IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

FRIENDS OF MAHA`ULEPU, INC., a Hawai`i non-profit corporation, Plaintiff, vs. HAWAI`I DAIRY FARMS, LLC, a Delaware Limited Liability Company; ULUPONO INITIATIVE, LLC; a Delaware Limited Liability Company; MAHA`ULEPU FARMS, LLC; a Delaware Limited Liability Company, Defendants.	CIVIL 15-00205 LEK-BMK

ORDER GRANTING PLAINTIFF'S FED. R. CIV. P. 56(D) MOTION TO DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 41)

Before the Court is Plaintiff Friends of Maha`ulepu, Inc.'s ("Plaintiff") Fed. R. Civ. P. 56(d) Motion to Defer Consideration of Defendants' Motion for Summary Judgment (ECF No. 41) ("Rule 56(d) Motion"), filed on January 4, 2016.[1] [Dkt. no. 68.] Defendants Hawai`i Dairy Farms, LLC, Ulupono Initiative, LLC, and Maha`ulepu Farm, LLC (collectively "Defendants") filed their memorandum in opposition on January 11, 2016, and Plaintiff

[1] The 56(d) Motion also included a request to shorten time for the hearing on the motion. On January 28, 2016, this Court denied the request as moot because it vacated the hearing on the Motion for Summary Judgment that was originally set for February 16, 2016. [Dkt. nos. 81 (EO vacating the hearing), 83 (EO denying the request).]

filed its reply on January 15, 2016. [Dkt. nos. 72, 78.]

On February 2, 2016, this Court issued an entering order finding this matter suitable for disposition without a hearing pursuant to Rule 7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawai`i ("Local Rules") and ruling on the 56(d) Motion ("2/2/16 EO Ruling"). [Dkt. no 86.] The instant Order supersedes the 2/2/16 EO Ruling. After careful consideration of the motion, supporting and opposing memoranda, and the relevant legal authority, Plaintiff's Rule 56(d) Motion is HEREBY GRANTED for the reasons set forth below.

BACKGROUND

The instant case is a citizen suit brought pursuant to the Clean Water Act ("the Act"), 33 U.S.C. § 1365(a)(1)(A). [Complaint, filed 6/1/15 (dkt. no. 1), at ¶ 2.] Specifically, Plaintiff alleges that Defendants have engaged in "construction and construction support activities" at the site of a "proposed commercial dairy farm" in Maha`ulepu Valley, on the island of Kaua`i, without the proper permit. [Id. at ¶¶ 1, 5.] According to Plaintiff, this has caused or is "likely to cause discharges of pollutants including, but not limited to, dirt, debris, sewage sludge from land applications, biological materials, rock, sand, or other materials" in violation of 33 U.S.C. § 1311(a) and 33 U.S.C. § 1342. [Id. at ¶¶ 3, 6.]

On November 3, 2015, Plaintiff filed a Motion to Compel Re: Fed. R. Civ. P. 34 Notice of Site Inspection ("Motion to Compel"), [dkt. no. 36,] which the magistrate judge orally granted at a hearing on December 22, 2015 ("12/22/15 Hearing") [dkt. no. 66]. On November 25, 2015, Defendants filed a Motion for Summary Judgment. [Dkt. no. 41.]

The Rule 56(d) Motion seeks deferral of the Court's consideration of the Motion for Summary Judgment until Plaintiff can conduct discovery, including discovery related to the Motion to Compel. [Rule 56(d) Motion at 1.] Defendants argue that the issues raised in the Rule 56(d) Motion are not relevant to the Motion for Summary Judgment, and the Rule 56(d) Motion should therefore be denied. [Mem. in Opp. at 2.]

STANDARD

Rule 56(d) states, in relevant part:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

This district court has stated:

> Whether to deny a Rule 56(d) request for further discovery by a party opposing summary judgment is within the discretion of the district court. Nidds v. Schindler Elevator Corp., 113

> F.3d 912, 920-21 (9th Cir. 1996). To obtain a continuance under Rule 56(d), the party opposing a motion for summary judgment must make "(a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists." Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009) (citation omitted).
>
> "A party requesting a continuance pursuant to Rule [56(d)] must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment." Tatum v. City & Cnty. of San Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006). Moreover, "[t]he burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists." Nidds, 113 F.3d at 921. The movant must also show diligence in previously pursuing discovery. See Pfingston v. Ronan Engineering Co., 284 F.3d 999, 1005 (9th Cir. 2002) ("The failure to conduct discovery diligently is grounds for the denial of a Rule 56[(d)] motion."); Kocsis v. Delta Air Lines, Inc., [963 F. Supp. 2d 1002, 1020] (D. Haw. Aug. 5, 2013) ("[T]he district court may deny further discovery if the requesting party failed to pursue discovery diligently in the past.").

