

WATER POLLUTION

Judge: High court ruling calls for more info on *Maui* fight

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The Maui County, Hawaii, wastewater treatment facilities. Warren Gretz/National Renewable Energy Laboratory

A federal judge said yesterday that she needed more information to decide whether discharges from a Hawaii wastewater treatment plant meet the Supreme Court's test for a Clean Water Act permit.

The Hawaii Wildlife Fund and other green groups had asked Senior Judge Susan Oki Mollway of the U.S. District Court for the District of Hawaii to block releases from Maui County's Lahaina Wastewater Reclamation Facility (LWRF), in a legal challenge that made its way to the nation's highest bench last year.

The county likewise asked the judge to find that the environmental challengers had not provided sufficient evidence to support their claims.

In an [order](#) issued yesterday, Mollway said she first needed the parties to fill out an 11-question survey.

"There appears to be no dispute that LWRF is a 'point source' or that the Pacific Ocean is a 'navigable water,'" wrote Mollway, a Clinton appointee.

She later added: "The present motions therefore turn on whether the LWRF's discharge of treated wastewater into its injection wells that then makes its way to the Pacific Ocean is the 'functional equivalent of a direct discharge' from the LWRF into the Pacific Ocean."

The case, *Hawaii Wildlife Fund v. County of Maui*, turns on the question of whether pollution that moves through groundwater on its way to a navigable water — the Pacific Ocean in this case — is subject to the National Pollutant Discharge Elimination System permitting program under the Clean Water Act.

In a 6-3 ruling last term, the Supreme Court decided that it is — if the release is the "functional equivalent of a direct discharge" from a point source to a navigable water ([Greenwire](#), April 23, 2020).

Justice Stephen Breyer's majority opinion offered some factors that may be considered when determining whether a discharge meets the "functional equivalent" test, including the time and distance pollutants travel before they reach a jurisdictional water.

Those factors shaped Mollway's questionnaire. The parties' responses are due by June 9.

Under the Trump administration, EPA issued guidance to help regulated entities make sense of the Supreme Court test.

The agency may consider a formal rulemaking under President Biden ([Greenwire](#), May 3).

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