

## Clean Water Act Permit May Be Required for Pollution Discharged Indirectly into Navigable Waters

A Clean Water Act permit is required for discharging wastewater from injection wells into groundwater where wastewater is "fairly traceable" to navigable waters, the U.S. Court of Appeals for the Ninth Circuit held in [Hawai'i Wildlife Fund v. County of Maui, 881 F.3d 754 \(9th Cir. 2018\)](#). The County of Maui owns and operates a municipal wastewater treatment plant, and disposes of most of the treated effluent by injecting it into four wells. In 2013, a study by the Environmental Protection Agency, Hawaii Department of Health, and other researchers demonstrated that effluent from at least two of the wells flowed through groundwater and eventually reached the Pacific Ocean. The researchers placed tracer dye into the wells and found that it took 84 days for the tracer dye to emerge from submarine seeps in the ocean floor. Environmental plaintiffs filed a citizen suit against the county, alleging that it was violating the Clean Water Act's prohibition on discharging pollutants to navigable waters from a point source without a permit. The federal district court ruled in favor of the plaintiffs, and the county appealed to the U.S. Court of Appeals for the Ninth Circuit. The court of appeals agreed with the plaintiffs that the county's discharges of effluent into the injection wells without a permit violated the Clean Water Act. The parties did not dispute that the wells were point sources and that wastewater injected into the wells reached the Pacific Ocean via an underground hydrologic connection. And the county conceded that it would need a permit if it discharged effluent *directly* into the Pacific Ocean. The key legal issue, therefore, was whether the Clean Water Act required the county to obtain a permit to discharge pollutants into groundwater that *indirectly* reached navigable waters. The court articulated a standard for determining when a permit is required for indirect discharges of pollutants to navigable waters: (1) the pollutants are discharged from a point source, (2) the pollutants are fairly traceable from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) more than a de minimis level of pollutants reaches navigable waters. Applying this standard, the court concluded that the county was liable under the Clean Water Act. The court declined to decide "when, if ever, the connection between a point source and a navigable water is too tenuous to support liability." Over the past several decades, district and appellate courts have not agreed on the scope of Clean Water Act liability for discharges of pollutants that indirectly reach navigable waters. The U.S. Courts of Appeals for the Second, Fourth, and Sixth Circuits are currently considering five cases involving Clean Water Act liability for pollutant discharges to groundwater that is hydrologically connected to navigable waters. *See 26 Crown Associates, LLC v. Great New Haven Regional Water Pollution Control Authority*, No. 17-2426 (2d Cir.); *Upstate Forever v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir.); *Sierra Club v. Virginia Electric Power Co.*, No. 17-1895 (4th Cir.); *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 17-6155 (6th Cir.); *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115 (6th Cir.). Shortly following the Ninth Circuit's decision in *Hawai'i Wildlife Fund*, on February 20, 2018, the EPA initiated a 90-day request for comments on whether and how the agency should clarify or revise its prior statements on whether the Clean Water Act permitting regime applies to pollutant discharges to groundwater that has a direct hydrological connection to jurisdictional surface water. [83 Fed. Reg. 7126](#). EPA indicated in its notice that it would consider a rulemaking on this topic, among other possible actions. In the meantime, *Hawai'i Wildlife Fund* will provide some additional clarity to regulated entities in the Ninth Circuit.

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