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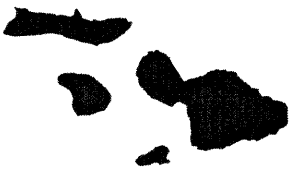

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May 18, 2019

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)

For the Committee's ease of reference, below is a listing of the 19 amicus ("friend of the court") briefs filed on May 16, 2019, in the above-identified matter. The files are uploaded to Granicus as "00-Zip File 05-17-2019," et cetera.

1. Municipal briefs: two separate briefs joined by many organizations – National Association of Clean Water Agencies (NACWA) brief and National Conference of State Legislatures brief, including the following:

   NACWA (09 Zip File)
   - San Francisco Public Utilities Commission
   - Denver Metro Wastewater Reclamation District
   - City of New York

   National Conference of State Legislatures (11 Zip File)
   - WateReuse Association
   - California Association of Sanitation Agencies
   - Association of California Water Agencies
   - Idaho Water Users Association
   - Idaho Water Resources Board
   - International Municipal Lawyers Association
   - International City/County Management Association
   - League of California Cities

- National Association of Counties
- National League of Cities
- National Water Resources Association
- Western Coalition of Arid States

2. Federal Water Quality Coalition brief (06 Zip File)

3. Water Systems Council and National Ground Water Association brief (17 Zip File)

4. Florida organizations brief (07 Zip File)

   - Florida Water Environment Association-Utility Council
   - Florida Rural Water Association
   - Florida Electric Power Coordinating Group-Environmental Committee

5. Agricultural Business Organizations brief (02 Zip File)

   - Agricultural Retailers Association
   - CropLife America
   - Family Farm Alliance
   - The Fertilizer Institute
   - American Farm Bureau Federation
   - National Pork Producers Council
   - National Cattlemen's Beef Association
   - National Corn Growers Association

6. States brief (18 Zip File)

   - Alabama
   - Alaska
   - Arkansas
   - Florida
   - Georgia
   - Idaho
   - Indiana
   - Kansas
   - Kentucky
   - Louisiana
   - Mississippi
   - Missouri
   - Montana

- Nebraska
- Ohio
- Oklahoma
- South Carolina
- Texas
- Utah
- West Virginia
- Wyoming

7. US Chamber of Commerce brief (03 Zip File)

8. Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc. brief (08 Zip File)

9. Edison Electric Institute with the following parties brief (04 Zip File)

    - Utility Water Act Group
    - American Iron and Steel Institute
    - American Fuel & Petrochemical Manufacturers
    - American Public Power Association
    - International Brotherhood of Electrical Workers
    - National Rural Electric Cooperative Association
    - National Association of Manufacturers
    - Association of American Railroads
    - American Petroleum Institute
    - National Mining Association
    - Portland Cement Association

10. Wychmere Shores Condominium Trust and Longwood Venues & Destinations, Inc. (Cape Cod resort and condominiums) brief (19 Zip File)

11. National Association of Home Builders brief (10 Zip File)

12. Energy Transfer Partners brief (05 Zip File)

13. Pacific Legal Foundation brief (13 Zip File)

14. Washington Legal Foundation brief (16 Zip File)

15. United States Senators (select Senators) brief (15 Zip File)

16. US Solicitor General brief (14 Zip File)

17. Texas Public Policy Foundation (12 Zip File) brief for:

- National Federation of Independent Business Small Business Legal Center
- Western States Trucking Association, Inc.
- Nuckles Oil Co., Inc d/b/a Merit Oil Company

Testimony GET-26

United States Environmental Protection Agency

National Pollutant Discharge Elimination System (NPDES)

Releases from a Point Source to Groundwater

On April 15, 2019, the EPA issued an Interpretative Statement clarifying the application of Clean Water Act (CWA or the Act) permitting requirements to groundwater. EPA concluded that releases of pollutants to groundwater are categorically excluded from the Act's permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities.

Recent conflicting federal court decisions and the prior lack of clear agency guidance regarding whether National Pollutant Discharge Elimination System (NPDES) permits are required for releases of pollutants to groundwater caused uncertainty regarding how to implement and enforce the NPDES permitting program. EPA began to address this uncertainty in February 2018 by requesting public comment on whether the agency should revise or clarify its position on the issue. EPA received over 50,000 comments from a wide range of stakeholders, many of which affirmed that additional clarity from EPA was necessary. At the same time, the agency also undertook a comprehensive review of prior agency statements on the matter and performed a holistic analysis of the text, structure, and legislative history of the CWA.

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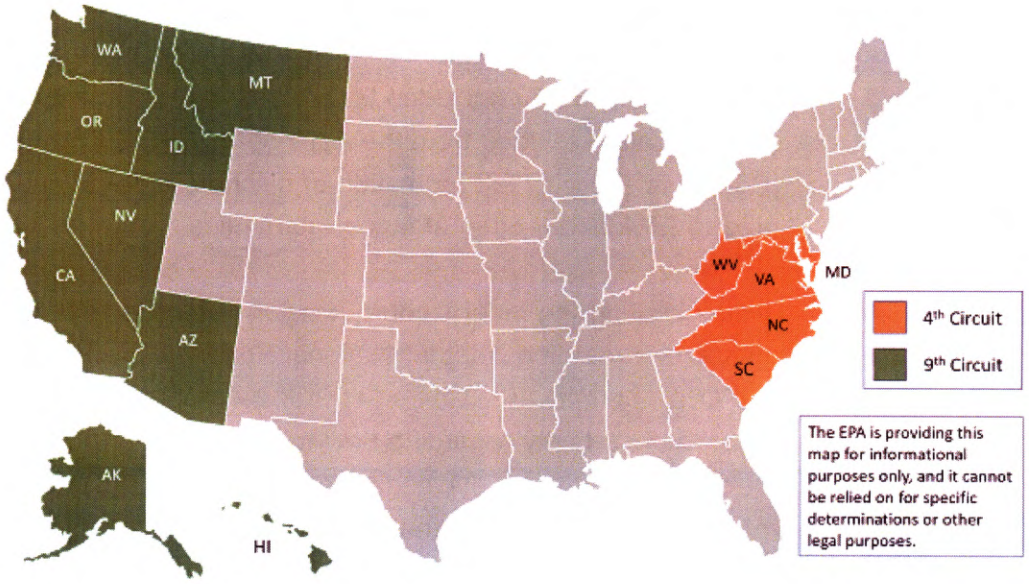
Richelle Thomson

Based on this analysis and careful consideration of public input, EPA concluded that releases of pollutants to groundwater are excluded from the Act's permitting requirements, regardless of whether that groundwater is hydrologically connected to surface water. States are the primary regulators of discharges to groundwater within their jurisdictions, as provided in state law and envisioned under the CWA. EPA will continue fulfilling its role in protecting groundwater and hydrologically connected surface waters as authorized by Congress through the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.

EPA's Interpretative Statement should guide states and EPA regions with future NPDES permitting and enforcement decisions in portions of the country outside the Fourth and Ninth Circuit Courts of Appeal. EPA recognizes that the Fourth and Ninth Circuit Court interpretations of how the CWA applies to discharges to groundwater are different than the agency's interpretation. The U.S. Supreme Court recently granted a petition for writ of certiorari in the Ninth Circuit case (*Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d. 737 (9th Cir. 2018)). Below is a map showing the states within the Fourth and Ninth Circuits where EPA's Interpretative Statement does not apply. Once the U.S. Supreme Court has issued its decision, the agency may take further action if necessary.



This map was last updated April 15, 2019.

Concurrently with issuing its interpretation of the CWA, the EPA is soliciting additional public input regarding what may be needed to provide further clarity

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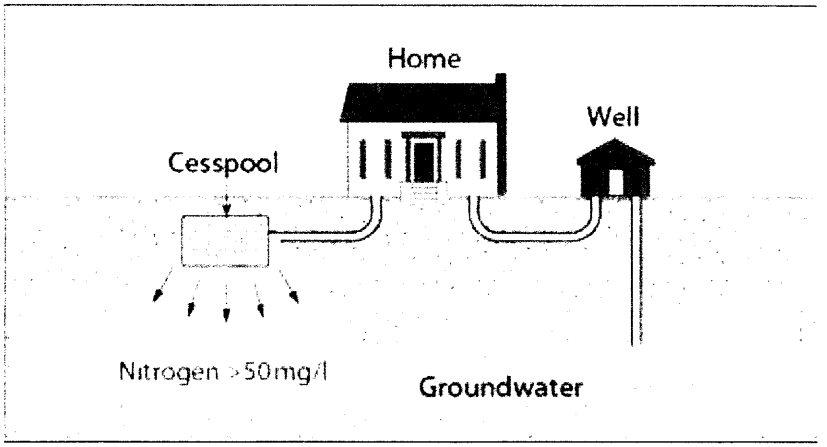
Financing Cesspool Conversions in Hawaii

Executive Summary:
There are currently over 88,000 cesspools open throughput the State of Hawaii, leaking over 53 million gallons of untreated sewage into the ground each day.

The State of Hawaii recently ban the construction of new cesspools and also passed a law requiring all cesspools be closed by 2050. This paper is an overview of EPA, HUD and USDA Rural Development federal funding programs which could potentially be used to close/convert cesspools, financial options available to the State of Hawaii and the four counties to utilize these funds and recommended next steps. Recommended next steps include 1. Working with the Environmental Finance Center and 2. Creating a Hawaii equivalent of the Craft3 Program.

* * * * *

What are cesspools?
Cesspools are underground holes used throughout Hawaii for the disposal of human waste. Raw, untreated sewage is discharged directly into the ground, where it can contaminate oceans, streams and ground water by releasing disease-causing pathogens and nitrates.
They were installed to serve many homes and businesses in Hawaii. Some communities adjacent to beaches are known to have high levels of bacteria and nutrients in the water due to cesspool leakage.



Why is US EPA Region 9 Involved?
US EPA Region 9 has been actively working in Hawaii to eliminate Large Capacity Cesspools (LCC) since they were banned under the Safe Drinking Water Act in April 2005. Large Capacity Cesspools

serve 20 or more persons per day. Hawaii has one of the highest levels of reliance on groundwater for drinking water as any State (95%) and competes economically on a global scale for tourism by marketing itself as a tropical paradise, making the elimination of cesspools critical to the State's health and welfare. The current Hawaii Water Quality Integrated Report identifies numerous impaired coastal water segments which do not meet state water quality standards for nutrients (nitrogen and phosphorus). These water quality impairments are attributed largely to nonpoint sources of pollution, including cesspools. A study conducted by the State of Hawaii identified 2,500 cesspools located within the capture zones delineated around public water supply wells.

Since 2002, US EPA Region 9 has implemented a LCC outreach, education, enforcement and monitoring program. To date, EPA has identified over 4,900 LCCs in Hawaii and overseen the closure/conversion of about 71%.

State of Hawaii's Efforts to Address Cesspools:
The State of Hawaii recently banned new cesspools (any size) and set a goal of closing all cesspools by 2050. The State of Hawaii Legislature set up a cesspool task force through S.B. 2567, which reads "The legislature finds that public health and the quality of Hawaii's drinking water, streams, ground waters, and ocean are being harmed by water pollution from cesspools. Hawaii has eighty-eight thousand cesspools that deposit approximately fifty-three million gallons of raw sewage directly into the groundwater every day. Drinking water, public recreation, and the precious coral reefs, on which Hawaii's economy, shoreline, recreation, fisheries, and native species depend, are or may be harmed by such pollution. The purpose of this Act is to establish a cesspool upgrade task force to consider and recommend means by which the department of health can ensure that cesspools on properties that are within priority upgrade areas are converted to more environmentally-responsible waste treatment systems or connected to sewer systems within fifteen years." U.S. EPA Region 9 has a representative on this task force.

Cesspool Alternatives
Options to close/convert cesspools:
-Replace cesspools with innovative septic tank alternatives (approved by the Hawaii Department of Health) or individual onsite septic systems
-Combine or connect properties with cesspools or malfunctioning septic systems into a cluster system or a Wastewater Treatment Facility (WWTF)

Available Federal Funding

EPA's Clean Water State Revolving Fund (CWSRF) may now provide financial assistance for the construction, repair, or replacement of decentralized wastewater treatment systems that treat municipal wastewater or domestic sewage. This is a change from what was previously eligible. Previously, the SRFs could only fund decentralized systems in cases where the project was correcting an existing nonpoint source problem. In effect, it only funded the repair or replacement of existing systems. In addition to what was previously eligible, we can now also fund new, publicly or privately owned decentralized systems. SRF assistance for decentralized systems can be provided to public entities, such as municipalities, county governments, and state agencies, as well as private entities such as homeowners associations, nonprofit organizations, and individual homeowners.

In general, the CWSRF grant program funds up to 80% of project costs and requires a 20% non-federal match. The Water Resources Reform and Development Act of 2014 (WRRDA) includes additional subsidizations such as principal forgiveness, negative interest loans and grants. Among its provisions are amendments to Titles I, II, V, and VI of the Federal Water Pollution Control Act (FWPCA). It also offers up to 30-year loan terms and new eligibilities. As amended, the FWPCA now includes section 603(c)(4), which states that each CWSRF may provide financial assistance: for the construction, repair, or replacement of decentralized wastewater treatment systems that treat municipal wastewater or domestic sewage.

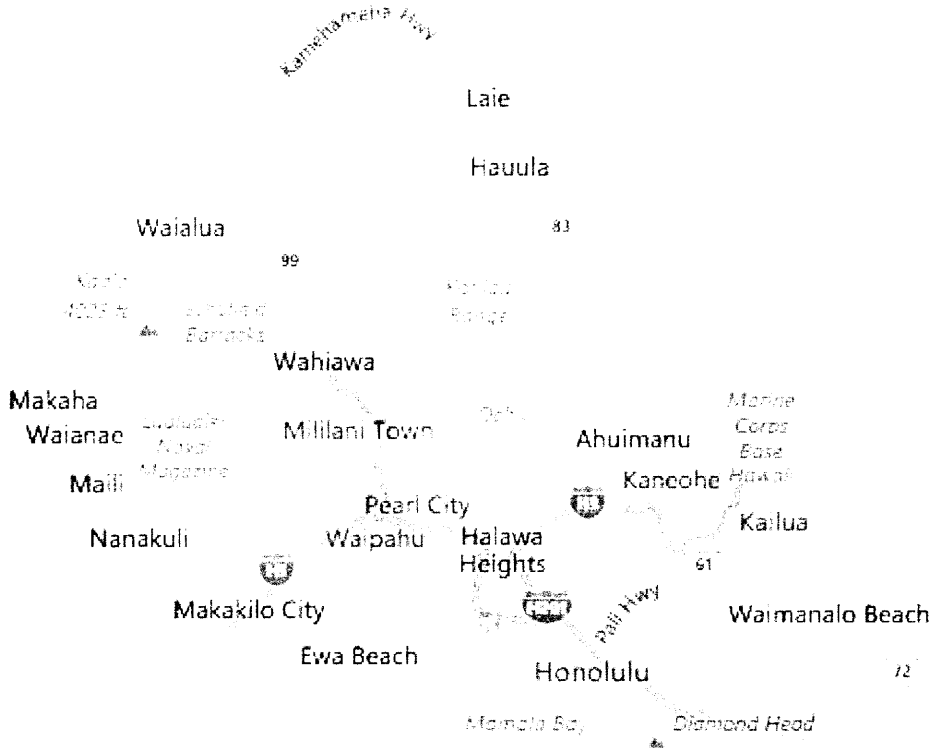
Publicly and privately owned decentralized wastewater treatment projects are eligible.

Eligible projects include, but are not limited to, the construction of new decentralized systems (e.g., individual onsite systems and cluster systems), as well as the upgrade, repair, or replacement of existing systems.
New decentralized eligibilities include: Decentralized projects do not need to address an existing NPS problem.
Decentralized systems for new construction may now be funded as either individual or cluster onsite systems.
Decentralized systems may be publicly or privately owned and serve either public or private purposes.

HUD's Community Development Block Grant (CDBG) can be used to fund alternatives to cesspools or connections for septic tanks as long as funding is applied to a low-moderate income family/beneficiary. CDBG could not be used to subsidize upper income households. The key caveat is the County would need to agree to use its CDBG funds towards this purpose.

USDA's Rural Development Program offers low-income families housing repair loans of up to $20,000 at 1% interest rate and/or grants to applicants of 62 years or older for up to $7,500 in eligible rural areas. Loans can be used to improve or repair rural homes and cesspool replacement costs/conversion costs are eligible. Grants must be used to remove health and safety hazards and cesspool replacement costs/conversion costs are eligible. Larger direct home loans are also available to low and very low-income households and cesspool replacement costs/conversions are eligible.

All of Kauai, Molokai and Lanai are considered rural areas. The maps below highlight ineligible areas on Oahu, Hawaii and Maui.



Map of Oahu. All of Oahu is considered rural except for those areas highlighted in pink.

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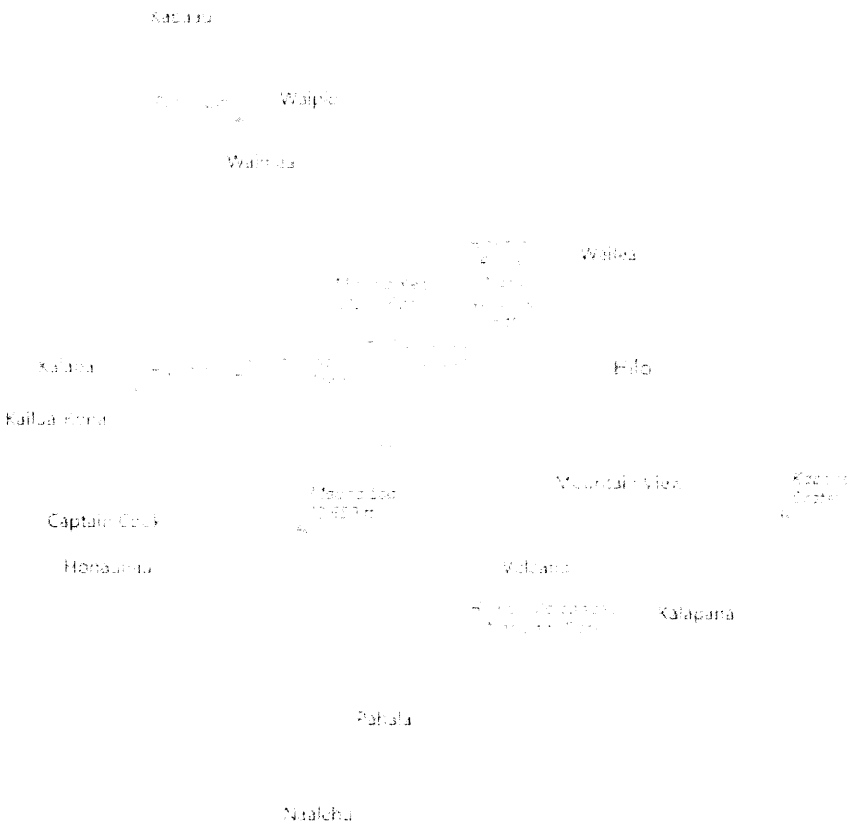
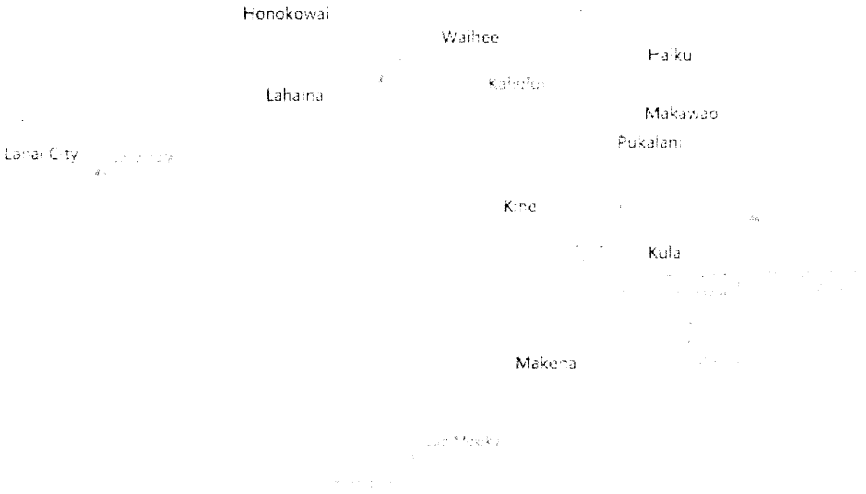


Map of Hawaii. All of Hawaii is considered rural except for those areas highlighted in pink.



