

GET Committee

From: Mike J. Molina
Sent: Wednesday, August 07, 2019 9:41 AM
To: GET Committee
Cc: Lucienne de naie; Gary.Saldana@mauicounty.us
Subject: FW: Recent media regarding Lahaina Wastewater case and Clean Water Act

Please forward the informational documents in the attached email to Item GET-26 on our Committee's agenda.

Thank you for your assistance on this matter.
Mike

From: Lucienne de naie <laluzmaui@gmail.com>
Sent: Tuesday, August 06, 2019 11:24 AM
To: Gary Saldana <g.saldana@mauicounty.us>; Mike J. Molina <Mike.Molina@mauicounty.us>
Subject: Recent media regarding Lahaina Wastewater case and Clean Water Act

Aloha Gary and Mike

Hannah and i and Kecia enjoyed meeting with you both recently to discuss current information re: the Lahaina case. Look forward to the GET meeting on Sept 3 where this matter can be discussed. You discussed inviting representatives of the State Dept of Health to also attend and we hope that can also work out.

Wanted to share these recent stories in the local and national press to emphasize the larger impact this case truly does have on the whole nation.

We can pass this information on to the GET committee as well.

<https://www.nbcnews.com/news/us-news/clean-water-case-ferments-trouble-craft-breweries-environmentalists-n1035401>

<https://www.civilbeat.org/2019/08/maui-is-taking-this-clean-water-legal-fight-all-the-way-some-say-too-far/>

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[U.S. NEWS](#)

Clean Water case ferments trouble for craft breweries and environmentalists

"This is just really critical to ensuring that we have clean water not just for brewers but for everyone going forward," one brewer said.



Craft brewers are worried that an EPA rule change and a case before the Supreme Court could dismantle the Clean Water Act, undermining water systems across the United States – as well as their beer.

Carolyn Figel / for NBC News

Aug. 1, 2019, 10:16 PM HST / Updated Aug. 2, 2019, 10:35 AM HST

By Phil McCausland

Beer is mostly water – more than 90 percent, in some cases. Which is why the craft brewing industry is increasingly concerned about the Trump administration's attempt to deregulate the 1972 Clean Water Act.

Sixty craft breweries from across the country filed a brief in July in support of environmental advocates who are fighting the deregulation attempt in a case before the Supreme Court. They claim that weakening the protections around American waterways directly threatens their livelihoods – as well as one of America's favorite adult beverages.

"The cleanliness and flavor profile of the water is really at the heart of making great beer," said Heather Sanborn, who opened Rising Tide Brewery in Portland, Maine, with her husband nine years ago. "We need to protect our water and make sure we have access to clean water to make great beer here in Maine and across the country."

The Supreme Court case starts with a wastewater station in Maui County, Hawaii, that is pumping waste into underground injection wells. The trouble, environmental groups argue, is that the effluent then moves into groundwater before traveling into the Pacific Ocean, which they say undermines the Clean Water Act. The groups are suing to stop the station from dumping waste into the groundwater, claiming that the polluted ocean water led to algae blooms that cause coral reefs and their unique ecosystems to deteriorate.

A 2013 dye test conducted by University of Hawaii researchers supported that position, concluding that 64 percent of the wastewater injected into the wells ended up in the ocean. That plant produces 4 million gallons of wastewater per day via 40,000 inhabitants.

The breweries, spread throughout the United States, are supporting the case for fear that a win for Maui County could allow wastewater treatment plants and other industrial facilities in their vicinity to pollute their local waterways and undermining the consistency of their beer.

A favorable ruling for the county and a recent change to an EPA policy, they argue, would allow industrial plants to dump their wastewater into groundwater without any oversight. Those pollutants could eventually seep into major waterways.

The environmental groups, represented by Earthjustice, originally sued Maui County in 2012. Their supporters say the county and the Trump administration are essentially asking the Supreme Court to redefine the scope of the landmark 1972 environmental legislation that many credit with cleaning up and restoring the integrity of America's waterways.

The Maui's mayor office, which represents the greater county, did not respond to a request for comment.

