



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

RECEIVED

2019 AUG 29 PM 1:30

OFFICE OF THE  
COUNTY COUNCIL

AUG 29 2019

Mr. Michael J. Molina  
Chair, GET Committee  
County Council  
County of Maui  
200 S. High Street  
Wailuku, Maui, HI 96793

Subject: Hawaii Wildlife Fund, et al. v. County of Maui (USSC 18-260)

Dear Mr. Molina:

On behalf of EPA, this is in response to your correspondence dated August 27, 2019 inviting Mr. David Smith, EPA Region 9, to make a presentation at the Committee's meeting on September 3, 2019. Consistent with Ms. Anna Wildeman's August 28, 2019 email to Ms. Richelle Thomson, EPA Region 9 will not be submitting a presentation. For more information on this matter, please refer to the August 28, 2019 email a copy of which is enclosed for your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Laurie Kermish".

Laurie Kermish  
Water & General Law, Branch Chief  
Office of Regional Counsel

Enc.

cc: Sylvia Quast, Regional Counsel  
David Smith, Manager Water Division

**From:** Wildeman, Anna [<mailto:wildeman.anna@epa.gov>]  
**Sent:** Wednesday, August 28, 2019 1:04 PM  
**To:** Richelle Thomson <[Richelle.Thomson@co.maui.hi.us](mailto:Richelle.Thomson@co.maui.hi.us)>  
**Cc:** David Fotouhi <[Fotouhi.David@epa.gov](mailto:Fotouhi.David@epa.gov)>  
**Subject:** RE: Hawaii Wildlife v. County of Maui (USSC 18-260)

Hi Richelle,

Thank you for the note and the call this afternoon. As we discussed, it is unusual for EPA to provide live or written testimony for local government proceedings, so EPA will not be submitting formal testimony for the Committee meeting next week. However, I am providing this email to address some of the questions you raised on the phone about EPA's April 23, 2019 *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants >From a Point Source to Groundwater* (84 FR 16810) (Interpretive Statement) and the interaction with the Clean Water Act NPDES permit programs.

As explained in detail in the Interpretive Statement, EPA has concluded that the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water. However, EPA has chosen not to apply the Interpretive Statement in the Ninth and Fourth Circuits to maintain the status quo pending further clarification by the Supreme Court. 84 FR 16812 n. 1.

The County of Maui is subject to the Ninth Circuit Court of Appeals' decision in *Hawai'i Wildlife Fund v. Cty of Maui*, 886 F.3d 737 (9th Cir. 2018), and therefore discharges of pollutants to groundwater that ultimately reach jurisdictional surface waters and are "fairly traceable" back to a point source and more than *de minimis* are currently subject to the NPDES permit program. *Id.* at 749. If the Ninth Circuit's decision is upheld by U.S. Supreme Court, all releases of pollutants from a point source to groundwater that ultimately reach a surface water could be subject to the NPDES permit program. This expansion of the Act's coverage could require NPDES permits for commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems that find their way to jurisdictional surface waters through groundwater. 84 FR 16823. These activities would therefore fall within EPA's state program oversight responsibilities and could subject unpermitted discharges to state or federal enforcement or citizen suit liability under the Clean Water Act.

Regards,  
Anna

**Anna Wildeman**  
Principal Deputy Assistant Administrator  
Office of Water  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
202-564-5700  
[Wildeman.Anna@epa.gov](mailto:Wildeman.Anna@epa.gov)