Map of Maui. All of Maui is considered rural except for those areas highlighted in pink.

State of Hawaii Wastewater Tax Credit
The Hawaii State Legislature passed a Wastewater Tax Credit that provides credits for homeowners who have cesspools upgrading to septic tanks, aerobic treatment units, sewer lines. Qualifying homeowners can receive up to $10,000 in income tax credit.
Deadline: December 31, 2020
For more information visit the Department of Health's Website:
http://health.hawaii.gov/wastewater/home/taxcredit/

State Examples of Financial Program Options
The State of Hawaii needs to decide how to best utilize available funding. Here are several financial program options the State of Hawaii could create:

Delaware: Loans
The Delaware SRF program makes direct loans to homeowners for septic system repair and replacement. The loans are secured by a mortgage lien on the property being serviced. The program is managed by the Delaware Dept of Natural Resources and Environmental Control Environmental Finance which shares a partnership with First State Community Action Agency (FSCAA) to assist with the application process.

Delaware has 2 options for funding decentralized systems, based on income:

1. The Septic Rehabilitation Loan Program(SRLP) provides financial assistance to moderate to low income homeowners to replace failing septic systems.

- On the financing side, up to $35k for individual homeowners is available. The average loan is $15k, and the minimum loan is $1k
- $250k can be made available for mobile home parks
- Interest rates are based on income
- Loans have a 20 year term
- Eligible loan costs include: Site evaluation, design, permits, construction costs, and closing and recording charges

- Applicants that are in bankruptcy are not eligible, and applicants must pass a basic credit check.
- Poor credit and a high debt-to-income ratio can disqualify an applicant, however they may be eligible for the Septic Extended Funding Option.
- The Septic Extended Funding Option, as described in the previous slide, provides 0% interest and no monthly payments. Loans are to be repaid if and when the property is sold.

2. The Septic System Extended Funding Option (SEFO) is used when an applicant is denied a SRLP loan due to the underwriting criteria. These are given a 0 percent loan with no monthly payments. The loans are forgiven after 20 years; however, principal must be repaid immediately if the property is sold or the mortgage loan is refinanced. This program is funded by an annual allocation of $500,000 that comes from a 1 percent fee charged on CWSRF municipal wastewater loans.

Washington: Pass-Through Entities

- Provides financing to individual residents for repair of septic systems
- County or health department (pass-through entity) is responsible for loan servicing
- $15 million in CWSRF loans dispersed and over 600 homeowners participated
- Regional On-Site Sewage System Loan Program (RLP)/ Craft3
- CWSRF loans are signed with several Washington counties and conservation districts to address nonpoint water quality problems. These counties/ conservations districts act as "pass-through entities". The pass-through entities then provide sub-loans to local homeowners for repair and replacement of septic systems.
- Additionally, the Washington CWSRF funds a pass-through program with 15 counties or local health departments in the Puget Sound and marine counties, as well as the Spokane Conservation District, that provides financing to individual residents to repair failing septic systems.
- The loans may also pay for abandonment of septic systems and connection to sewer. The county or health department is responsible for local loan servicing, collecting payments, and payment tracking (but may contract these services to a lending institution).
- The pass-through entity also approves or denies loan requests and establishes the terms of the sub-loans to residents.
- $15 million in CWSRF loans has been provided for the program since 1990, and over 600 homeowners have participated since 2007.
- A great example of a pass-through entity in Washington is the Regional On-Site Sewage System Loan Program (RLP).
- Since the early 90s, the Washington Dept of Ecology has loaned money from the SRF to local governments to repair or replace septic systems.
- In 2014, a local county health department applied for funding from the Dept of Ecology, which turned into a 10 County-wide partnership.
- In 2016, the Dept of Ecology contracted with Craft3, a non-profit CDFI, to administer and service loans for the program.
- Through Craft3, the loan fund provides loan assistance to eligible property owners across a multi-county region to repair, upgrade, or replace failing or malfunctioning septic systems to protect public health and water quality. Craft3 works with the local authorities to ensure that every repair and replacement they fund is appropriate and approved. Craft3 assumes the financial risk associated with lending, and is obligated to repay the SRF funds. Structuring the RLP with a revolving loan fund component leverages grant-funded resources for reinvestment in local communities.
- This program is fiscally innovative. It directs more funds into the actual repair and replacement of failing septic systems than the individual county programs, and less money is spent on administration of the program.
- This program has already been replicated in Oregon.

Current Eligibility:

- Residential properties throughout Oregon and in many Washington counties
- Loan-to-value and loan amount maximums apply to repayment types.
- One of the following must apply:
  - your septic system is at least 25 years old;
  - your system is failing;
  - you've been contacted by Health Officials; or
  - you are under orders to fix your septic system.
- Counties currently served by Craft3:
  - Residential Oregon: All
  - Residential Washington: Clallam, Clark, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Mason, Pacific, Pierce, Snohomish, Thurston, Wahkiakum and Whatcom
  - Commercial septic systems: All in Oregon or Washington

CRAFT3 MAKES REPLACING SEPTIC SYSTEMS EASY

1. Apply Online. Receive pre-approval in as soon as three business days.
2. Work with the contractor to design the system, receive permits and finalize project cost.
3. Sign loan documents electronically.
4. Begin the project. Make sure work is completed to the customer's satisfaction.
5. Authorize final payment to the contractor once the project gets final approval from local officials.
6. Loan payments, if required, will be automatically withdrawn from the customer's bank account.

Minnesota: Conduit Lending

Minnesota has a Small Community Wastewater Treatment Program.
Funds for the program have been appropriated by the legislature from the Clean Water Fund via the Clean Water, Land and Legacy Amendment.

Administered by the Minnesota Public Facilities Authority, the program provides technical assistance grants and construction grants and loans for public subsurface sewage treatment systems.

Technical assistance grants up to $60,000 may be used by communities to contract with licensed SSTS professionals, counties, the University of Minnesota on-site sewage treatment program, or qualified nonprofit organization to conduct preliminary site evaluations and prepare feasibility reports, provide advice on possible SSTS alternatives, and help develop the technical, managerial, and financial capacity to build, operate, and maintain SSTS systems.

The PFA provides construction financing up to $2 million per year at 1 percent interest and grants up to 80 percent, based on affordability criteria. Disadvantaged communities may receive 50% grant/principal forgiveness. There are specific scoring protocol for projects in unsewered areas require applicants to establish a user charge system to pay for operation and maintenance costs. All unsewered communities seeking CWSRF funding for decentralized systems must create:

- Financing plan that provides a dedicated source of revenue for debt service and operation and maintenance (typically special assessments or user charges)
- Management Plan with a schedule for inspections, pumping, repair and replacement
- Alternatives analysis using the Wastewater Treatment Hierarchy "Wastewater Hierarchy". This Hierarchy encourages communities to focus on small, acute problem areas before deferring to a larger infrastructure solution to correct environmental or public health issues.

Rhode Island: Loans

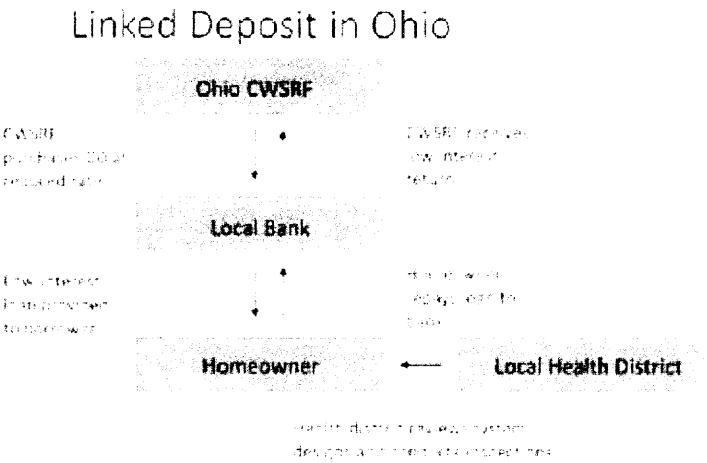
Through the Rhode Island Community Septic System Loan Program (CSSLP), loans are made to communities who then distribute to individual homeowners.

- Rhode Island Housing and Mortgage Financing Corporation (RI Housing) acts as the loan
- servicing agent and loan administrator
- RI Housing accepts applications from homeowners, coordinates payments to septic system

- installers; collects repayments from homeowners, credits repayments to the principal payment
- of the local government unit; makes monthly reports to both the CWSRF and the local
- government unit.
- Communities may only qualify for funding after completing an Onsite Wastewater Management Plan
- No income limits for program participants
- Can be used for residential properties with up to 4 units
- Financing up to $25,000 at 2% for 10 years
- $300 origination fee
- 1% service fee on outstanding loan balance
- Application package, policies and procedures (see Attachment C)
- Rhode Island Sewer Tie-In Loan Fund (STILF)
- Loans for homeowners to tie into the local sewer system and abandon individual septic systems
- Financing up to $150,000 to sewer system owner
- Owner then directs funds to individual homeowners via RI Housing (as above)

Ohio: Linked Deposit

- The Ohio CWSRF uses a linked deposit program to make low-interest loans available to individual homeowners in need of upgrading or replacing their decentralized systems.
- Under a linked deposit approach, a state works with their ocal banks at a reduced rate to provide assistance. This allows the borrower to receive a loan at under market rate. The CWSRF investment (deposit) is linked to a low-interest loan, hence the term "linked deposit".
- This type of program benefits CWSRF programs, local banks, and borrowers.
    - CWSRF: high priority projects are supported, risk and financial management is placed on banks
    - Local banks: earn profits from linked deposit agreements and add an additional service for their customers
    - Borrowers: save money with low-interest loans, and they find comfort in working with local banks
- The Ohio CWSRF partners with local counties, health districts, and banks to offer this program.
- The homeowner obtains a permit from the local health district, which contains specifications on the proper installations, operation, and maintenance of the onsite system.
- The homeowner is then issued a certificate that he or she can take to any bank that participates in the Linked Deposit Program.
- The bank, using its own criteria, decides whether or not to offer the applicant a loan and at what interest rate and term.
- The lending institution then notifies the Ohio CWSRF, which then deposits the loan amount in the institution at a reduced interest rate. The savings from the reduced interest rate are then passed on to the loan applicant.



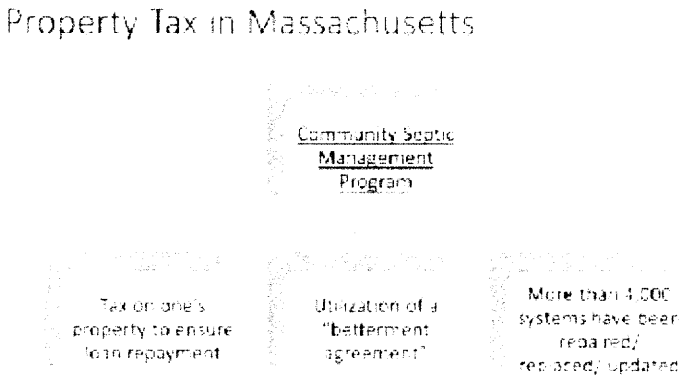
Ohio: Special Purpose Grants

- Ohio Water Development Authority's Un-Sewered Area Assistance Program
  - Grants for the construction of a POTW for un-sewered areas that have failing on-lot
  - systems. To assist local gov't agencies who are responsible for un-sewered areas to
  - construct a POTW as affordably as possible.
  - To Qualify:
- Documented failing on-lot system (septic or cesspool)
- MHI < statewide average
- Permit-to-install for proposed improvements issued by OEPA
  - Eligible costs include
- Engineering
- Permit fees
- Land acquisition
- Construction Costs
  - Grant award amount:
- Grant award amount MHI < $20,000 MHI $20,001 - $35,000 MHI $35,001 to State
- < 100 customers $1,000,000 $750,000 $500,000
- 100-200 customers $750,000 $500,000 $250,000
  - 200 customers $500,000 $250,000 $250,000

Massachusetts: Property Tax

- Funding nontraditional eligibilities with the CWSRF often involves identifying unconventional repayment sources. While "traditional" pipe and plant infrastructure projects often have a stable revenue source, many nontraditional projects lack these options. The property tax is a creative revenue source for funding nontraditional projects.
- The Community Septic Management Program:
- was created in 1996 after the Massachusetts DEP recognized failing cesspools and septic systems as a leading cause of water pollution and drinking water contamination.
- allows municipalities to borrow funds at a below market rate (the Massachusetts Clean Water Trust provides up to $5 million a year from the CWSRF program assets to fund municipalities' needs). Municipalities in turn lend money to homeowners at a low interest rate for septic system repair or replacement.
- utilizes a "betterment agreement" that channels loans through a municipality to individuals for septic system improvements and allows the municipality to ensure that the loan is repaid as part of a property tax bill. The municipality can place a municipal lien on property if the homeowner defaults on the loan.

- A Betterment is a Financial Agreement between a homeowner and the community. The "Betterment Agreement" outlines the rights and responsibilities of the community and the homeowner for the repair, replacement or upgrade of the homeowner's septic system
- A Betterment Agreement between the community and a homeowner may be used for all costs necessary to repair or replace a failed septic system including:
    - renovating the existing system
    - hooking up to existing sewer lines
    - replacing traditional septic systems with an approved Title 5
    - innovative/alternative system
- Since the implementation of the Community Septic Management Program, more than 4,000 systems have been replaced, repaired, or upgraded. Over $22 million in low interest loans have been approved by the MA Clean Water Trust and the MA CWSRF program to communities.



Recommendation 1: Work with the Environmental Finance Center
The Environmental Finance Center is dedicated to enhancing the ability of governments and other organizations to provide environmental programs and services in fair, effective, and financially sustainable ways. In addition to direct community outreach, the EFC at UNC works with decision-makers to assess the effectiveness of environmental finance policies at a regional or state level, and to improve those policies as a way of supporting local efforts.

In Hawaii, the Environmental Finance Center could:

- Evaluate funding and financing strategies for decentralized wastewater system repair, replacement, and on-going management.
- Work with local entities to assess, develop and market local programs.
- Work with federal, state and county entities (HDOH, SRF programs, HUD, USDA Rural Development, regulators, DBEDT) to utilize existing programs such as CWSRF funding to be used to support decentralized wastewater improvements. This has been done by a few states and there are several approaches that could be considered.
- Provide a range of finance modeling and legal framework analysis. In other words, EFC can develop multiyear finance models as well as review local and state laws related to local finance to understand options. The later task can be important when public funds are going to benefit private property owners. It is important to identify obstacles early in the process so there is sufficient time to develop solutions.

The EFC competed for and won an agreement to operate a US EPA funded Finance Center. Work related to supporting finance strategies and programs for decentralized wastewater treatment in Hawaii could be completed as part of this scope of work, if state funds are available. EFC also has an on-going

EPA project that allows EFC to work directly with states and local utilities on small system management issues. For this project, EFC typically does at least one state event and carries out a combination of in-person and remote assistance activities relating to small water systems.
https://efc.sog.unc.edu/project/smart-management-small-water-systems

In the past, EFC worked directly for the Hawaii Department of Health to prepare a statewide water finance and benchmarking system: https://efc.sog.unc.edu/resource/hawaii-water-rates-dashboard. EFC also analyzed onsite wastewater financing options and examples for North Carolina. While dated, this paper describes what continue to be viable options in NC and other states:
https://efc.sog.unc.edu/sites/default/files/FinancingOnsiteWastewater_0.pdf

Recommendation 2: Create a Hawaii equivalent of the Craft3 Program, using the financial program options best suited for Hawaii.
For more than ten years, Craft3 has been financing replacement of failing septic systems for families in the Northwest with their unique Clean Water Loan program, a customer-friendly, easy-to-use, one-stop-shop portal. This is not a traditional program, just like they are not a traditional financial institution, but rather a collaboration between public and private funding institutions, coming together to provide critical financial support so the state can meet their overarching environmental goals. These loans are designed to work for each applicant's unique situation. The Clean Water Loan is currently offered throughout Oregon and in many Washington counties. Over one-thousand families have trusted the Craft3 Clean Water Loan to meet their needs.

Please visit EPA's Water Infrastructure and Resiliency Finance Center Water Finance Clearinghouse to learn more about funding, financing, and other resources for the water infrastructure sector. Please watch the in-depth, step-by-step water finance guides that provide information on funding and financing options to support communities' water infrastructure decision-making. The first modules focus on the drinking water and clean water state revolving funds (SRFs), the Water Infrastructure Finance and Innovation Act (WIFIA), and Financing Septic Systems.

* * * * *

Research Methodology:
This paper is written as a compendium of key information about financing cesspool conversions in Hawaii. Resources and content come from government programs and websites. Recommendations come from my own personal experience and interviews. All information in this paper is public information and may be shared.

