources Board approves the NOI, the operator may then discharge waters pursuant to the terms of the general permit.

The development in question was originally owned William Isaac and Linkside Place LLC. (AR Pt. II, Vol. 9 pp. 1832-1833.) In October of 2003, Petitioner Albert Garland acting as the manager for the project, submitted a proposed SWPPP and NOI. (AR Pt. II pp. 25550-2683.) This was approved by the State Water Resources Board. (AR Pt. I p. 500015.) In December of 2003, the property was sold to Petitioner Tehama Market Associates. (AR Pt. II p. 1818.) Tehama did not submit a new NOI nor did it file any documentation to have Mr. Isaac's NPDES permit transferred to it. (AR Pt. II Vol 1, p 516.) According to the Regional Board, "the permit was not technically transferable" in any event. (AA p. 41.) Later, in October of 2004, Tehama Market Associates sold the property back to Linkside Place LLC. (AR Pt. II pp 1832-1833.)

C. February 2004 Inspections

On February 18, 2004 regional board staff inspected the property in response to a citizen complaint. (AR Pt. II p. 151.) According to the inspection report, sediment laden storm water was being discharged off of the construction site into what the report referred to as "ephemeral drainages and wetlands adjacent to the site." (AR Pt. II p. 151.) Additional discharges were also seen going into "ephemeral drainages and then onto the golf course properties." (AR Pt. II p. 151.) The ephemeral drainages also received "run-ons from the property directly to the south." (AR Pt. II, p. 151.) Three samples were taken, one at the end of a dewatering pipe which was still located on Linkside Place property; the second was at a location where storm water was discharging "into an ephemeral drainage on golf course property..." and then a third was taken in what is described as "wet swale adjacent to the north side of NEXRAD. (AR Pt. II pp. 151-152.) The third sample was taken as attempting to show the background conditions unaffected by the property. (AR Pt. II p. 151.) The samples were determined to be in excess of the total suspended solids requirement and turbidity objectives. (AR Pt. II p. 151.)

The Regional Board staff again returned to the site on February 25, 2004 during another heavy storm event. (AR Pt. II pp. 154-155) Water samples were again taken immediately on the east side on an access road to the NEXRAD, which also constitutes the northwest corner of the golf

course as well as on the west side of the NEXRAD facility which is adjacent to the northeast corner of Linkside Place. (AR Pt. II p 154.) Additional sample were taken on the west side of the NEXRAD road just east of the property in what the board described as a "wetland" and a fifth sample was taken at a point where a culvert was discharging "two an ephemeral drainage one hundred feet north of the NEXRAD facility." (AR Pt. II pp. 154-155.) Three samples were taken to the north of the property, the first sample taken on the Linkside Place property itself; and two samples were taken on the immediate north side of highway 162. (AR PT. II p. 155.) All of these samples were found in violation of the requirements for total suspended solids and turbidity. (*Ibbid.*)

Scott A. Zaitz was the Regional Board inspector responsible for the inspections on February 18th and 25th. (AR PT. II p. 578, 597.) Mr. Zaitz testified that what he described as "ephemeral drainages" would be an area when rainfall occurs, water collects and then runs into the area, such as gully's or washes during winters, but that it is "otherwise basically dry." (AR PT. II p. 610-611.)

During the February 18th inspection, Mr. Zaitz observed water draining from the eastern-most portion of Linkside Place and entering a "swale" between the NEXRAD road and the development. (AR Pt. II, pp. 628-629.) From this swale, water entered two culverts which went underneath the NEXRAD access road. (AR Pt. II, pp. 628-629.) After the

water flowed through the culverts, it entered the golf course property and traveled south along the golf course. (AR Pt. II p. 610-612.) He followed the drainage as it traveled south along the western boundary of the golf course and then to the southeast where it went underneath a runway for the Oroville airport. (AR PT. II p. 610-612.) He did not follow the ephemeral drainage further past where he observed it going onto the airport property. (AR PT. II pp. 612-613.) Mr. Zaitz also testified that he observed where turbid water had "pooled" on the western (i.e. Linkside Place) side of the culvert that could move through the culverts in future storm events. (AR Pt. II pp. 621-622.)

Mr. Zaitz further testified that according to his observations, the majority of the water went off of Linkside Place into "these ephemeral drainages going between the golf course and Linkside Place." (AR Pt. II p. 633.) A smaller percentage of runoff was observed going north underneath highway 162 and into the northwest corner of the golf course. (AR Pt. II Vol 1 p. 633.) After going under highway 162 he observed the water flowing "into what I just simply called pasture land." (AR Pt. II Vol 1 p. 633-634.) Once in the pastureland, he opined that the water "then meanders through this pastureland going due north and west and eventually discharges into the Thermalito Afterbay." (AR Pt. II p. 633-634.)

During the February 25, 2004 inspection, in addition to observing the same areas as he had on February 18th, Mr. Zaitz walked to the northern

side of highway 162 where he states he observed sediment laden water "in the roadside drainage ditches." (AR Pt. II p. 919.) He did not observe where the water flowed from there. (AR Pt. II p. 919.)

Following these inspections, Mr. Zaitz contacted David E. Bird, the General Manager of the Thermalito Irrigation District and asked him to describe the drainages in the pastureland to the north of Linkside Place. (AR Pt. II p. 631-332.) Mr. Bird responded by a letter which described the area as being approximately 1,500 – 2,000 acres of unimproved pastureland that was drained by a meandering course he decided to call "snake creek." (AR Pt. II p. 331-332.) Mr. Bird's letter does not discuss whether or not what he referred to as "snake creek" flows consistently or at all when it is not raining. (AR Pt. II pp. 331-332.) His letter further states as follows:

> The predominate surface soil make-up is a deep red clay, which has been along the majority of the creek's banks during periods of high flow. In addition fresh areas of soil erosion was evident throughout the creek. This is and of itself would introduce very high turbidity waters into the Thermalito Afterbay via the Powerhouse Chanel.

(AR Pt. II Vol 1 p. 331.)

Mr. Zaitz testified that he has no knowledge whether or not what Mr. Boyd had described as "snake creek" was a continuously flowing stream or whether it only flowed intermittently. (AR Pt. II p. 921.) During the

February 25, 2004 inspection, Mr. Zaitz only walked to the other side of highway 162 where he states he observed turbid and sediment laden water "in the roadside drainage ditches." (AR Pt. II Vol 1 p. 921.)

D. First Administrative Civil Liability Complaint.

On November 23, 2004 the regional board issued an administrative civil liability complaint against Linkside Place, LLC. (AR Pt. II pp. 5055-5062.) Thereafter, settlement negotiations were commenced which extended through May of 2005. (See Board's description of negotiations at AA pp. 42-43.)

At some point in the Spring of 2005, Regional Board Staff conducted a title search and learned that the property had been sold and was then owned by Linkside Place, Inc. (AR Pt. II p. 1842.) On July 11, 2005 Regional Board staff amended the ACL complaint to name Linkside Place and Mr. Isaac. (AR Pt. II, pp. 5009-5018.) The Regional Board staff then conducted additional research and realized that Linkside Place, was not the owner of the property in question when the alleged discharges occurred. (AR Pt. II pp. 159, 1818-1834.) Therefore, on January 26, 2006 the Regional Board staff rescinded the original ACL complaint and replaced it with a new ACL complaint. (AR Pt. II pp. 4995-5007.)

E. Second Administrative Civil Liability Complaint.

The second ACL complaint was scheduled for hearing to take place on March 16, 17, 2006. (AR Pt. II pp. 4995-5007.) This complaint named

the property owner as the discharger, the listed property owner, Tehama Market Associates and alleged violations of the CWA by failing to comply with the terms of the general NPDES permit. On March 8, 2005 an opposition brief was submitted which argued at length that the inspection reports had failed to establish a discharge into a water of the United States. (AR Pt. II pp 496-513.) This appears to have triggered a drainage survey which the Regional Board staff performed on March 16, 2003.

At some point the staff recognized that there was, in fact no permit because and stated as much in its proposed order. (AR Pt. II p. 4775.) As a result, the hearing was taken off calendar and the January 2006 ACL complaint was rescinded because it was now impossible to conduct a hearing within 90 days of the ACL complaint. (AR Pt. II p. 212.)

F. March 16, 2006 Drainage Inspection.

On March 16, 2006--the day the hearing had originally been scheduled to take place--Regional Board Staff returned to the property to conduct a drainage survey. (AR Pt. II p. 283.) It had been raining with local gauges showing between .12 and .9 inches of rain on that date. (AR Pt. II p. 283.) Consequently, the ground was wet and saturated and thus it would impossible to determine the conditions in the absence of recent rains.

According to the survey, a roadside "drainage ditch" would received water from the northeast corner of Linkside Place. (AR Pt. II p. 284.) From there, it would be conveyed by an under-road corrugated metal pipe

which then discharged "into a well defined ephemeral drainage swale" in the pastureland to the north of highway 162. (AR Pt. II p. 284.) As the inspectors walked the swale, they noticed that it still had some "ponded storm water from the past 24 hour storm events." (AR Pt. II p. 284.) What is noteworthy is that even though it had been raining that day, there was no discernable flow through the swale. (AR Pt. II p. 287-289.) Instead, the inspectors found vegetation patterns indicating "repeated storm flow." (AR Pt. II p. 284.) The swale traveled approximately 420 yards from highway 162 to where it entered the drainage being described as "snake creek." No further efforts were made to follow the "snake creek" drainage to determine its final course. (AR Pt. II p. 926.)

On the eastern edge of the Linkside Place, inspectors found a "ephemeral drainage swale between LP and the golf course that received the majority of storm water run-off from LP." (AR Pt. II p. 284.) This ephemeral drainage then moved in a southern direction for an undefined distance and then turned due east and entered the golf course property. (AR Pt. II p. 284.) The storm water was then conveyed through the golf course "by a number of ditches and underground pipes..." (AR Pt. II p. 284.) From the golf course, the drainage was then conveyed under the airport via underground piping and exited on the western side of the airport. (AR Pt. II p. 284.) This drainage then conveyed water underneath another road which then discharged into an area known as the "Oroville Wildlife Area." (AR

Pt. II p. 284.) Inspectors then described the drainage as meandering through the wildlife area and the eventually reaching the Feather River. (AR Pt. II p. 284.) However, they never followed to actually followed the drainage to observe it enter the Feather River. (AR Pt. II. p. 955.)

G. Third Administrative Civil Liability Complaint.

On October 26, 2006, another ACL complaint was issued, this time naming Tehama Market Associates LLC and for the first time Albert Garland as the responsible corporate officer. (AR Pt. II pp. 4674-4686) The October 26, 2006 complaint alleged that Tehama Market Associates and Albert Garland were responsible for a discharge of storm water in violation of a the general permit alleging the permit had somehow been "transferred" to Tehama Market Associates. (AR PT. II p 469.) Petitioners responded by pointing out that permits were not transferable and therefore the Board lacked jurisdiction to issue a fine based on a violation of the General Permit alone. (AR PT. II pp 4488-4489.) This resulted in the Board rescinding the yet another ACL complaint. (AR PT. II pp. 3039.)

