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Pollution Problems in Paradise: Does the Clean Water Act Apply to Groundwater Pollution in Maui?

Hawaii Wildlife Fund v. County of Maui

Brett Smith

I. INTRODUCTION

Living on an island certainly limits the available wastewater disposal options. The County of Maui (“the County”)¹ in Hawaii eliminates wastewater for a population of approximately 163,000,² in addition to many visiting tourists every year. The County partially achieves this by processing wastewater at the Lahaina Wastewater Reclamation Facility (“LWRF”).³ The LWRF serves a fluctuating population of about 40,000 people in the Lahaina area, a former whaling center and current resort community on the west side of Maui.⁴ The facility processes three to five million gallons of the island’s wastewater daily, filtering and disinfecting it before sending the treated effluent into injection wells that lead into a groundwater aquifer underneath the facility.⁵

However, in the past 25 years studies have determined that the discharged effluent migrates from the aquifer into the Pacific Ocean, where it is causing damage to the local coral reefs.⁶ The plaintiffs in *Hawaii Wildlife Fund v. County of Maui* argue this violates the Clean Water Act of 1972 (“CWA”), which Congress passed with the intent of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s

¹ The County of Maui includes Maui and the smaller islands of Molokai, Lanai, and Kahoolawe. THE COUNTY OF MAUI, <http://co.maui.hi.us/> (last visited Apr. 26, 2015). The County of Maui includes Maui and the smaller islands of Molokai, Lanai, and Kahoolawe. THE COUNTY OF MAUI, <http://co.maui.hi.us/> (last visited Apr. 26, 2015).

² UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/15/15009.html> (last visited Apr. 26, 2015).

³ Haw. Wildlife Fund v. County of Maui, 24 F. Supp. 3d 980, 983 (D. Haw. 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

waters.”⁷ The CWA prohibits the discharge of any pollutants into navigable waters from any point source.⁸ Any such discharge requires a National Pollutant Discharge Elimination System (“NPDES”) permit to avoid running afoul of the CWA.⁹ The County conceded that it discharged pollutants (i.e., the treated effluent) from a point source (i.e., the injection wells).¹⁰ But the County maintains that groundwater in the aquifer does not qualify as navigable waters.¹¹

The defendant and the United States District Court for the District of Hawaii each came up with a test to determine if the groundwater fits the definition of “navigable waters.” The County proposed that the aquifer must have both “a direct and immediate hydrological connection to the ocean” and “significantly affect the chemical, physical, and biological integrity of the ocean’s waters.”¹² The court took a slightly different approach, creating the “conduit” test.¹³ Under this theory, the plaintiff could prevail if the discharge of pollutants into the groundwater is “functionally equivalent to a discharge into the ocean itself.”¹⁴ Applying either test, the court found that the County violated the CWA.¹⁵

The decision expanded the parameters of the CWA in a way that effectively advances the act’s purpose. However, the issue is far from settled. The court broke new ground with its decision, but it admittedly could not cite a controlling appellate decision or statute allowing the conduit theory.¹⁶ After the decision, the County remained defiant. Faced with the disposal of three to five million gallons of wastewater per day, the County has continued to use the LWRF as it awaits a decision on its NPDES permit.

⁷ *Id.*; 33 U.S.C. § 1251(a) (2012).

⁸ *Haw. Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 984, 985 (D. Haw. 2014); 33 U.S.C. § 1362(12) (2012).

⁹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 983.

¹⁰ *Id.* at 983-84.

¹¹ *Id.* at 983, 998-99.

¹² *Id.* at 989 (internal quotes omitted).

¹³ *Id.* at 994.

¹⁴ *Id.*

¹⁵ *Id.* at 1005.

¹⁶ *Id.* at 996.

II. FACTS AND HOLDING

Every day, the Lahaina Wastewater Reclamation Facility (“LWRF”), operated by the County of Maui (“the County”) on the west side of the Hawaiian island, receives four million gallons of sewage from a system that serves approximately 40,000 people.¹⁷ The facility processes the sewage, and sends the treated effluent¹⁸ into four injection wells.¹⁹ From there, the effluent travels 200 feet down into a shallow groundwater aquifer.²⁰ Effluent from Wells 3 and 4, which receive 80 percent of all effluent, eventually finds its way into the Pacific Ocean, a half mile-away through submarine springs off the shore of Kahekili Beach.²¹ A joint study conducted by the Environmental Protection Agency (“EPA”), the Hawaii Department of Health (“DOH”), the U.S. Army Engineer Research and Development Center, and University of Hawaii researchers concluded that 64 percent of the effluent from those wells reaches the ocean about three months later.²² The research confirmed the findings of previous studies, including one conducted by the County in 1991.²³