In a brief filed in May, the county admitted that their wastewater flowed into the Pacific Ocean, but maintained that the Clean Water Act did not apply because they were dumping their waste into groundwater – not protected waterways. They noted that the case represented a dangerous expansion of the federal government's powers to prohibit how they deal with waste water.

The 60 breweries have joined a group of former EPA administrators, 13 states, a Native American tribe and clean water advocates in filing briefs in support of Earthjustice's position.

"This case pits those who are committed to the protection of life-giving, clean water against the Trump administration and polluting industries that want free rein to use groundwater as a sewer to

dump their waste and toxic discharges into our nation's lakes, rivers and oceans," said David Henkin, an attorney for Earthjustice, a nonprofit that works to enforce environmental laws.

If the court rules that the law does apply, critics say that would require the court to essentially rewrite key elements of it. That's some thing the Trump administration is already making some headway on.

The current EPA appears to have endorsed Maui County's claim that the wastewater station should be allowed to continue doing what it's been doing. In April, it released a new interpretation that "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."

“EPA just flipped on 30 plus years of interpretation of that decision and is saying Maui is correct. EPA has never taken that position before.”

MARK RYAN, FORMER EPA SENIOR LITIGATOR

That undercuts the entire point of the legislation, said Mark Ryan, a leading expert on the Clean Water Act who worked for 24 years as a senior litigator for the EPA.

“EPA just flipped on 30-plus years of interpretation of that decision and is saying Maui is correct,” said Ryan, who left the agency in 2014. “EPA has never taken that position before.”

As of now, Ryan explained, wastewater and industrial plants have to get costly EPA permits when discharging waste into a body of water. The permits limit what the source of the waste can discharge, requires monitoring and reporting, and includes a number of other provisions that ensure the water quality won't diminish or hurt people's health.

The rule change posed by the EPA, or a favorable Supreme Court decision, would essentially allow groups to circumvent the need for the permits by just discharging their waste into groundwater.

“It blasts a gigantic hole into the Clean Water Act,” Ryan said.

And it could also blast a gigantic hole in the burgeoning craft brewing industry.

Breweries across the country employed more than 503,000 people in 2017 and produced more than \$76 billion in economic impact and \$24.6 billion in labor income, according to the Brewers Association.

"There are over 7,000 craft breweries today," said Steve Fechheimer, CEO of the New Belgium Brewing Company, the fourth largest craft brewer in the United States, based in Colorado and North Carolina. "They're in every corner of the industry and pulling water from all kinds of different watersheds and you need all those protected for the health of the industry."

The alternative is that breweries would have to test their water with a regularity that Fechheimer believes would be prohibitively expensive and nearly impossible to maintain.

"We can't change the way we brew our beer every day," Fechheimer said of his 689 employees. "We can't afford to test the water every 25 minutes. Those kinds of things are real costs and difficulties, so starting clean and remaining consistent really matters to us."

The Supreme Court agreed take the case up on appeal after the Hawaii federal district court and the 9th Circuit Court of Appeals in San Francisco sided with the environmental groups. But advocates are worried how the two justices appointed by President Donald Trump – Neil Gorsuch and Brett Kavanaugh – will respond to the case when it is argued in November. Hopes are not high.

Nevertheless, Fechheimer and Sanford said they would continue to advocate for the protections.

"This is just really critical to ensuring that we have clean water," Sanborn said. "Not just for brewers, but for everyone going forward. We can't wind up in situations like we're seeing in other parts of the country where water systems are irretrievably polluted. We have to stay ahead of this issue."



Phil McCausland

Phil McCausland is an NBC News reporter focused on the rural-urban divide.



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Environment

Maui Is Taking This Clean Water Legal Fight All The Way — Some Say Too Far

The Maui wastewater case has far-reaching ramifications for the nation's rivers, lakes and oceans. And it's headed to a conservative Supreme Court.



By Nathan Eagle    / August 6, 2019

 Reading time: 13 minutes.

