

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Supreme Court Grants Certiorari Addressing Maui Case



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The United States Supreme Court granted a Petition for writ of certiorari in the 9th Circuit Decision *Hawaii Wildlife Fund v. County of Maui*, ___ F. 3d ___ (9th Cir., February 1, 2018).

The case involves whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination (“NPDES”) permitting requirements.

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are met:

- a person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

The scope of the term “waters of the United States” from a Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact it is also relevant to non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Relations

As a result, whether, and to what extent, a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

The 9th Circuit Court of Appeals in *Maui* had ruled that discharges from a point source to groundwater can in certain circumstances be subject to the Clean Water Act.

The Hawaii Wildlife Fund and other organizations filed a Clean Water Act citizen suit against the County of Maui arguing that its discharge of pollutants from injection wells into the groundwater triggered Clean Water Act jurisdiction requiring acquisition of an NPDES permit. The basis for the argument was the migration of the pollutants released into the groundwater to hydrologically connect to surface water (i.e., the Pacific Ocean).

The Court in *Maui* held that the Clean Water Act does not required that the point source convey the pollutants directly to the navigable waters (waters of the United States).

The United States Solicitor General (“SG”) had filed a brief related to the petition addressing the decision, taking the position that the Supreme Court should grant the writ of certiorari. The office further took the position that the writ should be limited to whether:

. . . a discharge of a pollutant, 33 U.S.C. 1362(12)(A) occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable water.

A copy of the Supreme Court Order granting certiorari can be found [here](#).