Discharging effluent into the ocean without a National Pollutant Discharge Elimination System (“NPDES”) permit violates the Clean Water Act (“CWA”), and the plaintiffs, Hawaii Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association, brought suit.²⁴ The plaintiffs claim the discharge significantly affects the “chemical, physical, and biological integrity of the nearshore water” and specifically cite elevated temperatures and levels of inorganic nitrogen and phosphorus, and

¹⁷ *Id.* at 984.

¹⁸ The County preferred the term “effluent” or “reclaimed water” and objected to the use of the term “wastewater,” citing concerns of prejudice. The court noted that “wastewater” had been used throughout litigation and that the “W” in “LWRF” stands for “wastewater.” However, the court acknowledged that the treated water is more potable than the name connotes, and may even be safe to drink. But the court found that regardless of what the treated water was called, it had no effect on any of the County’s arguments. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 984.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 983.

low pH levels and salinity.²⁵ The plaintiffs' experts claim these alterations contribute to the destruction of coral and could prevent reef growth.²⁶

The defendant, the County of Maui, applied for an NPDES permit, submitting its application in November 2012, after the plaintiffs filed suit.²⁷ The County moved to dismiss or stay the case while the EPA and DOH decided whether to issue the permit.²⁸ The defendant challenged the credibility and statements made by plaintiff's experts.²⁹ The County's expert also disputed the danger to the reef, stating that upon inspection "all reef areas appeared essentially pristine."³⁰ But the court dismissed those objections.³¹

According to the court, which adopted language from a Ninth Circuit decision,³² the County needed an NPDES permit when it discharges a pollutant into navigable waters from a point source.³³ The County argued that "navigable waters" under the CWA must have both "a direct and immediate hydrological connection to the ocean *and* significantly affect the chemical, physical, and biological integrity of the ocean waters."³⁴ The County argued the EPA and DOH should determine this.³⁵ But the court found itself competent to judge the case and stated that if the court required an NPDES permit, that decision would supersede a final decision by the EPA and DOH.³⁶ The plaintiffs agreed that the County's two-part test for navigable waters was a reasonable interpretation of the standard the plaintiffs must meet.³⁷ But the court went further and said the plaintiffs also may prevail if

²⁵ *Id.* at 984-85.

²⁶ *Id.* at 985.

²⁷ *Id.*

²⁸ *Id.* at 986.

²⁹ *Id.* at 987.

³⁰ *Id.* at 985.

³¹ *Id.* at 987.

³² *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

³³ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 988-89 (quoting *Headwaters*, 243 F.3d at 532).

³⁴ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 989 (internal quotes omitted) (emphasis added).

³⁵ *Id.*

³⁶ *Id.* at 989-91.

³⁷ *Id.* at 994.

they could show that the “discharge into the groundwater below the LWRF is functionally equivalent to a discharge into the ocean itself.”

The District Court denied the County’s motion for stay or dismissal and granted the plaintiff’s motion for partial summary judgment.³⁸ The court held that discharging, without a permit, more than a de minimis amount of pollutants into groundwater that serves as a conduit to navigable-in-fact water is a violation of the CWA.³⁹ The court also found that the defendant would not prevail under its own proposed two-part test, holding that when discharged pollutants eventually flow into protected waters and undisputed evidence exists that the discharge significantly affects the physical, chemical and biological integrity of those waters, the plaintiffs fall under the purview of the CWA.⁴⁰

III. LEGAL BACKGROUND

Congress enacted the Clean Water Act of 1972 (“CWA”) as a means of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”⁴¹ As per this goal, the CWA prohibits the discharge of pollutants unless the discharger obtains a National Pollutant Discharge Elimination System (“NPDES”) permit.⁴² A NPDES permit is required when there is a discharge of a pollutant into navigable waters from any point source.⁴³

³⁸ *Id.* at 983.

³⁹ *Id.* at 996.

⁴⁰ *Id.* at 1000.

⁴¹ *Id.* at 986 (quoting 33 U.S.C. § 1251(a) (2012)).

⁴² *See* 33 U.S.C. § 1311(a) (2012); 33 U.S.C. § 1342 (2012). The plurality in *Rapanos v. United States* stated that the discharge of pollutants includes “the addition of any pollutant to navigable waters.” 547 U.S. 715, 743 (2006).