Nakagawa v. Cty. of Maui, Civil Nos. 11-00130 DKW-BMK, 12-00569 DKW-BMK, 2014 WL 1213558, at *12 (D. Hawai`i Mar. 21, 2014) (some alterations in Nakagawa).

DISCUSSION

Plaintiff has made a sufficient showing for a Rule 56(d) continuance. Plaintiff states that its expert, David J. Erickson ("Erickson"), "has not been permitted to conduct an on-site inspection of the property," which was the subject of the Motion to Compel. [Declaration of Charles M. Tebbutt in Support

of Plaintiff's Fed. R. Civ. P. 56(d) Motion and Ex Parte Request for Shortened Time for Hearing ("Tebbutt Decl."), filed 1/4/16 (dkt. no. 69), at ¶ 10.] Plaintiff argues that an inspection would allow Erickson to better understand the "general topography and hydrology of the land," and that Defendants' expert, Ross Dunning ("Dunning"), "was not as thorough as needed to truly understand whether, and where, discharges have occurred and may be occurring." [Id. at ¶ 11.] Without an inspection conducted by Erickson, Plaintiff "is in the impossible position of having to respond to" the Motion for Summary Judgment "without any of its own expert's observations or opinions." [Id. at ¶ 13.]

Plaintiff states:

> In summary, the specific facts and information that [Plaintiff] hopes to elicit from its Rule 34 inspection and other discovery that are necessary for its response to [the Motion for Summary Judgment] include: (1) facts about the existing surface water and storm water collection features on the property, observed by Mr. Dunning, (2) facts about the vegetative buffers observed by Mr. Dunning, including their age and efficacy at preventing pollutant discharges, (3) facts about the extent of ground disturbance, observed by Mr. Dunning and documented in Defendants' invoices, (4) photographs of the sites and features visited by Mr. Dunning and data from soil and groundwater samples, "slug tests," surface water samples, and stream gauging, to be collected during [Plaintiff's] Rule 34 inspection, and (5) deposition and written discovery into the statements and observations of Messrs. Dunning and Garmatz, as provided in their respective declarations in support of [the Motion for Summary Judgment].

[Id. at ¶ 20.] Plaintiff has identified: specific facts; how those facts would prevent summary judgment; and evidence that the sought after facts exist. Moreover, Plaintiff's Rule 56(d) Motion was filed soon after the 12/22/15 Hearing, and soon after notification from Defendants "that they would oppose any further attempt by [Plaintiff] to conduct discovery prior to the Court's consideration of their challenge to [Plaintiff's] standing."[2] [Id. at ¶ 21.]

Defendants argue that Plaintiff does not have standing to bring a citizen suit under the Act because Defendants "have presented evidence that, long before Plaintiff filed its Complaint, construction activities at the site had ceased, no discharges of pollutants resulting from prior construction were occurring, and Defendant Hawai`i Dairy Farm had committed to halt construction activities until permitting issues were resolved." [Mem. in Opp. at 1.] Plaintiff therefore, according to Defendants, has no right to conduct discovery "[u]ntil Plaintiff presents evidence it possessed before filing the lawsuit to prove standing" – an issue that will be decided by the Motion for Summary Judgment. [Id. at 3.] Further, Defendants argue that

[2] On December 30, 2015, Plaintiff's counsel sent an email to Defendants' counsel "to inquire as to Defendants' position on [Plaintiff's] *ex parte* application to shorten time for hearing on [Plaintiff's] Rule 56(d) Motion." [Tebbutt Decl. at ¶ 21.] Defendants' counsel replied by stating that they opposed any further discovery before the Court ruled on the Motion for Summary Judgment. [Id.]

"[w]hat Plaintiff seeks to discover are other facts which are neither relevant to the underlying action . . . nor essential to oppose [the Motion for Summary Judgment]." [Id. at 6.]

Defendants base their standing argument on Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987), where the Supreme Court of the United States held that the citizen suit provision of the Act "does not permit citizen suits for wholly past violations." Id. at 64. The Supreme Court also determined that, "[b]ecause the court below erroneously concluded that respondents could maintain an action based on wholly past violations of the Act, it declined to decide whether respondents' complaint contained a good-faith allegation of ongoing violation by petitioner. We therefore remand the case for consideration of this question." Id. at 67.