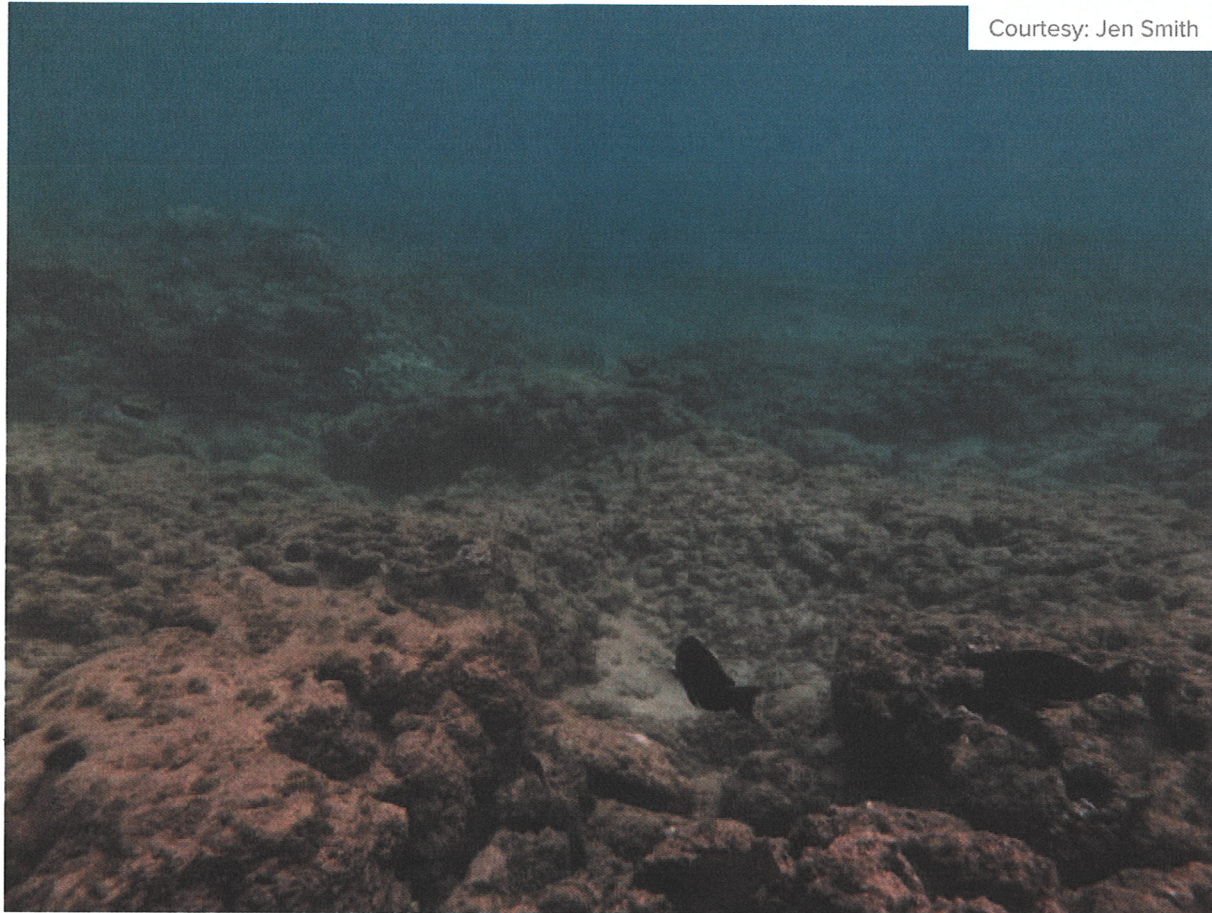


For more than 40 years, Maui has piped wastewater into wells on the west side of the island, treated it to a certain standard and then done nothing as it flows through the groundwater and into the ocean just off the coast of Kahekili Beach.

County officials knew the effluent would follow this course before the Lahaina facility was built in the 1970s. And they know it's happening now along the resort-lined shore as tourists snorkel through a coral wasteland wondering where all the fish went.

But the county has yet to do anything about it, despite losing repeatedly in court over whether a federal pollution permit is needed.

Now the case is barreling toward a conservative-leaning [U.S. Supreme Court](#), whose decision could carve a massive loophole into longstanding protections for America's rivers, lakes and oceans.