⁴³ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 988-89 (quoting *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001)). In order to clarify the scope of this rule, these terms of art need further exploration. “Discharge of pollutants” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12) (2012). The CWA defines a “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water.” 33 U.S.C. § 1362(6) (2012). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling

The CWA defines navigable waters broader than traditional definitions, subjugating some waters to regulation that would not typically be classified as “navigable.”⁴⁴ In *Rapanos v. United States*, the Supreme Court was split 4-4-1 on whether the CWA applied to wetlands adjacent to tributaries of navigable-in-fact waters.⁴⁵ The four justices in the plurality described navigable waters under the CWA as “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features,’” meaning streams, oceans, rivers, lakes and the like, and not including wetlands adjacent to tributaries.⁴⁶ Justice Kennedy, concurring, developed a “significant nexus” test, in which waters would be considered “navigable” if they “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.”⁴⁷ Kennedy stated that “hydrological linkage” that is “speculative or insubstantial” is not enough to establish a nexus; instead there must be a “reasonable inference of ecological interconnection” with navigable-in-fact water.⁴⁸

The Ninth Circuit in *Northern California River Watch v. City of Healdsburg* applied the “significant nexus” standard to a rock quarry that fed pollutants into a river through surface wetlands and an underground aquifer.⁴⁹ The court in *Healdsburg* found that a significant nexus existed. In the instant case, the plaintiffs and defendants read a two-part test into the court’s decision in *Healdsburg*, stating that to fall under the CWA’s jurisdiction, the

stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (2012).

⁴⁴ *Rapanos*, 547 U.S. at 731; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs.*, 531 U.S. 159, 167 (2001) (quoting *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). “Navigable waters” are “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7) (2012).

⁴⁵ *Rapanos*, 547 U.S. at 743.

⁴⁶ *Id.* at 739 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2992 (2d ed.)).

⁴⁷ *Id.* at 780.

⁴⁸ *Id.* at 780, 784-85.

⁴⁹ *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 999, 1000 (9th Cir. 2007).

plaintiffs must show (1) a hydrological connection exists between the groundwater and the ocean *and* (2) a significant impact results.⁵⁰

The CWA specifically excludes agricultural stormwater discharges and return flows from irrigated agriculture, but it does not mention any exclusion for groundwater.⁵¹ Federal courts in other jurisdictions also have held that groundwater falls under the scope of the CWA when it carries pollutants into other bodies of water.⁵² The Environmental Protection Agency (“EPA”) has agreed with this sentiment as well.⁵³ However, the EPA has also teamed with the Army Corps of Engineers for a proposed rule that would expressly proclaim groundwater not waters of the United States.⁵⁴

State and federal agencies work together to enforce the CWA, and a state may apply for the authority to issue permits under the act.⁵⁵ The state of Hawaii received its permit in 1974, giving it the primary authority to review and approve NPDES permits with oversight from the EPA.⁵⁶ Hawaii must advise the EPA of each NPDES the state plans to issue.⁵⁷ The EPA may object to and raise concerns about any permit, and authority over the permits reverts back to the EPA if the state does not properly address the concerns.⁵⁸ If a court requires an NPDES permit, neither the EPA nor the Department of Health (“DOH”) can supersede the decision and rule that a permit is not

⁵⁰ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 994.

⁵¹ *Id.* at 995.

⁵² See *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 3d 1300, 1319-20 (S.D. Iowa 1997); *Wash. Wilderness Coal. v. Hecla Min. Co.*, 870 F. Supp. 3d 983, 990 (E.D. Wash. 1994).

⁵³ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule, 66 Fed. Reg. 2960 (Jan. 12, 2001) (to be codified at 40 C.F.R. pt. 12, 412).

⁵⁴ Definition of “Waters of the United States” under the Clean Water Act, 79 Fed. Reg. 22188 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116-17, 122, 230, 232, 300, 302, 401).

⁵⁵ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 986; 33 U.S.C. § 1342 (2012).

⁵⁶ Hawaii's Application To Administer the National Pollutant Discharge Elimination System (NPDES) Pretreatment Program, Proposed Rule, 48 Fed. Reg. 15662 (Apr. 12, 1983); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007).

⁵⁷ 33 U.S.C. § 1342(d)(1), (2) (2012).