H. Fourth Administrative Civil Liability Complaint.

In response to the foregoing, on April 20, 2007, the regional board issued yet another ACL complaint, this time alleging violation Section 301 of the Clean Water Act for discharging pollutants without an applicable NPDES permit. (AR p. 92.) Petitioners responded by arguing there was insufficient evidence to find a violation of CWA because there was no

evidence of a discharge from a point source to waters of the United States. (AR Pt. II pp. 367-376.) Petitioners further argued that the multiple delays warranted dismissal of the ACL complaint on both statute of limitations and laches grounds. (AR Pt. II pp. 349-351.)

A hearing was conducted on June 22, 2007. During the course of the hearing, regional board staff admitted that no samples had been taken from the drainage they were identifying as "snake creek" nor had they done anything to insure that water was at any point actively draining from "snake creek" into the Feather River or Thermalito Afterbay. (AR Pt. II p. 926)

With respect to waters traveling from Linkside Place, through the golf course, and ultimately towards the Feather River, regional board staff admitted that they had not actually observed the water entering the Feather River. (AR Pt. II p. 955.) This was because they found it sufficient that they had observed water transiting into an area that would be flooded by the Feather River during high storm events even though "on the day we were there, there was no water inundation in this area." (AR Pt. II. 955.) Further, staff admitted "we didn't document how much entered the waters of the U.S. directly." It was instead, the staff's opinion that the various swales and drainages were "tributaries" to a federal waters water and this was all that was needed to establish coverage by the CWA. (AR Pt. II p 997.) No evidence at the hearing was offered as to the biological or

chemical effect of any of the swales or ephemeral drainages on the Feather River or Thermalito Afterbay.

I. The Regional Boards Findings and First Writ of Mandate Proceeding.

On June 21, 2007, the regional board upheld the ACL complaint, and issued a find of $250,000. (AR Pt. II pp. 85-103.) A petition for review was filed with the California State Water Resources Control Board on July 18, 2007. (AR PT. II p. 6.) On September 27, 2007 the State Water Resources Control Board rejected the petition. (AR Pt. II p. 3.) Thereafter, Mr. Garland and Tehama Market Associates filed a petition for administrative mandate in the Tehama County Superior Court raising the following arguments:

- That there was insufficient evidence to establish the discharge of pollutants into a water of the United States;
- There was insufficient evidence to sustain the amount of the fine;
- There was insufficient evidence to sustain a fine against Albert Garland in his personal capacity;
- There was insufficient evidence that the petition was barred under the doctrine of laches.

(AR I p. 500279) On April 6, 2009, the trial court issued an order granting the petition and remanding the matter back to Regional Board for further proceedings. (AR I pp 500279-500289.) In doing so, the court ruled against Petitioners on the question of whether their had been a discharge into a water of the United States. (AR I pp. 500282-500264.) The trial held that the "drainage swale that received run stormwater run-off from the northern side of the construction site was a water of the United States." (AR I p. 500282.1) The court also concluded that there was substantial evidence to support a finding that the "ephemeral watercourse draining stormwater from the southeastern side of the construction site is water of the United States." (AR I p. 5000283.) The court also ruled against Petitioners on their statute of limitations argument. (AR I p. 500287.)

Where the Court ruled in favor of Petitioners was on their laches argument. (AR I pp. 500287.1-500289.) The Regional Board had found the laches argument was barred under the doctrine of unclean hands, and the court held this finding was not supported by substantial evidence. (AR I pp. 500287.1-500289.) Accordingly, the matter was remanded back to the Regional Board to conduct further administrative proceedings. AR Pt. I p. 500292.)

J. Second Board Hearing and Writ Petition

Thereafter the Regional Board conducted a new hearing in which staff sought to address the laches arguments further, and recommended reissuance of the Administrative liability order. The staff report contended the delay was reasonable because it was brought about by the property owner's failure to advise the Board of the change in ownership. (AR I p. 500193) The report further contend that an additional delay of 6 months was reasonable because the parties were engaged in settlement negotiations. (AR I p. 500194.) The Regional Board agreed and re-issued the Administrative Civil Liability Order with a $ 250,000.00 fine. (AR I p. 500014-500031.) Petitioners sought review from the State Board which was denied. (AR I p. 1.))

Petitioners then filed a second petition for writ of mandate. (AA pp. 1-32.) This time, the trial court rejected the laches argument finding that the Regional Board's finding as to laches was supported by substantial evidence. (AA pp 82-91.) The trial Court entered its order denying the petition on November 10, 2010. (AA p. 82.) A notice of appeal was filed on January 7, 2011. (AA p. 92.)

III. STATEMENT OF APPEALABILITY

A trial court order denying a petition for writ of mandate is an appealable order. (*In re C.F.* (2011) 198 Cal.App.4th 454, 458-459, citing, *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d. 1115, 1122.)

However, the ruling in the first writ proceeding was not appealable at that time. An appeal can only be taken from a final decision aggrieving the petitioner and thus a trial court order remanding a matter back to the administrative agency is this not a final appealable order. (*Kunar v. National Medical Enterprises, Inc* (1990) 218 Cal.App.3d 1050, 1054.)

Therefore, no appeal could be taken from that order until there was a final order adverse to Petitioners. The order of November 10, 2010 in the second writ proceeding was such a final order. The matter thus became appealable at that time and the orders it issued in both proceedings became ripe for review. Petitioners filed a notice of appeal within 60 days of the order denying the second writ petition and appellate jurisdiction is therefore proper. (AA p. 92.)

IV. DISCUSSION ON THE MERITS

In this case the Regional Board found that Petitioners violated the Clean Water Act by allowing sediment laden waters to be discharged into adjacent "intermittent tributaries" and that these watercourses constituted waters of the United States. (AR Pt. I p. 500021, AR Pt. II pp. 21-22.) The Regional Board made no findings concerning any discharges of pollutants occurring from these drainages into a navigable waterway. (AR Pt. II pp. 21-22["It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the tradition sense."]) Instead, the Regional Board found that the ephemeral

drainages themselves constitute waters of the United States and the validity of the ACL order depends on this conclusion. The conclusion was based on the notion that "intermittent or ephemeral streams which sometimes flow into navigable waters are themselves waters of the United States" without the need for any additional showing. (AR I p. 500021, AR PT. II pp. 21-22) This is simply not the law.

A. To Constitute a Water of The United States, A Watercourse Must Either Be A Relatively Permanent Standing or Continuously Flowing Body of Water, Or There Must Be Evidence of A Significant Nexus to Waters That Are Navigable In Fact.

Prior to the adoption of the Clean Water Act, the phrase "waters of the United States" was understood to mean interstate waters that are either navigable in fact or readily susceptible to being rendered so. (*Rapanos v. United States, supra,* 547 U.S. 715, 723 (plurality opinion), citing, *The Daniel Ball* (1871) 77 U.S. 557, 563.) However, since the adoption of the Clean Water Act, the courts have come to recognize that "the transition from water to solid ground is not necessarily or even typically an abrupt one..." (*United States v. Riverside Bayview Homes, Inc* (1985) 474 U.S. 121, 132) This has caused both courts and regulators to struggle with defining where a navigable water ends and where dry land begins. In *Riverside Bayview Homes* the Supreme Court concluded that a wetland area which "actually abutted" to a navigable waterway was itself part of that waterway and thus part of the waters of the United States. (*Id.* at 135)

Following *Riverside Bayview Homes* the Federal Government, through the Army Corps of Engineers took the position that any intrastate waters that would be used by migratory birds as well as "ephemeral streams" and "drainage ditches" found to be "tributary" to a navigable water were themselves navigable waters. In *Solid Waste Agency of Northern Cook County (SWANCC) v. United States* (2001) 531 U.S. 159, the court rejected the migratory bird rule and held that "non-navigable, isolated, intrastate waters" were not waters of the United States within the meaning of the CWA. (*SWANCC, supra* at p. 171.) In so holding, the court clarified that the extension of CWA coverage to the wetland at issue in *Riverside Bayview Homes* was possible because of the significant nexus between the wetland and the navigable waterway owing to the fact the wetland immediately abutted the waterway. (*Rapanos, supra* at. p. 726.)

Despite this explanation, the Army Corps of Engineers continued to take the position that ephemeral streams and drainages were still to be construed as tributaries and thus waters of the United States. This lead to a host of lower court decisions which seemed immediately counter-intuitive. These included manmade ditches winding over a 32 mile path, (*United States v. Deaton,* (4th Cir. 2003) 332 F.3d 698, 702); irrigation ditches and drains which only intermittently connect to covered waters, (*Community Association for Restoration of Environment v. Henry Bosma Dairy* (9th Cir 2002) 305 F.3d 943, 954-955; and even dry washes and arroyos in the

middle of a desert, (*Save Our Sonoran, Inc v. Flowers* (9th Cir. 2005) 408 F.3d 1113, 1118).

In *Rapanos, supra,* the Supreme Court once again took up the cause of defining an outer limit to the concept of what is a Water of the United States. At issue was weather or not wetlands which lied near a series of ditches which occasionally connected to a navigable water way constituted waters of the United States. (*Id.* 547 U.S. at pp. 719-720.) The Army Corp of Engineers regulations defined waters of the United States to include "[a]ll interstate waters including interstate wetlands," and "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." (*Id.* at p. 724, citing 33 C.F.R. § 328.3 subd. (a)(1)(3) & (5).) Four justices voted to reject this broad definition and replace it with a much narrower construction of what constitutes "waters of the United States." Four dissenting justices voted to uphold the government's regulations. Justice Kennedy was the deciding vote, finding against the government but on grounds significantly different from the plurality. Thus to understand the current state of the law, it is necessary to examine both the plurality opinion and justice Kennedy's concurrence.

1. The Rapanos Plurality

The plurality opinion could not be any clearer in its outright rejection of the very principle upon which the Regional Board based its decision in this case. The plurality opinion held:

> [O]n its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. (*Id.* 547 U.S. at p. 738.)

The plurality opinion repeatedly emphasized that the phrase does not include channels with "merely intermittent of ephemeral flows…" (*Id.* at pp. 732-734.) The court stated:

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction. (*Id.* at. p. 734.)

Here, both the trial court and Regional Board cited to the Ninth Circuit's Opinion in *Headwaters, Inc v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526 for the proposition that ephemeral streams running off

the property constitute waters of the United States so long as the ephemeral drainage is "tributary" to a navigable water. (AR I p500282, AR PT. II pp 20-21.) However, *Headwaters* was one of the cases the plurality specifically rejected. (*Rapanos, supra* 547 U.S. at p. 727.) Indeed, it was this overly broad construction of the word "tributaries" that the plurality opinion appears most concerned with. (*Id.* at p. 727-728.)