Courtesy: Jen Smith

Scientists have found the treated wastewater flowing into the ocean off Kahekili Beach in West Maui is harmful to coral reefs.

“The county is being a frontman for a whole villain’s list of the nation’s worst polluters that want to use this case to gut the Clean Water Act,” said David Henkin, a Honolulu-based attorney for [Earthjustice](#), which is representing the four environmental groups who brought the lawsuit.

The [Hawaii Wildlife Fund](#), [Sierra Club-Maui Group](#), [Surfrider Foundation](#) and [West Maui Preservation Association](#) sued in 2012 after trying for years to reach an agreement with the county to instead reuse the treated effluent on golf courses, farms or commercial landscaping.

They argued that the county should have obtained a [National Pollutant Discharge Elimination System](#) permit that is required under the Clean Water

Act when polluted water from a known source enters “navigable waters.”

Federal district and appeals court judges have ruled in their favor, rejecting the county’s argument that it did not need a permit since the treated effluent passed through groundwater before entering the ocean — a sort of who-touched-it-last argument.

“To hold otherwise would make a mockery of the CWA’s prohibitions,” 9th U.S. Circuit Court Judge Dorothy Nelson bluntly wrote in the court’s decision last year.

Federal Courts Split

The Lahaina facility serves about 40,000 people and handles 3 million to 5 million gallons of sewage a day. On the low end, the amount entering the Pacific is like installing a permanently running garden hose every three feet along a half mile of coastline, according to court filings.

The treated effluent is generally not harmful to humans. But peer-reviewed studies have shown it has decimated the fringing reef, which is already reeling from warmer and more acidic waters thanks to global climate change.

Read the friend-of-the-court briefs each group filed in the U.S. Supreme Court case [here](#).

The nutrient-rich wastewater causes huge algal blooms that smother the corals, which is what sounded the initial alarm in the early 2000s. That means less habitat for fish and endangered sea turtles, but also the breakdown of a natural barrier to protect coastal roads and properties from stronger storms and surf.

“This is something we can do something about,” Henkin said. “When people sometimes get a little hopeless, the name of the game is building resilience. Attacking the input of nutrients and acidic freshwater into reefs is going to make them more resilient and capable.”

Maui County contends that it has just been disposing of pollutants into wells and does not need an NDPES permit because it is not directly dumping the treated wastewater into the ocean; it's passing through groundwater first, which is not federally regulated.

No one disputes that groundwater is generally the state's jurisdiction. It's where the pollution ends up that matters, as judges have ruled in this case.

"Although the County quibbles with how much effluent enters the ocean and by what paths the pollutants travel to get there, it concedes that effluent from all four wells reaches the ocean. The County has known this since the Facility's inception," Nelson wrote in the appeals court decision.

But there isn't a clear consensus among federal appeals courts throughout the country, especially in recent years.

The 6th U.S. Circuit Court of Appeals decided the Kentucky Utilities Co. was not responsible for the pollution from its coal-fired power plants that was released into Herrington Lake because it did not happen directly. Leftover coal ash was stored in manmade ponds, seeping into the groundwater before entering the lake.

The 4th U.S. Circuit Court of Appeals has felt similarly about coal ash but not about oil. A pipeline owned by Kinder Morgan ruptured in South Carolina, spilling hundreds of thousands of gallons of gasoline, which seeped into the groundwater and then polluted nearby rivers, lakes and wetlands.

In a split decision, the court determined the Clean Water Act applied because pollutants from a known source were added to federally regulated waters. It did not matter that they flowed through groundwater first, so long as there was a clear connection.

'Trivially Easy To Evade'

The U.S. Supreme Court agreed to take up the Maui case to answer the question. It set a hearing for Nov. 6, and seemingly everyone wants to be part of it.

Last month, a slew of groups filed friend-of-the-court briefs that lay out their positions, generally backing one side or the other.

Maui County has received support from current EPA and Department of Justice officials; oil, gas, mining and pipeline industry representatives; utility companies; property rights groups; iron and steel workers; and almost two dozen mostly red states, their governors and senators.

