

## **Lahaina Wastewater Injection Wells Timeline and Frequently Asked Questions**

Updated 5/6/2020

**Overview:** In 2012, after years of unsuccessful attempts to convince the County of Maui to address the environmental harm from use of injection wells at its Lahaina Wastewater Reclamation Facility, four environmental groups (Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation, and the West Maui Preservation Association), represented by Earthjustice, sued the County for violating the Clean Water Act by using the groundwater beneath the Lahaina facility as a sewer to discharge millions of gallons of treated sewage into the Pacific Ocean each day. This polluted wastewater enters the ocean just offshore of Kahekili Beach Park, where it has destroyed a formerly pristine coral reef.

### **Timeline of Events:**

- **1973** – County's environmental review of the proposed Lahaina Wastewater Reclamation Facility (LWRF) acknowledges that "the effluent will eventually get into the ocean."
- **1982** – LWRF begins discharging treated wastewater into two injection wells; two more wells begin accepting discharges in 1985.
- **1991** - County's environmental review for LWRF upgrades concedes that "[t]reatment plant effluent contributes various constituents, including but not limited to, suspended solids, dissolved oxygen, and nutrients such as nitrogen and phosphorous to the ocean."

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- **1992** – The Hawai'i Department of Health (DOH) warns Maui County that, if the LWRF injection wells are linked to pollution of the ocean in West Maui, Clean Water Act compliance could become an issue.
- **2002** – UH marine biologist Jennifer Smith reports the results of her research into the 2001 algae bloom nearshore to the West Maui community showing a link between fresh water seeps from LWRF and the algae blooms. The research re-energized the West Maui community's hope to end injection as a regular practice. The research is eventually published in 2005.
- **2004** – West Maui Preservation Association (WMPA) obtains biannual water quality testing of nearshore waters.
- **2005-2007** – WMPA begins additional shoreline water quality testing and requests from 2005 to 2007 that the State Department of Health include those results of impaired water quality as to turbidity and nutrient loads in its required Clean Water Act biennial report.
- **2007** – Researchers confirm that high levels of a nitrogen isotope associated with sewage discharges are present in West Maui waters off Kahekili Beach Park.
- **2007** – The State Department of Land and Natural Resources circulates a study that shows the correlation between algae blooms in nearshore waters, coral reef declines, and injection wells. This leads to the formation of the DIRE Coalition (Don't Inject, REdirect).
- **2008** – The DIRE Coalition asks for an EPA hearing on renewal of the LWRF's Safe Drinking Water Act permit for underground injection. At the hearing, which was held in November 2008, the DIRE Coalition urged the County to secure a Clean Water Act permit for use of the LWRF injection wells.
- **2009** – The U.S. Geological Survey reports wastewater plumes in nearshore waters near the LWRF, citing detection of sewage-related nitrogen isotopes and other "inherent" wastewater tracers, including pharmaceuticals.
- **2009** – The DIRE Coalition met with then-Maui Mayor Charmaine Tavares to continue lobbying the County to secure and comply with a Clean Water Act permit for the LWRF injection wells.

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- **2010** – EPA orders the County to conduct sampling, monitoring, and reporting of LWRF discharges to determine whether the County is violating the Clean Water Act.
- **2010** - EPA orders the County to secure a water quality certification from DOH pursuant to section 401 of the Clean Water Act, stating that LWRF injectate may discharge into navigable waters, thus subjecting the facility to the Clean Water Act’s state certification provision.
- **2010** – Marine Pollution Bulletin publishes an article based on 2009 testing, showing that macro-algal blooms in West Maui occur only in areas with substantial nutrient loading from humans, *i.e.*, the high levels of nitrogen isotope associated with sewage.
- **2010-2011** – WMPA files a petition for a contested case hearing against the State Department of Health asserting violations of Maui County’s then-existing Safe Drinking Water Act permit. After ten months of proceedings, the case ends without a definitive decision or the immediate ability to appeal.
- **February 2011** – Former Maui Mayor Alan Arakawa and other County officials meet with DIRE Coalition representatives. Mayor Arakawa indicates that the County would like to eliminate injection wells altogether, but that it is necessary to first take steps to increase water reuse.
- **August 2011** – Maui County Council approves a settlement of the EPA’s case against the county for Safe Drinking Water Act violations caused by the LWRF injection wells. The settlement requires the County to disinfect all treated wastewater injected at LWRF.
- **April 16, 2012** - After years of trying to negotiate with the County to develop responsible community solutions for the LWRF pollution, environmental groups file suit in federal district court to challenge the County of Maui’s Clean Water Act violations.
- **2014-2015** – The federal district court rules that the County of Maui is violating the Clean Water Act by discharging pollutants into the ocean through groundwater without the required permit. Rather than work to bring LWRF into compliance with the Clean Water Act, Maui County appeals the decision to the Ninth Circuit Court of Appeals.
- **2018** – The Ninth Circuit Court of Appeals affirms the district court’s ruling, holding that Clean Water Act liability attaches when pollution is “fairly traceable” to a point source,

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such that an indirect discharge of pollutants is functionally equivalent to a direct discharge. Again, rather than bring its operations into compliance with the Clean Water Act, Maui County petitioned the U.S. Supreme Court for review.

