

Alert | Environmental



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Environmentalists Score Clean Water Act Victory Which May Affect Permitting Status

While litigants and the U.S. Environmental Protection Agency (EPA) continue to debate the fate of the agency's 2015 rule defining jurisdictional waters under the Clean Water Act (Act), environmentalists have scored a victory – one that may cause a widespread re-evaluation of permitting status.

Last week the Ninth U.S. Circuit Court of Appeals upheld a lower court's grant of summary judgment in favor of environmental groups challenging the County of Maui's decades-old practice of injecting partially treated wastewater from its wastewater treatment plant into wells. The wells leaked, and the wastewater subsequently migrated through groundwater to the ocean. See *Hawai'i Wildlife Fund v. County of Maui*, ___ F.3d ___ (Ninth Cir. 2018).

The Ninth Circuit rejected the County of Maui's argument that the Act prohibits only direct discharges of pollutants from point sources into jurisdictional waters. It also rejected the EPA's argument, filed in an amicus curiae brief, that the Act forbids such discharges only where there is a "direct hydrological connection" between point sources and waters of the United States.

Instead, the court held the county liable for discharges into jurisdictional waters where they are "fairly traceable" to point sources. This standard was met here where a previous EPA tracer dye study had confirmed that 64 percent of the wastewater wound up in the ocean less than three months after injection into the wells, which the court designated as point sources.

In reaching its decision, the Ninth Circuit cited to the plurality opinion in *Rapanos v. United States*, where Justice Scalia opined that the Act forbids not the "addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. 715,

743 (2006) (emphasis in original). The Ninth Circuit thus joins the Second Circuit in holding that indirect discharges of pollutants are sufficient for liability under the Act.

The County of Maui has not yet announced whether it will seek rehearing *en banc* or seek a writ of *certiorari* from the Supreme Court. In the meantime, companies that discharge pollutants to air, land, or groundwater may want to reanalyze their compliance risks under the Act in light of the ruling.

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