The plurality explained that the CWA's use of the phrase "the waters of the United States" refers to water found in streams, oceans, rivers and lakes, and these terms "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." (*Id.* at p. 723.) The plurality further reasoned that since the phrase "waters of the United States" was used to define "navigable waters" confirms that the scope of the CWA was to protect only "open waters," and "under no rational interpretation are typically dry channels described as "open waters." (*Ibbid.*)

Furthermore, the plurality rejected the notion that a wetland area could constitute an adjacent water so long as there was some hydrologic connection between the wetland and a navigable in fact waterway. (*Id.* at pp. 740-741.) The plurality held that the term "significant nexus" referred to in *Riverside Bayview Homes* meant to "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." (*Id.* at p. 742.) Thus,

"[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus'..." (*Ibbid.*)

2. The Kennedy Concurrence

Justice Kennedy disagreed with the plurality's notion that the CWA drew a line excluding irregular waterways. (*Rapanos, supra* 547 U.S. at p. 770 (Kennedy, J. concurring).) Justice Kennedy opined that the plurality's construction was overly narrow because the term "waters" could include "flood or inundation" events. (*Ibbid.*) Justice Kennedy also noted the importance wetland features can have on the water quality of navigable waterways, noting that wetlands can serve to filter and purify water draining into adjacent bodies of water, and low the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion." (*Id.* at p. 775.)

Yet Justice Kennedy also disagreed with exceedingly broad reach of the existing regulations which would include otherwise isolated wetlands which happen to lie near a ditch or drain which would eventually lead to a navigable waterway no matter how "however remote and insubstantial" the connection to the navigable waterway is. (*Id.* at p. 775.) Therefore, Justice Kennedy found that to constitute a "water of the United States" a wetland

or watercourse must be shown to have a "significant nexus" which "must be assessed in terms of the statute's goals and purposes." (*Id.*) Justice Kennedy then explained:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." (*Id.* at p. 780.)

Under Justice Kennedy's analysis, the requirement for a significant nexus between the watercourse and the navigable in fact waterway applies as much to ephemeral drainages which happen to be tributary to navigable waters as it does to wetlands. That is, there merely calling a water course a "tributary" does not render it a water of the Untied States. Justice Kennedy explained that in assessing the scope reach of the CWA, the Army Corps could "identify categories of tributaries that due to the volume of flow (either annually or on average) and their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." (*Id.* at p. 781.) This explanation would not be necessary if the ephemeral drainages were

themselves waters of the United States, because then the wetlands would then qualify as adjacent waters. Justice Kennedy makes this point clear when he rejected the Army Corps' existing standard precisely because it "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it..." (*Ibbid.*)

Here, as explained below, no evidence was offered to establish a significant nexus between the ephemeral drainages at issue and a navigable in fact waterway. Neither was there any evidence offered that would support a finding of a navigable water under the plurality approach. Instead, the Regional Board's analysis mirrored the broad and over-inclusive analysis that was rejected by both the plurality and Justice Kennedy.

B. There Was No Evidence Offered Before The Regional Board To Satisfy Either The Test of The Rapanos Plurality or the Kennedy Concurrence.

The standard of review from a denial of a petition for administrative mandate under Code Civ. Proc § 1094.5 essentially mirrors that of the trial court. (*Desmond v. County of Contra Costa* (1993 21 Cal.App.4th 330, 334.) The reviewing court first determines whether the agencies factual findings are supported by substantial evidence in administrative record. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 506 Cal. 3d 506, 515.) Then the reviewing court must determine if

those findings support the legal conclusion or the agency's ultimate determination. (*Ibbid.*) Here, the only factual findings that were made were that Petitioner's property drained into a number if ephemeral drainages that connected with other drainages in the form of swales, ditches, and culverts which connected with the Feather River or its Thermalito Afterbay at some undetermined location. (AR I p. 500021-500023, AR I pp. 500283-500284.) These findings are not sufficient to sustain a conclusion that the drainages in question constitute waters of the United States under either the Kennedy or Plurality tests.

1. There Was No Evidence That Any of The Drainages Constituted Relatively Permanent Bodies of Water.

There is nothing in the administrative record which would support a finding that the drainages in question constitute waters of the United States under the plurality analysis. The plurality could not have been more explicit; only waters with relatively permanent flows connecting to a navigable in fact water constitute waters of the United States. It simply does not matter that during high storm events that a particular waterway could reach a navigable waterway.

The plurality did recognize that waters could include "seasonal rivers" and other intermittent watercourses which flow during "some months" but have no flow during dry months. (*Rapanos, supra*, 547 U.S. at p. 733, n.5) Thus, for example a watercourse which was seasonally dry

only due to a man-made diversion but became a "raging torrent" during the spring snow melt was held to constitute a water of the United States. (*United States v. Moses* (9th Cir. 2007) 496 F.3d 984, 988.) However, "normally, ditches, channels, and conduits carrying an intermittent flow of water are, by and large, not "waters of the United States." (*Sierra Club v. City and County of Honolulu* (D. Hawaii 2008) 2008 U.S. Dist LEXIS 64262 p. 16, 68 ERC (BNA) 1592, attached hereto as appendix 1.)

The district court decision in *Sierra Club* is illustrative of this point. There, the City of Honolulu's waster water treatment system had overflowed and spilled raw sewage into storm drains and dry stream beds but their was no evidence offered of the sewage actually reaching a navigable waterway. (*Id.* at p. 14.) Even though the storm drains led directly to Pearl Harbor, the court concluded that there was insufficient evidence to find either constituted jurisdictional waters under the CWA. The Court stated:

> Although some storm drains could possibly have a continuous flow of water during some months of the year or "when the time for run off comes," no such evidence was presented. At most, the DOH Summary Table or CCH Spill Reports state that at the time of the spill in question there were intermittent showers or heavy rainfall. This is insufficient to establish as a matter of law that each storm drain is a water of the United States or is anything other than a "channel[] that periodically provide[s] drainage for rainfall." (*Id.* at p. 24.)

With respect to the dry stream bed, the district court also concluded the evidence was insufficient to establish a relatively permanent water course, stating "Plaintiffs have not provided evidence regarding the level of flow in the stream at the time of the spill or whether Palolo Stream is ordinarily a dry channel through which water occasionally or intermittently flows, or has a continuous flow." (*Id.* at p. 26.)

Therefore, to establish the existence of a water of the United States for a non-permanent body of water, it is necessary that there be evidence of what the typical flow is other than during times of heavy rainfall. Yet no such evidence exists in the administrative record. All of the observations were made during or soon after storm events. (AR Pt. II p. 283.) With respect to the drainage swale to the North of the property, no flow was directly observed during the March 2006 drainage survey despite it having rained earlier that day. (AR Pt. II p. 284.) With respect to the swales draining the property to the east, although the Regional Board Staff observed those drainages to still be actively draining water from that days rains, there were no observations of whether the flow was actually reaching the Feather River. (AR Pt. II pp. 955-956.) Instead it was observed to reach an area designated on a map as part of the river's flood plain, even though the area was actually not flooded on the day in question. (AR Pt. II p. 956.)

More importantly, absolutely no evidence was offered as to the flow of any of the ephemeral watercourses on days in which had not been

recently raining. One Regional Board staff member admitted that when he used the phrase "ephemeral drainage" in preparing his reports, he understood that he was describing drainages that other than during rainy periods were "basically dry." (AR Pt. II p. 610-611.) The only evidence is that these drainages occasionally transport water. This is simply not enough to establish a jurisdictional water under the *Rapanos* plurality holding.

2. *The Regional Board Made No Findings of A Significant Nexus Under Within The Meaning of Kennedy's Concurrence.*

In *Precon Development Corp. v. United states Army Corps of Engineers* (4th Cir. 2010) 633 F.3d 278 The Fourth Circuit summarized the type of evidence needed to satisfy Justice Kennedy's significant nexus test. The court sated that while the test 'does not require laboratory tests or any particular quantitative measurements," the test requires some evidence of both a nexus (i.e. hydrologic connection) and of its significance. (*Id.* at p. 294.) This requires some measurement of actual flow rates. (*Ibbid.*) Then there must be evidence offered relating to "the comparative relationship between the wetlands at issue, their adjacent tributary, and traditional navigable waters." (*Ibbid.*)

Examples of the type of evidence needed to support a finding of a significant nexus were found in the Ninth Circuit's decision in *Northern California River Watch v. City of Healdsburg* (9th Cir. 2007) 496 F.3d 993

and the Sixth Circuit's decision in *United States v. Cundiff* (6th Cir. 555 F.3d 200. (*Precon Development, supra,* 633 F.3d at p. 296.) In *Northern California River Watch* found a significant nexus based on evidence that leakage from a wetland was resulting in increased chloride levels in the Russian River. (*Northern California River Watch, supra,* 496 F.3d at. p. 1001.) Similarly, in *Cundiff* a nexus was found based on evidence of a mine drainage's impact on the ability of a wetland to control sediment accumulation. (*Cundiff, supra,* 555 F.3d 210-211.) Thus in both instances there was "evidence not only of the functions of the relevant wetlands and their adjacent tributaries, but of the condition of the relevant navigable waters." (*Precon Development Corp., supra* 633 F.3d at p. 296.)

Here, the Regional Board made no findings fact even addressing the existence or non-existence of a substantial nexus under these standards. Moreover, the administrative record is devoid of any evidence of the type or character needed to sustain a finding of a substantial nexus. No evidence was offered as to any impact of the drainages in question on a navigable in fact waterway. Therefore, there is no basis in the record to conclude that a substantial nexus exists between the drainages in question and a water which is navigable in fact.

C. Remedy

In view of the foregoing analysis, there really can be little doubt that both the trial court and the Regional Board erred in finding that the

ephemeral drainages constituted waters of the United States based on nothing more than their apparent flow during storm events. That raises the issue of what the appropriate remedy is on appeal. Typically, the remedy is to remand the matter back to the administrative agency to conduct additional proceedings consistent with the reviewing court's opinion. (See, e.g. *Clark v. City of Hermosa Beach* (1998) 48 Cal.App.4th 1152, 1174.) This general practice is founded the Code of Civil Procedure § 1094.5 subd. (f) providing that a reviewing court issuing a writ shall not "limit or control in any way the discretion legally vested in the respondent. (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 159.)

However, that same statute also empowers a court to order a respondent to "take such further action as is specially enjoined upon it by law..." (Code Civ. Proc § 1094.5 subd. (f).) Here, because this is now the second time this case has progressed through the courts and over six years has passed since the discharges in question, fundamental fairness requires that the Board be instructed to simply vacate and dismiss the Administrative Civil Liability Order at issue. To find a discharge into waters of the United States would require new studies and surveys far more detailed than what was accomplished in those surveys contained in the administrative record. Yet, at this juncture, it would be impossible to be able to fairly assess what the conditions of the property and surrounding watershed were back in 2004. No evidence could be offered as to what the

impact of the watercourses at issue on the Feather River were in 2004. Thus any hearing would be inherently unfair.

