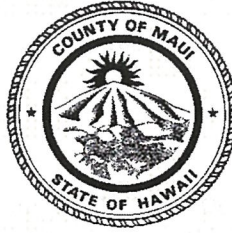


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May 23, 2019

To: Mike Molina, Chair  
Governance, Ethics, and Transparency Committee

FROM: Richelle M. Thomson Deputy Corporation Counsel

RE: **Hawaii Wildlife, et al. v. County of Maui (GET-26)**

**Lahaina Wastewater Reclamation Facility - Background**

The County of Maui produces tertiary-treated, disinfected recycled water that is sold for irrigation, with the excess disposed of into four Class V UIC wells located approximately half a mile from the Pacific Ocean. The wells are permitted by both the EPA and the State of Hawaii Department of Health (HDOH) under UIC permits, issued pursuant to the Safe Drinking Water Act and its state equivalent. The wells are long pipes that carry recycled water approximately 200 feet underground into a shallow groundwater aquifer. The groundwater flows to and enters the ocean in a broad and diffuse manner along a 2 mile stretch of coastline, as well as through freshwater seeps or springs that change location over time.

**Federal and State Safe Drinking Water Act Permits for Lahaina Facility**

1985 – First HDOH UIC permit

1996 – First EPA UIC Permit

Since planning for the treatment plant began in the 1970s, and federal Clean Water Act grant funding was provided for the construction of the facilities, regulators knew recycled water from the wells would move through unconfined groundwater and eventually reach the ocean. Neither the federal EPA or HDOH has ever required a Clean Water Act NPDES permit or brought any enforcement

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action against the County for use of the injection wells. The County has complied with the terms of these UIC permits.

Hawaii DOH has never issued an NPDES permit for an injection well. HDOH says it is “actively considering the possibility of using a UIC permit to address pollution issues at Lahaina.”

**Dr. Bruce Anderson, Director, State of Hawaii Department of Health**

April 30, 2019: “Having the U.S. Supreme Court’s clarity on this issue will be helpful, especially if there’s a good chance the court would rule in favor of the County and not require an NPDES permit. From a regulatory standpoint, and speaking from the State Health Department’s standpoint, I would rather not have a court mandate that we have to issue an NPDES permits for injection wells, which is what the Ninth Circuit Court’s decision amounts to. It is just another permitting requirement that would create nightmares for the State Department of Health, in terms of trying to figure out what effluent limits might be required, how we’re going to set up monitoring program, et cetera. I think our collective energies could be much better used going toward trying to find environmental beneficial uses for the recycled water on land as the reclamation plants were designed to do.

Keep in mind, this case sets a huge precedent, and the Ninth Circuit’s decision would mean that an NPDES permit would be required not just for the County but for hundreds of other similar types of sources in Hawaii, most of which are along the coastline. If DOH has to implement the Ninth Circuit’s decision, this will set precedent for how we will deal with many of those other situations. These types of sources are best regulated through the UIC permit program. The NPDES permit program never contemplated something like this, and honestly, I don’t know how we would even write an NPDES permit for an injection well. How do you determine the assimilative capacity of the groundwater you might be injecting into? How do you establish a zone of mixing? What effluent limits would you be applying, and many other concerns that we don’t have answers for now.

I would rather that we not be encumbered by some legal mandate and that we figure this out in a more reasonable and thoughtful way.”

**2012 Earthjustice Lawsuit – “Citizen’s Suit” under the Clean Water Act**

Earthjustice, on behalf of citizen groups sued claiming the County of Maui needed an NPDES permit under the federal Clean Water Act for its wells, in addition to the UIC permits. The plaintiffs sought an expansion of this federal law to cover discharges to groundwater, which is considered a “non point source” under the federal law and which is regulated by the states.

### **2015 Existing Settlement Agreement & Order**

The County entered into lengthy settlement negotiations with the plaintiffs upon the inception of the lawsuit in 2012. After the Hawaii District Court found the County liable under the Clean Water Act by way of decisions on motions for summary judgment, the parties agreed to the terms of the settlement, which specifically were based on appeal to the Ninth Circuit and on to the U.S Supreme Court (Paragraph 2 & 3 of the 2015 Settlement). After a mandatory review of this agreement by the federal government, the Hawaii District Court entered it as a court order.