This district court has directly addressed the issue of ongoing violations under the Act:

> Defendants argue that even though they began construction without the permit, they stopped construction and thus ended their violation. Defendants apparently believe that on the day construction ceases, the violations become "wholly past" under the Gwaltney doctrine. The problem with this argument is that it loses sight of the focus of the Act: the water. It fails to account for the interplay of rainwater and the construction site, an interaction that the Act and its regulatory scheme is intended to manage. It is the discharge of water without permit coverage that violates the Act, not the construction activity itself.

> The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source, ..." 33 U.S.C. § 1362(12). Regulations include under this term "additions of pollutants into the waters of the United States from surface runoff which is collected or channeled by man; . . . ." 40 C.F.R. § 122.2. Pollutants include "dredged soil." 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. Point sources include any "discernible, confined and discrete conveyance," 33 U.S.C. § 1362(14); C.F.R. § 122.2, "including but not limited to, any pipe, ditch, channel, tunnel, conduit [or] well . . . ." From these definitions it is clear that, once a person creates a conduit for pollutants, no further act is necessary to violate the act, regardless of whether the conduit meets the technical permit requirements. If permit coverage is required for that conduit and is not obtained, the conduit is in continual violation of the act. Notably, neither the Act nor the regulations promulgated under it contain an intent requirement for such violations. See United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979).

Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1400-01 (D. Hawai`i 1995) (some alterations in Molokai) (footnote omitted). In summary, the district court stated that "violative discharges continue until Defendants obtain a permit coverage **and** bring themselves into compliance with the permit requirements. Without permit coverage, discharges violate the Act; with permit coverage and compliance, they do not." Id. at 1402.

Here, Plaintiff states: "Hawai`i Dairy Farms has engaged and continues to engage in Construction Activities at the Proposed Dairy Site"; [Complaint at ¶ 41;] "Defendants have

discharged, are discharging, and will continue to discharge unpermitted stormwater runoff"; [id. at 44;] "the sources of the pollutants . . . include, but are not limited to, roadways, raceways, concrete troughs, concrete and compacted limestone platforms for troughs, irrigation pipe installation, wells, and other items, machinery and construction materials stored on the Site, any vehicles driving on and off the Site, and others"; [id. at ¶ 45;] "Construction Pollutants present in stormwater discharged from the facility include, but are not limited to, dirt, debris, sewage sludge form land applications, biological materials, rock, sand, or other materials"; [id. at 46;] "stormwater runoff from the Proposed Dairy Site has been and continues to be conveyed to navigable waters by gravity via site grading, slopes, and existing infrastructure"; [id. at ¶ 47;] and "[w]ater quality in Wai`opili Stream exceeds applicable water quality standards" [id. at ¶ 49]. The violations of the Act that Plaintiff alleges are therefore not "wholly past," and the Complaint itself clearly contains a "good-faith allegation of ongoing violation." See Gwaltney, 484 U.S. at 67.[3]

[3] Defendants repeatedly cite Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), to support their claim that a plaintiff does not have standing to bring suit under the Act where an alleged violation ends before the complaint is filed. See, e.g., Mem. in Opp. at 1, 2, 4. The passage from Laidlaw that Defendants reference, however, is a citation to Gwaltney. See id.; Laidlaw, 528 U.S. at 175 ("Accordingly, we have held that citizens lack statutory standing (continued...)

The Complaint alleges continuing violations of the Act, and the information Plaintiff seeks is relevant to this issue and Plaintiff's efforts to defeat the Motion for Summary Judgment. In addition, Plaintiff's Rule 56(d) Motion complies with the federal rule and relevant case law. The Court therefore GRANTS Plaintiff's Rule 56(d) Motion.

CONCLUSION

On the basis of the foregoing, Plaintiff Friends of Maha`ulepu, Inc.'s Fed. R. Civ. P. 56(d) Motion to Defer Consideration of Defendants' Motion for Summary Judgment (ECF No. 41), filed January 4, 2016, is HEREBY GRANTED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, February 29, 2016.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

FRIENDS OF MAHA`ULEPU, INC. VS. HAWAI`I DAIRY FARMS, LLC, ET AL; ORDER GRANTING PLAINTIFF'S FED. R. CIV. P. 56(D) MOTION TO DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 41)

[3](...continued)
under [the Act] to sue for violations that have ceased by the time the complaint is filed." (citing Gwaltney, 484 U.S. at 56-63, 108 S. Ct. 376)). As this Court has already explained, Gwaltney addressed a complaint that did not allege an ongoing violation.