REFERENCES

1. U.S. Environmental Protection Agency. (2016). Cesspool information. Retrieved March 12, 2019, from https://www.epa.gov/uic/large-capacity-cesspools
2. Hawaii State Legislature. (2018). Cesspool Legislation. Retrieved March 18, 2019 from https://www.capitol.hawaii.gov/session2018/bills/SB2567_HD1_.HTM
3. U.S. Environmental Protection Agency. (2019). Clean Water State Revolving Fund (CWSRF) program information. Retrieved March 13, 2019 from https://www.epa.gov/cwsrf
4. U.S. Environmental Protection Agency. (2016). Overview of Clean Water State Revolving Fund Eligibilities. Retrieved March 20, 2019 from https://www.epa.gov/cwsrf/overview-clean-water-state-revolving-fund-eligibilities
5. Craft 3. (2018). Clean Water Loans. Retrieved March 7, 2019 from https://www.craft3.org/Borrow/clean-water-loans

6. U.S. Department of Housing and Urban Development. (2018). Community Development Block Grant Program. Retrieved March 20, 2019 from https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs
7. U.S. Department of Agriculture Rural Development. (2018). Single Family Housing Direct Home Loans. Retrieved March 13, 2019 from https://www.rd.usda.gov/programs-services/single-family-housing-direct-home-loans
8. U.S. Department of Agriculture Rural Development. (2018). Single Family Housing Repair Loan Grants. Retrieved March 13, 2019 from https://www.rd.usda.gov/programs-services/single-family-housing-repair-loans-grants
9. U.S. Department of Agriculture Rural Development. (2018). Income and Property Eligibility. Retrieved March 15, 2019 from https://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do
10. State of Hawaii Department of Health Wastewater Branch. (2019). Tax Credit Program and Qualifying Cesspools. Retrieved March 14, 2019 from http://health.hawaii.gov/wastewater/home/taxcredit/
11. Delaware Department of Natural Resources and Environmental Control. (2018). Septic Rehabilitation Loan Program. Retrieved March 20, 2019 from https://dnrec.alpha.delaware.gov/environmental-finance/septic-rehabilitation/
12. Minnesota Public Utilities Authority. (2019). Small Community Wastewater Treatment Program. Retrieved March 20, 2019 from https://mn.gov/deed/pfa/funds-programs/smallcommunitywastewatertreatmentprogram.jsp
13. Commonwealth of Massachusetts. (2019). The Community Septic Management Program. Retrieved March 20, 2019 from https://www.mass.gov/guides/the-community-septic-management-program
14. Rhode Island Housing. (2019). Septic System and Sewer Tie-in Loan Program. Retrieved March 20, 2019 from https://loans.rihousing.com/SepticSewer/
15. U.S. Environmental Protection Agency. (2019). Water Finance Clearinghouse. Retrieved March 20, 2019 from https://ofmpub.epa.gov/apex/wfc/f?p=165:1::::::
16. U.S. Environmental Protection Agnecy. (2019). Water Finance Learning Modules. Retrieved March 20, 2019 from https://ofmpub.epa.gov/apex/wfc/f?p=165:9:1644653503907::NO:9::
17. U.S. Environmental Protection Agency. (2017). Financing Options for Nontraditional Eligibilities in the Clean Water State Revolving Fund Programs. Retrieved March 20, 2019 from https://www.epa.gov/sites/production/files/2017-05/documents/financing_options_for_nontraditional_eligibilities_final.pdf
18. The University of North Carolina at Chapel Hill School of Government. (2019). Environmental Finance Center. Retrieved on March 14, 2019 from https://efc.sog.unc.edu/

EARTHJUSTICE

SETTLING THE LAHAINA CASE

Working Together To Protect The Public Interest

DAVID HENKIN
EARTHJUSTICE, MID-PACIFIC OFFICE

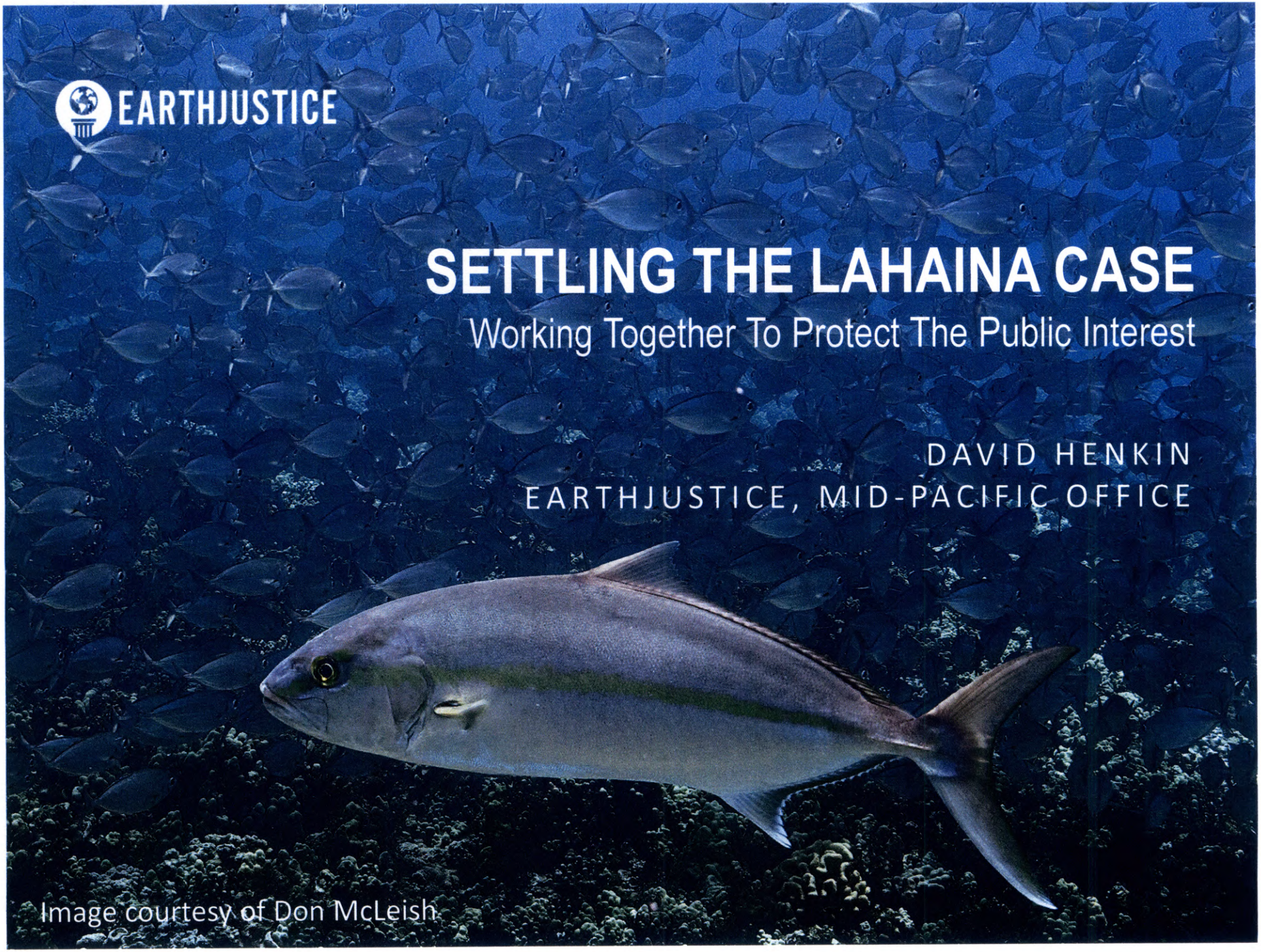


Image courtesy of Don McLeish


LWRF
Kahekili Beach Park
Google Earth


Image courtesy of Jen Smith

Image courtesy of Jen Smith

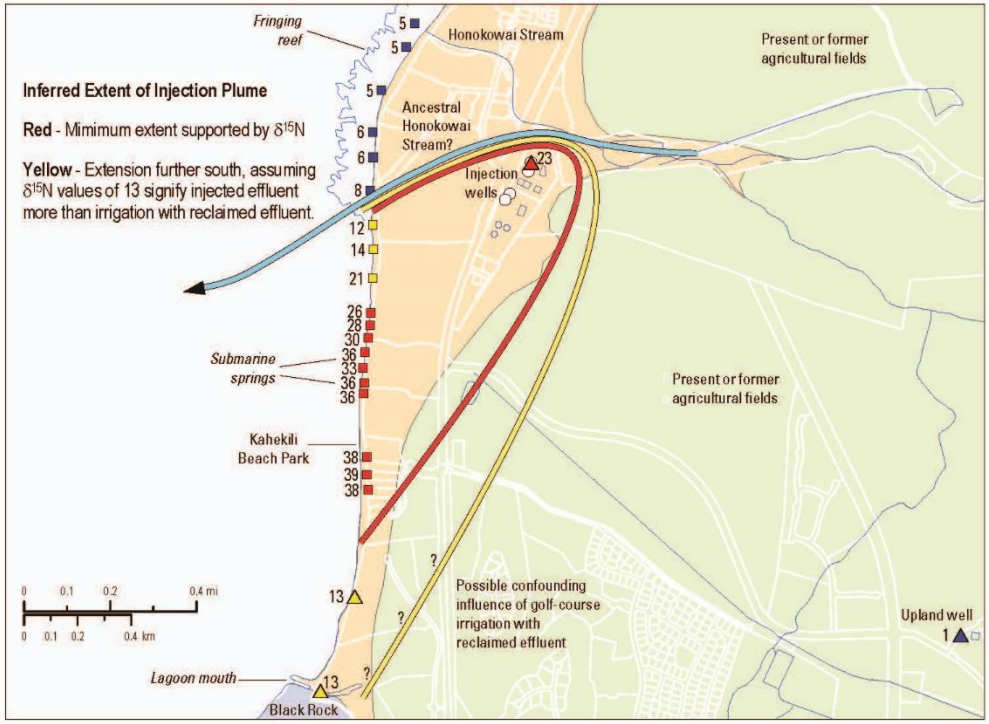
Image courtesy of Jen Smith

Image courtesy of Jen Smith

USGS
science for a changing world

Prepared in Cooperation with the Hawaii State Department of Health, Clean Water Branch

A Multitracer Approach to Detecting Wastewater Plumes from Municipal Injection Wells in Nearshore Marine Waters at Kihei and Lahaina, Maui, Hawaii



Scientific Investigations Report 2009–5253

U.S. Department of the Interior
U.S. Geological Survey

Image courtesy of Jen S

- Wastewater Plume Detected Using $\delta^{15}N$ (Dailer, et al. 2011)
- Highest Algal $\delta^{15}N$ Values Ever Detected (Dailer, et al. 2012)

