



# After 9th Circuit Ruling in *Hawai'i Wildlife Fund v. County of Maui*, EPA Considers 'Clarifying' Clean Water Act Coverage for Discharges Via Groundwater

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## **After 9th Circuit Ruling in *Hawai'i Wildlife Fund v. County of Maui*, EPA Considers 'Clarifying' Clean Water Act Coverage for Discharges Via Groundwater**

Written by [James Rusk](#) and [Keith Garner](#) on March 14, 2018

A recent Ninth Circuit ruling that pollutants reaching waters of the United States through groundwater may trigger Clean Water Act liability has prompted the U.S. EPA to consider clarifying its position on the subject. The Ninth Circuit held last month, in [Hawai'i Wildlife Fund v. County of Maui](#), that the Act applies to “indirect discharges” from point sources, such as wells, that eventually make their way to surface waters. Though the Ninth Circuit is not the first federal court to hold that indirect discharges require a permit under the Act, the EPA responded by [seeking public comment](#) on whether it should clarify previous statements addressing this topic. The County of Maui subsequently filed a petition on March 1 for *en banc* rehearing of the Ninth Circuit panel’s opinion.

*Hawai'i Wildlife Fund* began as a citizen suit alleging that the County of Maui unlawfully discharged pollutants to the Pacific Ocean without a permit under the Clean Water Act’s National Pollutant Discharge Elimination System. For years, the County had been disposing of millions of gallons of treated wastewater per day in four injection wells. Studies conducted by the County showed that much of the wastewater flowed from the wells into groundwater, and then

underground toward the coastline, eventually entering the Pacific Ocean about half a mile from the wells, through vents in the ocean floor just offshore.

The County argued that its use of the wells did not constitute a “discharge of a pollutant” under the Act—defined as “any addition of any pollutant to navigable waters from any point source”—because the point source (the wells) did not convey the pollutant (the wastewater) *directly* into the navigable waters (the Pacific Ocean). Instead, the wastewater reached the ocean indirectly, through groundwater, “a non-point source.” The court found this distinction legally irrelevant, inasmuch as the wastewater was discharged from the wells and subsequently entered the ocean.

To impose liability for indirect discharges such as the County’s wastewater disposal, the Ninth Circuit’s opinion requires a factual showing that pollutants reaching waters are “fairly traceable” to a point source, such that the discharge is the “functional equivalent” of a discharge directly into the navigable water, and that the pollutant levels reaching navigable waters are “more than de minimis.” The court declined to adopt the standard proposed by the EPA, which would have required a “direct hydrological connection” between the point source and the navigable water, noting that the Act does not require that the connection be either “direct” or “hydrological.”

Less than three weeks after the Ninth Circuit’s opinion, the EPA published a request for public comment in the Federal Register. The request seeks comment on whether and how the EPA should consider clarifying or revising its prior statements that pollutants discharged

from point sources that reach waters of the United States through groundwater or other subsurface flows *may* require a Clean Water Act permit. Those statements, made in prior rulemakings and guidance documents, have generally applied the “direct hydrological connection” standard that the EPA proposed in *Hawai’i Wildlife Fund*. But the EPA noted that federal courts have struggled with the issue, leading to inconsistent rulings.

The EPA’s request for comment could, potentially, lead to rulemaking that clarifies when discharges to groundwater will require a Clean Water Act permit, and how to determine whether a sufficient connection exists between a point source and a jurisdictional water when the discharge is indirect, among other issues. It also could lead to further litigation, with environmental groups and/or industry likely to challenge any final rulemaking, depending on its content. In the interim, dischargers without permits should carefully evaluate whether they face exposure to potential citizen suits based on the Ninth Circuit’s ruling.

The EPA comment period ends on May 21, 2018. The County’s petition for rehearing, which criticizes the Ninth Circuit panel’s adoption of the “fairly traceable” standard, is pending.

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