Since 2015, the County has relied on this Settlement Agreement and Order and has complied in all respects with it, including spending significant money and effort in proceedings in the Ninth Circuit Court of Appeals, and application to the U.S. Supreme Court. The plaintiffs are currently proposing to revise the existing settlement agreement, primarily by requiring the County to withdraw its action from the U.S. Supreme Court. *See chart.*

### **Ninth Circuit Court of Appeals New Theory of Clean Water Act Liability**

The County is asking the Court to review the Ninth Circuit's new indirect discharge theory which would apply in all situations where pollutants are **fairly traceable** from a source to the ocean, lake, or river, and are more than *de minimis* ("more than minimal").

The Ninth Circuit supported Earthjustice's goal to **expand the Clean Water Act** to groundwater discharges, where Congress had not intended it to apply.

In the Clean Water Act, Congress distinguished between the many ways that pollutants reach navigable waters (in Maui's case, the ocean). Congress defined these ways as "point sources" – namely, pipes, ditches, and other "discernible, confined, and discrete conveyances." A common example is an ocean outfall that discharges treated wastewater into the ocean. This discharge requires a Clean Water Act "NPDES" permit.

The remaining ways of moving pollutants, like surface water runoff or groundwater migration, are "non point sources." These non point sources are controlled through federal oversight of state management programs, including those pursuant to Hawaii Revised Statutes 340E (Safe Drinking Water), 342D (Water Pollution), 342E (Non Point Source Pollution Management).

### **U.S. Supreme Court**

In February 2019, the U.S. Supreme Court agreed to hear Maui County's appeal because there is a split in how federal appellate courts are deciding these "groundwater conduit" cases under the Clean Water Act.

**The earliest that the U.S. Supreme Court will consider this matter is October 2019.**

The U.S. Supreme Court will render its opinion only on this question: “Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source, such as groundwater.”

### **Possible outcomes from the U.S. Supreme Court:**

1. Clarity on whether the Clean Water Act applies to discharges to groundwater or does not.
2. If the Clean Water Act does apply, under what circumstances (i.e., a clearer test).

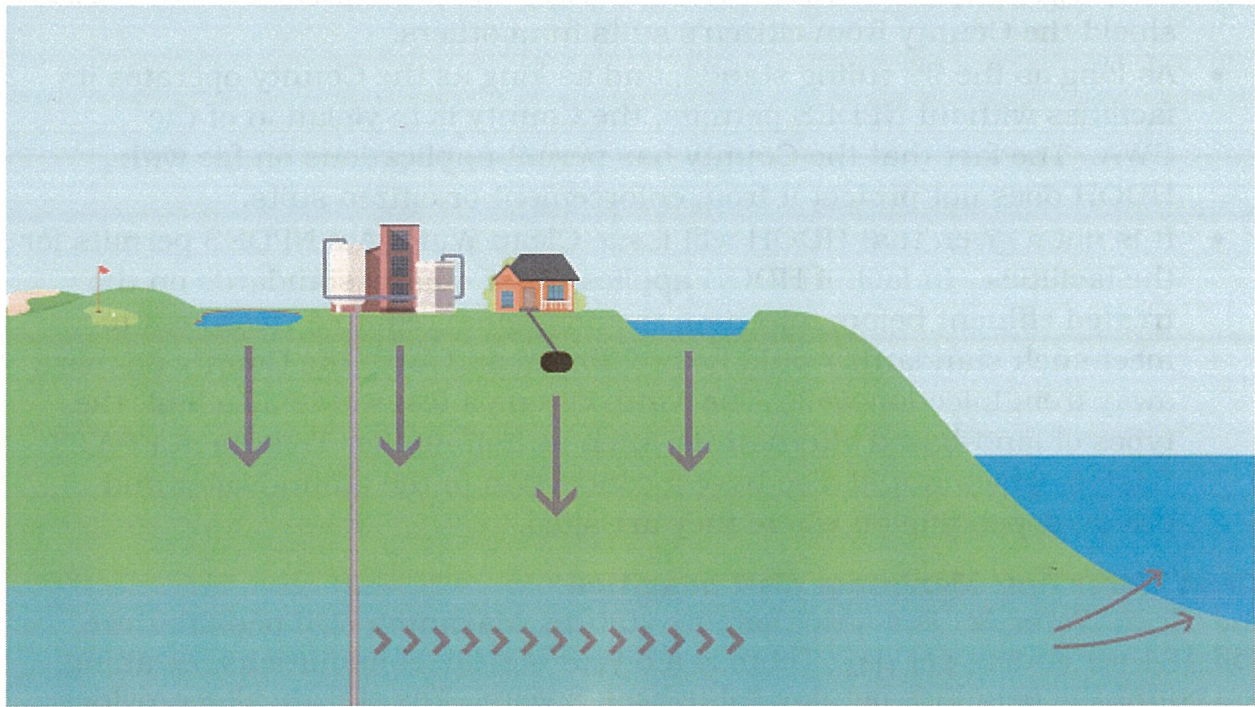
### **Effect of Withdrawing from the U.S. Supreme Court**

