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## Case Description: *Hawaii Wildlife Fund v. County of Maui*, US Court of Appeals for the Ninth Circuit (Case No. 15-17447)

On March 28, 2016, NACWA filed a [brief](#) in the Ninth Circuit appeal of a federal district court decision holding that a release of pollutants into groundwater that migrates to hydrologically-connected navigable waters violates the Clean Water Act (CWA). Although the case deals with injection wells permitted under the Safe Drinking Water Act (SDWA), the court's decision has far reaching implications, potentially requiring an NPDES permit for any source that may release pollutants to groundwater that is hydrologically-connected to navigable waters.

### Background

Citizen groups sued claiming the County of Maui needed an NPDES permit for its injection of wastewater treated to tertiary standards into SDWA permitted Class V underground injection control ("UIC") wells. Since planning for the treatment plant began in the 1970s, regulators knew wastewater from the wells would move through unconfined groundwater and eventually reach the ocean. Public concerns about potential impacts were repeatedly raised during the UIC permitting process, inducing demands that the state NPDES permitting authority and the United States Environmental Protection Agency (EPA) require an NPDES permit. Neither agency imposed such a requirement.

A 2013 tracer study, conducted on behalf of EPA, the Army Corps of Engineers and the Hawaii Department of Health, confirmed that treated wastewater from the County's UIC wells reached the ocean roughly half a mile south of the treatment plant. On average, it took approximately 10 months for groundwater containing County wastewater to enter the ocean along approximately 2 miles of coastline.

### District Court Decision

Relying on the tracer study, the district court ruled in two separate decisions that the County violated the CWA because its treated wastewater reached navigable waters without an NPDES permit. The court applied a novel conduit theory to impose liability, holding that the unconfined groundwater acted as a "conduit," conveying pollutants from the point source – the permitted UIC wells – to the ocean. The CWA requires an NPDES permit for "any addition of any pollutant to navigable waters from any point source" and defines "point source" as "any discernible, confined and discrete conveyance." The conduit theory eviscerates the point source requirement. Under the theory, a point source no longer needs to be the way pollutants enter navigable waters. Rather, CWA liability "is triggered when pollutants reach navigable water, regardless of *how* they get there." Likewise, there is no confined and discrete conveyance requirement. "While any conduit that is a 'confined and discrete conveyance' is a point source, that does not mean that all conduits must be 'confined and discrete conveyances.'" The conduit theory essentially re-writes the CWA, eliminating the distinction between point and non-point sources.

## **Department of Justice Involvement**

On May 31, 2016, the United States Department of Justice (DOJ) filed a brief on behalf of EPA in support of the NGOs position and the district court's conduit theory. In its brief, DOJ argues that the district court's decision is consistent both with "the text and purpose of the CWA" and with "EPA's long-held position governing when the CWA requires permits for discharges of pollutants that move to jurisdictional surface waters through groundwater with a direct hydrological connection." The brief notes that DOJ does not intend that groundwater should be considered waters of the United States and that the district court misapplied the significant nexus test, but that the district court nonetheless reached the right result.

The brief argues that the NPDES permit program should only apply to discharges from point sources through groundwater with a "direct hydrological connection" to waters of the United States, and emphasizes that "a general hydrological connection between all groundwater and surface waters is insufficient." DOJ's argument does not eliminate the risk of further enforcement or citizen suit litigation, however, as "direct hydrological connection" is not a clearly defined test and few courts have weighed in on the issue.

## **Potential Ramifications**

The district court ruling raises fundamental CWA legal issues and may have far reaching implications including expansion of the universe of sources subject to NPDES permit requirements. If this theory of liability is upheld on appeal, an NPDES permit may be required for clean water infrastructure (collection systems, pipes, cesspools, septic systems), underground storage tanks, surface impoundments, and landfills that may release pollutants to groundwater that is hydrologically connected to navigable waters. There are also potential implications for water reuse and biosolids land application operations.

Given that groundwater often contains a mixture of pollutants from various point and non-point sources, pollutant source identification may be difficult if not impossible. Permittees could face enforcement for alleged permit exceedances associated with groundwater migration that are not associated with their operation. The ruling also creates new opportunities for citizen suits, and at least two other federal district courts have already relied on the opinion in their decisions allowing CWA citizen suits to proceed based in part on releases to groundwater that reach navigable water.