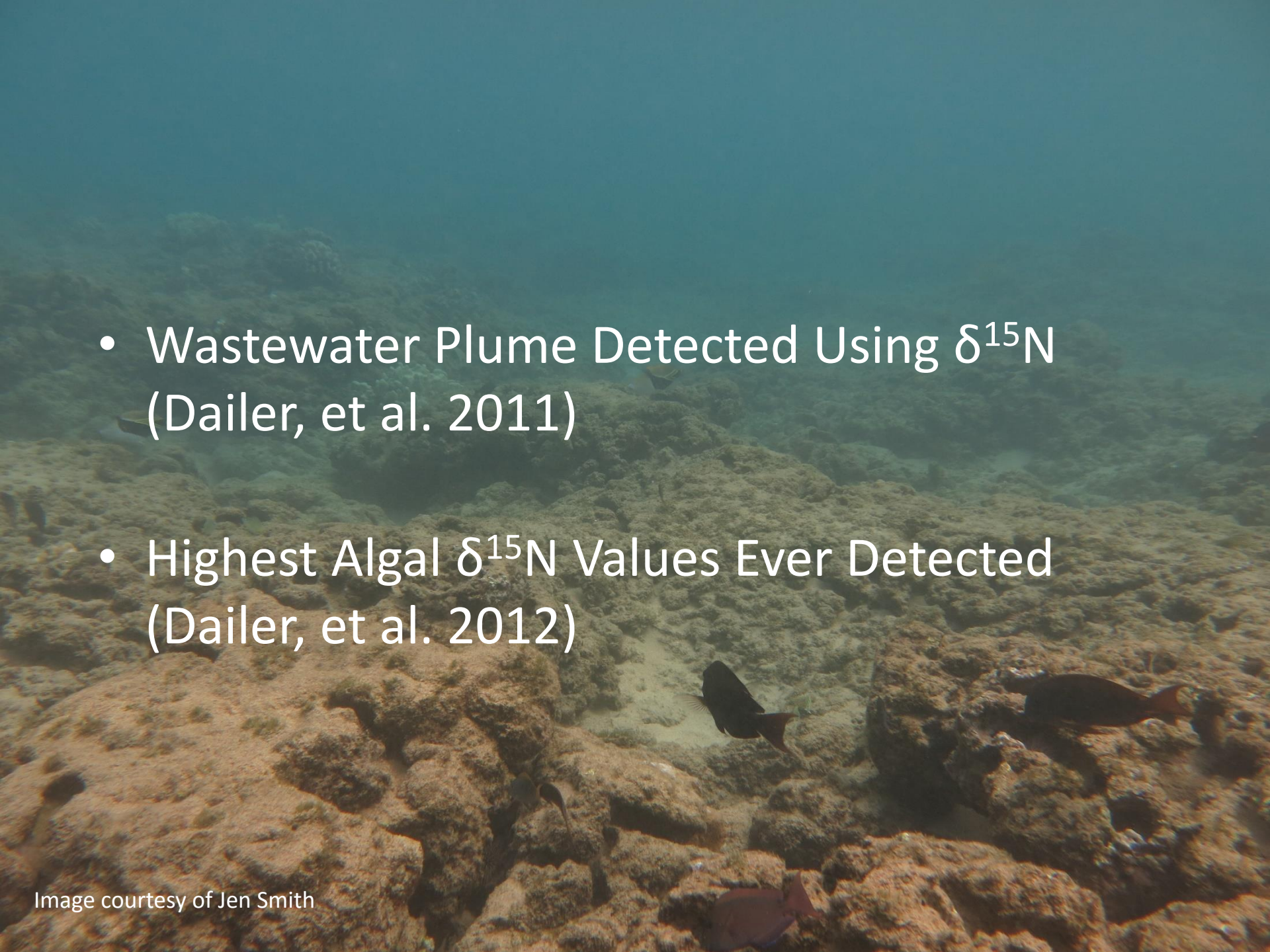


Image courtesy of Jen Smith

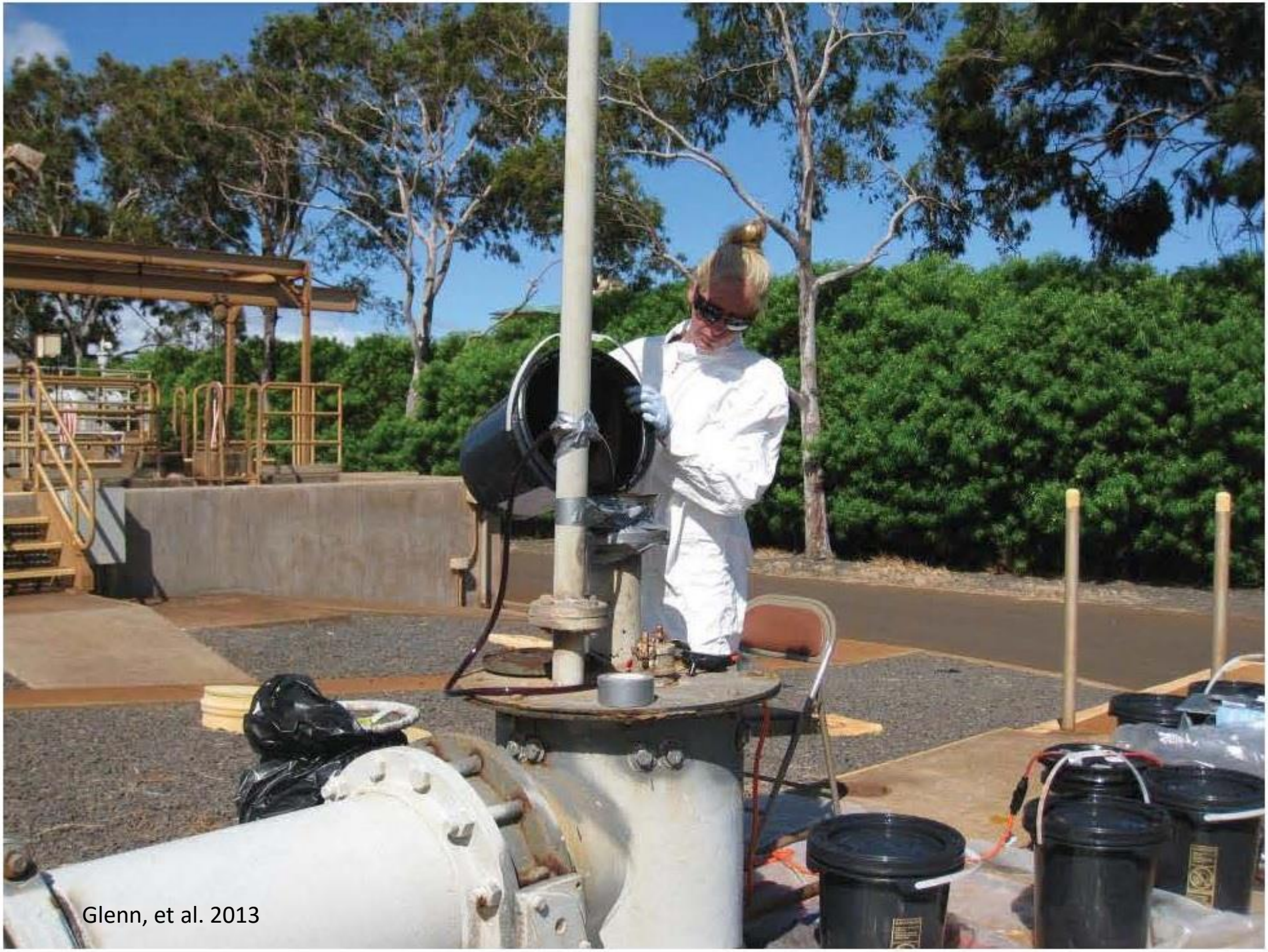
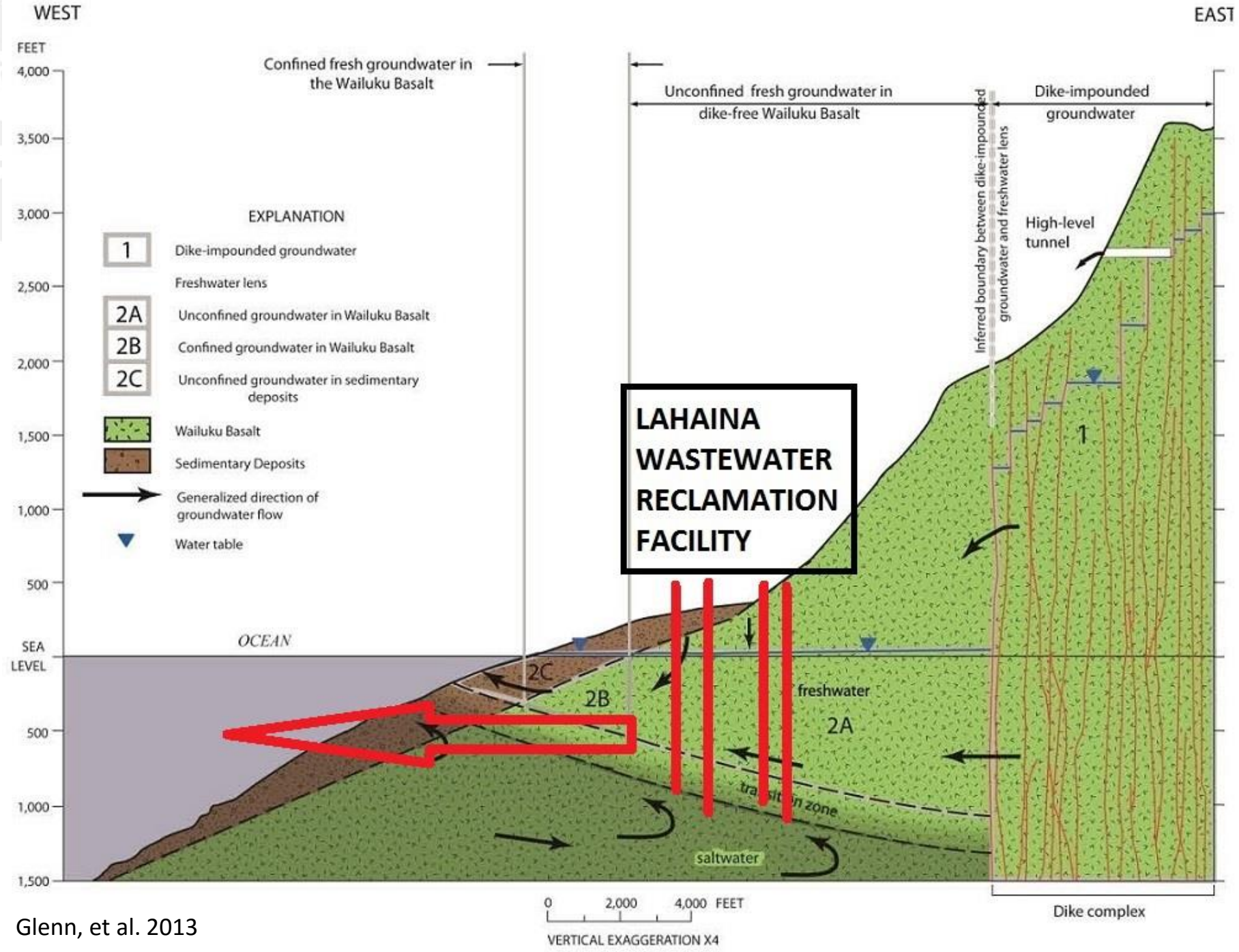
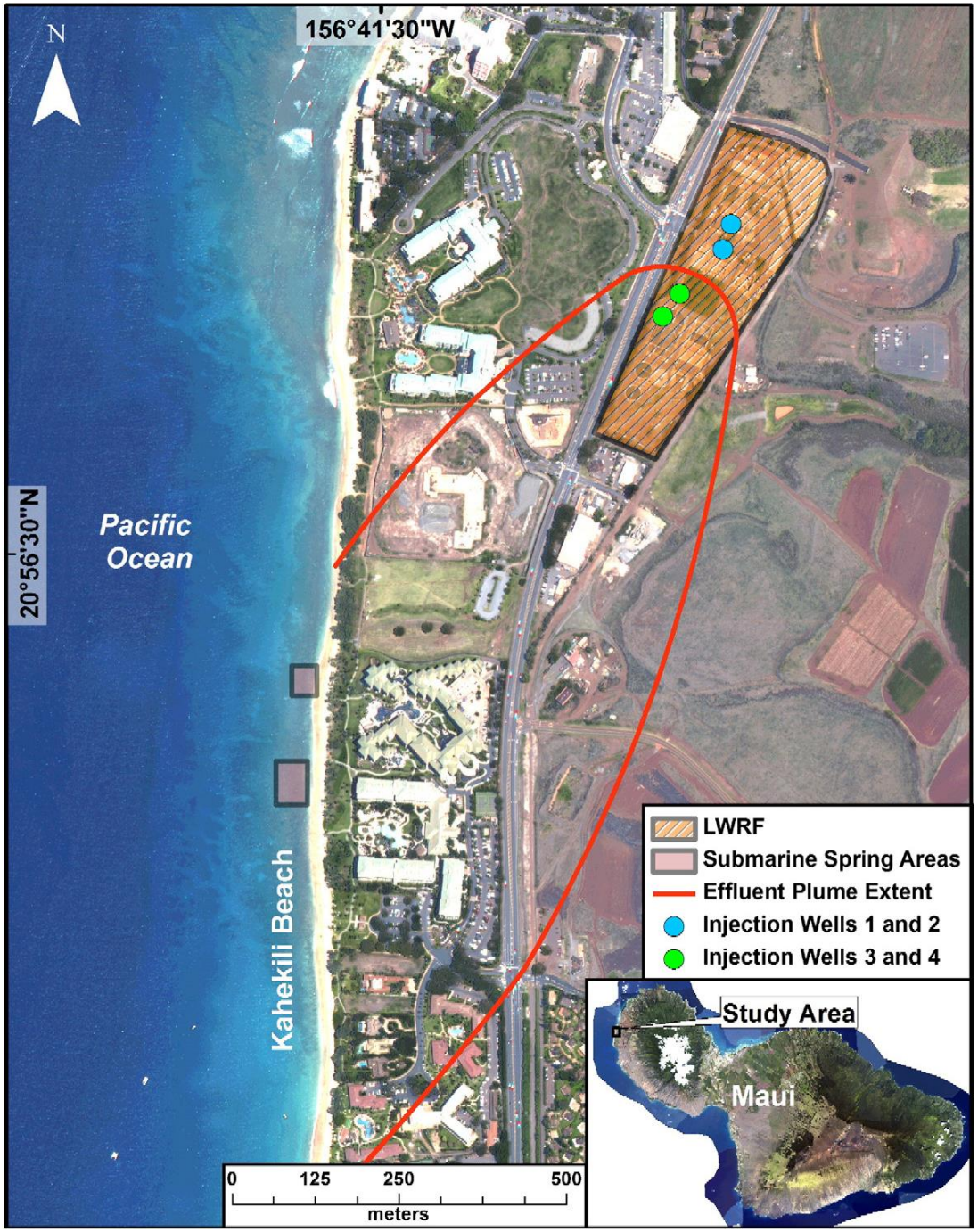

Glenn, et al. 2013

Image courtesy of Jen Smith

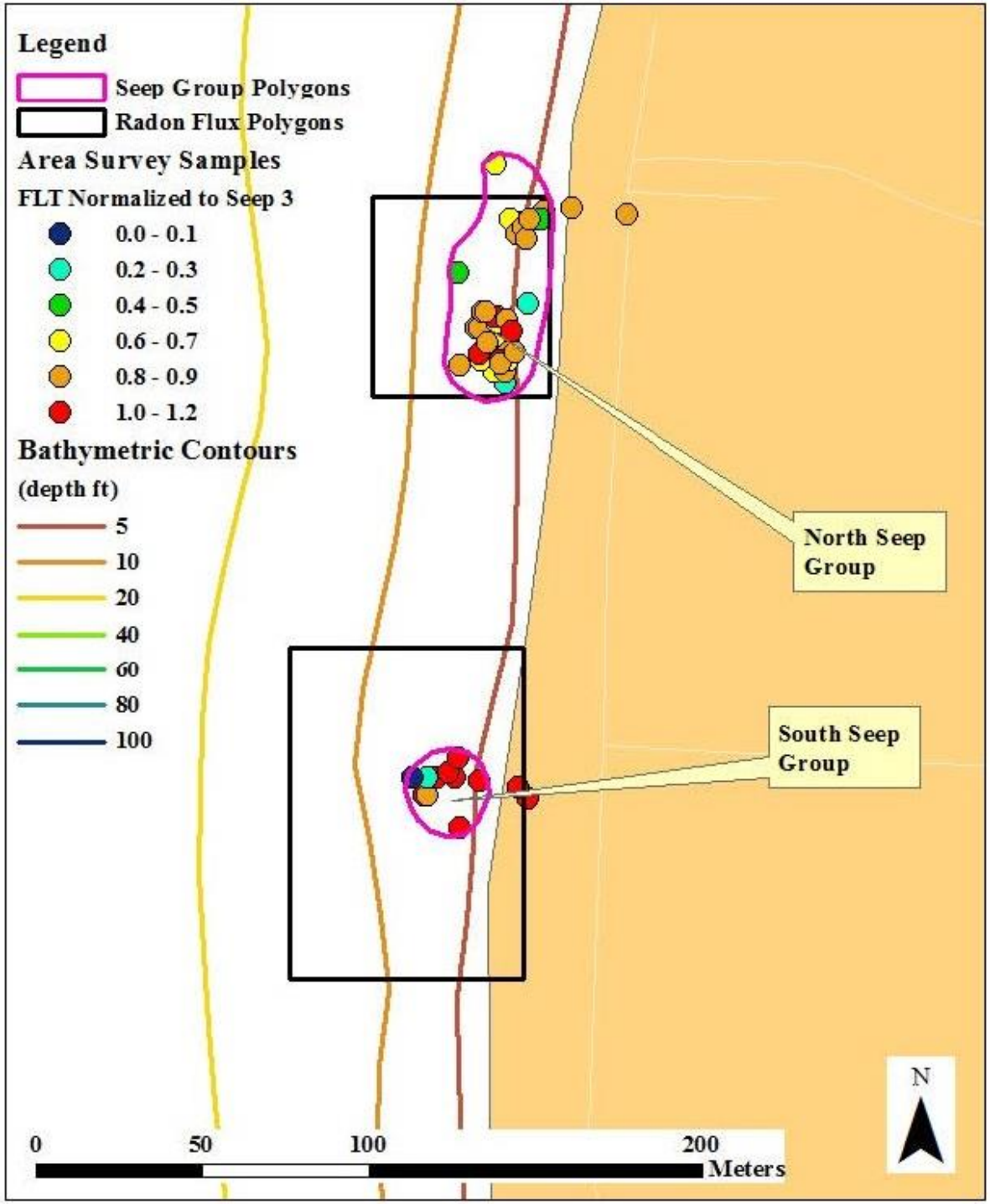
Video courtesy of Meghan Dailer



Glenn, et al. 2013



Fackrell, et al. 2016



Glenn, et al. 2013

Location	Date (MM/DD/YY)	<>	NO_3^- + NO_2^--N (mg N/L)	<>	Total N (mg N/L)	<>	Total P (mg P/L)
South control mid-depth	7/14/14		0.010		0.082		0.012
North control surface	8/25/14		0.023		0.085		0.014
Control north mid-depth	8/25/14		0.014		0.100		0.014
North seep surface	8/25/14		0.029		0.103		0.016
North seep mid-depth	8/25/14		0.035		0.135		0.013
North seep A	8/25/14		2.59		2.94		0.260
North seep B	8/25/14		2.61		3.47		0.310
North seep C	8/25/14		2.09		3.53		0.190
South seep A	8/25/14		2.61		3.80		0.320
South seep B	8/25/14		3.20		3.90		0.330
South seep C	8/25/14		1.63		3.71		0.295
South seep surface	8/25/14		0.042		0.068		0.012
South seep mid-depth	8/25/14		0.019		0.120		0.011
South control surface	8/25/14		0.010		0.085		0.011
South control mid-depth	8/25/14		0.010		0.129		0.009
North control surface	9/29/14		0.021		0.103		0.014
Control north mid-depth	9/29/14		0.016		0.090		0.013
North seep surface	9/29/14		0.023		0.095		0.014
North seep mid-depth	9/29/14		0.024		0.102		0.015
North seep A	9/29/14		1.69		3.17		0.310
North seep B	9/29/14		1.78		2.83		0.310
North seep C	9/29/14		1.62		2.80		0.325
South seep A	9/29/14		1.72		2.81		0.345
South seep B	9/29/14		1.57		2.61		0.340
South seep C	9/29/14		1.56		2.80		0.330
South seep surface	9/29/14		0.026		0.111		0.016
South seep mid-depth	9/29/14		0.023		0.106		0.019
South control surface	9/29/14		0.010		0.087		0.011
South control mid-depth	9/29/14		0.008		0.083		0.011
North control surface	10/27/14		0.004		0.063		0.011
Control north mid-depth	10/27/14		0.004		0.066		0.020
North seep surface	10/27/14		0.027		0.091		0.020
North seep mid-depth	10/27/14		0.019		0.085		0.022
North seep A	10/27/14		1.29		1.64		0.320
North seep B	10/27/14		1.68		1.86		0.280
North seep C	10/27/14		1.58		1.83		0.295
South seep A	10/27/14		1.66		1.79		0.330
South seep B	10/27/14		1.60		1.83		0.225
South seep C	10/27/14		2.24		2.45		0.340
South seep surface	10/27/14		0.002		0.078		0.011

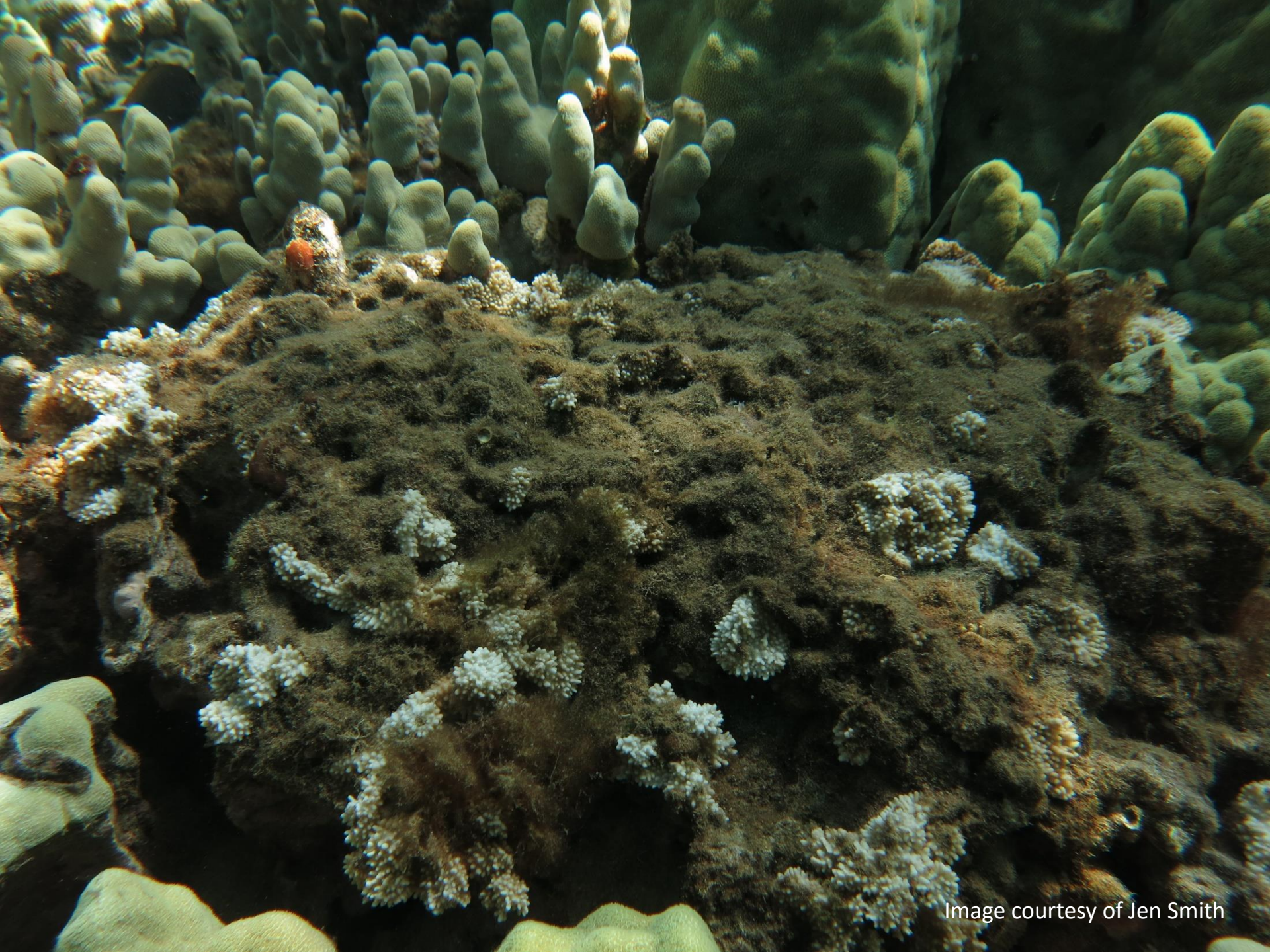
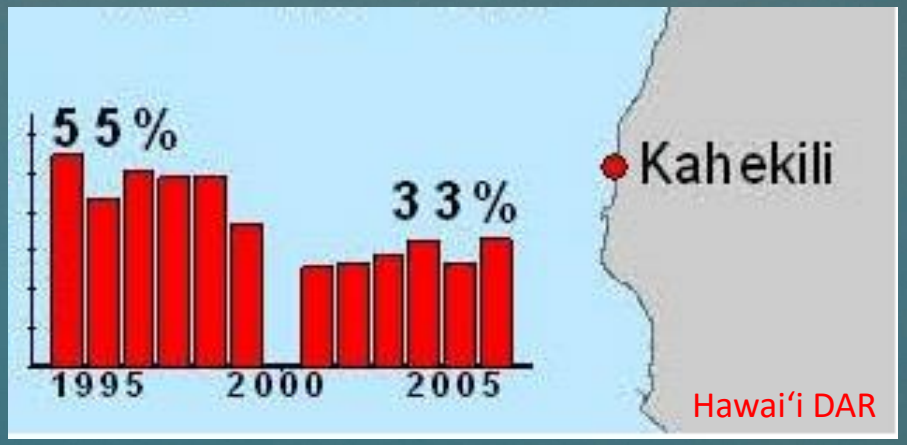


