

Citizen Suit Action/Clean Water Act: U.S. District Court (Hawaii) Addresses Whether Ditch/Drain Constitutes Point Source



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A United States District Court (District of Hawaii) (“Court”) in a June 14th Order addressed a definitional issue in a summary judgment motion in a Clean Water Act citizen suit action. See *Na Kia i Kai et al. v. County of Kauai and Elizabeth A. Char in her official capacity as Director of Health of the Department of Health, State of Hawaii*, Case No. 22-cv-00304-DKW-KJM.

The question involved whether a ditch or drain fell within the Clean Water Act definition of point source in these circumstances.

An individual plaintiff and Surfrider Foundation (collectively “Surfrider”) alleged that the County of Kauai (“County”) and the Hawaii Department of Health (“DOH”) violated the Clean Water Act by discharging water from the Kikiaola Harbor Drain (“Drain”) into waters of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit.

Surfrider moved for summary judgment. DOH opposed, arguing a NPDES permit was unnecessary for the alleged discharges.

The Drain is described by the Court as the point at which the water flowing from the Drain enters the Pacific Ocean within three miles of the coast. The channels and canals connected to the Drain are described as “unlined, earthen ditches.” This discharge is stated to contain sediment which originates from the banks and beds of the Drain and its connecting ditches.

Stormwater runoff is stated to be collected within the boundaries of the “Waimea 400 parcel” (“Parcel”) Further, when an earthen berm is removed from the Drain, the Order states that polluted water from the Parcel flows through the Drain into the Pacific Ocean at the outfall.

The waters discharged from the Drain system contain enterococci. These waters are stated to enter via stormwater runoff from the surrounding land, including the Waimea Wastewater Treatment Plant. Other pollutants are stated to be present in the stormwater runoff.

The County owns, operates, and maintains the portion of the Drain located mountain-side of a highway. It also is stated to maintain ditches located within the parcel that are connected to the Drain. The County authorizes the Outfall to be opened by breaching one or more earthen berms to allow drainage waters to enter the Pacific Ocean. This is stated to have occurred in recent years on at least three occasions during times of significant rainfall events.

The County does not have a NPDES permit for the pollutant discharges from the Outfall to the Pacific Ocean.

A NPDES permit is required when there is a:

- discharge
- of a pollutant
- to navigable waters
- from a point source
- without a NPDES permit.

The parties agree that the question is whether the County's discharges of pollutants to navigable waters originate from a "point source."

Surfrider argued that the discharges originate from a point source because the Drain system consists of ditches which are expressly encompassed by the Clean Water Act definition of "point source." The Court agrees, noting that the Drain is a ditch and the channels and canals connected to it are unlined, earthen ditches.

DOH responds that there are nonpoint sources within the Mana Plain ("Plain") which encompasses the Drain. It argues that the entire Plain should therefore be subject to nonpoint source regulation. The Court rejects this argument, noting an absence of legal or factual support for the proposition.

DOH also argues that the Drain is a water of the United States because it flows into the Pacific Ocean – which is also a water of the United States. It argues that waters of the United States are therefore excluded from needing a permit because it is a transfer from a water of the United States to another.

The Court also rejects this argument, noting that even if the Outfall was a water of the United States, there is no indication that water in the Drain which leads to the Outfall is similarly a water of the United States. Further, DOH acknowledged that to be exempt from NPDES permit requirements, transferring waters of the United States must not introduce pollutants into the receiving waters of the United States. Pollutants are stated to have been introduced into such transfers.

The Court holds that the Drain constitutes a point source. As a result, the elements required to trigger the need for a NPDES permit have been established.

A copy of the Order can be downloaded [here](#).