⁵⁸ 33 U.S.C. §§ 1342(d)(1)-(2), (4) (2012).

required.⁵⁹ If the EPA and DOH require an NPDES permit, then the defendant could be liable for civil penalties.⁶⁰

IV. INSTANT DECISION

Both parties in the case agreed that the Lahaina Wastewater Reclamation Facility (“LWRF”) discharged a pollutant from a point source.⁶¹ But the plaintiffs and the County of Maui differed on whether the facility discharged the effluent into “navigable waters” as defined by the Clean Water Act (“CWA”).⁶² The County also argued that the aquifer receiving the effluents must have a “direct and immediate hydrological connection” and significantly affect its chemical, physical, and biological integrity.⁶³

The court in this case relies partly on Justice Kennedy’s “significance nexus” test in the *Rapanos v. United States*⁶⁴ concurrence.⁶⁵ The Ninth Circuit previously also applied the “significance nexus” test in deciding *Northern California River Watch v. City of Healdsburg*,⁶⁶ holding that a sufficient enough relationship existed between two bodies of water in that case.⁶⁷ The court in the instant case stated that the plaintiffs could prevail if they proved that the discharge into the aquifer was “functionally equivalent to a discharge into the ocean itself.”⁶⁸ In other words, even if the groundwater

⁵⁹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 991; *see also* Ass’n to Protect Hammersley v. Taylor Res., 299 F.3d 1007, 1009, 2002 (9th Cir. 2002).

⁶⁰ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 991; *see also* Chafin v. Chafin, 133 S. Ct. 1017 (2013).

⁶¹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 989.

⁶² *Id.*

⁶³ *Id.* The County also argued that the Hawaii Department of Health (“DOH”) and the Environmental Protection Agency (“EPA”) were better suited to decide these matters and had primary jurisdiction in this case. The County asked for a judgment on the pleadings or, in the alternative, a stay to allow this. However, the court rejected the request stating it had the authority and competence to address the matter. *Id.* at 989-92.

⁶⁴ *Rapanos v. U.S.*, 547 U.S. 715 (2006).

⁶⁵ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 994.

⁶⁶ *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d at 999-1000 (9th Cir. 2007).

⁶⁷ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 994.

⁶⁸ *Id.*

in the aquifer was not itself protected by the CWA, liability would still arise if the aquifer acted as a conduit to navigable-in-fact waters.⁶⁹

Referring back to *Rapanos*, the court stated a pollutant need not be added directly to navigable water, but may pass through conveyances in between.⁷⁰ The court did not distinguish between groundwater and surface water conveyances, stating that either can act as a “conduit through which pollutants reach the ocean.”⁷¹ Failing to regulate tributaries to a river or groundwater flowing into the ocean could lead to these waters being used as “open sewers as far as federal regulation was concerned.”⁷² The court cited persuasive case law in several other jurisdictions⁷³ that found that the addition of effluents to groundwater subjects an entity to regulation and the National Pollutant Discharge Elimination System (“NPDES”) permit.⁷⁴ The Environmental Protection Agency (“EPA”) has also determined that pollutants conveyed by surface or groundwater can subject a discharger of effluents to the CWA’s jurisdiction.⁷⁵

The court emphasized that groundwater is not always considered part of navigable waters.⁷⁶ A discharge of pollutants that never eventually migrates into navigable-in-fact waters does not violate the CWA.⁷⁷ The court acknowledged a split in authority about whether groundwater may or may not be regulated.⁷⁸ But the court found that almost every decision that held that groundwater was not protected by the CWA was based on those courts’ determination that the groundwater itself was not navigable water.⁷⁹ Those

⁶⁹ *Id.*

⁷⁰ *Id.* at 995.

⁷¹ *Id.*

⁷² *Id.* at 995 (quoting *U.S. v Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974)).

⁷³ *Id.* Including the Sixth Circuit, the Southern District of Iowa, and the Eastern District of Washington. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 995-96; see National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960-01, 3017 (proposed Jan. 12, 2001).

⁷⁶ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 996.

