

## SUPREME COURT

### Maui: Narrow Clean Water Act is by design, not loophole

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The Maui County, Hawaii, wastewater treatment facilities at issue in Supreme Court litigation. Warren Gretz/National Renewable Energy Laboratory

A narrow reading of the Clean Water Act does not create a loophole in the landmark law but rather interprets it as Congress intended, lawyers for Maui County told the Supreme Court this week.

The Hawaiian municipality is involved in a closely watched environmental case slated for the high court's consideration in November. The question: Does the Clean Water Act's permitting system apply to pollution that moves through groundwater before reaching a federally regulated waterway?

County lawyers say the answer is no.

Their position in *County of Maui v. Hawai'i Wildlife Fund* is based on a careful but disputed reading of the federal statute's text. The law stipulates that the permitting program — known as the National Pollutant Discharge Elimination System, or NPDES — applies only when there is an addition of a pollutant from a specific "point source" to a water of the United States.

In Maui, treated wastewater sent down disposal wells mixes with groundwater and ends up in the Pacific Ocean. That doesn't trigger the NPDES requirements, county lawyers say, because the pollutant doesn't move directly from the point source, the disposal wells, to a water of the U.S., the Pacific Ocean. The detour through groundwater means the discharge qualifies as "nonpoint source" pollution, which falls to states to regulate.

Maui's reading, which is largely supported by the Trump administration, focuses on the word "from" in the Clean Water Act.

"Like other prepositions and function words, 'from' might indicate one of many relationships. It may indicate the starting point of the 'addition,' as in 'that package came to me from my uncle in Detroit,'" the county wrote in a [brief](#) filed yesterday. "Or, it may indicate the means of the 'addition,' as in 'that package arrived today from the post.'"

According to Maui and its supporters, the Clean Water Act adopts the latter use of "from." They say the law uses the term to describe the "means of delivery" of a pollutant.

In other words, the source must deliver the pollutant to the federal waterway to trigger the permitting program. Because the Maui pollutants are delivered to the ocean via groundwater — which is not a point source — no federal permit is needed, they say.

"As the County explained, point source permitting is necessary only where pollutants are delivered to navigable waters by a point source or series of point sources," Maui told the Supreme Court. "That follows from the CWA's text, structure, context, history, and purposes, as well as the clear-statement rules in [Supreme Court precedent]."

Local environmental groups and a growing coalition of legal allies, meanwhile, want the justices to uphold a 9th U.S. Circuit Court of Appeals ruling that sided with them.

In an earlier brief, they called the county's interpretation "unnatural and cramped" and said it amounted to a loophole for unpermitted pollution ([Greenwire](#), July 15).

The Trump administration is backing Maui in the fight. EPA released a new Clean Water Act interpretation earlier this year that largely adopts the county's view on discharges through groundwater. That's a departure from the position the agency had for decades, most clearly laid out in a 2016 amicus brief when the Maui case was at the 9th Circuit ([Greenwire](#), April 16).

Justice Department attorneys are set to argue the case alongside Maui lawyers before the Supreme Court on Nov. 6.

Environmental groups and Maui County launched settlement talks earlier this year but have not reached an agreement.

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