Image courtesy of Jen Smith

Image courtesy of Jen Smith

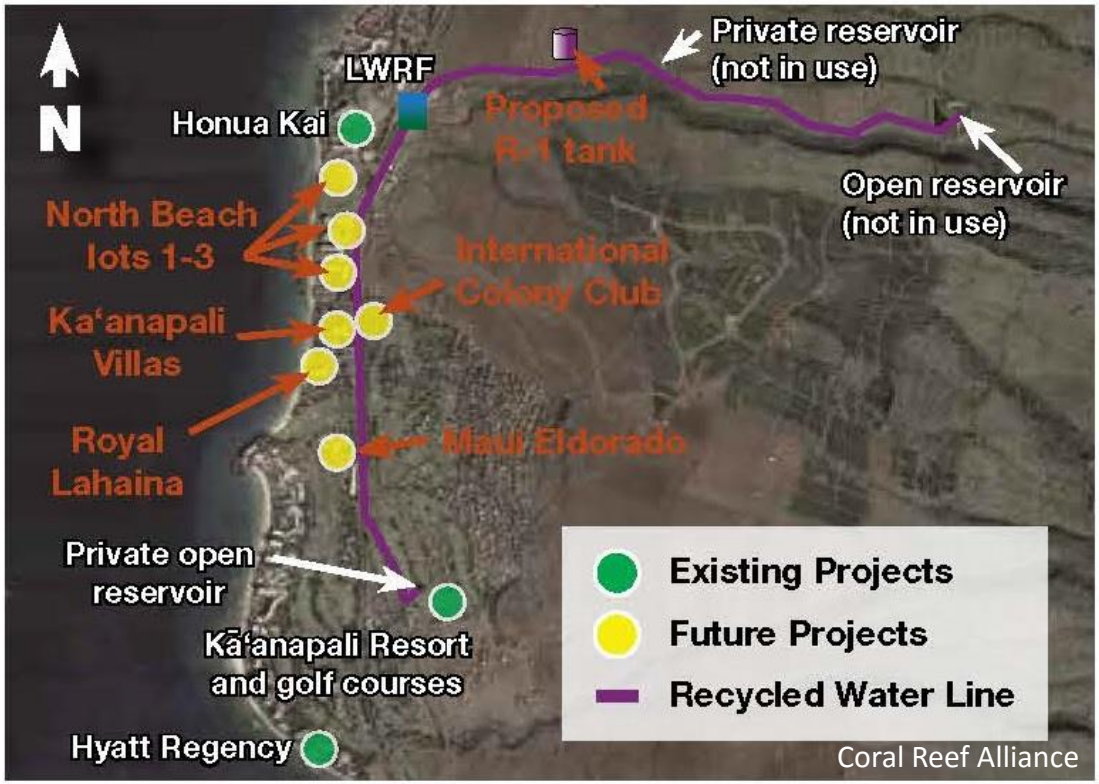


- Due to Lahaina injection wells - Rates of bioerosion orders of magnitude higher (Prouty, et al. 2017)

Image courtesy of Jen Smith

The Path Forward

- Investment to increase R-1 Reuse



The Path Forward

- Investment to increase R-1 Reuse

Hawai‘i Dept. of Health

Coral Reef Alliance

The Path Forward

- Good faith efforts to get/comply with permit
- No future litigation
  - Over Lahaina injection wells
  - Over other County injection wells
  - Over reuse of R-1 water
- No admission of harm

Draft Resolution

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Governance, Ethics, and Transparency Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; …

Image courtesy of Jen Smith


Image courtesy of Jen Smith

Governance, Ethics, and Transparency Committee

Hawaii Wildlife Fund, et al. v. County of Maui
U.S. Supreme Court, Docket 18-260 (GET-26)

ERIC NAKAGAWA

DIRECTOR, DEPARTMENT OF ENVIRONMENTAL MANAGEMENT


Pre-1970s
Raw sewage disposal
via direct ocean outfalls

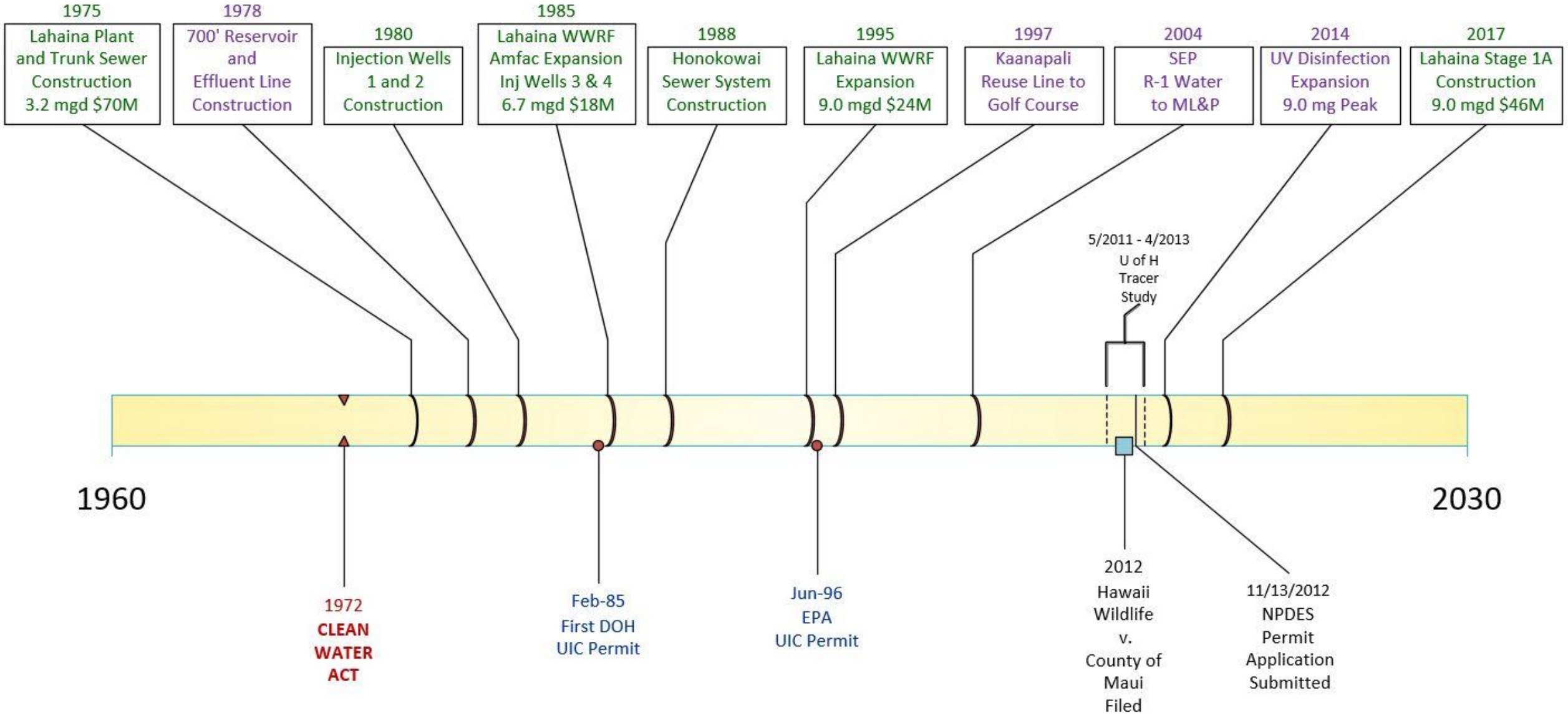
Now: Water Reclamation and Reuse

Irrigation

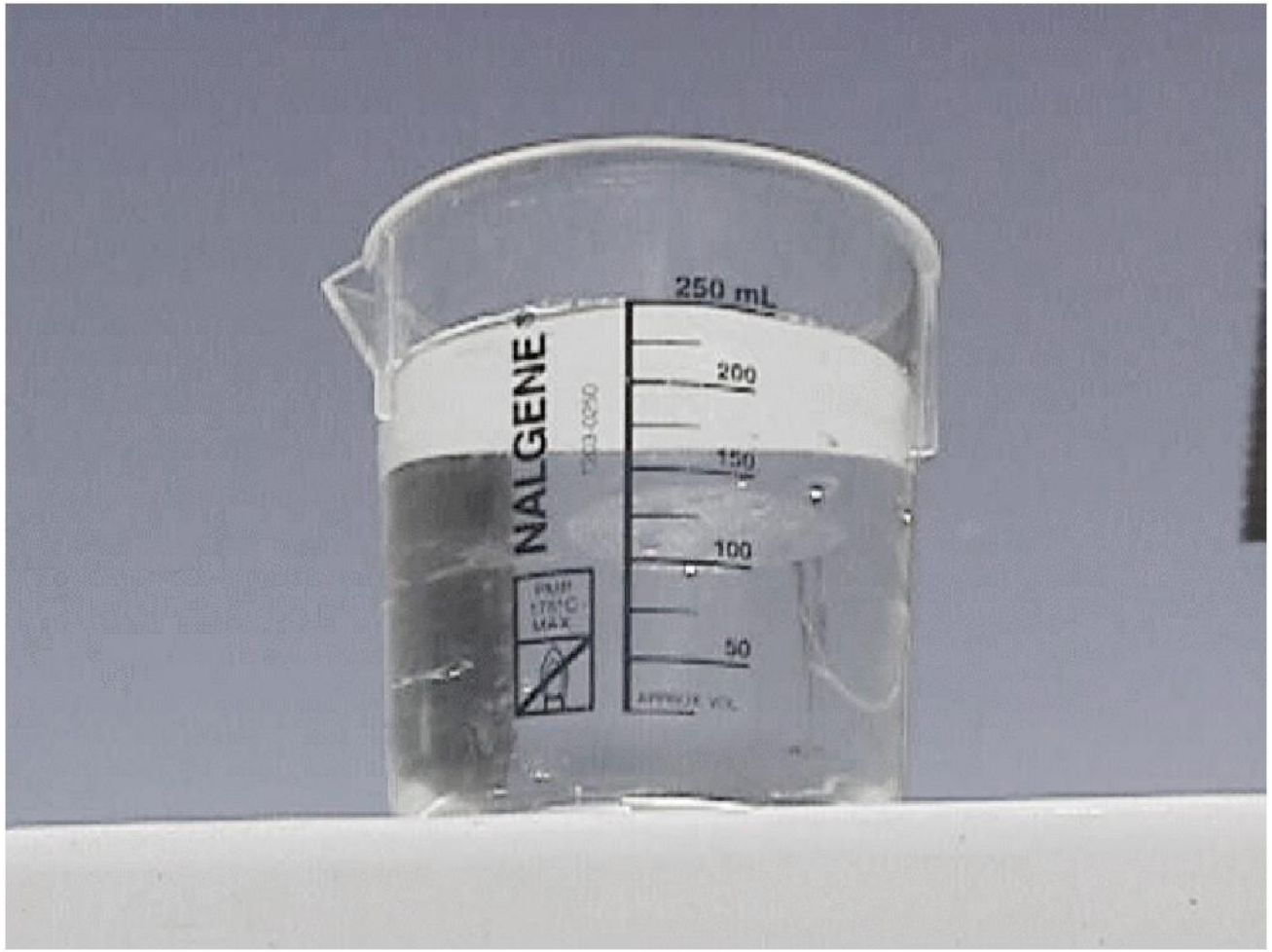
(Resorts, golf courses, parks and other facilities)

Disposal via injection wells

(Excess treated water)

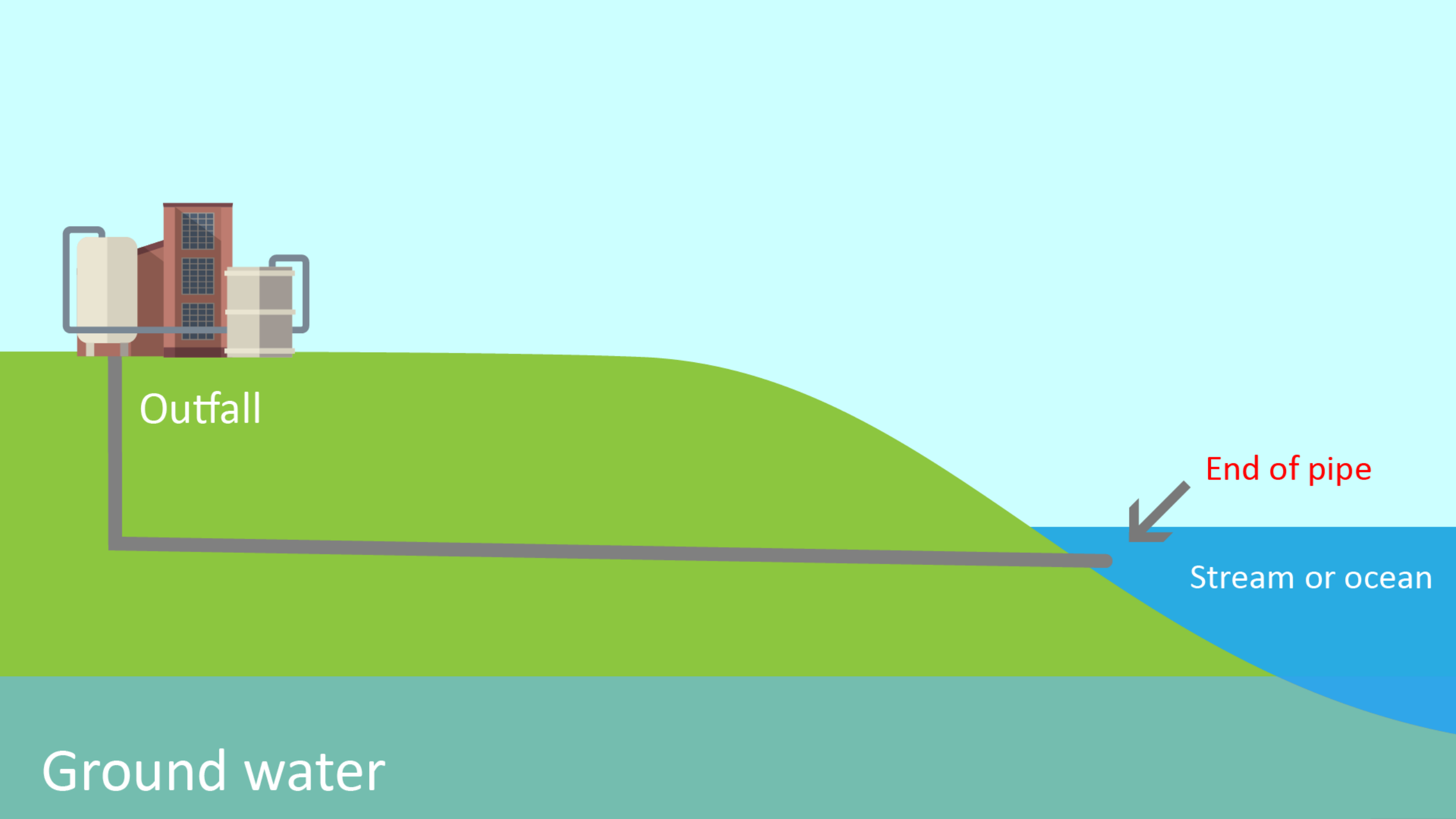

1975
Lahaina Plant and Trunk Sewer Construction 3.2 mgd $70M
1978
700' Reservoir and Effluent Line Construction
1980
Injection Wells 1 and 2 Construction
1985
Lahaina WWRF Amfac Expansion Inj Wells 3 & 4 6.7 mgd $18M
1988
Honokowai Sewer System Construction
1995
Lahaina WWRF Expansion 9.0 mgd $24M
1997
Kaanapali Reuse Line to Golf Course
2004
SEP R-1 Water to ML&P
2014
UV Disinfection Expansion 9.0 mg Peak
2017
Lahaina Stage 1A Construction 9.0 mgd $46M
5/2011 - 4/2013
U of H Tracer Study
1960
2030
1972
CLEAN WATER ACT
Feb-85
First DOH UIC Permit
Jun-96
EPA UIC Permit
2012
Hawaii Wildlife v. County of Maui Filed
11/13/2012
NPDES Permit Application Submitted

The County's Lahaina Facility produces the highest quality recycled water in the State of Hawaii.



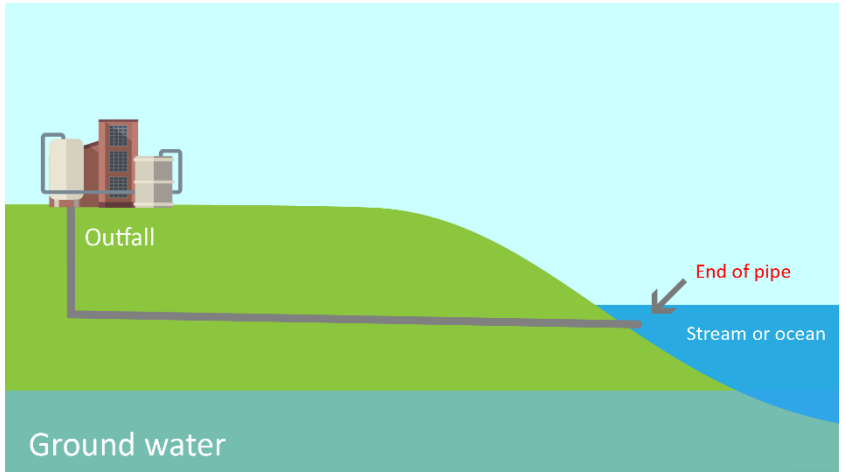
Point Source vs. Non-Point Source

- Point Source – Any discernable, confined, and discrete conveyance
  - Outfalls and pipes
  - **Regulated by the Clean Water Act**