- The Ninth Circuit Court of Appeals held that the County is liable under the Clean Water Act because it did not have an NPDES permit.
- Withdrawing from the U.S. Supreme Court means that the County accepts the Ninth Circuit’s decision.
- All 4 County wastewater reclamation facilities using injection wells will be in violation of the Clean Water Act on Day 1, because none of these facilities have Clean Water Act permits.
  - The County has 18 total injection wells in Maui County: 4 wells in Lahaina, 8 wells in Kahului, 3 wells in Kihei, and 3 wells in Molokai.
  - Under the Ninth Circuit’s test, each of these wells is a different point source.
- The Ninth Circuit’s decision is being cited in a lawsuit against a small condominium/resort in Massachusetts that uses a septic system. This is a clear indication that this theory of liability can and is being applied to a septic system, and that it can be applied to other uses such as cesspools.
- The County’s recycled water users may be exposed to Clean Water Act liability because if their use can be “traced” – for example, unlined impoundments of recycled water that seep into groundwater and out to the ocean, or use on irrigation that may get into the groundwater.
- Potential negative impacts/legal liability under Ninth Circuit’s test:
  - County’s recycled water program
  - Recycled water users
  - Green infrastructure such as stormwater impoundments
  - Salt water intrusion barrier wells (freshwater used to keep salt water out of freshwater aquifers)

- Although the plaintiffs in this case can promise not to sue, this does not shield the County from citizen's suits from others.
- As long as the 9<sup>th</sup> ruling stands, and as long as the County operates its facilities without NPDES permits, the County is in violation of the CWA. The fact that the County has permit applications on file with HDOH does not protect it from enforcement or citizen suits.
- It is not a given that HDOH will issue Clean Water Act NPDES permits for the facilities. In fact, if HDOH applies water quality standards on the treated effluent before injection, the additional required treatment to meet such standards would be prohibitive and force the County do move away from injection wells. The Ninth Circuit's test would also limit the types of land-based alternatives, such as Soil Aquifer Treatment ("SAT") Basins, which would also have a connection to the groundwater and ocean, depending on where they are sited.

**Clean Water Act: Maximum civil penalties**

The Clean Water Act is a strict liability statute. Maximum civil penalties are \$53,484 per source per day. There is a 5 year statute of limitations, meaning, you count the penalties per day going back 5 years. The statute also provides for criminal prosecution for "knowing" or "negligent" violation.



**Potential for Future Litigation for Common Wastewater Disposal Systems in Hawaii Under the 9<sup>th</sup> Circuit'**

<p>Cesspools – 88,000 in Hawaii (12,000 on Maui; 1,400 on Molokai)</p>	<p>Cesspools are little more than holes in the ground that discharge raw, untreated human waste.</p> <p>Cesspools can contaminate ground water, drinking water sources, streams and oceans with disease-causing pathogens, algae-causing nutrients, and other harmful substances.</p>	<p><a href="http://health.hawaii.gov/wastewater/cesspools/">http://health.hawaii.gov/wastewater/cesspools/</a></p> <p>Hawaii Senate Bill 2567 reads:  “Hawaii’s cesspools ... deposit 53 million gallons of raw sewage directly into the groundwater ever day. ... [S]horeline, recreation, fisheries, and native species ... may be harmed by such pollution.”</p>
<p>Septic Systems with Leachfield</p>	<p>The septic tank digests organic matter and separates floatable matter (e.g., oils and grease) and</p>	<p><a href="https://www.epa.gov/septic/how-your-">https://www.epa.gov/septic/how-your-</a></p>

	solids from the wastewater. Soil-based systems discharge the liquid (known as effluent) from the septic tank into a series of perforated pipes buried in a leach field, chambers, or other special units designed to slowly release the effluent into the soil.	<a href="#"><u>septic-system-works</u></a>
Injection wells	Shallow disposal systems that depend on gravity to drain fluids directly in the ground. EPA estimates that there are more than 650,000 Class V wells in operation nationwide. There are 6,000 such wells in Hawaii.  Examples include: <ul style="list-style-type: none"> <li>• Stormwater drainage wells</li> <li>• Septic system leach fields</li> <li>• Agricultural drainage wells</li> </ul>	<a href="https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water"><u>https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water</u></a>  These wells are regulated with permits issued under the Safe Drinking Water Act and state equivalent