The Board has had ample opportunity to develop the evidence necessary to sustain a complaint under the CWA. This case has been through four separate ACL complaints. The third ACL complaint was issued on October 26, 2006, four months after *Rapanos* was decided. Despite *Rapanos,* the Regional Board staff did virtually nothing to address the opinion. No additional efforts were made at studying the water courses in question to determine if they had a sufficient degree of permanence to meet the requirements of the plurality test. No effort was made to characterize the impact of those watercourses on navigable waters to meet the Kennedy substantial nexus test. When the Regional Board dismissed the third ACL and issued the fourth one, it could have taken that opportunity to address the matter, but it again chose not to. Consequently, there is no reason to now force Petitioners to go back before the Board to address issues which should have been addressed years ago.

This court does have the power to put an end to a controversy once and for all. That is what should occur here.

V. CONCLUSION

For the foregoing reasons Appellant respectfully requests that the order denying the Petition for Writ of Mandate be reversed and the Trial

Court be directed to issue an order vacating the Administrative Civil Liability Order.

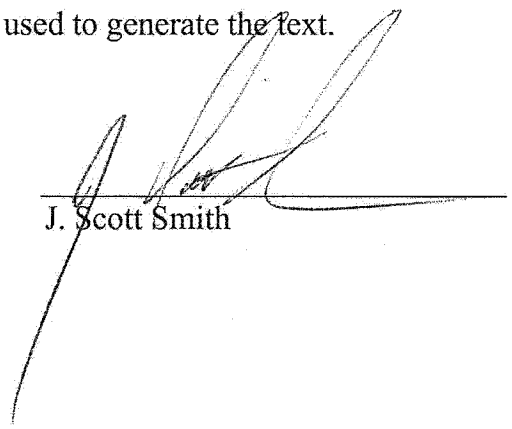
DATED: December 5, 2011

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____
J. Scott Smith
Attorneys for Plaintiff and Appellant Albert Garland

CERTIFICATE OF WORD COUNT

Pursuant to CRC 14(c), the text of this brief, including footnotes and excluding the table of contents and tables of authorities, consists of 8,257 words in 13-point Times New Roma type as counted by the Microsoft Word 2003 word-processing program used to generate the text.



J. Scott Smith

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Sacramento, State of California. My business address is 555 Capitol Mall, Suite 1200, Sacramento, California 95814.

On December 5, 2011, I served true copies of the following document(s) described as **APPELLANTS OPENING BRIEF** on the interested parties in this action as follows:

Cecilia L. Dennis Office of the State Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102-3664	Attorneys for Defendant and Respondent
Butte County Superior Court – Main One Court Street Oroville, CA 95965	
Albert Garland P.O. Box 5373 Incline Village, NV 89450-5373	
Supreme Court Office of the Clerk 350 McAllister Street San Francisco, CA 94102	Four (4) copies

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 5, 2011, at Sacramento, California.

Crystal Noe

1740886.1

*2008 U.S. Dist. LEXIS 64262, *; 68 ERC (BNA) 1592; 38 ELR 20229*

SIERRA CLUB, HAWAII CHAPTER, HAWAII'S THOUSAND FRIENDS; and OUR CHILDREN'S EARTH FOUNDATION, Plaintiffs, vs. CITY AND COUNTY OF HONOLULU, and FRANK DOYLE, DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL SERVICES, in his official capacity, Defendants.

CV. NO. 04-00463 DAE-BMK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

2008 U.S. Dist. LEXIS 64262; 68 ERC (BNA) 1592; 38 ELR 20229

August 18, 2008, Decided
August 18, 2008, Filed

SUBSEQUENT HISTORY: Injunction denied by Sierra Club v. City & County of Honolulu, 2008 U.S. Dist. LEXIS 94061 (D. Haw., Nov. 18, 2008)

PRIOR HISTORY: Sierra Club v. City & County of Honolulu, 2008 U.S. Dist. LEXIS 37896 (D. Haw., May 7, 2008)

CORE TERMS: spill, summary judgment, stream, storm drain, sewage, dry, pollutant, channel, stream bed, navigable waters, body of water, permit conditions, ocean, bypass, ground-only, overflow, river, matter jurisdiction, intermittent, collection, continuous, effluent, contested, intermittently, drainage, wetland, enforcement proceedings, tributary, reply, rainfall

COUNSEL: **[*1]** For Sierra Club-Hawaii Chapter, Hawaii's Thousand Friends, Our Children's Earth Foundation, Plaintiffs: Blake K. Oshiro, Paul Alston, William M. Tam, LEAD ATTORNEYS, Alston Hunt Floyd & Ing, Honolulu, HI; Christopher A. Sproul, LEAD ATTORNEY, Environmental Advocates, San Franciso, CA.

For City and County of Honolulu, Defendant: Bryan K. Brown, Darshann M. Turpin, James J. Dragna, Nancy M. Saunders, LEAD ATTORNEYS, Bingham & McCutchen LLP, Los Angeles, CA; Carrie K. Okinaga, Kathleen A. Kelly, LEAD ATTORNEYS, Office of Corporation Counsel-Honolulu, Honolulu, HI.

For United States of America, Amicus curiae, Amicus: Robert D. Mullaney, LEAD ATTORNEY, United States Department of Justice, San Francisco, CA.

JUDGES: David Alan Ezra, United States District Judge.

OPINION BY: David Alan Ezra

OPINION

ORDER GRANTING IN PART AND DENYING IN PART WITHOUT PREJUDICE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' FIRST AND SECOND CLAIMS; AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' SECOND CLAIM

On June 30, 2008, the Court heard Plaintiffs' Motion and Defendant's Motion. William Tam, Esq., and Christopher Sproul, Esq., appeared at the hearing on behalf of Sierra Club, Hawai'i Chapter, Hawai'i's Thousand **[*2]** Friends and Our Children's Earth Foundation (collectively, "Plaintiffs"); James J. Dragna, Esq., Bryan K. Brown, Esq., and Kathleen A. Kelly, Deputy Corporation Counsel, appeared at the hearing on behalf of Defendant City and County of Honolulu ("CCH"). This Court allowed the parties and the EPA to submit additional exhibits and briefing after the hearing. After reviewing Plaintiffs' motion, CCH's motion, and the supporting and opposing memoranda, the Court GRANTS IN PART AND DENIES IN PART WITHOUT PREJUDICE Plaintiffs' Motion for Partial Summary Judgment on Plaintiffs' First and Second Claims and DENIES CCH's Motion to Dismiss Plaintiffs' Second Claim.

Plaintiffs' motion for summary judgment is GRANTED with respect to their First Claim for the uncontested 112 spills, each of which this Court has found in turn violates the Clean Water Act, and for 37 other violations from the contested spills, for a total of 149 violations under the First Claim. Plaintiffs' motion on their First Claim for all other violations, all of which are contested, is DENIED WITHOUT PREJUDICE. Plaintiffs' motion for summary judgment with respect to their Second Claim is GRANTED, and this Court finds 148 violations **[*3]** of the Permit.

BACKGROUND

Plaintiffs filed the instant lawsuit in July 2004, pursuant to the citizen suit provision of the Clean Water Act ("CWA") for violations of the CWA due to sewage spills from the collection system, the wastewater treatment plants ("WWTP"), and alleged violations of the Sand Island and Honouliuli National Pollution Discharge Elimination System ("NPDES") Permits. Plaintiffs' first and second claims are at issue in these motions. Plaintiffs' first claim for relief alleges sewage spill discharges of pollutants without a permit in violation of the CWA, 33 U.S.C. §§ 1311(a), 1365 (the "First Claim"). Plaintiffs' second claim for relief alleges sewage spills in violation of CCH's Honouliuli NPDES permit (the "Permit"), also in violation of the CWA, 33 U.S.C. §§ 1311(a), 1365 (the "Second Claim").

The Honouliuli Permit authorizes CCH to discharge treated wastewater from the outfall sewer located in Ewa Beach into Mamala Bay of the Pacific Ocean in accordance with effluent limitations, monitoring requirements, and other conditions. (Pls.' Ex. 1.) Unless certain specific circumstances exist, the Permit prohibits overflows or bypasses of the treatment facilities, including **[*4]** the waste collection system. (*Id.*) The term "overflow" is defined as "the intentional or unintentional diversion of flow from the collection and transport systems, including the pumping facilities." (*Id.*) The term "bypass" is defined as "the intentional diversion of waste streams from any portion of a treatment facility whose operation is necessary to maintain compliance with the terms and conditions of this permit." (*Id.*) The Permit requires that CCH immediately report any "noncompliance that may endanger health or the environment," which includes a violation of a discharge prohibition, any overflow or unanticipated bypass that exceeds an effluent limitation, and a violation of a maximum daily discharge limitation for any toxic pollutant or hazardous substance. The Permit also requires CCH to submit monthly Wastestream Diversion Reports, which report sewage spills and bypasses from Honouliuli WWTP. All reports must be signed and certified as accurate under penalty of law. In general, these reports are referred to herein as CCH Spill Reports.

The Consent Decree issued by this Court on May 15, 1995, in a related case, Civ. No. 94-00765 DAE-KSC, requires CCH to submit quarterly reports **[*5]** regarding any noncompliance with the requirements of the Consent Decree. The Quarterly Reports must also include collection system spills and all WWTP emergency bypasses caused by infiltration and inflow in the previous quarter. The Consent Decree requires that the reports be signed and certified as accurate under penalty of law. CCH filed Quarterly Reports through December 31, 2005. However, there is no evidence that CCH filed Quarterly Reports for the period between January 1, 2006, and September 30, 2007.

On May 20, 2008, Plaintiffs filed a motion for partial summary judgment on their First and Second Claims. (Doc. # 177.) With respect to their First Claim, Plaintiffs requested that this Court find there were a total of 332 violations of the CWA. However, in their reply brief, Plaintiffs requested a finding with respect to only 270 violations and withdrew their requests to the extent they were based upon spills from facilities that CCH contended it did not own and those spills that constituted WWTP bypasses. After the hearing, the parties filed joint exhibits wherein they agreed that under the First Claim there are 112 spills that are not contested by CCH and 134 alleged violations **[*6]** that are contested by CCH. (Doc. # 202, Exs. A, B.)

With respect to their Second Claim, Plaintiffs initially sought a finding that there were 207 violations of the CWA for discharging raw or partially treated sewage to ground from the Honouliuli WWTP or collection system in violation of the Permit. However, in their reply brief, Plaintiffs lowered the number of alleged violations to 148 days/incidents of spills, none of which are a part of their First Claim.