Courtesy: Meghan Dailer

Scientists put a tracer dye into the injection wells, then tracked it coming out of underwater springs just feet from Kahekili Beach.

Among them is Kinder Morgan Energy Partners and Plantation Pipe Line Co., which is 49% owned by ExxonMobil. They essentially make the same argument as Maui. If the pollutant passes through groundwater first before entering federally regulated surface waters, the Clean Water Act should not apply.

The Maui environmental groups' arguments have been backed by former Republican and Democratic Environmental Protection Agency administrators; craft brewers; trout fishermen; aquatic scientists; law professors; conservationists; a Native American tribe; and a dozen mostly blue and coastal states.

The Craft Brewers group, which depends on clean water as the main ingredient in beer, finds "little sense" in Maui's argument, saying this would make it "trivially easy to evade" the Clean Water Act, according to the brief it filed last month.

The group's attorney argues that a factory whose pipe sends pollutants flowing into a river could avoid regulation by moving its pipe into a gravel pit so the groundwater carries the pollutants to the same river.

Others have spelled out similar hypotheticals. What if a pipeline stops just shy of the shoreline, dumping its waste first into the groundwater despite knowing it will pollute the ocean?

In the Maui case, attorneys relied on a tracer dye study that the EPA ordered in 2011 after growing concerned about the Lahaina wastewater system polluting the ocean. Sure enough, when scientists from the University of Hawaii put dye into the injection wells, they documented it less than three months later flowing out of natural underwater springs just feet from Kahekili Beach about a half mile from the facility.

That confirmed what seemingly everyone had known since the 1970s — that treated wastewater injected into the wells would find its way to the ocean.

A 2017 study discovered how much that actually mattered. Scientists found the nutrient-laden water was literally eating the reefs away, orders of

magnitude faster than just by ocean acidification and other effects of climate change.

“Our results confirm how valuable nearshore coral reef ecosystems – the cornerstone of Hawaiian tourism, shoreline protection, and local fisheries – are affected by land-based sources of pollution that are also magnified by effects of coastal acidification,” Nancy Prouty and five other scientists wrote in their peer-reviewed paper.

Courtesy: EPA

Between all the stressors, the state Division of Aquatic Resources has reported a 40% decline in coral cover off of Kahekili from 1994 to 2005.

Maui County actually has one permit for its wastewater system in Lahaina. It’s an underwater injection control permit required by the Safe Drinking Water Act. That

A schematic of one of the Lahaina injection wells.

ensures the water is fine to use on crops, for instance, but it doesn’t regulate the quality for marine life.

Nitrogen levels, for instance, have to be kept below 10 mg per liter under the Safe Drinking Water Act, which is reflected in the county’s underwater injection control permit.

If the county had to obtain an NPDES permit, as the district and appeals courts have ruled, it would have to treat the wastewater to bring the nitrogen

levels below 0.15 mg per liter to not kill marine life, Henkin said.

Maui's elected leaders have so far refused to drop the case, torpedoing settlement offers. The last one, which Henkin said still stands, involved paying a \$100,000 fine and putting \$2.5 million toward infrastructure to recycle the wastewater.

The county has instead paid more on outside legal counsel than the settlement would have cost. Maui taxpayers are spending \$4.3 million for representation by Hunton, Andrews, Kurth.

Elbert Lin, the Virginia-based firm's lead counsel for the case, did not respond to a request for comment last week.

Cory Lum/Civil Beat

Maui County Council Chair Kelly King has tried to wrest control from Mayor Mike Victorino, who has followed in the path of former Mayor Alan Arakawa under advice from the same corporation counsel, Patrick Wong. But so far she has lacked the votes.

Maui Mayor Mike Victorino wants to move forward with the case.

In May, the council was split 4-4, with one member absent, on a

vote at the committee level to recommend the full council approve the latest settlement. The committee's chair, Mike Molina, who voted against it, has yet to put it back on the agenda.

“This would be a huge stain on the reputation of Maui,” King said in an interview last week.

“It’s a political move to help the Trump administration perpetuate its attack on the environment,” she said. “I have no idea why anyone on Maui would support that.”

