

## Ninth Circuit Rules Indirect Discharges to Navigable Waters through Groundwater Require Permits under Clean Water Act

FEBRUARY 16, 2018

On February 1, 2018, the Ninth Circuit Court of Appeals published [its opinion](#) in *Hawai'i Wildlife Fund v. County of Maui*, holding that in some cases, indirect discharges to navigable waters through groundwater require a National Pollutant Discharge Elimination System (NPDES) permit to avoid violation of the Clean Water Act. An indirect discharge is a discharge from a point source that is not directly discharged into a navigable water but ultimately reaches one. The indirect discharge in *Hawai'i Wildlife Fund* was a discharge of effluent into groundwater, which is not a navigable water, that ultimately entered the Pacific Ocean, which is a navigable water, approximately half a mile away from the discharge point. Discharges into groundwater are common in certain industries, and companies should consider reviewing such discharges to determine whether to apply for a NPDES permit. Based on the Ninth Circuit's opinion, it is unclear what effect having a permit for underground injection under the Safe Drinking Water Act would have on the need to apply for a NPDES permit when injecting into groundwater.

The County of Maui owns and operates the Lahaina Wastewater Reclamation Facility, a municipal wastewater treatment facility. *Hawai'i Wildlife Fund*, slip opinion at 4. The County operates four injection wells at this facility, which it uses to dispose of treated effluent. *Id.* at 5. In the district court proceedings, the County conceded that some wastewater from each of these wells ultimately entered the Pacific Ocean. *Id.* The court also considered a tracer dye study that was conducted in 2013, in which dye was placed in three of the wells; eighty-four days later, this dye began to enter the ocean about a half-mile away from the facility. *Id.* at 6. Based on this evidence, the district court ruled in favor of the plaintiffs on a summary judgment motion. *Hawai'i Wildlife Fund v. City of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014).

The Ninth Circuit affirmed the district court's decision, holding that because the effluent was discharged from wells, which were point sources, and the effluent was "fairly traceable" from the wells to the Pacific Ocean, a navigable water, these discharges constituted "discharge[s] of a pollutant" under the Clean Water Act, prohibited without an NPDES permit. *Hawai'i Wildlife Fund*, slip opinion at 19. The Court did not provide guidance on the meaning of "fairly traceable" beyond holding the effluent was fairly traceable in this case because the discharge into groundwater was the "functional equivalent" of discharging directly into the Pacific Ocean. *Id.* The Court noted that the U.S. Environmental Protection Agency filed an *amicus* brief proposing a liability rule that would require a "direct hydrological connection" between the point source and the navigable water. *Id.*, n. 3. The Court, however, adopted the "fairly traceable" standard instead. Under this rule, indirect discharges to navigable waters that are fairly traceable to the original discharge point violate the Clean Water Act unless they are covered by an NPDES permit.

The defendant in this case has the opportunity to petition for a rehearing before the Ninth Circuit, and if that fails, it could try to take its case to the Supreme Court. Regardless, the opinion should start to affect litigation immediately.

## potential impacts

The ruling in this case has the potential to impact a number of industries. For example, it could cause problems for energy companies that operate coal-fired facilities, as seepage from coal ash storage and disposal units can enter groundwater and could indirectly discharge into navigable waters. The ruling could also impact wastewater treatment facilities, either because they discharge effluent into groundwater, or because deteriorating facility infrastructure allows seepage into groundwater. Any other facilities that store waste underground or inject waste or treated effluent into injection wells could be similarly impacted, including chemical plants or hazardous waste disposal facilities. As mentioned above, it is unclear whether a permit under the Safe Drinking Water Act would affect the need for a NPDES permit for such discharges.

The rule creates some difficult compliance issues for entities that may be responsible for discharges into groundwater. For example, in the tracer dye study cited in the case, it took almost three months for the dye to emerge from the groundwater into the ocean, and it emerged about half a mile away from the facility. Three months is a long time to be uncertain about whether to apply for a permit, and an ultimate release into a navigable water may be difficult to locate. Facilities using dye studies to determine the potential for indirect discharges would thus have to decide what to do with their effluent or waste while they await results, how long to wait for dye to potentially appear, and how far away from the discharge point to look for the dye. Further, groundwater flow may change over time, raising the question of how often a study should be conducted.

In addition to the effects above related to potential groundwater discharges, the ruling could also lead to broader application of indirect discharge theories in general under the Clean Water Act. While this case related to ground water, its reasoning supports similar treatment of indirect discharges over land or through the air. Several courts have already found that these types of indirect discharges can require NPDES permits, and this ruling provides further support for such reasoning. See *Hawai'i Wildlife Fund*, slip opinion at 14–16 (citing cases from the Second and Fifth Circuit Courts of Appeals in which an indirect discharge theory was discussed).

4 Min Read

---

### Author

[Sam Falcon Trimbach](#)

---

### Related Locations

Chicago

Washington, DC

### Related Topics

Water

Court Decisions

### Related Capabilities

Environmental

Environmental Litigation & Enforcement

## Related Professionals

---



Sam Falcon Trimbach

*This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.*