CCH filed its opposition on June 12, 2008. (Doc. # 184.) CCH also filed on June 12, 2008, a motion to dismiss Plaintiffs' Second Claim. (Doc. # 182.) By request of the parties, CCH's motion to dismiss was set for hearing on the same day as Plaintiffs' previously scheduled motion and Plaintiffs filed one brief as their opposition to CCH's motion and a reply to their motion on June 23, 2008. (Doc. # 191.) CCH filed a reply to its motion on June 26, 2008. (Doc. # 195.) After the hearing, the United States Environmental Protection Agency ("EPA") was allowed to file an Amicus Curiae Brief, which it did on July 14, 2008 (Doc. # 200), and CCH was allowed to file an opposition to the Amicus Curiae Brief, which it did on July 21, 2008. (Doc. **[*7]** # 205.)

STANDARD OF REVIEW

I. *Plaintiffs' Motion for Partial Summary Judgment*

Rule 56 requires summary judgment to be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Porter v. California Dept. of Corrections,* 419 F.3d 885, 891 (9th Cir. 2005); *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1134 (9th Cir. 2000). A main purpose of summary judgment is to dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. A moving party without the ultimate burden of persuasion at trial-usually, but not always, the defendant-has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102 (9th Cir. 2000). The burden initially falls upon the moving **[*8]** party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.,* 477 U.S. at 323).

Once the moving party has carried its burden under Rule 56, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" and may not rely on the mere allegations in the pleadings. *Porter,* 419 F.3d at 891 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). In setting forth "specific facts," the nonmoving party may not meet its burden on a summary judgment motion by making general references to evidence without page or line numbers. *S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885, 889 (9th Cir. 2003); Local Rule 56.1(f) ("When resolving motions for summary judgment, the court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."). "[A]t least some 'significant probative evidence'" must be produced. *T.W. Elec. Serv.,* 809 F.2d at 630 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)). **[*9]** "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu,* 198 F.3d at 1134.

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv.,* 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter,* 419 F.3d at 891. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. *Id.* However, inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 631.

II. *CCH's Motion to Dismiss the Second Claim*

CCH brought its motion based upon lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6).

In a motion to dismiss for lack of the subject matter jurisdiction **[*10]** the plaintiff bears the initial burden of proving that subject matter jurisdiction exists. *Prescott v. United States,* 973 F.2d 696, 701 (9th Cir. 1992). Upon a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may make a jurisdictional attack that is either facial or factual. *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004). CCH has made a facial attack.

A facial attack occurs when the movant "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal

jurisdiction." *Id.* In resolving a facial attack on the allegations of the complaint, the court must accept the allegations of the complaint as true. *Mason v. Arizona,* 260 F. Supp. 2d 807, 815 (D. Ariz. 2003). "Unlike a Rule 12(b)(6) motion, however, the court will not reasonably infer allegations sufficient to support federal subject matter jurisdiction because a plaintiff must affirmatively allege such jurisdiction." *Id.* For a facial attack, the court will grant the motion "only if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Denney v. Drug Enforcement Admin.,* 508 F. Supp. 2d 815, 2007 WL 2344900, at *3 (E.D. Cal. 2007). **[*11]** "A complaint will be dismissed for lack of subject matter jurisdiction (1) if the case does not 'arise under' any federal law or the United States Constitution, (2) if there is no case or controversy within the meaning of that constitutional term, or (3) if the cause is not one described by any jurisdictional statute." *Id.* (citing *Baker v. Carr,* 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).

A Rule 12(b)(6) motion will be granted where the plaintiff fails to state a claim upon which relief can be granted. Review is limited to the contents of the complaint. *See Clegg v. Cult Awareness Network,* 18 F.3d 752, 754 (9th Cir. 1994). Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the plaintiff. *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,* 416 F.3d 940, 946 (9th Cir. 2005). A complaint need not include detailed facts to survive a Rule 12(b)(6) motion to dismiss. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). In providing grounds for relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. *See id.* at 1966. A plaintiff must include enough facts to raise a reasonable expectation that discovery **[*12]** will reveal evidence. In other words, a plaintiff must allege enough facts to state a claim for relief that is plausible on its face. *See id.* at 1974. "[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir. 1988).

DISCUSSION

I. *Plaintiffs' Motion for Summary Judgment on Their First Claim*

A. *Uncontested Spills*

In their motion Plaintiffs requested that this Court find there were a total of 332 violations of the CWA based upon overflows or spills of raw sewage from the CCH collection system or WWTPs. In their opposition, CCH contested only 216 of the 332 alleged violations. In their reply brief, Plaintiffs withdrew their request for summary judgment with respect to 332 violations and sought summary judgment for 270 violations. At the hearing, CCH suggested that the parties be allowed to jointly submit a chart identifying the contested and uncontested spills. On July 14, 2008, the parties submitted Submissions in Response to June 30, 2008 Hearing on Plaintiff's Motion for Partial Summary Judgment with jointly submitted charts, Exhibits A and B attached, which listed a number **[*13]** of spills by date and location. (Doc. # 202, Exs. A, B.) All spills not included on Exhibits A or B have been withdrawn by Plaintiffs.

Exhibit B lists by date and location each spill that CCH does not dispute reached receiving waters of the United States. (*See* Doc. # 202 at Ex. B.) Those spills total 112 spills. Upon review of the record, this Court also finds that Plaintiffs have presented evidence that each of those spills in turn violated the CWA, since each element, as set forth below, has been met. Accordingly, this Court enters judgment in favor of Plaintiffs with respect to 112 violations of the CWA, as listed by date and location of each spill on Exhibit B of Document number 202.

B. *Contested CWA Violations*

Exhibit A of document number 202 lists by date and location a total of 94 spills for which Plaintiffs are seeking a finding of 134 violations. CCH contests liability, arguing that such spills did not reach receiving waters of the United States because the spills went into a storm drain, a dry stream bed, were contained, or there is no evidence that the spill reached receiving waters of the United States. CCH also asserts that some of the spills were double counted.

In order **[*14]** to establish liability for these 94 spills at issue, Plaintiffs must establish that CCH is a person who discharged a pollutant into the navigable waters of the United States. *See* 33 U.S.C. § 1311(a) ("the discharge of any pollutant by any person shall be unlawful"); 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" as the addition of a pollutant into navigable waters); *see also United States v. Moses,* 496 F.3d 984, 988 (9th Cir. 2007) (the CWA "outlaw[s] the unauthorized 'discharge of any pollutant by any person. That, in turn, means that [a person] could not add 'any pollutant to navigable waters,' which means 'the waters of the United States'") (citations omitted).

It is undisputed that CCH falls within the definition of person under the CWA [1] and that sewage is a pollutant. [2] The dispute in this case is whether many of the alleged 94 spills went to navigable waters of the United States.

FOOTNOTES

1 "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).

2 "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage **[*15]** sludge, munitions, chemical wastes, biological materials, ..." 33 U.S.C. § 1362(6).

"[A] body of water need not, itself, be navigable in order to be one of the waters of the United States." *Moses,* 496 F.3d at 988. Instead, both the EPA and the Army Corps of Engineers have defined waters of the United States to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . [and] [t]ributaries of [such] waters[.]" 33 C.F.R. § 328.3(a); *see also* 40 C.F.R. § 122.2 (same); *see also Moses,* 496 F.3d at 989 n.8 ("There can be little doubt that a tributary of waters of the United States is itself a water of the United States.").

The Supreme Court has refined this definition as follows:

> "[T]he waters of the United States" *includes only those relatively permanent,* standing *or continuously flowing* bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. *The phrase does not include* channels through which water flows intermittently or ephemerally, or *channels that periodically provide drainage for rainfall.*

Rapanos v. United States, 547 U.S. 715, 739, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (citation, internal quotations, **[*16]** ellipses, and brackets omitted) (emphasis added).

The term "relatively permanent" does not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstance,

such as a drought, nor does it exclude seasonal rivers that contain continuous flow during some months of the year but no flow during dry months. *Id.* at 733 n.5. Thus, even "a seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States." *Moses,* 496 F.3d at 989. In addition, the Supreme Court made it clear that "channels containing permanent flow are plainly within the definition[.]" *Rapanos,* 547 U.S. at 733 n.5. However, normally, ditches, channels, and conduits carrying an intermittent flow of water are, by and large, not "waters of the United States." *Id.* at 735-36.

In *Rapanos,* the government brought civil enforcement proceedings based on Rapanos's actions of backfilling wetlands without a permit. 547 U.S. at 719-21. The wetlands were on his own property and were near ditches or man-made drains that eventually emptied into traditional navigable waters. Based upon the Army Corps of Engineers and the EPA's interpretation **[*17]** of their jurisdiction, the government urged the Supreme Court to adopt an expansive interpretation of "the waters of the United States." That interpretation included

> virtually any parcel of land containing a channel or conduit-whether man-made or natural, broad or narrow, permanent or ephemeral-through which rainwater or drainage may occasionally or intermittently flow. . . . [such as] storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years.

Id. at 722. The Supreme Court stated that the Army Corps's definition of "the waters of the United States," which would include "storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert," stretches the definition "beyond parody[] [and] [t]he plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Id.* at 734.

In supporting its holding that "waters of the United States" does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage **[*18]** for rainfall, the Supreme Court further explained that

> [i]t is of course true . . . that ditches, channels, conduits and the like can all hold water permanently as well as intermittently, . . . such a statute that treats "waters" separately from ditches, channels, tunnels, and conduits, thereby distinguishes between continuously flowing "waters" and channels containing only an occasional or intermittent flow. It is also true that highly artificial, manufactured, enclosed conveyance systems-such as sewage treatment plants, and the mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents of the city['s] . . . system of waterworks,-likely do not qualify as "waters of the United States," despite the fact that they may contain continuous flows of water. But this does not contradict our interpretation, which asserts that relatively continuous flow is a necessary condition for qualification as a "water," not an adequate condition. Just as ordinary usage does not treat typically dry beds as "waters," so also it does not treat such elaborate, man-made, enclosed systems as "waters" on a par with "streams," "rivers," and "oceans."

Id. at 736 n.7 (citations, some quotation **[*19]** marks, and brackets omitted).

The holding of *Rapanos* discussed above is the plurality holding of four Justices. The *Rapanos* decision, however, produced another test for whether a body of water falls under the reach of the CWA, as set forth by Justice Kennedy in his concurrence. Justice Kennedy found that "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring in the judgment). He explained that

> wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id. at 780.

Relying on the test espoused by Justice Kennedy, CCH argues that proof that a spill went into a streambed is insufficient to establish liability because **[*20]** Plaintiffs have not established that each stream at issue has a "significant nexus" with a navigable water such that each stream has a hydrological connection with the ocean that affects the physical, chemical or biological integrity of the ocean. CCH's reliance on *Rapanos* for this proposition is misplaced because that test was applied specifically to an isolated wetland that is not adjacent to a navigable-in-fact-water. *See Rapanos,* 547 U.S. at 759, 783-87 (Kennedy, J., concurring in the judgment). As there are no isolated wetlands at issue in this case, the "significant nexus" test is irrelevant and inapplicable.