⁷⁷ *Id.* For example, if a party only released rocks or other fill material that did not cause pollutants to migrate through groundwater. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

courts did not consider whether the groundwater acted as a conduit to navigable-in-fact waters.⁸⁰ The plaintiffs also limited their argument to restricting effluents that pollute the ocean through the groundwater as opposed to a blanket statement that groundwater deserves wholesale ecological protection.⁸¹

In this case, the court said that the plaintiffs showed that pollutants are directly traced from the LWRF to the ocean, and that the level of pollutants emerging in the ocean is more than de minimis.⁸² The plaintiffs established this through the Tracer Dye Study conducted by the EPA, the Department of Health, the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii.⁸³ The Tracer Dye Study found that 64 percent of treated wastewater from two of the LWRF's four injection wells found its way into the ocean.⁸⁴ Because those wells receive more than 80 percent of all the wastewater treated at the facility, the study determined that more than 50 percent of the wastewater the LWRF discharged reached the ocean.⁸⁵ The County admits that pollutants from the plant reach the ocean but disputed the numbers in the study.⁸⁶ However, the County gave no reason or evidence to support its claim.⁸⁷

The County also argued that the aquifer could not be viewed as a conduit because of the diffusive effects of deep groundwater.⁸⁸ The County argued that a conduit must confine or contain the water.⁸⁹ However, the court stated that the County was confusing a "conduit" with a "point source," and not all conduits need to be point sources.⁹⁰ The court found that "[a]ny conveyance that transmits such a high proportion of a pollutant from one place to another is consistent with being 'confined and discrete,' irrespective

⁸⁰ *Id.*

⁸¹ *Id.* at 997.

⁸² *Id.* at 997-98.

⁸³ *Id.* at 983-84, 998.

⁸⁴ *Id.* at 998.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 998-99.

⁹⁰ *Id.*

of its other geologic properties.”⁹¹ The court also rejected the County’s distinction between deep and shallow groundwater, noting “[n]either logic nor case law” supports that distinction and that determinations about whether groundwater reaches navigable-in-fact water should be made on a case-by-case basis.⁹²

The court further found that requiring a finding of a significant impact on the physical, biological, and chemical integrity of the ocean would limit regulation regarding groundwater.⁹³ The court decided this despite an agreement between the two parties that accepted the County’s two-part proposed test.⁹⁴ The CWA’s strict liability scheme “categorically prohibits the discharge of pollutants from a point source without a permit” regardless of the discharge’s effects.⁹⁵ The court noted that Congress intended to bar all unpermitted discharges when enacting the CWA, and requiring a significant impact would undermine that intent.⁹⁶

However, even considering the impact of the wastewater on the ocean, the court stated that the plaintiffs would still prevail in their action.⁹⁷ Numerous studies and reports conducted for more than a decade by a variety of scientists and state and federal authorities found that effluent has affected the water near the submarine seeps where it is being discharged.⁹⁸ The plaintiffs contend that elevated levels of nitrogen and phosphorus appearing near the seeps can accelerate the growth of fleshy seaweed and algae that can damage coral.⁹⁹ The plaintiffs also showed that water near the seeps was more acidic than the surrounding water, which reduces the amounts of carbonate ions available for corals, mussels, and limpets and promotes the

⁹¹ *Id.* at 999 (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)).

⁹² *Id.*

⁹³ *Id.* at 1004.

⁹⁴ *Id.* at 1000-01. The court stated the parties incorrectly interpreted the test from the *Healdsburg* case but proceeded with the incorrect interpretation as it was central to the motion for summary judgment. *Id.* at 1001. *See N.Cal. River Watch v. City of Healdsburg* 496 F.3d 993, 999-1000 (9th Cir. 2007).

⁹⁵ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 997.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1000.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1003.

growth of seaweed that competes with coral.¹⁰⁰ The plaintiffs showed that the water near the seeps had lower salinity, which could harm coral.¹⁰¹ Oxygen concentrations were also lower, which could suffocate coral and promote the growth of seaweed.¹⁰² Elevated water temperatures discovered near the seeps could also lead to the bleaching and death of coral.¹⁰³

The County's experts attempted to minimize these effects by saying that the ocean's vast size dispersed the effluents and attenuated their effects to an insignificant level.¹⁰⁴ But the court dismissed this argument, saying that there is no basis for the conclusion that the effects must be felt across all the nearshore waters.¹⁰⁵ The water near the seeps is sufficiently and significantly affected.¹⁰⁶

Because the study provides undisputed evidence that the County discharged pollutants at the LWRF site that eventually migrated into the ocean, and because the County did not have a NPDES permit, the court found the County violated the CWA.¹⁰⁷ Even applying the significant effects test, which the court did reluctantly, the plaintiffs would still prevail as the effluents affected the ocean water near the seeps.¹⁰⁸

V. COMMENT

The immediate impact of the Hawaii District Court decision is that the County of Maui ("the County") has violated the Clean Water Act ("CWA") by discharging pollutants from a point source into navigable waters.¹⁰⁹ This means that the Lahaina Wastewater Reclamation Facility ("LWRF") must either obtain a National Pollutant Discharge Elimination System ("NPDES") permit or stop pumping millions of gallons of treated

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1003-04.