She and others who want the case dropped blame scare tactics. Some members of the council and administration worry that losing this case would mean thousands of homeowners with cesspools and septic systems might also be in violation and face fines.

The Hawaii Department of Health sent a letter in June to Councilwoman Tasha Kama to allay those concerns, which has been shared with other council members.

The letter from the state’s deputy director for environmental health, Keith Kawaoka, says the department has no plans to enforce the NPDES permit requirements against existing septic systems and cesspools.

The EPA’s own website makes that clear, too. The agency’s [summary of the Clean Water Act](#) says individual homes that use a municipal system, septic system or otherwise don’t have a surface discharge don’t need an NPDES permit.

“There’s been a lot of fear mongering,” Henkin said. “It’s just fantasy stuff.”

Victorino won’t back down though. He was unavailable for an interview last week, but his office sent a statement and sections of the EPA’s latest views on the issue.

The EPA’s stance shifted in April with an [“interpretative statement”](#) on the application of the Clean Water Act on the NPDES program when it comes to releasing pollutants from a point source to groundwater.

A spokesman for the mayor highlighted a section that says how the circuit court decisions “potentially sweep into the scope” of common activities “such as releases from homeowners’ backyard septic systems that find their way to jurisdictional surface waters through groundwater.”

Henkin views it as a 180 degree shift in the EPA’s position, noting how it was the EPA itself that was concerned about Maui violating the Clean Water Act.


“This is not Trump EPA versus Obama EPA,” he said. “It’s Trump EPA versus every EPA — the Bush EPA, the Reagan EPA.”

An EPA spokesperson deferred comment to the solicitor general’s friend-of-the-court brief in the Maui case, another document Victorino’s office pointed to.

Noel Francisco, counsel of record for the Department of Justice solicitor general, says in the brief that the Clean Water Act could be interpreted to cover such releases into groundwater that could require some septic tank owners, for the first time, to obtain NPDES permits.

He says the same could be true for those engaging in other common forms of water management, including green infrastructure projects.

In the mayor’s statement to Civil Beat, he touts how much the county plans to spend on recycled water projects in Lahaina and Kihei, but sticks to the administration’s past arguments for proceeding with the case.



“It’s one of the most important cases going before the Supreme Court in years.” — Stuart Coleman, Surfrider Foundation

“The Lahaina injection well lawsuit affects the County’s water reuse and disposal systems, as well as private properties with cesspools and septic tanks,” the mayor’s statement says. “This is why it is vital that the U.S. Supreme Court decide whether the Ninth Circuit Court of Appeals expansion of the Clean Water Act is accurate or not.”

Victorino said in the statement that the case would have far-reaching consequences, but the concerns he stated were about property owners not the environment.

“The Ninth Circuit ruled that if you can prove that pollutants make their way from a source to the ocean or a river, and don’t have a permit, it is a violation of the federal Clean Water Act,” he said. “This is true for the County’s injection wells and it would also be law for property owners, condominium complexes, and others in the non-sewered makai areas.”

While the county treats the wastewater to a certain degree, the mayor is uncertain if it would meet requirements of a Clean Water Act permit.



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His office did not respond to follow-up requests for an interview with Victorino.

King is baffled by the mayor’s and her fellow council members’ reluctance to drop the case. But she has faith in the county eventually fixing its wastewater problems, noting that money has already been budgeted to do so.

“Maui will be OK,” she said. “I worry about other places around the country like Flint, Michigan, that may no longer have standing to bring lawsuits.”

Stuart Coleman, head of the Hawaii chapter of Surfrider Foundation, is similarly concerned about the precedent the case could set.

“It’s one of the most important cases going before the Supreme Court in years because it could set us back so far,” he said.

Coleman still thinks settling the case is the best option, as does his attorney. But it’s up to the mayor and council.

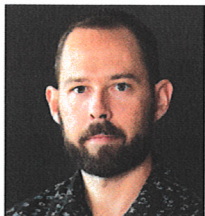
“This is a case that should never have had to go to court in the first place,” Henkin said. “The ball is in their court though. We will see what they do.”