However, the plurality's definition of waters of the United States discussed above is clearly applicable to CCH's arguments that it cannot be held liable for spills that entered a storm drain, dry stream bed, or otherwise did not enter into receiving waters of the United States. This Court will discuss each of CCH's objections by category in turn.

1. *Storm Drain Spills*

Of the 134 contested violations, CCH argues that it is not liable for 74 because the spills at issue reached only a storm drain ("Storm Drain Spills"). (*Compare* Pls.' Reply Ex. 5A, Joint Ex. A from Doc. # 202, **[*21]** and CCH Ex. C from Doc. # 202.) Plaintiffs state that with respect to each of the Storm Drain Spills at issue, CCH's own discharge monitoring reports specified a water, under the column tilted "Entered Receiving Waters" as the water which the spill could have reached or to which the storm drain led. [3] For example, the overflow on July 13, 1999, at Lawehana St., was noted by the DOH as having entered a storm drain, whose outlet was Pearl Harbor. Similarly, the overflow on July 17, 1999, at Middle St., was noted as having entered a storm drain which leads to Kahauiki Stream. Plaintiffs provided evidence, which is uncontested by CCH, that Pearl Harbor is a receiving water, and Kahauiki Stream is a tributary that runs to receiving waters.

FOOTNOTES

3 The Ninth Circuit has held that Discharge Monitoring Reports, are "conclusive evidence of an exceedance of a permit limitation." *Sierra Club v. Union Oil Co. of Cal.,* 813 F.2d 1480, 1492 (9th Cir. 1987) *vac'd on other grounds,* 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988), *judgment reinstated and amended,* 853 F.2d 667 (9th Cir. 1988). This Court has also previously held that Discharge Monitoring Reports constitute admissions of noncompliance that bind the defendant in an enforcement **[*22]** proceeding because the reports are submitted under penalty of perjury. *Save Our Bays and Beaches,* 904 F. Supp. at 1138 ("these self-monitoring reports, known as "Discharge Monitoring Reports" or "DMRs," are public documents and are submitted under penalty of perjury.").

CCH asserts that regardless of whether its Spill Reports reported a receiving water, under the *Rapanos* decision, spills that enter only a storm drain cannot result in a CWA violation because a storm drain is not a water of the United States. Plaintiffs assert that this Court should follow the Eleventh Circuit case, *United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997), and count spills which went into a storm

drain that leads to a receiving water, because the Ninth Circuit recently relied on reasoning from that case and found that *Rapanos* did not undercut that reasoning.

In *Eidson,* the court found CWA violations based upon discharges which entered into storm water ditches that led to a drainage canal, which in turn flowed into Tampa Bay. The *Eidson* court reasoned that

> [t]here is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently. Pollutants **[*23]** need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage. . . . Rather, as long as the tributary would flow into the navigable body of water "during significant rainfall," it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

Id. at 1342.

The Ninth Circuit in *Moses* noted that it had previously found that "a seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States" and in so doing relied upon the language quoted above from the *Eidson* case. *Moses,* 496 F.3d at 989. The Ninth Circuit discussed the *Rapanos* decision and found that it did not undercut the prior analysis based on *Eidson* because the prior analysis was in line with the statements in *Rapanos* that seasonal rivers with continuous flow for some months of the year were not necessarily excluded from the definition, and that "'intermittent streams, like perennial streams, are still streams.'" *Id.* at 989-90 (quoting *Rapanos* 547 U.S. at 801 (Stevens, J., dissenting)). Therefore, in *Moses,* the Ninth Circuit found that

> the man-made severance **[*24]** of Teton Creek at Alta, Wyoming, may have made the portion [of the Teton Creek] in question here dry during much of the year, but when the time of runoff comes, the Creek rises again and becomes a rampaging torrent that ultimately joins its severed lower limb and then rushes to the Teton River, the Snake River, and onward to the Columbia River and the Pacific Ocean. . . . In short, on this record Teton Creek constitutes a water of the United States[.]

Id. at 991.

Unlike the record in *Moses,* however, this Court does not have evidence with respect to each Storm Drain Spill that the storm drains at issue ever had a continuous flow over some months of the year or could be considered a seasonally intermittent stream or tributary to a receiving water. Although some storm drains could possibly have a continuous flow of water during some months of the year or "when the time for run off comes," no such evidence was presented. At most, the DOH Summary Table or CCH Spill Reports state that at the time of the spill in question there were intermittent showers or heavy rainfall. This is insufficient to establish as a matter of law that each storm drain is a water of the United States or is anything **[*25]** other than a "channel[] that periodically provide[s] drainage for rainfall." *Rapanos,* 547 U.S. at 739 (the term waters of the United States "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall"). [4] As a channel that periodically provides drainage for rainfall is not included within the definition of waters of the United States, Plaintiffs, without more evidence, cannot establish CWA violations for spills that entered storm drains only.

FOOTNOTES

[4] Indeed, storm drains, also known as storm sewers, are defined as sewers "intended to carry only storm waters, surface runoff, street wash waters, and drainage." 40 C.F.R. § 35.905; *see also* 40 C.F.R. § 35.2005.

Accordingly, Plaintiffs' claim with respect to the 74 violations based upon Storm Drain Spills is DENIED WITHOUT PREJUDICE as there is no evidence that the storm drains at issue had at least a seasonally intermittent flow of water during some portion of the year.

2. *Dry Stream Bed*

CCH states that four of the alleged spills entered only a dry stream bed (one of which also went into a storm drain and another of which was also contained) and thus, Plaintiffs are **[*26]** not entitled to summary judgment with respect to CWA violations on those spills. *See Rapanos,* 547 U.S. at 732-733 (waters of the United States "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. . . . [The term does not] encompass[] transitory puddles or ephemeral flows of water."). Plaintiffs argue that the streams at issue intermittently flow to the Pacific Ocean.

As it is clear that a completely dry stream bed through which water never flows would not be considered a water of the United States, this is a factual dispute of whether the stream beds at issue have no flow, only intermittent or ephemeral flow, or continuous flow during some months of the year.

One of the spills at issue occurred on March 13, 2000, at La-I Road in Palolo, Honolulu. The DOH Summary Table and the CCH Spill Reports state that rocks fell on a line in a dry stream bed, and the spill was removed. Under the receiving Waters column, CCH reported that the spill entered Palolo Stream. Plaintiffs provided the declaration of Matthew McGranaghan, an Associate Professor of Geography at the University of Hawaii, in which **[*27]** he testifies that Palolo Stream is a tributary to the Pacific Ocean. Other than this unsupported and unexplained statement that Palolo Stream is a tributary to the Pacific Ocean, Plaintiffs have not provided evidence regarding the level of flow in the stream at the time of the spill or whether Palolo Stream is ordinarily a dry channel through which water occasionally or intermittently flows, or has a continuous flow. Because CCH's spill reports and DOH's summary table both indicate that the spill occurred in a dry stream bed, there is a question of fact as to whether Palolo Stream qualifies as a water of the United States. Accordingly, summary judgment cannot be found in Plaintiffs' favor regarding this spill.

Similarly, for a spill that occurred on October 17, 2001, the DOH summary table indicated that the spill entered Aiea Stream and that the stream bed was dry. Plaintiffs offered only McGranaghan's declaration that Aiea Steam is a water body that drains into the Pacific Ocean. This is insufficient for this Court to find as a matter of law that Aiea Stream is continuously flowing body of water, rather than a dry stream bed which may never have any flow.

For a spill that occurred on **[*28]** February 13, 2007, the DOH Summary Table stated that the spill entered Moanalua Stream, which was dry. McGranaghan's declaration again states only that Moanalua Stream is a tributary to the Pacific Ocean.

Finally, for a spill that occurred on July 31, 2007, the CCH Spill Reports and DOH Summary Table state that the spill entered Waimalu dry stream bed. Plaintiffs only evidence regarding Waimalu stream is the declaration that states that it drains into the Pacific Ocean. This is insufficient to establish that the stream beds at issue had any continuous flow of water.

Thus, Plaintiffs' claim with respect the dry stream bed spills is DENIED WITHOUT PREJUDICE.

3. *No Evidence Spill Reached Receiving Waters/Spill Contained*

CCH argues that two spills (which also went into a dry stream bed or a storm drain) should not be counted because the spills were contained. CCH also asserts that 16 alleged violations should not be counted because there was no reported volume to a receiving water, and therefore, no violation of the CWA.

To the extent CCH argues that it cannot be found liable for any spills because there is no evidence of the actual volume of spill that reached a receiving water, that argument **[*29]** lacks merit. It is of no importance that CCH's Spill Report only estimated the total volume of the spills and that the spill reached the waters of the United States, but did not expressly identify the volume of sewage that entered the Pacific Ocean. There is no requirement that a specified volume must reach waters of the United States, only that the discharge went into a receiving water. *See Sierra Club,* 813 F.2d at 1491 (there is no de minimus exception to the CWA); *Moses,* 496 F.3d at 989 ("Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.").

All that matters is whether there is sufficient evidence to determine as a matter of law that a spill entered into a water of the United States as defined above. Although this Court has previously held that discharge monitoring reports constitute admissions of noncompliance that bind the defendant in an enforcement proceeding because the reports are submitted under penalty of perjury, CCH's notation in its Spill Reports under the column "Entered Receiving Water" is only some evidence that a spill entered a receiving water, rather than conclusive evidence. This is **[*30]** due in part to the fact that whether an identified body of water is in fact a receiving water of the United States is a legal question, in addition to being a factual question. Therefore, that a CCH employee realized that a body of water may have been involved or impacted by the spill and therefore listed that body of water in the Spill Report under the appropriate column does not conclusively show that the body of water fits within the definition of the term "waters of the United States," as defined in *Rapanos.* That is a determination to be made by the court.

Moreover, for spills where there was also a notation that it entered a dry stream bed or a storm drain, the report itself creates a question of fact as to whether the body of "water" identified under the column "Entered Receiving Water" legally qualifies as a receiving water.

In other words, the mere fact that CCH named a body of water under a column entitled Receiving Water in its Spill Report is not conclusive evidence that the spill entered into "waters of the United States" as that term has been defined by case law. Accordingly, based on the record as its stands, this Court cannot enter summary judgment in favor of Plaintiffs **[*31]** on the 16 violations alleged. Plaintiffs' motion with respect to these 16 violations is DENIED WITHOUT PREJUDICE.

5. *Multiple Violations*

The following four spills began on one date and ended on another date: 1) December 6 to December 7, 2000; 2) March 7 to March 8, 2002; 3) July 4 to August 7, 2003; and 4) March 22 to March 23, 2006. CCH contends each of the four spills should be counted as only one violation, for a total of four violations. Plaintiffs argue that a violation should be counted for every calendar day on which the spill occurred, which according to Plaintiffs, would be 41 violations.