¹⁰⁵ *Id.* at 1004.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1000.

¹⁰⁸ *Id.* at 1004-05.

¹⁰⁹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 1000.

wastewater into the aquifer every day. The County decided to do neither. Immediately after the court handed down its decision, a County of Maui spokesperson released a statement stating that “[a]lthough [the County] respects the court’s decision, we are still reviewing the court’s ruling and evaluating our options.”¹¹⁰

While the court found a CWA violation, it did not issue an injunction to force the County to comply and made no determinations regarding civil damages.¹¹¹ However, each day since the decision the County has racked up massive amounts of fines with its violation. This led the parties back to court in January 2015.¹¹² The County wanted the court to re-examine its original decision by expanding its argument against the violation.¹¹³ Since the court had found that Injection Wells 3 and 4 violated the CWA, the County argued that it only could be in violation of the CWA if Injection Wells 1 and 2 were also found in violation.¹¹⁴ The plaintiffs filed a cross-motion for summary judgment arguing Wells 1 and 2 were in violation, and the court agreed.¹¹⁵ The court applied the same test it used for Wells 3 and 4, and found the only point of contention was the point source element.¹¹⁶ The court rejected the County’s argument, stating that “[i]t would be nonsensical to regulate a polluter that discharges effluent to the ocean through a series of sequential point sources, while exempting a polluter that discharges the same effluent through a combination of an initial point source and subsequent nonpoint sources.”¹¹⁷

¹¹⁰ Sophie Cocke, *Maui County Faces Millions in Fines for Clean Water Act Violations: Federal court rules that Lahaina injection wells are polluting Kahekili Beach Park*, HONOLULU CIVIL BEAT (June 2, 2014), <http://www.civilbeat.com/2014/06/maui-county-faces-millions-fines-clean-water-act-violations/>.

¹¹¹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 1005.

¹¹² Anthony Pignataro, *Federal Judge again smacks County of Maui with Clean Water Act violations*, MAUI TIME WEEKLY (February 2, 2015), <http://mauitime.com/news/science-and-environment/federal-judge-smacks-county-maui-clean-water-act-violations/?hvid=LxXUj>; *See Haw. Wildlife Fund v. Cty. of Maui*, No. CIV. 12-00198 SOM/BM, 2015 WL 328227 (D. Haw. Jan. 23, 2015).

¹¹³ *Haw. Wildlife Fund*, 2015 WL 328227, at *4.

¹¹⁴ *Id.* at *5.

¹¹⁵ *Id.* at *1.

¹¹⁶ *Id.* at *6.

¹¹⁷ *Id.*

Having lost again, the County said that it was “too early” to talk about fines.¹¹⁸ The fines could have been in excess of \$100 million.¹¹⁹ The plaintiffs, however, are not focused on the imposition of large fines, and would rather the money be re-invested into the County rather than go into the federal treasury.¹²⁰ The County reached a settlement with the court on September 24, 2015, and agreed to pay a \$100,000 penalty and invest \$2.5 million on projects to divert and reuse treated wastewater.¹²¹ The goal always has been to compel the County to comply with the CWA and protect the waters off the Maui shore, not to harshly penalize the County and its taxpayers. But the penalties exist as a compliance measure and may be necessary given the County’s prolonged reluctance and defiance.¹²²

As its spokesperson stated, the County still has options that would allow the LWRF to continue operating as it is currently. The County had already applied for a NPDES permit,¹²³ and if approved, could continue to discharge the effluents into the groundwater. Should this happen, the efforts of the plaintiffs will be completely lost. The plaintiffs want to protect the waters and the reef, and they have presented to the court studies that clearly demonstrate wastewater from the LWRF has been affecting Maui’s west coast. An NPDES permit would effectively prevent that and thwart the goal of the CWA to restore and maintain the integrity of American waters.¹²⁴

¹¹⁸ Lee Imada, *Injection wells ruling opens county up to civil penalties*, WEST MAUI PRESERVATION SOCIETY (Jan. 27, 2015), http://savewestmaui.com/news_maui/news_150127.htm; see also Pignataro, *supra* note 115.

¹¹⁹ Imada, *supra* note 121. The hearing was originally set for Mar. 17, 2015, after the first trial; Wendy Osher, *Federal Ruling: Maui County Is Violating Clean Water Act*, MAUI NOW (June 2, 2014), <http://mauiNOW.com/2014/06/02/federal-ruling-maui-county-is-violating-clean-water-act/>.