- **February 2019** - U.S. Supreme Court accepts the case on appeal. The nation's worst polluting industries and the Trump administration file briefs in support of the County's position that the Clean Water Act does not regulate discharges that reach surface waters through groundwater.
- **September & October 2019** - After extensive community outreach, the Maui County Council voted on September 20, 2019 to settle the case, withdraw the County's appeal from the Supreme Court, and instead work with the local community to find sustainable, long-term solutions. Despite this public outcry and the decision of Maui's elected representatives, Mayor Michael Victorino refused to execute the settlement.
- **November 6, 2019** - Case argued in front of the Supreme Court in Washington, D.C.
- **April 23, 2020** – The United States Supreme Court rules that permits are required for discharges that are the “functional equivalent” of a direct discharge, refining the Ninth Circuit's ruling and sending the case back for further proceedings to apply the Supreme Court's newly-articulated legal standard.

### General Background:

- **Who is involved?** Four environmental groups, the Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation, and West Maui Preservation Association, all represented by Earthjustice, sued the County of Maui for violations of the Clean Water Act.
- **What is the problem?** The County of Maui is violating the federal Clean Water Act by pumping 3-5 million gallons of treated sewage into the ground each day using underground injection wells at its Lahaina Wastewater Reclamation Facility in West Maui. That treated sewage flows with the groundwater to the ocean, and emerges through seeps in the nearshore coral reef directly off Kahekili Beach Park, half a mile from the LWRF. Studies have shown that the nutrient-laden, freshwater discharges from the LWRF to the ocean violate water quality standards, erode the formerly pristine coral reef from the inside, and promote algae growth that suffocates and kills the corals and other marine life.

## Violations of the Clean Water Act:

- **How is the County of Maui violating the Clean Water Act?** The Clean Water Act is a federal law that regulates the discharge of pollutants into surface waters including lakes, rivers, streams, certain wetlands, and the ocean. Permits are required to discharge pollutants (including treated sewage) into these waters. The County of Maui doesn't have the required permits to discharge millions of gallons per day of treated sewage into the Pacific Ocean.
- **Why didn't the County of Maui get the necessary permits?** The County of Maui claimed that the Clean Water Act covers only "point sources" (which the law defines to include wells) that dump pollutants directly into surface waters, and that the Act does not cover pollution from a "point source" that passes through a "non-point source" such as groundwater on its way to surface waters. The County claimed that, because it was not injecting pollutants "directly" into the ocean, the Clean Water Act does not regulate their massive sewage discharges.
- **Did the County of Maui know its injection wells were polluting the ocean?** Yes, the County's own environmental reviews for the LWRF, prepared in 1973 and 1991, acknowledged that treated sewage from the injection wells would end up in the ocean. In the lawsuit, the County admitted that pollutants from its injection wells enter the ocean.
- **How do we know the sewage seep is coming from the Lahaina Injection Wells?** In 2012, an Environmental Protection Agency-funded study used tracer dye to confirm conclusively that treated sewage from the LWRF injection wells is emerging from the reef offshore of Kahekili Beach Park. The study determined that it takes the treated sewage about 84 days to travel the half-mile from the LWRF to the ocean.

## Supreme Court Ruling:

- **Question posed to the Supreme Court:** Does the Clean Water Act require a permit when pollutants originate from a "point source" (*e.g.*, a pipe or injection well) but first pass through a "non-point source" such as groundwater before reaching navigable surface waters (*e.g.*, the ocean)?

- **Supreme Court Ruling:** In a 6-3 ruling on April 23, 2020, the Supreme Court squarely rejected the County’s argument that the Clean Water Act regulates only discharges of pollutants from point sources that directly enter surface waters, noting: “That Maui’s proffered interpretation would ... create a serious loophole in the permitting regime ... indicates it is an unreasonable one.” Instead, the Court affirmed that the Clean Water Act requires a permit “if the addition of the pollutants through groundwater is the *functional equivalent of a direct discharge* from the point source into navigable waters.”
- **How is the Supreme Court ruling different from the Ninth Circuit Court of Appeals ruling?** The Supreme Court generally agreed with the Ninth Circuit that the Clean Water Act regulates point-source discharges of pollutants that reach surface waters indirectly, including through groundwater. The Supreme Court slightly narrowed the Ninth Circuit’s ruling by providing a list of factors to guide agencies and lower courts in determining if a specific instance of water pollution is covered by the Act. These factors include:
  1. The time it takes for the pollution to reach surface water;
  2. How far the pollution has to travel to get there;
  3. The nature of material through which the pollution travels;
  4. How much the pollution is diluted or chemically altered during its transit;
  5. The amount of pollution entering surface water relative to the amount discharged at the point source;
  6. How and where the pollution enters surface waters; and
  7. How much the pollution has maintained its specific identity at the point it enters surface waters.