Plaintiffs cite to this Court's October Order wherein this Court determined that a violation of an annual limit counts as a violation of each day of the year. (October Order at 16-17.) This Court so held because the CWA imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d); *see also Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.,* 791 F.2d 304, 314 (4th Cir. 1986), *vacated on other grounds,* 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (holding that 33 U.S.C. § 1319(d) speaks in terms of "penalties per day of violation").

It is clear to this Court therefore, that CCH is liable for each **[*32]** day on which a violation occurred, which in this case would be each day during which a spill occurred or was still occurring. However, neither party presented legal citations to this Court defining a "day." For example, should a day be considered solely by calendar date without regard to a 24 hour period, or where a sewage spill lasts for several days, should a day be counted on a rolling 24 hour period? This is an important question for these spills because some of them occurred in the evening or at night and lasted into the early hours of the next morning, but in total lasted far less than 24 hours. Without answering this question, and counting only each 24 hour period in favor of the non-moving party, this Court finds that at a minimum, there were 37 violations. This Court, therefore, GRANTS summary judgment in favor of Plaintiffs with respect to these four spills, finding a total of 37 violations. This Court DENIES the remainder of Plaintiffs' request for further violations with respect to these spills WITHOUT PREJUDICE.

II. *Plaintiffs' Second Claim for Relief*

In their motion, Plaintiffs sought a finding that there were 207 violations of the CWA for discharging raw or partially treated **[*33]** sewage to the ground in the form of overflows or bypasses from the Honouliuli WWTP in violation of the Honouliuli Permit (the "Permit"). Plaintiffs, however, withdrew some of these alleged violations and now seek summary judgment on 148 violations of the Permit. Plaintiffs claim that *any* spill or bypass of the Honouliuli WWTP collection system, even those that did not reach waters of the United States, violate the Permit because the Permit prohibits any overflow or bypass and requires CCH to operate its system in a manner that precludes public contact with wastewater. Plaintiffs have presented CCH's reports which indicate that CCH spilled raw or partially treated sewage from the Honouliuli WWTP or collection system hundreds of times between May 1999 and December 2007. CCH seeks summary judgment with respect to 148 alleged violations.

CCH opposes this motion and has separately filed a motion to dismiss the Second Claim. CCH states that this Court must deny Plaintiffs' motion and grant its motion to dismiss the Second Claim in its entirety because Plaintiffs are seeking recovery for ground-only spills, which Plaintiffs concede did not enter into waters of the United States. CCH's main **[*34]** argument is that the Supreme Court in *Rapanos* and *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (hereinafter "SWANCC") [5] clarified that the scope of the CWA is limited to impacts to waters of the United States, and because none of the spills alleged in the Second Claim impacted the waters of the United States, this Court has no jurisdiction over the Second Claim. In other words, although the spills at issue in the Second Claim may have violated the terms of the Permit, those Permit violations did not involve spills that reached waters of the United States and therefore, this Court does not have jurisdiction because it cannot enforce through a permit what it could not enforce under the CWA.

FOOTNOTES

5 In *SWANCC,* the Supreme Court held that the Amy Corps of Engineers' rule which extended the definition of "navigable waters" under the CWA to include intrastate waters used as habitat by migratory birds, exceeded the authority granted to Corps under CWA. 531 U.S. at 171-72. Therefore, an abandoned sand and gravel pit containing ponds used by migratory birds was not subject to Corps' jurisdiction under CWA. *Id.*

Plaintiffs argue that they have the right to enforce **[*35]** the Permit through this citizen suit and that CCH is essentially seeking to modify or challenge its Permit terms, something which it cannot do in this enforcement proceeding. CCH argues in its reply brief that it is not at this time challenging the validity of the Permit, or EPA's or DOH's authority to issue permit conditions that do not impact waters of the United States, nor is it seeking to nullify any of the conditions in its Permit. CCH is only raising the issue that Plaintiffs should not be able to use the Permit terms to enforce ground-only spills under the CWA because the CWA only prohibits spills that reach the waters of the United States.

The EPA was allowed to file an Amicus Curiae brief on these issues, which it did on July 14, 2008 (the "Amicus Curiae Brief"). (Doc. # 200.) The EPA agrees with Plaintiffs and asserts that CCH is in fact seeking to challenge the terms of its Permit, something which it cannot do. In addition, EPA avers that this Court has subject matter jurisdiction over Plaintiffs' Second Claim through 28 U.S.C. § 1331 and the CWA and that jurisdiction is unaffected by the *Rapanos* and *SWANCC* cases. CCH filed an opposition to the Amicus Curiae Brief on July **[*36]** 21, 2008. (Doc. # 205.) Because there are cross motions on the Second Claim, this Court will discuss each motion in turn.

A. *CCH's Motion to Dismiss the Second Claim*

1. *Subject Matter Jurisdiction*

The heart of CCH's argument is that Plaintiffs' claim should be dismissed because they cannot prove a necessary element of their Second Claim -- that the spills entered waters of the United States. [6] CCH argues that Plaintiffs' claim is therefore not colorable under the CWA, and this Court does not have jurisdiction over the Second Claim. This Court disagrees.

FOOTNOTES

[6] As stated above, one way to establish a violation of the CWA is to show that CCH is a person who discharged a pollutant into the navigable waters of the United States. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12); *see also Moses,* 496 F.3d at 988.

Subject matter jurisdiction is established in this case under 28 U.S.C. § 1331, which vests this Court with jurisdiction over actions arising under the laws of the United States. The Second Claim arises under the CWA, a law of the United States. In addition, section 505 of the CWA authorizes citizens to bring suit against any governmental entity that is alleged to be in violation of an effluent **[*37]** standard or limitation, which includes a permit condition, and provides that the district courts shall have jurisdiction to enforce the effluent standard or limitation. 33 U.S.C. §§ 1365(a)(1) and (f). Plaintiffs have brought such a claim in their Second Claim.

Whether or not Plaintiffs can prove violations of the CWA based upon violations of NPDES permit terms that prohibit ground-only spills, goes to the merits of Plaintiffs' claim, not to the jurisdiction of this Court. Indeed, "[i]t is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

> Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

In *United States v. Sea Bay Dev. Corp.,* No. 2:06cv624, 2007 U.S. Dist. LEXIS 29059, 2007 WL 1169188 (E.D. Va. April 18, 2007), **[*38]** the court was presented with the same argument that CCH makes here. The defendants argued that pursuant to the *Rapanos* decision, the court lacked subject matter jurisdiction because the CWA could not be construed to cover the property in question. The court determined that "the issue of whether the property in question is covered by the CWA depends upon the Court's construction of the CWA." 2007 U.S. Dist. LEXIS 29059, [WL] at *4. The court held that its construction of the term

> 'waters of the United States' may determine whether [the] [p]laintiff has a valid cause of action, but as in *Steel Co.,* this question of statutory construction does not implicate subject matter jurisdiction. Instead, whether the property in question falls under the purview of the CWA's 'navigable waters' definition as construed by the Supreme Court goes to the merits of Plaintiff's case.

Id.

Similarly, here, the issue of whether the spills violated the Permit and in turn violated the CWA depend upon this Court's construction of the CWA based on precedent. As detailed below, there is a colorable argument that CCH is attempting to challenge its Permit terms through this jurisdictional argument and because this is an enforcement proceeding and **[*39]** CCH did not exhaust its administrative remedies, CCH cannot now make such a challenge. Accordingly, this Court has jurisdiction to consider the merits of Plaintiffs' Second Claim because the issue of whether they can enforce permit terms based on ground-spills goes to the scope of the CWA, its grant of authority to the EPA, and CCH's failure to follow the statutorily imposed administrative remedies. *See Steel Co.,* 523 U.S. at 92 (the question of the scope of the Emergency Planning and Community Right-To-Know Act of 1986 goes to the merits and not to statutory standing).

2. *Challenge to Permit Terms*

Although CCH claims that it is not challenging its Permit terms, that is in fact what CCH has done in its briefs. Indeed, Plaintiffs' Second Claim is based on violations of the Permit, and CCH is arguing that the Permit cannot be enforced in this Court because the Permit prohibits acts that are not prohibited by the CWA -- ground-only spills. Time and again CCH asserts that neither the EPA nor Plaintiffs can enforce through a permit what is unenforceable under the CWA. In other words, the Permit violations alleged here are unenforceable. [7]

FOOTNOTES

[7] Specifically, in its opposition to the Amicus Curiae **[*40]** Brief, CCH states "permit conditions -- to the extent they seek to regulate non-navigable water spills -- are clearly invalid." (Doc. # 205 at 3.)

As acknowledged by CCH, however, permit terms are not subject to judicial review in enforcement proceedings. 33 U.S.C. § 1369(b)(1)

provides that review of the Administrator's action

> may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. § 1369(b)(2) provides "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *See* 33 U.S.C. § 1369(b).

Following this premise and cases based thereon, this Court previously held in this case that CCH could not challenge **[*41]** the typographical error of the effluent limitations set forth in its Permit because this Court did not have authority to change the terms of a permit in an enforcement action, and CCH had not exhausted its administrative remedies. (Order Granting in Part and Denying in Part Pls.' Mot. for Partial SJ on Pls.' Third, Fourth and Eighth Claims filed Oct. 30, 2007 ("October Order") at 24-27.) In making that determination, this Court relied upon *Sierra Club* which, similar to the instant case, was "an enforcement action in which Sierra Club alleged that Union Oil failed to comply with the terms of a permit[.]" 813 F.2d at 1486. In *Sierra Club,* the Ninth Circuit found that "Union Oil was essentially asking the district court to modify its permit to include an upset provision," something which the district court did not have authority to do. *Id.* at 1486. Instead, the court held that Union Oil should have exhausted its administrative remedies to modify the terms of the permit. *Id.* Because Union Oil had failed to proceed through the proper administrative channels, it was bound by the terms of the permit. *Id.*

The Ninth Circuit explained that "[t]he purpose of the exhaustion rule is to allow an **[*42]** administrative agency to perform functions within its special competence-to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Id.* (citation and internal quotation marks omitted). The Ninth Circuit further noted that there are several administrative routes that can be taken to protest a permit's terms. *Id.* at 1487. For example,

> [t]he NPDES program authorizes permittees to seek modifications of their permits in response to current judicial decisions and new EPA regulations. 40 C.F.R. § 122.62. In addition, when a state permit issuer submits a proposed permit to the EPA Administrator for review, the Administrator is authorized to object to the permit's terms. 33 U.S.C. § 1342(d).

Id. In addition, as noted above, 33 U.S.C. § 1369 allows for review by the appellate court.

Here, CCH has not exhausted its administrative remedies with respect to the Permit. Although the *Rapanos* decision was issued well after the 120 days had passed to challenge the Permit terms, CCH has provided no reason why it did not challenge its Permit terms based on this argument soon after the *Rapanos* decision was issued in 2006. Accordingly, it is too late **[*43]** for CCH to now challenge the terms of its Permit through a motion to dismiss the Second Claim of this enforcement action. For these reasons, this Court DENIES CCH's motion to dismiss Plaintiffs' Second Claim.