¹²⁰ Imada, *supra* note 121.

¹²¹ Jennifer Sinco Kelleher, *Maui County Settles Lahaina Wastewater Lawsuit*, HAWAII NEWS NOW (Sept. 24, 2015), <http://www.hawaiiNEWSNOW.com/story/30111505/maui-county-settles-lahaina-wastewater-lawsuit>.

¹²² Rick Daysog, *Judge: Maui Illegally Discharged Sewage*, HAWAII NEWS NOW (Jan. 26, 2015), <http://www.hawaiiNEWSNOW.com/story/27946857/judge-maui-illegally-discharged-sewage>.

¹²³ *Id.*

¹²⁴ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 986 (quoting 33 USC § 1251(a) (2012)).

POLLUTION PROBLEMS IN PARADISE

The County could appeal the lower court's decisions, which seems likely given the County's reluctance to comply with the CWA. Years of pressure and litigation have not stopped the County yet. And while the County spokesperson said the administration could not comment on pending legal issues, it would be difficult to believe that the County is done fighting this matter. How the appeal process plays out likely depends on the instant court's interpretation and expansion of the CWA and its creation and application of the conduit test.

The most significant part of the instant court's decision is its expansion of the term "navigable waters" to include groundwater that serves as a conduit to navigable-in-fact waters – in this case, the aquifer leading to the Pacific Ocean.¹²⁵ Never before had the CWA been interpreted in such a matter. However, the court's interpretation seems a logical evolution of the statutory language of the CWA. Had the LWRF discharged the effluents directly into the ocean, it would not even be a question whether the County was violating the CWA. The County's argument that groundwater, as the conduit here, would diffuse the pollutants and minimize their effects is similar to its argument that the vastness of the ocean makes it a viable dumping ground. These arguments fail to take into account cumulative and local effects of the pollutants. In addition, they run counter to the purpose of the CWA, which includes protecting the oceans as navigable waters.¹²⁶ Allowing the LWRF to continue its waste disposal process would allow the County – and other would-be polluters – to successfully circumvent the CWA and potentially harm the environment.

Hawaiians have long revered the oceans and their land. But in the centuries since Captain Cook stumbled upon the archipelago, a collection of colonists, tourists and businesses have transformed the islands without much consideration of the environment. Hawaii is a prime example of a place that can benefit from the CWA, and this case is a prime example of how. The reef along Kahekili Beach Park, the area affected by the discharge of pollutants, comes right up to the shore.¹²⁷ The plaintiffs claim that the effects of the effluents are evident. Coral reefs are fragile ecosystems. To prevent any

¹²⁵ *Haw. Wildlife Fund*, No. 12 Civ. 00198, *supra* note 114.

¹²⁶ *Rapanos v. U.S.*, 547 U.S. 715, 739 (2006).

¹²⁷ *Kahekili Beach Park*, MAUI GUIDEBOOK (July 15, 2009), <http://mauidebook.com/beaches/kahekili-beach-park/>.

further changes in the composition of the reef, the plaintiffs must rely on the CWA and the court's decision to prevent the discharge of effluents. While the effects on the Kaheliki Beach Park reef may seem minimal,¹²⁸ proving damage is not necessary for the County to be in violation of the CWA.¹²⁹ This makes sense. Forcing a plaintiff to show negative effects prevents a plaintiff from prevailing in a CWA suit until damage occurs. The point of the CWA is not just to restore but also to maintain. Prevention of destruction is synonymous with that goal.

The plaintiffs also hope the court's decision has an impact beyond the shores of the Hawaiian Islands.¹³⁰ The district court's decision is a step in the right direction, but the decision has only persuasive authority. Barring a Supreme Court decision or federal regulation that determines otherwise, groundwater still will not suffice as a navigable water source. If the matter does find its way into the Ninth Circuit Court of Appeals, that court could strike down the decision. And while the district court in the instant case opens the door for entities to run afoul of the CWA because of polluted groundwater, its holding could be construed in a very narrow sense. The court itself mentions that the facts in this case are unique.¹³¹ Few states contain islands with wastewater facilities that discharge effluents into an aquifer that makes its way to the oceans or Gulf of Mexico. But one can imagine other scenarios where the conduit theory may also apply when assessing groundwater for CWA purposes, such as underground tributary systems, especially those in caves.¹³²

¹²⁸ Especially compared to damage done in the past to other Hawaiian underwater ecosystems, e.g. the near destruction of the reef at Oahu's Haunauma Bay, which was nearly obliterated by careless snorkelers, fishers, and other human traffic. *See* SUSAN SCOTT & DAVID SCHRICHTE, *EXPLORING HANAUMA BAY* (rev. ed. 2013).