The Court stated that time and distance will be the key factors in most cases, but each instance of challenged water pollution will have to be analyzed on a case-by-case basis, using the Supreme Court’s factors as a guide.

- **Next Steps:** The case will be sent back to the Ninth Circuit Court of Appeals. The appeals court will apply the new “functional equivalent” test to the facts in the case and decide whether Maui County needs a permit. Alternatively, the Ninth Circuit could send the case back to the federal district court in Honolulu. Given that both the district court and the court of appeals previously concluded the County’s discharges are the “functional equivalent” of direct discharges, it is a near certainty that Maui County will be required to secure a Clean Water Act permit. That permit—a National Pollutant Discharge Elimination System (NPDES) permit—will require the County to cut down on the amount of pollution it sends into the ocean to ensure that water quality, the coral reefs, and the rest of the marine environment are protected. Pollution reductions can be achieved by increasing reuse of the treated wastewater to irrigate golf courses, commercial

landscaping, and agriculture (thus reducing use of the injection wells) and by improving the sewage treatment process for any wastewater that will still be injected.

## Impacts of the Supreme Court Ruling:

- **The Mayor said that the Supreme Court ruling did not require the County to get a permit for its discharges. Is this true?** Technically, yes. The Supreme Court's opinion addresses the broader legal question of whether the Clean Water Act can apply to discharges like the injected wastewater at LWRF that reach surface waters via groundwater. The lower courts will be the ones to apply the Supreme Court's new standard to our specific case.
- **Does the Supreme Court ruling settle the issue of potential Clean Water Act liability for homeowners with cesspools or septic tanks, which was used as a "red herring" to drum up support for the County Administration's refusal to settle the case?** The Court answered that question the same way we did when it was raised repeatedly in the lead-up to the Supreme Court argument: in the 30-plus years that the EPA has regulated discharges via groundwater, there has been no expansion of the Clean Water Act to encompass individual residential wastewater systems. The Supreme Court created no new liability for homeowner septic systems and cesspools. In addition, the Court pointed out that the EPA and the states have tools to reduce the Clean Water Act's regulatory burden on homeowners by issuing "general permits," which cover entire classes of discharges and allow the discharges as long as you meet the permit's requirements. In Hawai'i, the state Department of Health issues general permits. Also, the County itself administers its own building code, which regulates new construction, including septic tank siting. There is no reason to fear that regulating the County's massive discharges from the LWRF injection wells of 3-5 million gallons of treated sewage every day will impose liability on every homeowner with a septic tank or cesspool. It's apples and oranges.
- **How does the Supreme Court decision affect the operation of other injection wells on Maui? For example, other County injection wells, injection wells used by large resorts to dispose of stormwater runoff, and injection wells used by private condominiums near the shore?** The Supreme Court's new standard will be applied on a case-by-case basis, depending on the facts of the specific situation. If pollutants discharged from an injection well reach the ocean or another surface water, a Clean Water Act permit may be required if the discharge is the "functional equivalent" of a direct discharge.

- **Does the Supreme Court ruling mean that the Clean Water Act now regulates the quality of groundwater?** No. Groundwater quality is still regulated by the federal Safe Drinking Water Act and state regulations, not the Clean Water Act, which seeks to protect the quality of surface waters.
- **How will this ruling change the situation and conditions along West Maui?** This ruling should improve conditions at Kahekili Beach Park by forcing the County to ensure that any use of the LWRF injection wells will no longer impair ocean water quality or destroy the coral reef.
- **Does this ruling have repercussions for other parts of the United States?** Yes, this case, which establishes nationwide precedent, thwarted an attempt by the County, the Trump administration, and a rogue's gallery of polluting industries to create a massive loophole in the Clean Water Act. The ruling upholds the intent of the Clean Water Act and ensures that polluters cannot use groundwater as a sewer to pollute our Nation's oceans, rivers, and lakes with impunity. Now, all federal courts in the United States will have to apply the Supreme Court's "functional equivalent" standard when determining whether the Clean Water Act regulates a discharge of pollutants that reaches surface waters through groundwater.