B. *Plaintiffs' Motion for Summary Judgment on Their Second Claim*

If the only pending motion were CCH's motion to dismiss the Second Claim, this Court would not need to further discuss the Second Claim as the motion has been denied because it is essentially an untimely challenge to the Permit terms. However, because Plaintiffs have moved for summary judgment on their Second Claim, this Court must determine whether Plaintiffs have met their burden of proof on each element.

It is undisputed that each of the sewage spills at issue in the Second Claim are ground-only spills. Plaintiffs' have conceded that they cannot show that any of the spills entered waters of the United States. CCH argues that because the spills did not enter receiving waters, Plaintiffs cannot prove violations of the CWA. Plaintiffs, however, argue that whether or not the spills entered waters is irrelevant because it is clear that the spills violated the Permit terms, and therefore the CWA, and CCH cannot now attack **[*44]** the terms of its Permit. This Court agrees with Plaintiffs.

Plaintiffs framed their Second Claim as a cause of action for sewage spills in violation of the Permit conditions and the CWA "33 U.S.C. §§ 1311(a), 1365." (Second Amend. Compl.) Plaintiffs alleged that CCH's poor system operation and maintenance allowed ground-only sewage spills in violation the Standards Provisions and Reporting Requirements of the Permit, which requires CCH to operate the collection system in a manner that precludes public contact with wastewater and prohibits overflows and bypasses. (*Id.* at 39-42.) Plaintiffs were careful to keep their Second Claim to violations of the Permit. The last paragraph of the Second Claim states the Permit condition

> constitutes an effluent limitation within the meaning of CWA section 505(a) and (f), 33 U.S.C. § 1365(a), (f). Accordingly, every separate instance when CCH has failed to comply with DOH NPDES Standard Permit Condition paragraph 9 on or after May 30, 1999 constitutes a day of the Defendants' violation of a CWA effluent limitation.

(*Id.* P 84.)

In order to determine if Plaintiffs are entitled to summary judgment, this Court must review the Permit terms, and the underlying **[*45]** CWA authority that the Permit is based upon.

CWA section 505(a) provides in part as follows

> any citizen may commence a civil action on his own behalf-- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a). The definition of the term "Effluent standard or limitation" includes "a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter[.]" 33 U.S.C. § 1365(f)(6). 33 U.S.C. § 1342(a)(1) provides that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant." "The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and *such other requirements as he deems appropriate.*" 33 U.S.C. § 1342(a)(2) (emphasis added).

Thus, the statute clearly provides the Administrator with broad authority to **[*46]** place conditions in the permit that he deems appropriate. *See Arkansas v. Oklahoma,* 503 U.S. 91, 105, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992) ("Congress has vested in the Administrator broad discretion to establish conditions for NPDES permits."). The EPA has promulgated regulations in reliance on this grant of power. Those regulations provide that permits must contain conditions appropriate to achieve compliance with the CWA, including a condition to properly operate and maintain facilities. 40 C.F.R. § 122.41. Those regulations also provide that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action." *Id.*

On the one hand CCH asserts that it is not challenging the Permit terms or EPA's authority. On the other hand, in its opposition to the Amicus Curiae Brief, relying on *Rapanos* and *SWANCC,* CCH asserts that to the extent the Permit regulates ground-only spills, it is invalid. CCH also asserts that the EPA has failed to make the connection or explain how conditions prohibiting ground-only spills are necessary to ensure compliance with the CWA and thus, is actually within EPA's authority to regulate. CCH is essentially arguing that the prohibition of ground-only **[*47]** spills in its Permit is beyond EPA's authority to regulate.

Although CCH's argument that Plaintiffs cannot enforce through a permit what is unenforceable directly under the CWA may be persuasive given the holdings in *Rapanos* and *SWANCC,* CCH has not effectively challenged the EPA's authority to regulate ground-only spills or argued that its Permit conditions were outside of EPA's reasonable exercise of statutory authority. [8] Indeed, CCH only raised that argument in its last brief, and prior to filing that brief had stated that it was not challenging EPA's authority or the Permit terms. Having failed to make the argument earlier, and leading Plaintiffs and this Court to believe that CCH was not challenging its Permit terms or EPA's authority, CCH's argument is untimely and cannot be considered. *See* LR 7.4 ("Any arguments raised for the first time in the reply shall be disregarded."). Moreover, even if CCH had challenged EPA's authority in its motion, such challenge could not be considered by this Court in an enforcement proceeding where CCH failed to exhaust its administrative remedies. *See* 33 U.S.C. § 1369(b); *Sierra Club,* 813 F.2d at 1486. [9]

FOOTNOTES

[8] This Court notes, however, that although CCH's **[*48]** argument is persuasive based upon the definition of waters of the United States provided in *Rapanos,* the Supreme Court in *Rapanos* and *SWANCC* decided the cases based on interpretation of the statute and avoided addressing the outer limits of Congress's authority under the Commerce Clause, such as whether Congress could authorize the EPA to regulate purely intrastate waters under the CWA. *See SWANCC,* 531 U.S. at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."); *Rapanos,* 547 U.S. at 738-39 (interpreting the language of the statute and declining to adopt an interpretation that stretches the outer limits of Congress's commerce power).

[9] CCH also relies on *Exxon Corp. v. Train,* 554 F.2d 1310 (5th Cir. 1977), which found that the EPA did not have the authority to place conditions in permits controlling the disposal of wastes into deep wells. The procedural posture of that case, however, is quite different from the instant case. In *Exxon,* Exxon had already requested a permit modification from the EPA, which was denied, and the case **[*49]** involved a petition for review. *Id.* at 1315-16. Here, however, CCH has not requested a modification of its Permit from the EPA and this is an enforcement proceeding.

Additionally, the Ninth Circuit has held that permit conditions relating to sewage, and permit conditions regulating discharges that never reach navigable waters are enforceable permit conditions. *See NW Envtl. Advocates v. City of Portland,* 56 F.3d 979, 988-89 (9th Cir. 1995) ("enforceable permit conditions include conditions relating to sewage maintenance, and construction schedules . . . [and] *citizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the Clean Water Act, namely discharges that may never reach navigable waters.*") (citations omitted) (emphasis added). [10] This is exactly the type of conduct prohibited by the Permit that Plaintiffs now seek to enforce and for which they have the right to enforce. *Id.* at 986 ("[t]he plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions.") (emphasis added).

FOOTNOTES

[10] Although the *NW Envtl. Advocates* decision was issued prior to the *Rapanos* and *SWANCC* **[*50]** decisions, the Ninth Circuit's holding has not been overturned.

This Court is cognizant of the fact that by granting Plaintiffs' motion and finding 148 violations of the Permit, it is in effect finding 148 violations of the CWA that are not based on adding pollutants to waters of the United States.

Although this may seem as if it is a flawed result as argued by CCH, courts, including this Court in this case, have consistently found violations of the CWA for permit violations where the violative conduct could not by itself have violated the CWA had a permit not been issued. [11] Indeed, in the October Order, this Court granted summary judgment in favor of Plaintiffs on their Fourth Claim for relief, which alleged violations of the Sand Island WWTP Permit deadlines to construct and operate a disinfection facility. (October Order at 2.) This Court found that CCH committed a total of 1,578 violations of the permit for its continuous failure to construct and operate the disinfection facility as required by the NPDES permit. (*Id.* at 30.) Certainly, had the permit not been issued, a failure to build a disinfection plant would not directly violate the CWA as it does not involve an addition of **[*51]** pollutants to waters of the United States. CCH has not challenged that holding or argued that those violations should be discounted as they do not involve direct CWA violations. *See Nw Env't Advocates,* 56 F.3d at 988-89 (noting that several courts had held that citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations, such as retaining records of discharge sampling, and filing reports).

FOOTNOTES

[11] *See Save Our Bays and Beaches v. City and County of Honolulu,* 904 F. Supp. 1098, 1105 (D. Haw. 1994) ("Courts have held that a failure to comply with a permit condition amounts to a violation of the Act itself.") (citing *NRDC v. Vygen Corp.,* 803 F. Supp. 97, 103 (N.D. Ohio 1992) (reporting violations enforceable under the Act); *Sierra Club v. Simkins Indus., Inc.,* 847 F.2d 1109, 1115 (4th Cir. 1988) (same); *SPIRG v. P.D. Oil & Chem. Storage, Inc.,* 627 F. Supp. 1074, 1087-88 (D.N.J. 1986); *United States v. Earth Scis., Inc.,* 599 F.2d 368, 374 (10th Cir. 1979); *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton,* 506 F. Supp. 902 (W.D. Pa. 1980), aff'd, 644 F.2d 995 (3rd Cir. 1981) (holding conditions relating to maintenance to be enforceable)).

The reason **[*52]** for allowing citizen enforcement of permit terms that do directly involve adding pollutants into receiving waters is that as long as the permit is valid, a violation of a permit in turn is a violation of the CWA because the Administrator has authority to include in a permit conditions to assure compliance with the CWA as he deems appropriate. CCH had the opportunity to challenge the conditions of its Permit, including the condition that any bypass or overflow would be considered a violation of the Permit despite the fact that it did not reach receiving waters. Having failed to challenge the Permit conditions, as set forth above, CCH may not use an enforcement proceeding to collaterally attack the terms of its Permit. In other words, by failing to make this argument earlier in the correct forum, this Court cannot now entertain such an argument.

Although it is clear that ground-only spills are not in themselves violative of the CWA, a permit was issued and each spill in fact violates the

Permit. As set forth above, the Permit prohibits overflow or bypasses of the treatment facilities, and prohibits public contact with sewage. Each of these sewage spills violated those provisions of the **[*53]** Permit. Therefore, this Court finds 148 violations of the Permit and the CWA. For these reasons, Plaintiffs' motion for summary judgment on the Second Claim is GRANTED and this Court finds 148 violations of the Permit.

CONCLUSION

For the reasons stated above, this Court GRANTS IN PART AND DENIES IN PART WITHOUT PREJUDICE Plaintiffs' Motion for Partial Summary Judgment on Plaintiffs' First and Second Claims and DENIES CCH's Motion to Dismiss Plaintiffs' Second Claim.

Plaintiffs' motion for summary judgment is GRANTED with respect to their First Claim for the uncontested 112 spills, each of which this Court has found in turn violates the Clean Water Act, and for 37 other violations from the contested spills, for a total of 149 violations under the First Claim. Plaintiffs' motion on their First Claim for all other violations, all of which are contested, is DENIED WITHOUT PREJUDICE. Plaintiffs' motion for summary judgment with respect to their Second Claim is GRANTED, and this Court finds 148 violations of the Permit.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 18, 2008.

/s/ David Alan Ezra

David Alan Ezra

United States District Judge