¹²⁹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 1000.

¹³⁰ Anthony Pignataro, *Federal Court Rules County Of Maui Violating Clean Water Act At Lahaina Wastewater Facility*, MAUI TIME WEEKLY (June 2, 2014), <http://mauitime.com/news/science-and-environment/federal-court-rules-county-of-maui-violating-clean-water-act-at-lahaina-wastewater-facility/>.

¹³¹ *Haw. Wildlife Fund*, 24 F. Supp. 3d at 1002.

¹³² *See generally* Philip M. Quatrochi, *Comment, Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. AFF. L. REV. 603 (1996).

Given the divergence in jurisdictions over the groundwater issue, the court in the instant case knew that a higher court might strike down its conduit test. For that reason, the court provided some insurance for its decision in favor of the plaintiffs by also analyzing the case based on the defendant's test requiring a significant impact on the area subjected to the discharge. By doing so, the district court bolstered its chances of not being reversed by the higher courts and preserved its decision to make the County comply with the CWA.

The district court's decision in the instant case puts the County in a difficult spot. Trying to find a new place for millions of gallons of reclaimed wastewater is not an easy task. Mayor Arakawa noted that the County must find a solution while the LWRF is still operational, lamenting, "Do we tell everybody don't flush? We have to deal with reality. This water is coming in."¹³³ But the plaintiffs have proposed a solution – re-using the water for golf courses, resorts, agricultural fields and other developments.¹³⁴ West Maui desperately needs fresh water thanks to a "near permanent drought."¹³⁵ Arakawa also said the solution to the problem could be a partnership with Anaergia Services, which would use the wastewater to revitalize about 2,000 acres of West Maui's fallow farmlands to grow sorghum, a biocrop that could be used to generate electricity.¹³⁶ However, those talks have stalled.¹³⁷ Whatever the County decides, it will likely be a costly endeavor.

Provided that the County does not manage to obtain an NPDES permit or win on appeal of the district court's decisions, these could be effective – albeit likely expensive – alternatives to releasing the water into the aquifer. The County would not be in the position to find better alternatives had the court not found that groundwater in this instance suffices as navigable waters. By applying the conduit theory, the court made a logical

¹³³ Imada, *supra* note 121.

¹³⁴ *Id.* See also Pignataro, *supra* note 121. The suggestion has merit based on a similar re-use of wastewater in the past. Mayor Arakawa claims Maui's sugar and pineapple fields utilized reclaimed wastewater, and the disappearance of those fields stuck the county with more wastewater of which to dispose. Imada, *supra* note 121.

¹³⁵ Osher, *supra* note 122.

¹³⁶ Imada, *supra* note 121; Henry Curtis, *Maui's two Anaergia projects delayed*, ILILANI MEDIA SUNDAY (Sept. 28, 2014), <http://ililanimedia.blogspot.com/2014/09/mauis-two-anaergia-projects-delayed.html>

¹³⁷ Curtis, *supra* note 138.

expansion of the CWA that furthers the act's goals. Whether the court's decision stands and this expansion is upheld remains to be seen. If the County succeeds in obtaining a permit or winning an appeal,¹³⁸ it will be a loss for the Hawaiian environment.

VI. CONCLUSION

The Clean Water Act prohibits the discharge of effluents into navigable waters from a point source without a National Pollutant Discharge Elimination System permit. For decades, the County of Maui has discharged millions of gallons of treated wastewater into an aquifer, and the plaintiffs indisputably have proven this wastewater makes its way into the ocean. The only question the court needed to address was whether the groundwater in the aquifer qualified as "navigable." In response, the court found that groundwater serving as a conduit to navigable-in-fact water satisfied that requirement. By reaching this conclusion, the district court has furthered the purpose of the CWA to restore and maintain the nation's waters. The reclaimed wastewater now can be used to benefit the land, and the degradation of the reefs of Kaheliki Beach Park can cease. The precedent set here by the court provides the guidelines for a wiser interpretation of the CWA. But whether other courts – or even the County – will fall in line with the instant court's holding remains to be seen.

¹³⁸ At the time of publication, the County's appeal is still pending.