A citizen's suit was brought against the Wychmere Beach Club in Massachusetts (on left) under the same "hydrologic connection" theory as the case against the County, and cited to the Ninth Circuit's decision. It is a small condo/resort on 20 acres that's only open part of the year. There are 18 guest rooms, 18 staff rooms, and residential condominiums. At the height of its season, the property discharged under 7,000 gallons per day of sewage into its septic system. Maui County uses an average of 350 gallons per day as disposal from a typical single-family home – so this would be roughly equivalent to the average discharge from 20 homes. The condo has a Groundwater Discharge Permit, but was sued for lack of a Clean Water Act NPDES permit.



Aerial view of Maalaea condos – 10 condos using septic systems for wastewater disposal.

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**Excerpts from amicus briefs & May 20, 2019, GET testimony:**

“... The controlling version of the [Ninth Circuit’s] test will implicate parties like [Wynchmere condominium/resort] and millions of residential septic system owners, and thus will have pervasive adverse effects.” **Amicus Brief filed by Wynchmere Shores Condominium Trust, May 16, 2019 – See “19-Zip-File” in Granicus (Brief attached, and photo of condo/resort (in left foreground of picture). For comparison, an aerial of Maalaea is attached. All 10 condos have aging septic systems.**

Ramifications of the Ninth Circuit Court of Appeals decision “could require state and local governments across the country to rework their requirements for the permitting of discharge systems that heretofore have not been regulated as point sources. These could include UIC wells, cesspools, septic systems, drainage basins, and surface aquifer treatment (SAT) basins. In addition to local government facilities, the application of the CWA permitting system to nonpoint source pollution would affect numerous businesses, agricultural operations, and individual citizen property owners by potentially requiring them to meet uncertain standards and permitting requirements.” **Jason Kagimoto, Chief, Wastewater Management Division, Kyle Tabata, Deputy County Engineer, Department of Public Works, County of Kauai (May 14, 2019)**

“The County’s wastewater reclamation facilities and others in the state are already highly regulated... Other Hawaii state laws ... regulate uses and programs such as cesspools, septic systems, advanced treatment units, recycled water use on land .... The Federal Clean Water Act’s NPDES permitting program would be difficult if not impossible to apply to these uses and programs.” **John K. Nishimura, P.E., Fukunaga & Associates, Inc.**

“Septic systems – both large commercial ones and the ubiquitous personal ones that dot rural America – could qualify, requiring a federal permit and federal oversight at countless private properties.” **U.S. Chamber of Commerce Amicus Brief, Para. 9 (“03 Zip File” in Granicus”**

“Settlement of the lawsuit and perceived violation of the CWA will have a catastrophic and negative impact not just for the Lahaina WWRF, but across Hawaii ... . Other types of infrastructure such as cesspools, septic tanks, or reuse systems in coastal areas will be impacted by the ruling with discharges that go to groundwater that make it to the ocean. The outcome and resulting effects of this ruling will be far reaching.” **Benjamin Rasa and Eassie Miller, Kennedy/Jenks Consultants, Inc. (May 16, 2019)**

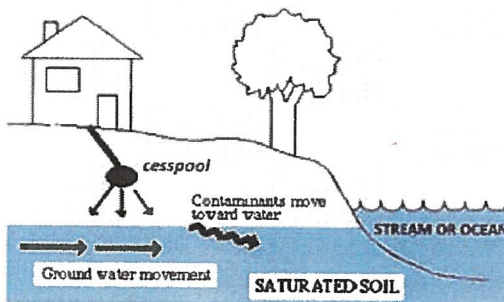


State of Hawaii, Department of Health  
Wastewater Branch

Home » CESSPOOLS IN HAWAII

## CESSPOOLS IN HAWAII

**Cesspools contaminate our  
ground water, streams and oceans**



Cesspools are substandard systems. They don't treat wastewater, they merely dispose of it. Cesspools concentrate the wastewater in one location, often deep within the ground and in direct contact with groundwater, causing groundwater contamination. This groundwater flows into drinking water wells, streams and the ocean, harming public health and the environment, including beaches and coral reefs.