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TBaker 9 hours ago

Where are the voices of property owners who for personal enjoyment (waterfront occupants) or economic reasons (resorts, holders of waterfront land available for resale) have a very big stake in a healthy near-shore ocean ecosystem? Social media directed to those who would use the ocean fronting the various Kaaupali Villas might get their attention.

Respect  Reply 

Share  Report 

Frank_DeGiacomo 21 hours ago

S. Ct. will say that if that is what Congress intended they they should write it into law. The only question is how much of the CWA will they take down with this. Pressure has to be brought on to Mayor Victorino. He has to be held accountable for all the tens of thousands of people that will get sick and die before this mess gets fixed.

Respect  Reply 

Share  Report 

Rickokona 22 hours ago

In Hawaii in a broad zone along the shore "ground water" is not freshwater, it is brackish to very brackish and it varies with the tides and storm surges. Many scientific studies by UH Geology Dept and the USGS confirm it. The definitive text, Hydrology of the Hawaii Islands by Lau and Mink, also describe this phenomena in some detail. The water we pump up to drink floats on sea water. Thus the notion of ground water from the mainland is different. Hawaii is not Kansas.

The flow of sea water in and out under the land makes the brackish ground water, waters of the United States. The freshwater lens well inland can be regarded as state waters. Most people here do not appreciate this difference. It for certain SCOTUS will not either and allow the state to dump all kinds of wastes into nearshore injection wells.

Why Maui would opt to kill the nearshore environment is tantamount to killing the goose that lays golden eggs. Where are Maui's water protectors Ku Kia'i?

Respect  1 Reply 

Share  Report 

ASprinkler 18 hours ago

In the Virginia waters you can find "Mussels" growing on old crushed oyster shells near shore where there isn't much human traffic and these waters are brackish, plus there are freshwater clams & mussels too.


Another good thing about old crushed oyster shells is that when it's spread out near the shoreline it slows down the acidic rate & reduces the algee bloom in the surrounding waters.

You can contact VIMS (Virginia Institute of Marine Science) to get All of the Oysters (spats) you need. Perhaps the local University can get these oysters quicker & learn How to raise them to clean these canals up.

Respect  Reply 

Share  Report 

rogerek44 1 day ago

Have the Maui Council drink this water, bathe in this  and see how fast they trip over themselves.

Respect  Reply 

Share  Report 

meldensis 1 day ago

Rather than fighting, do the millennial thing, YouTube it. This is a growing tourist destination, hit them where they'll pay attention. All parties have fallen into that "same old, same-old" trap, litigation. Even the story of Erin Brockovich went public to help the cause. Would it work on Maui, probably better

Respect  2 Reply 

Share  Report 

ASprinkler 1 day ago

To save the Reefs, you Will Need to set up Filter Feeders like Oysters around the areas where the contaminated waters enter into the ocean at. A single oyster will filter 50 gallons of water a day; by growing thousands of these oysters will purge a lot of the water & the spats (baby oysters) will continue to spread where there are contaminants in the ocean are at.

Secondly, this pumping of the contaminated waters into underground cisterns & wells reminds me about What the Coal Mines in Virginia use to do; perhaps you may find a Ruling or Regulations there.

God Luck.

Respect  3 Reply 

Share  Report 

paulcg 1 day ago

The real problem is overtourism is destroying Hawaii and everything we cherish here. Greed is not restricted to one political party or another. Hawaii's local politicians have the power to limit the ongoing damage but they sadly never will. Our Islands are dying more every day, while the local politicians welcome increased arrivals.

Respect  2 Reply 

Share  Report 

ASprinkler 21 hours ago

I noticed that it's becoming similar to Virginia, whereby Commercialism has Top Priority over Hawaiian Citizens Rights; in North Carolina their government takes care of it's watershed as well as the local fishermen & doesn't favor Commercialism.

There's other opportunities here to make money other than Tourism and this government is going to have to deal with it when the Tourist Industry Slows Down due to the Trade Wars.

Respect  Reply 

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whcrumb 1 day ago

"Trump-packed" Supreme Court?

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