Outfall
End of pipe
Stream or ocean
Ground water

Clean Water Act

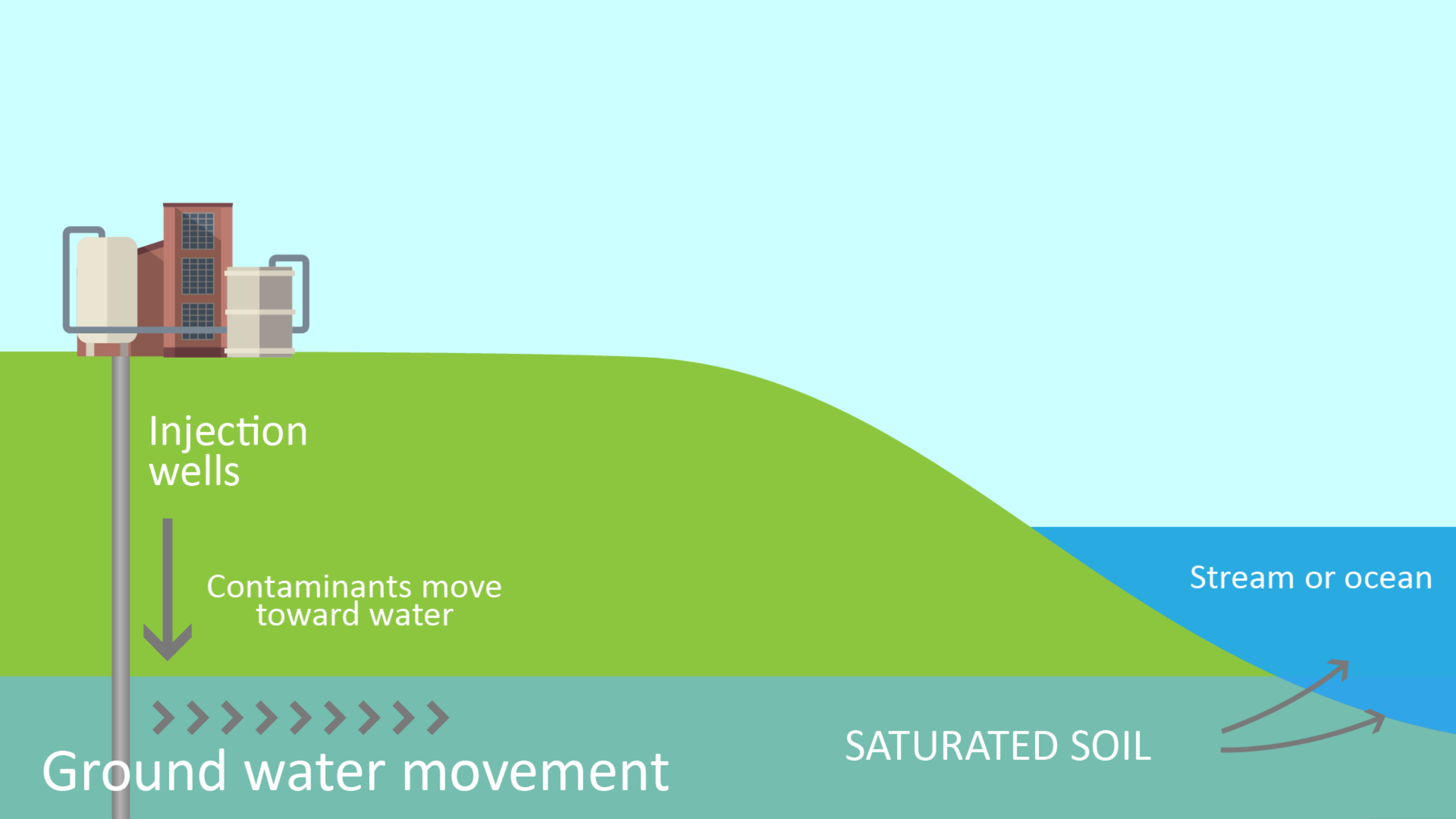
NPDES Permits



Outfalls

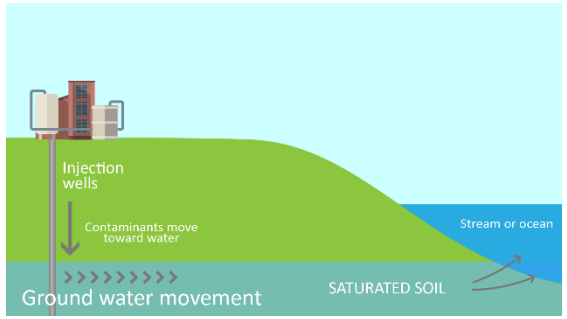
Point Source vs. Non-Point Source

- Non-Point Source – broad, diffuse and uncontained by nature
  - Surface water runoff (residential, urban, agricultural) and groundwater
  - **Regulated through State management programs and other non-Clean Water Act programs, including the Safe Drinking Water Act**


Injection wells
Contaminants move toward water
Stream or ocean
SATURATED SOIL
Ground water movement

Federal Safe Drinking Water Act
HRS 340E, HRS 342D, HRS 342E

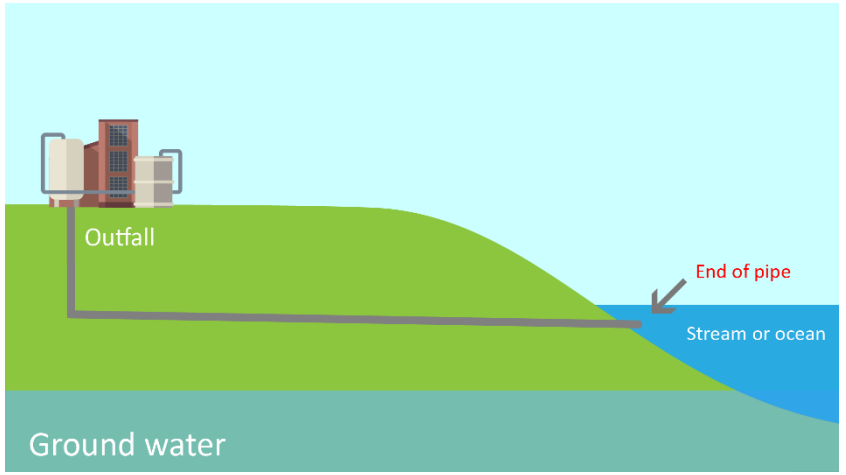
Regulates impacts to groundwater/aquifers



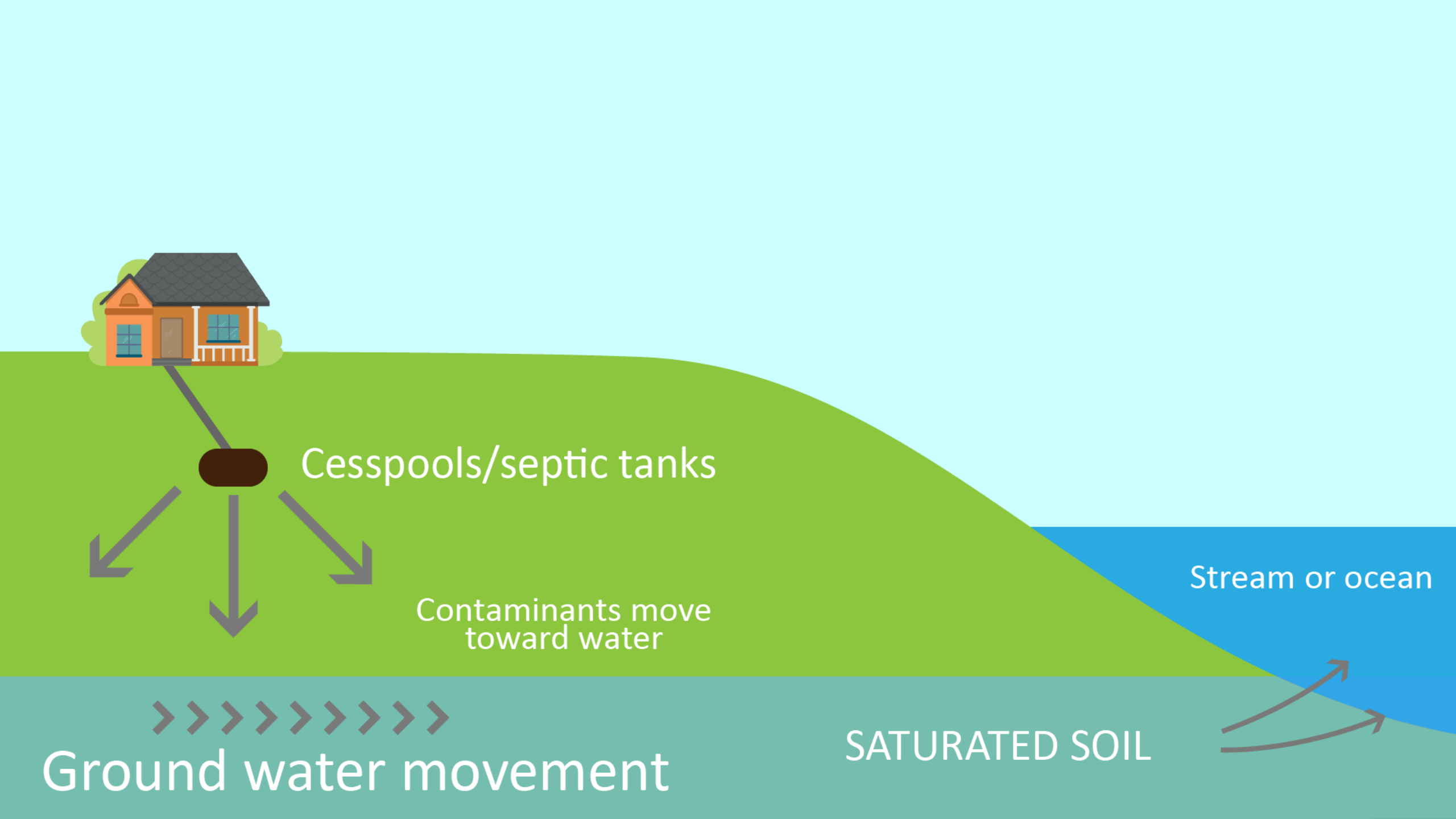
Injection Wells

Clean Water Act

NPDES Permits

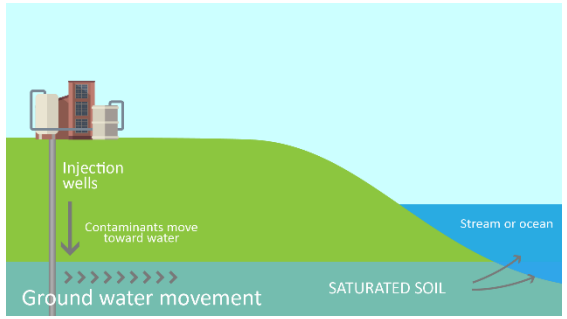


Outfalls

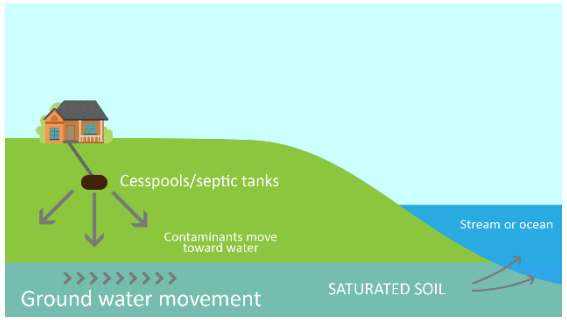

Cesspools/septic tanks
Contaminants move toward water
Stream or ocean
Ground water movement
SATURATED SOIL

Federal Safe Drinking Water Act
HRS 340E, HRS 342D, HRS 342E

Regulates impacts to groundwater/aquifers



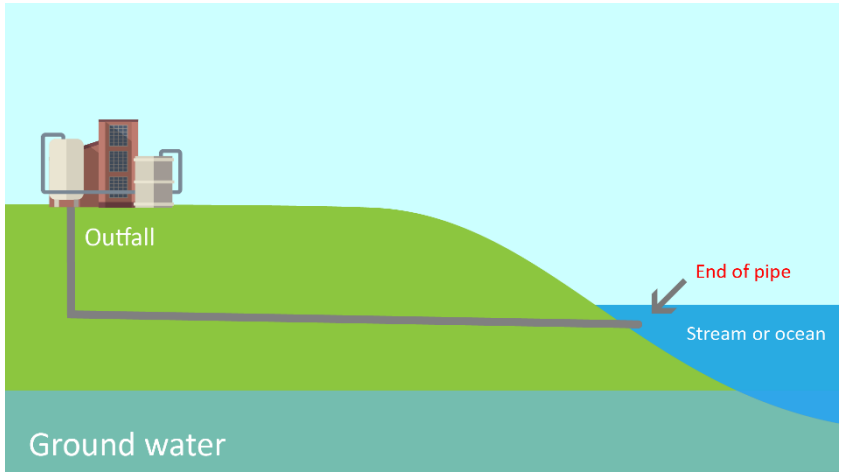
Injection Wells



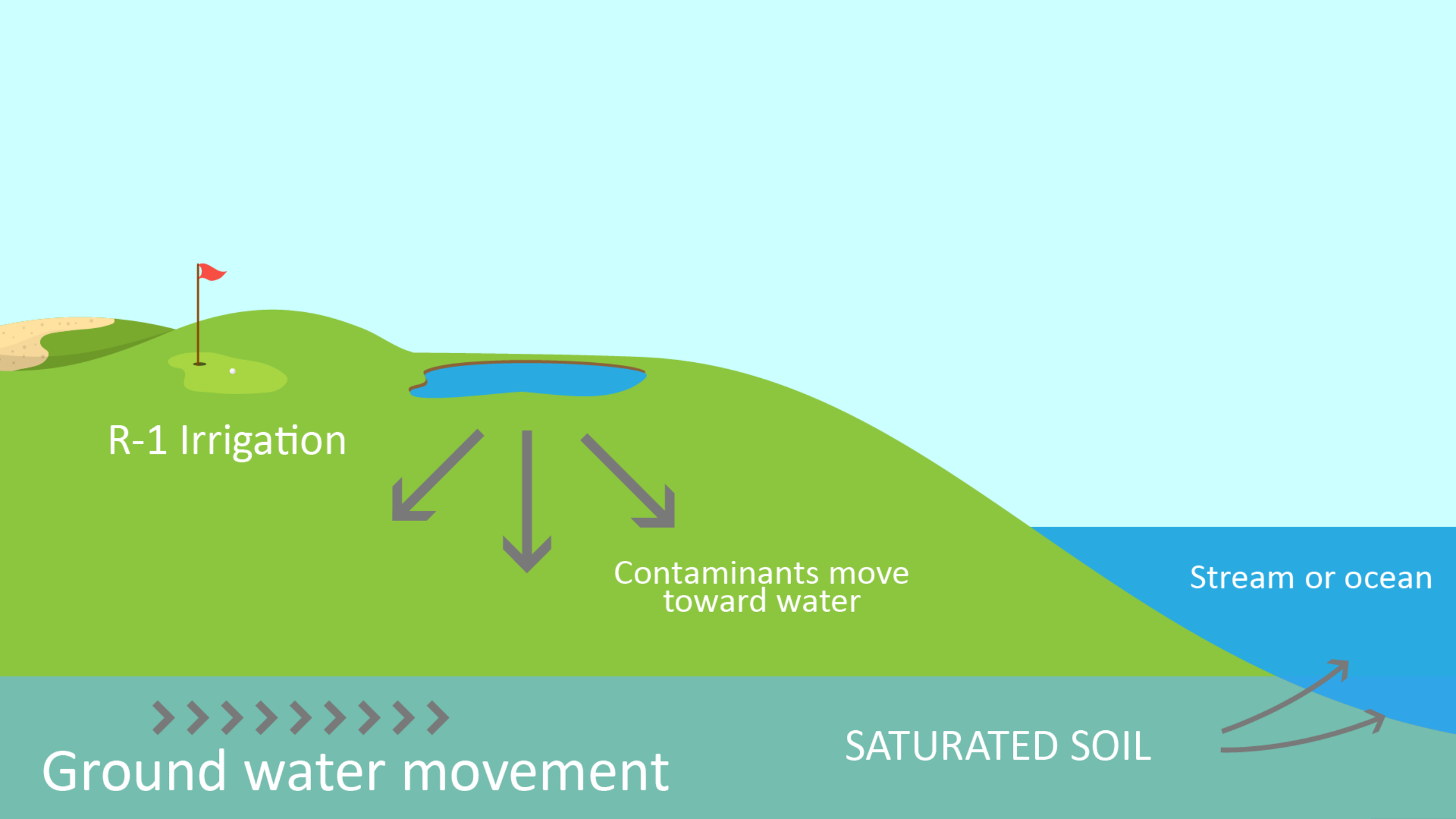
Cesspools/
Septic Tanks

Clean Water Act

NPDES Permits

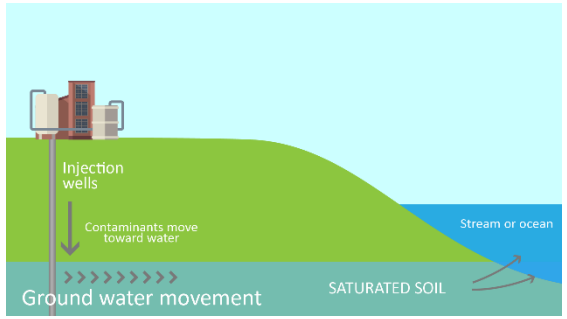


Outfalls

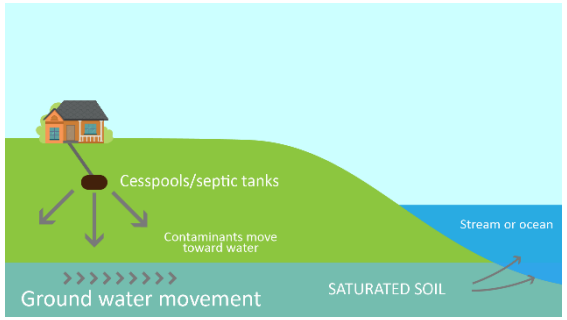

R-1 Irrigation
Contaminants move toward water
Stream or ocean
Ground water movement
SATURATED SOIL

Federal Safe Drinking Water Act
HRS 340E, HRS 342D, HRS 342E

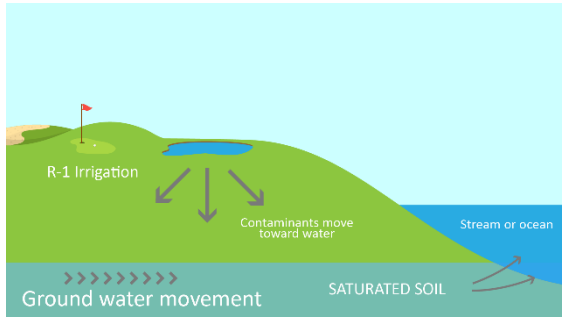
Regulates impacts to groundwater/aquifers



