

SUPREME COURT

Maui County could settle Clean Water Act case

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E&E News PM: Monday, April 29, 2019



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

The biggest environmental case on the Supreme Court's docket in years might not happen after all.

Earthjustice confirmed to E&E News today that it made a settlement offer last week to Maui County in closely watched litigation over the scope of the Clean Water Act.

"I think, as in all things settlements, nothing's happened until it happens," attorney David Henkin said. "We certainly have been trying to work with the county since 2008, since four years before we brought the litigation, to try and get the county to focus on addressing the harm to the environment."

At issue in the case is Maui County's process of pumping wastewater into underground injection wells, where the waste can migrate into groundwater and land in the Pacific Ocean. Hawai'i Wildlife Fund and other local environmental groups represented by Earthjustice sued the county in 2012 for operating the wells without Clean Water Act permits to account for the ocean impacts.

The question for the court: Does the Clean Water Act apply to pollution that moves through groundwater before reaching a federally regulated waterway? The answer affects everything from wastewater wells and coal ash ponds to pipeline ruptures and sewer systems.

Different federal courts and administrations have disagreed about the Clean Water Act's proper scope to such groundwater discharges ([Greenwire](#), Dec. 4, 2018).

If Maui County and environmental groups settle their case, the Supreme Court appeal will disappear — resolving the Hawaii issue but injecting further uncertainty into the national debate.

The settlement talks arise after County Council Chairwoman Kelly King last week signaled support for settling the case and proposed a resolution directing county officials to send all settlement offers to the council for an up-or-down vote, according to *The Maui News*. The resolution has been sent to a committee and could be considered by the full council, along with the settlement offer, in June.

King and the office of Maui Mayor Michael Victorino did not respond to requests for comment this afternoon.

Henkin, the Earthjustice lawyer, said the environmental groups involved in the case have made several efforts to settle it, including years of failed negotiations before they filed suit in 2012. He said the groups are "very open to resolving" the case but noted he's still busy preparing for oral arguments in the case this far.

"We are far from having any chickens hatching, so we're not going to count them yet," he said.

involving surface water pollution via groundwater from a gasoline pipeline rupture is currently on the court's back burner, as is a case involving a leaky coal ash impoundment in Tennessee ([Greenwire](#), April 18).

The court could opt to take up one of those disputes to resolve the broader groundwater discharge question. Or it could reject those petitions and take up a different case later.

"The existence of other cases addressing this question means that, in all likelihood, it would only be a matter of time before the groundwater-conduit question returns to the Court," Case Western Reserve University law professor Jonathan Adler wrote in a blog post today.

EPA earlier this month made waves when it unveiled a new interpretation of the Clean Water Act establishing that the law never applies to pollution that travels through groundwater, no matter where it ends up ([Greenwire](#), April 16).

The agency may later finalize that policy through a full notice-and-comment rulemaking process, which could trigger separate legal challenges.

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