### What are cesspools?

- Cesspools are little more than holes in the ground that discharge raw, untreated human waste.
- Cesspools can contaminate ground water, drinking water sources, streams and oceans with disease-causing pathogens, algae-causing nutrients, and other harmful substances.
- Untreated wastewater from cesspools contains pathogens such as bacteria, protozoa and viruses that can cause gastroenteritis, Hepatitis A, conjunctivitis, leptospirosis, salmonellosis and cholera.

How many cesspools do we have in Hawaii?

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- There are approximately **88,000** cesspools in the State, with nearly 50,000 located on the Big Island, almost 14,000 on Kauai, over 12,000 on Maui, over 11,000 on Oahu and over 1,400 on Molokai.

### How many cesspools pose a risk to our water resources and how do they impact our environment?

- There are **43,000** cesspools that pose a risk to our water resources.
- There are approximately 6,700 cesspools that are located within 200 feet of a perennial stream channel throughout the State. There are approximately 31,000 cesspools that are located within the perennial watersheds on the islands of Hawai'i, Kauai, Maui, and Molokai.
- Cesspools in Hawai'i release approximately **53 million gallons of untreated sewage** into the ground each day.
- Cesspools have significant impact on the quality of drinking water, general water quality, the health of our reefs, and the health of Hawaii's residents and visitors.

### What is Act 125?

- Act 125 was passed in the 2017 legislative session and require the replacement of all cesspools by 2050. it directs the Hawaii Department of Health (DOH) to evaluate residential cesspools in the state, develop a Report to the Legislature that includes a prioritization method for cesspool upgrades, and work with the Department of Taxation on possible funding options to reduce the financial burden on homeowners.

### Report to the Legislature – Relating to Cesspools and Prioritization for Replacement

- The report identifies 14 areas in the state where an evaluation of data on hand indicates greatest need for action.
- The report identifies four priority categories. **Priority 1** are areas where cesspools present a Significant Risk of Human Impacts, Drinking Water Impacts, or Draining to Sensitive Waters. **Priority 2** are areas where cesspools present a Potential to Impact Drinking Water. **Priority 3** are areas where cesspools have the Potential to Impact Sensitive Waters in our state. **Priority 4** is a placeholder for all cesspools whose impacts DOH have yet to fully analyze.
- The highest priority for action is located in Upcountry Maui and Kahalu'u.

### How can I get a copy of the report?

- The Report is available for download from the following website:  
<https://health.hawaii.gov/wpppd/files/2017/12/Act-125-HB1244-HD1-SD3-CD1-29th->

[Legislature-Cesspool-Report.pdf](#)

### **Posters and Handouts from the Makawao Cesspool Community Meeting on January 9, 2018**

- [Flier](#)
- [Posters](#)

### **Handouts, Powerpoint Presentation and Video from the Kahalu'u Cesspool Community Meeting on January 12, 2018**

- [Flier](#)
- [Powerpoint Presentation](#)
- [Video – Part 1](#)
- [Video – Part 2](#)
- [Video – Part 3](#)
- [Video – Part 4](#)

### **Upcountry Maui Groundwater Nitrate Investigation Report, Appendices, PowerPoint Presentation and Public Notice**

- [Upcountry Maui Groundwater Nitrate Investigation Draft Report](#)
- [Upcountry Maui Groundwater Nitrate Investigation Draft Report Appendices](#)
- [Upcountry Maui Groundwater Nitrate Investigation Draft Report – Appendix VI \(Groundwater Flow and Nitrogen Transport Model Report \(Draft\)\)](#)
- [Upcountry Maui Groundwater Nitrate Investigation PowerPoint Presentation – Kula Community Meeting on 2/21/18](#)
- [Notice of Opportunity to Provide Public Comment on the Draft “Upcountry Maui Groundwater Nitrate Investigation Report”](#)

### **Upcountry Maui Groundwater Nitrate Investigation Report – Department of Health Responses to Public Review Comments**

- [Department of Health Responses to Public Review Comments on the Upcountry Maui Groundwater Nitrate Investigation Report](#)

### **Handouts and Video from the Waimanalo Cesspool Community Meeting on May 29, 2018**

- [Handouts](#)
- [Video – Part 1](#)
- [Video – Part 2](#)
- [Video – Part 3](#)

**Handouts and Video from the Kailua-Kona Cesspool Community Meeting on June 29, 2018**

- [Handouts](#)
- [Video](#)

**Handouts and Video from the Hilo Cesspool Community Meeting on July 25, 2018**

- [Handouts](#)
- [Video](#)