Injection Wells



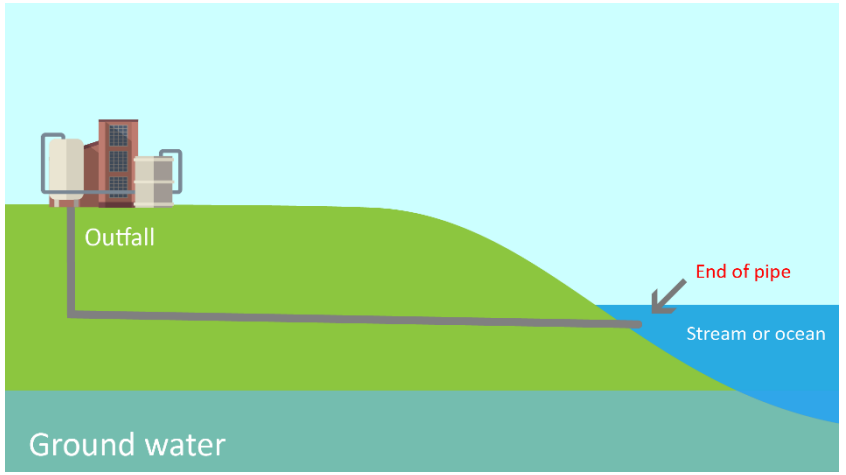
Cesspools/ Septic Tanks



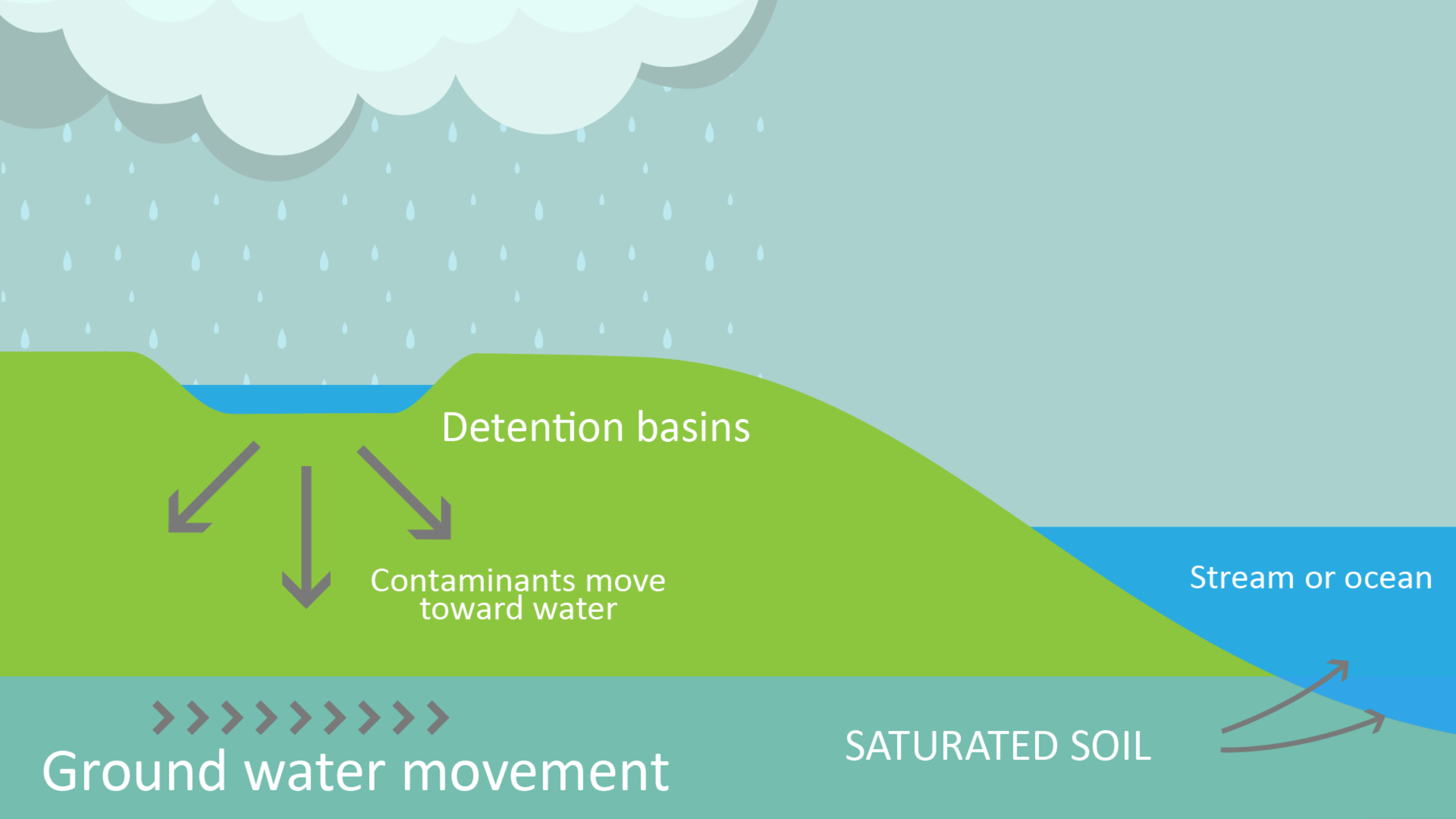
R-1 Irrigation

Clean Water Act

NPDES Permits



Outfalls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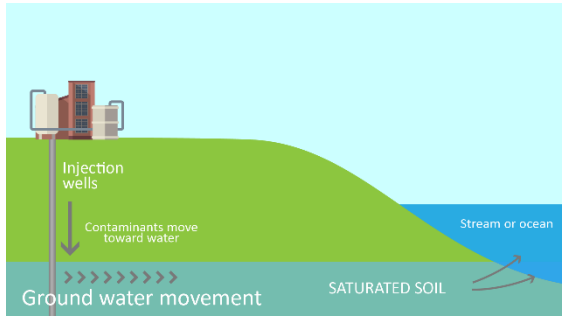

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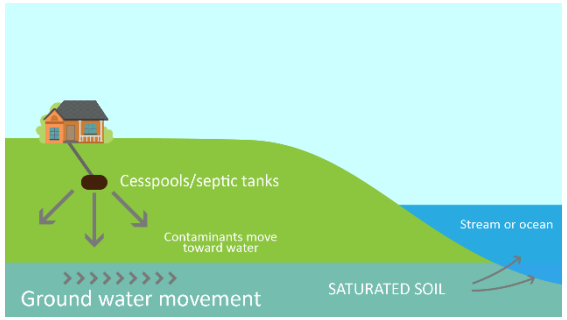
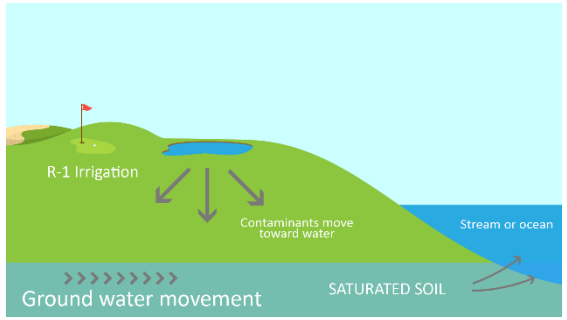
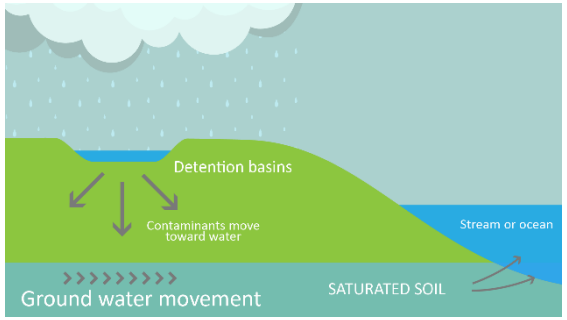


Cesspools/ Septic Tanks



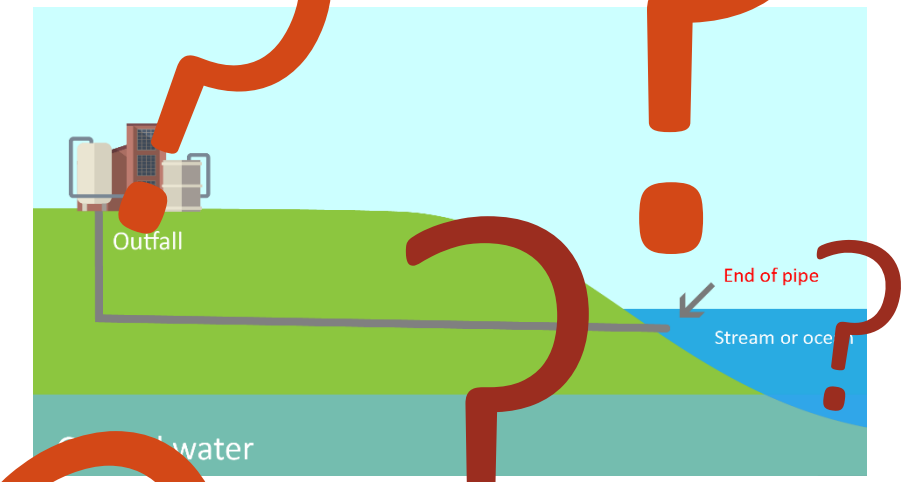
R-1 Irrigation



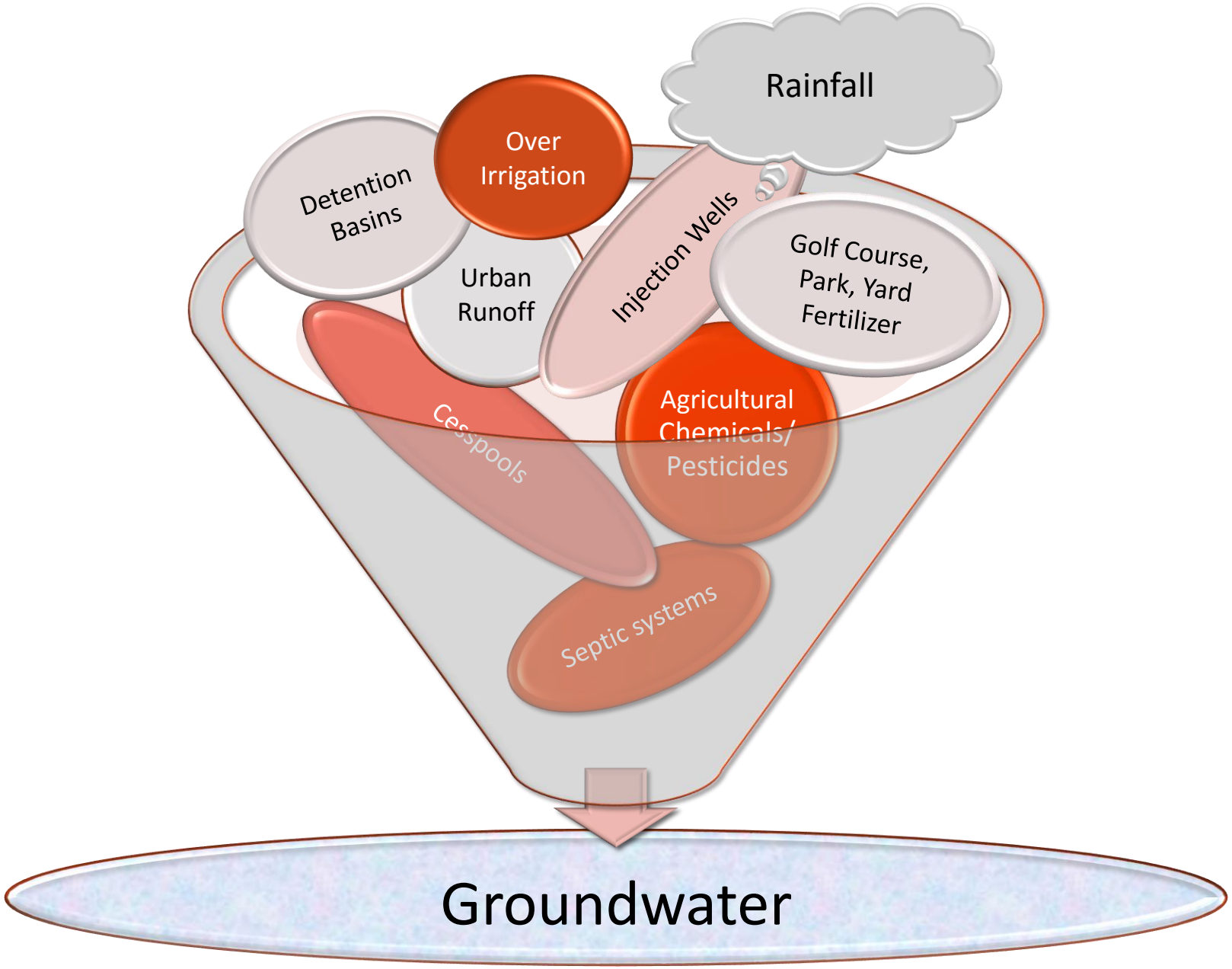
Detention Basins

Clean Water Act

NPDES Permits



Outfalls


Rainfall
Over Irrigation
Detention Basins
Urban Runoff
Injection Wells
Golf Course, Park, Yard Fertilizer
Cesspools
Agricultural Chemicals/ Pesticides
Septic systems
Groundwater

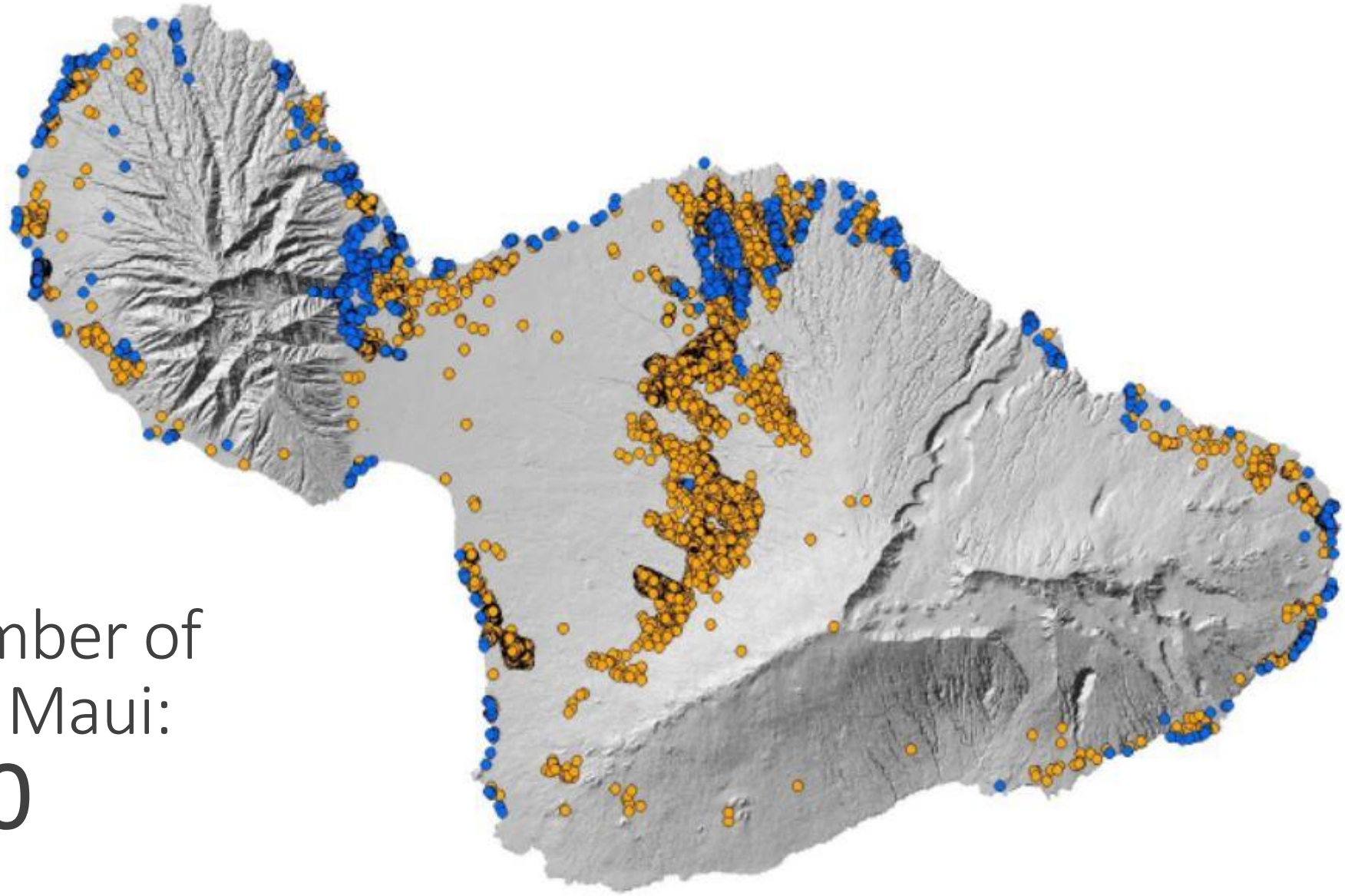
What does this lawsuit mean for Maui County and its property owners?

This case sets a huge precedent, and the Ninth Circuit's decision means that a Clean Water Act "NPDES" permit would be required **not just for the County's injection wells** but for **thousands of other types of sources in Hawaii, most of which are along the coastline**.

What does the Ninth Circuit's test mean for Maui County?

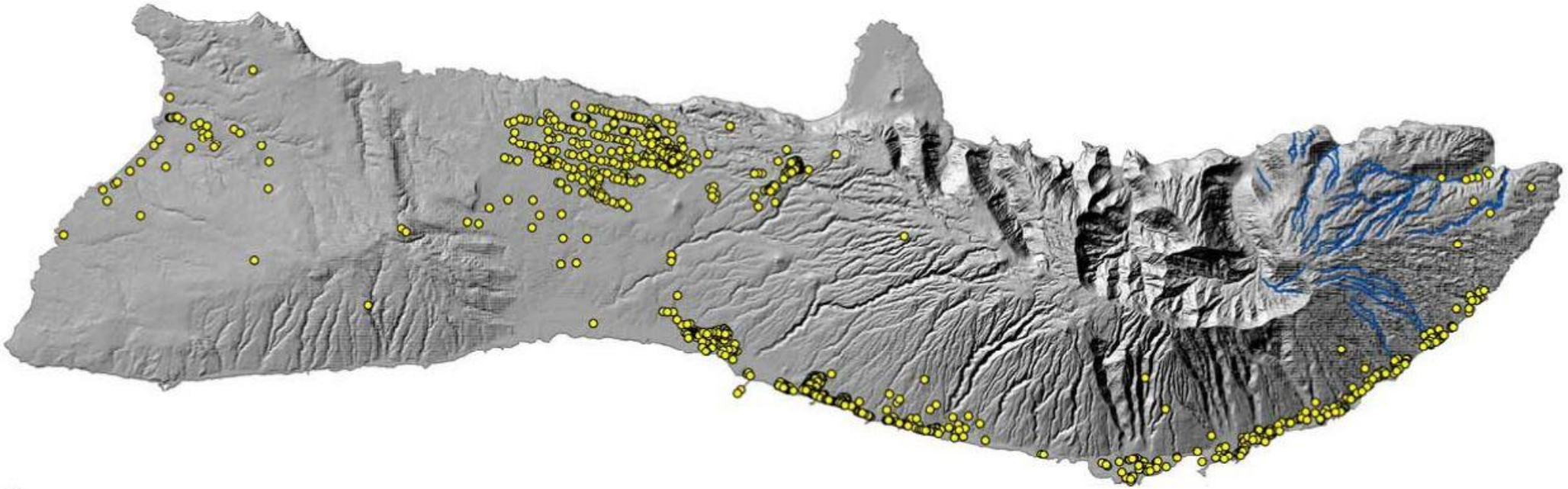
- **Injection wells (6,000 in State)**
- **Septic tanks (>21,000 in State)**
- **Cesspools (88,000 in State)**
- **Recycled water used on land close to the ocean**

All of these sources could now be regulated under the Clean Water Act.



Estimated number of cesspools on Maui:

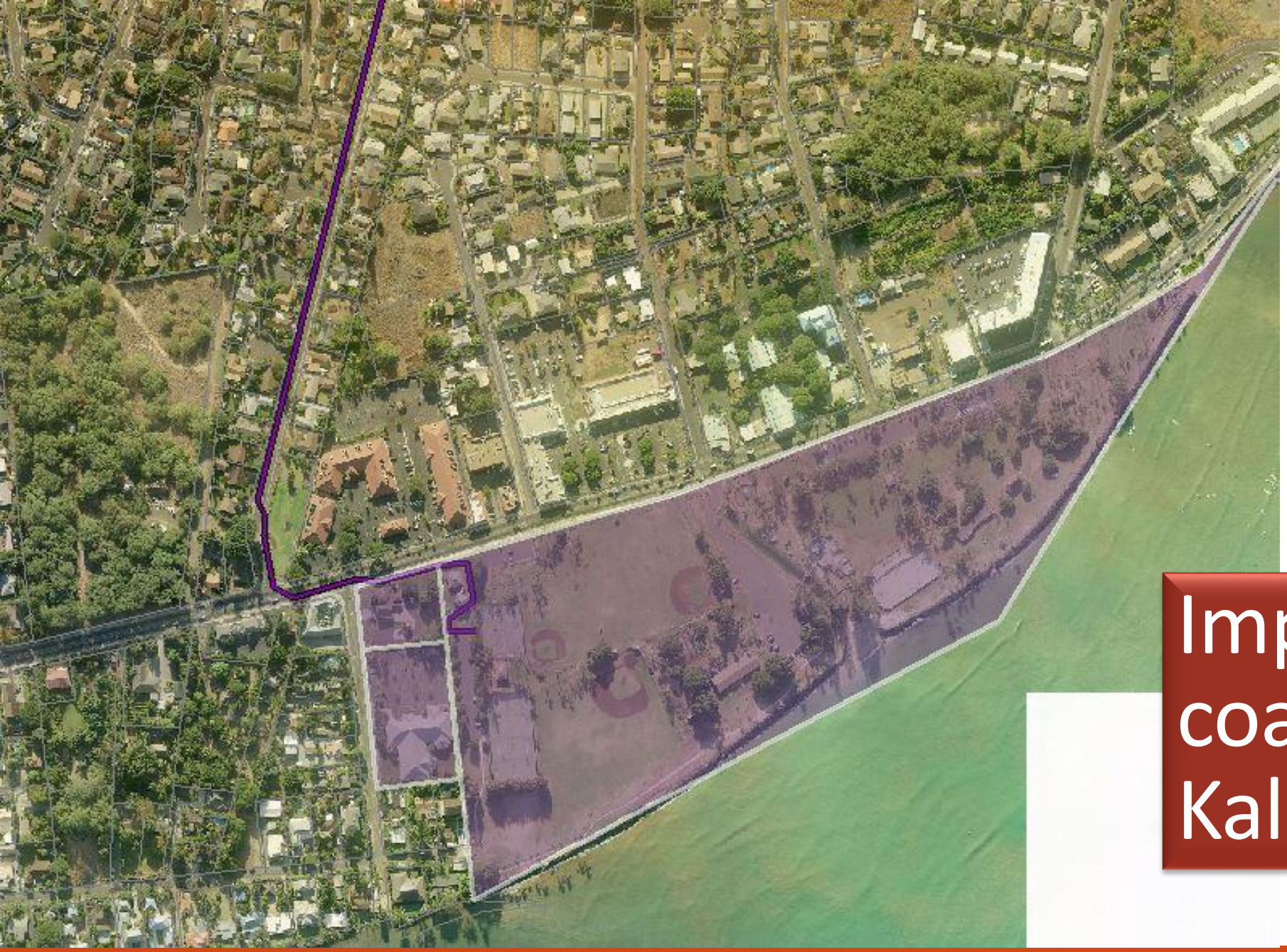
12,000



Estimated number of cesspools on Molokai:

1,400

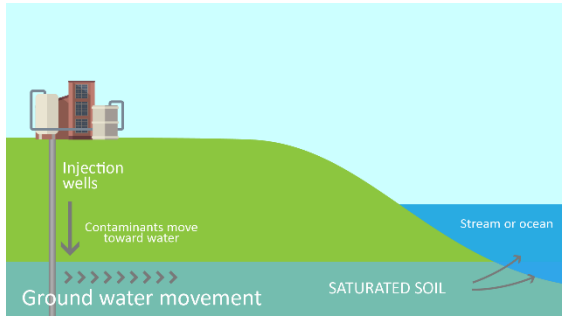
Impacts to non-sewered areas: Maalaea



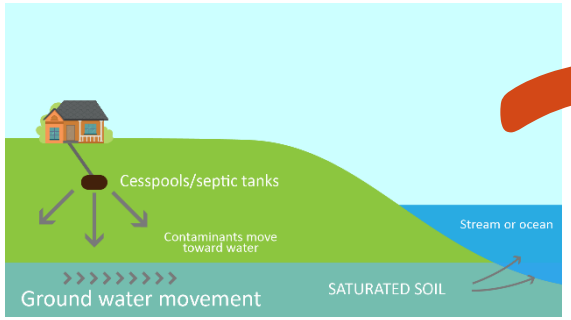
Impacts to coastal parks: Kalama Park

Impacts to coastal parks: Waipuilani Park

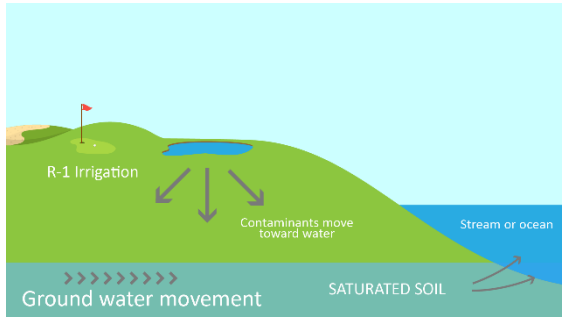
Federal Safe Drinking Water Act
HRS 340E, HRS 342D, HRS 342E
Regulates impacts to groundwater/aquifers



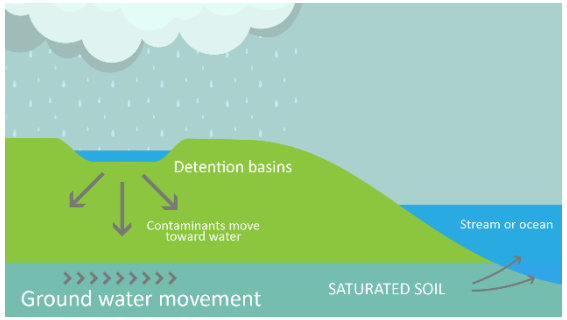
Injection Wells



Cesspools/
Septic Tanks

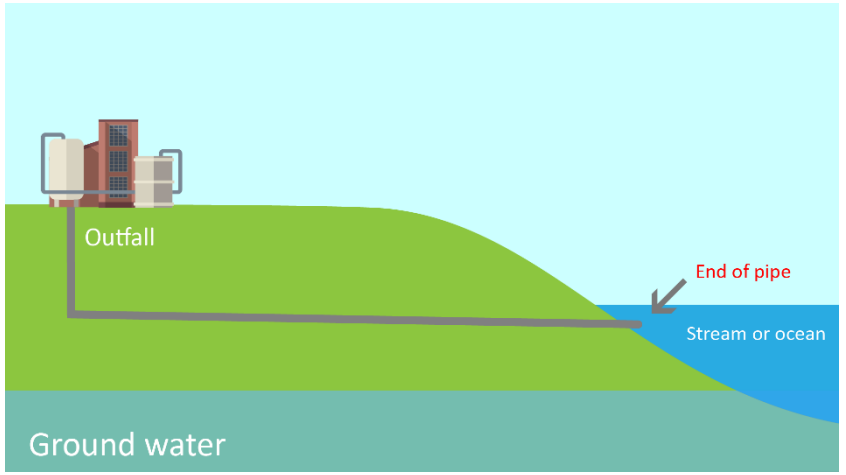


R-1 Irrigation



Detention Basins

Clean Water Act
NPDES Permits



Outfalls

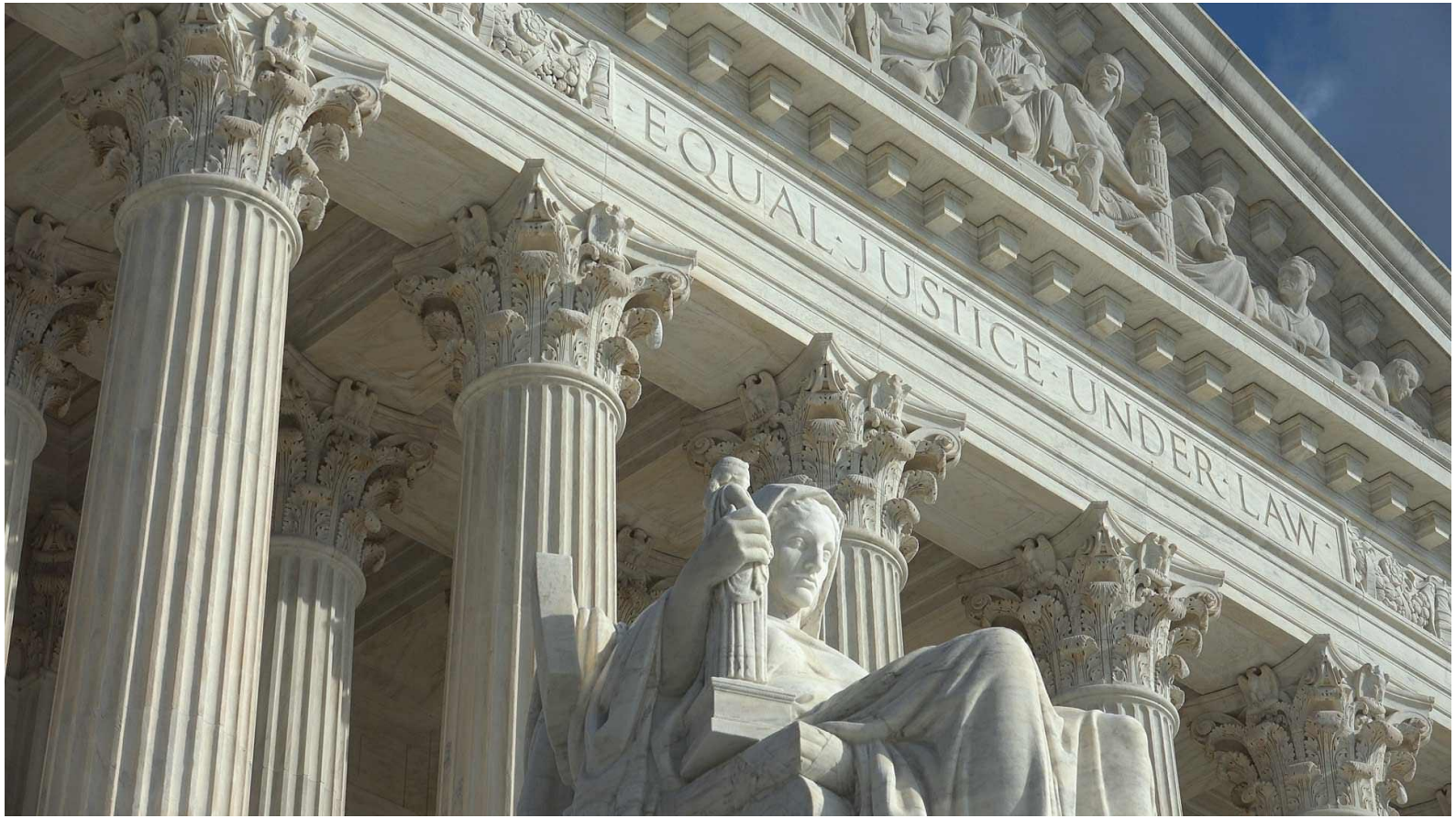
What are the alternatives?

- **Land Application Treatment ($177M)**
- **Direct Potable Reuse ($190-$200M Lahaina only)**
- **Deep Ocean Outfall ($130M Lahaina only)**

*Land Application needs Injection Wells for Backup during the wet season

*No regulations for Direct Potable Reuse and needs injection wells for brine

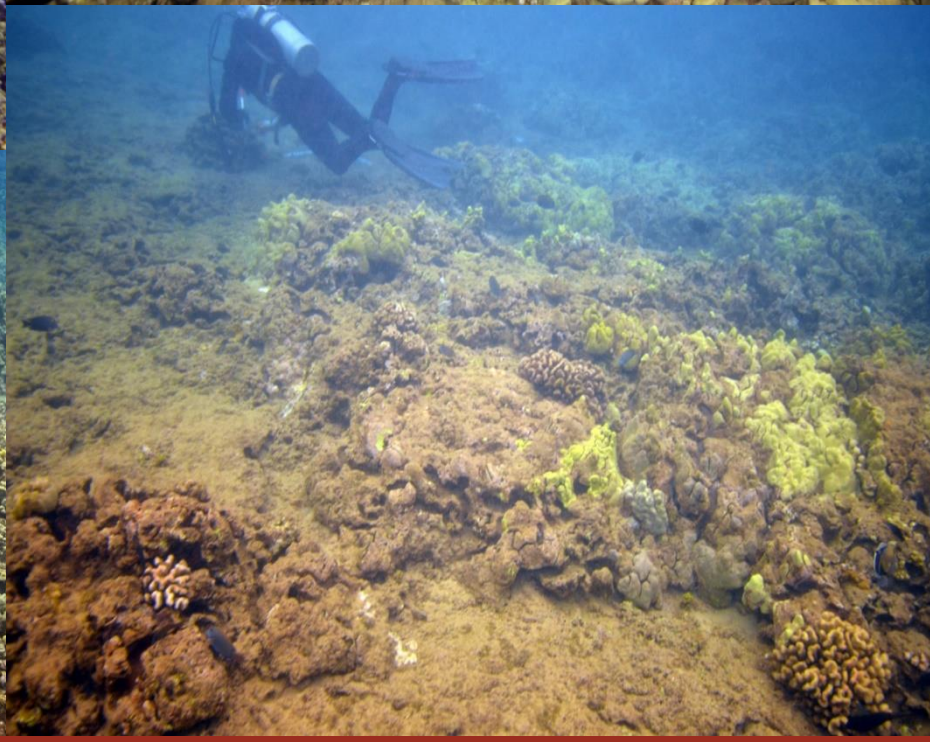
Supreme Court?



MAHALO





What does this mean for Maui County?

- If the County “settles” with Earthjustice, the Ninth Circuit “fairly traceable” standard will control in all the western states, including Hawaii.
- Under this standard, the potential liability is vast:
  - All 4 County wastewater treatment facilities
  - **UIC wells, septic systems and cesspools** throughout Hawaii
  - Underground water supply and irrigation systems
  - Underground storage tanks
  - Green infrastructure (stormwater impound basins, rain gardens)
  - Water reuse projects including continued use of County R-1 water by resorts, golf courses, and parks

What does this mean for Maui County?

Without clarification from the Supreme Court, the Ninth Circuit's ruling as it stands will **expose county taxpayers, private businesses and others to possible civil and criminal liability** if the pollutants from these sources can be traced back from their origin, which can easily be done through computer modeling.

Owners of injection wells, cesspools and septic tanks (and users of recycled water) could be subject to **civil fines of up to $53,484 per day and criminal prosecution** if a connection to the ocean can be found and you have no NPDES permit.

Clean Water Act – max civil penalties

Example: Lahaina's 4 injection wells

4 wells x $53,484 per day x (365 days x 5 years) = $390,433,200

Example: Kahului's 8 injection wells

8 wells x $53,484 x (365x5) = $780,866,400

My name is Kyle Ginoza and I was formerly the County Director of Environmental Management from 2011 to 2015. I am testifying today as a private citizen expressing my personal view.

To be clear, I am against settlement with Earthjustice and would like to see the County of Maui go forward with the appeal to the U.S. Supreme Court. This lawsuit was brought by Earthjustice in an attempt to expand the federal Clean Water Act to groundwater discharges, which Congress did not intend. The County has 18 total injection wells: 4 wells in Lahaina, 8 wells in Kahului, 3 wells in Kihei, and 3 wells in Molokai. Each of these wells is being operated in compliance with state Safe Drinking Water Act UIC permits, but that will not be enough

The Ninth Circuit's test also will mean that cesspools septic systems, recycled water storage like that in the Kaanapali golf course, and green infrastructure projects may require NPDES permits or be in violation of the law. Withdrawing the case means that the County will hand over control to the Ninth Circuit. And that court's decision will greatly dictate how this County will spend taxpayer funds. The burdens of compliance will fall to the County and be passed on to taxpayers and sewer rate payers.

It should not be overlooked that these increased taxes and fees often are the hardest to bear by those on the lower socio-economic scale.

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. When the County is sued, it is also common to name the department directors. The exposure to this kind of liability should be a sobering concern.

This resolution you are about to contemplate will undoubtedly define this Council. Should the County settle, there is no viable alternative to the injection wells that would be cost-effective or expedient. In my opinion, the only alternative are ocean outfalls, since no other option would be able to accommodate the large wet-weather flows during rain events. Implementing an outfall at each treatment facility is a daunting task since there are many technical impediments to resolve and many people who are against outfalls. This comes at a steep cost as well, in the neighborhood of $200 million.

In the almost five years that I headed the department, I spent hundreds of hours to trying to defend against the elimination of injection wells, because I firmly believe that an ocean outfall is neither a better solution, nor worth the financial strain on the general public. I can't imagine the public outcry that will result when residents are forced to cough up hundreds if not thousands more per year in taxes or fees to pay the hundreds of millions of dollars for outfall implementation. Such large sums of money would be better spent improving our watersheds or stopping runoff to the ocean. This is in effect a zero-sum game: hundreds of millions of dollars to this effort, means hundreds of millions of dollars less to other areas like road repair, affordable housing, coastal zone management, etc

Perhaps of greater concern to me is the likely cessation of water reuse and groundwater recharge programs that will result, since the current Ninth Circuit decision puts these beneficial programs at high risk. In addition, I have read testimony from other municipalities and organizations of the detrimental effects of the Ninth Circuit's decision, which puts many of their water reuse programs in jeopardy as well.

If this resolution passes, I suspect that all types of development, including workforce and affordable housing developments, will be severely impacted. The County would likely limit connections to the treatment facilities until an alternate disposal method is implemented and it would be cost prohibitive for developers to go through the NPDES permitting for septic systems.

Moreover, I predict the regulatory framework for getting an NPDES permit will be onerous and very complicated. Not only would the County need to still obtain NPDES permits for the eventual ocean outfalls, every cesspool and septic system owner and recycled water user would likely have to obtain an NPDES permit. Therefore, there will likely be thousands of new applications that will inundate an already strained Department of Health. New construction in non-sewered areas like Hana, Haiku, or portions of West Maui will be more expensive due to the eventual permit requirements should the case be settled. This will likely increase the costs of affordable and workforce homes, costs that are already expensive for many families.

I beg you to not pass this resolution as I believe the consequences of passing this resolution will undoubtedly negatively affect millions of Americans throughout the western US and result in many beneficial environmental programs to cease to exist.

Letting the U.S. Supreme Court decide this matter does not desecrate the Clean Water Act as I have heard some mention. Such an action affords our nation's highest court to weigh in on an interpretation of Federal law. I believe it would be foolhardy to not allow the Supreme Court to adjudicate this matter as the ramifications extend beyond Hawaii to the western United States.

Please do not succumb to the fear tactics being employed and please let the U.S. Supreme Court adjudicate this matter. I implore you to listen to your County technical and legal advisors on this matter.

If you have any questions on my testimony, please feel free to contact me.

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