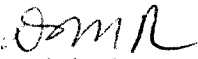


February 28, 2020

MEMO TO: Traci N. T. Fujita  
Director of Council Services

F R O M: David Raatz   
Supervising Legislative Attorney

SUBJECT: **2019 BAR CONVENTION** (PAF 19-309)

I attended the Hawaii State Bar Association Convention and Annual Meeting at the Hawaii Convention Center on October 11, 2019.

In the morning, I attended three panel discussions presented by the Real Property and Financial Services Section. The topics were:

- Electronic Land Court Filings
- Condominium Law Update for Real Property Attorneys
- Become a Planner Whisperer (Advanced Land Use Entitlements)

The latter discussion was led by Kauai County Managing Director Michael Dahilig, an attorney and former Planning Director. The panel discussed the entire process for obtaining land-use entitlements in Hawaii, from the idea stage to construction, explain the roles of planning departments, planning commissions, councilmembers, and other entities.

At a lunchtime general session, HSBA President Derek Kobayashi honored retiring Judge Joseph Cardoza of Maui. The bar association also announced that I would be serving as Maui's representative on the board for HSBA's Senior Counsel Division in 2020.

In the afternoon, I attended the following educational presentations from the Environment, Energy, & Resources Section

- Groundwater, NPDES Permits and the Clean Water Act – Where Are We Now?
- Climate Change: The Practical Implications & Local Impacts
- Ethics - The New Flat-Fee Rule: Now What?

Ms. Traci N. T. Fujita  
February 28, 2020  
Page 2

The groundwater discussion was about Hawaii Wildlife Fund v. County of Maui, now pending at the United States Supreme Court. The two panelists' PowerPoint presentations are attached.

Justin Gruenstein, Deputy Director, Office of Climate Change, Sustainability & Resiliency, City and County of Honolulu, gave a speech on the importance of local governments in Hawaii taking prompt, powerful action to combat the effects of climate change and sea-level rise.

The ethics discussion was presented by Deputy Chief of Disciplinary Counsel Rebecca Salwin, who highlighted new elements in the Hawaii Rules of Professional Conduct.

Thank you for the opportunity to attend the bar convention. Please let me know if you have any questions.

paf:dmr:19-309a

Attachments

Sarah Peterman Bell  
Farella Braun + Martel LLP

October 11, 2019



## CWA Background

- **Regulates discharges of pollutants into “waters of the United States” – focused on surface water.**
- **Cannot discharge a pollutant from a point source to navigable waters without a permit.**
- **EPA administers the NPDES permitting program to permit certain discharges.**



# CWA Background



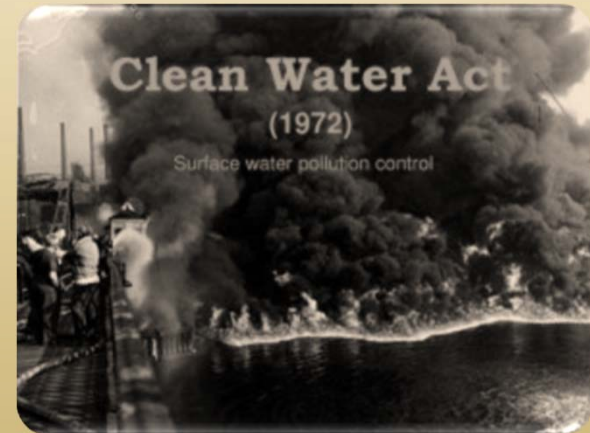
- **“Navigable waters”**
  - = surface waters and wetlands
  - has not been applied to groundwater.
- **Issue:**
  - Does a discharge to groundwater that later reaches navigable waters require an NPDES permit?

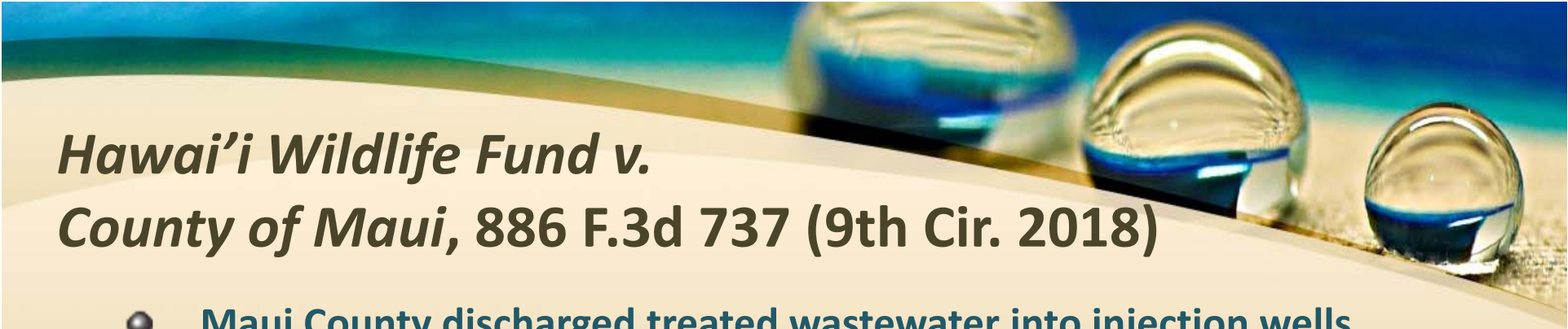


# CWA

## Legislative History

- 1899 Refuse Act required permit to discharge pollutants into navigable waters.
- 1972 Clean Water Act





## ***Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018)**

- **Maui County discharged treated wastewater into injection wells without an NPDES permit**
  - District court: County violated the CWA by discharging pollutants from its wells into the ocean.
- **Ninth Circuit upheld the groundwater conduit theory of CWA liability**
  - “At bottom, this case is about preventing the county from doing indirectly that which it cannot do directly.”
  - Indirect discharges must be “fairly traceable.”
  - Expressly rejected EPA’s proposed standard, which would have required a “direct hydrological connection” between the point source and the navigable water.
- **Particularly compelling case for indirect discharge liability**
  - 3-5 million gallons of treated wastewater injected daily
  - Court described evidence establishing a connection between the wells and coastal waters as “overwhelming.”



## 6th Circuit: *Kentucky Utilities and TVA*


- *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018)
- *Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6th Cir. 2018)
- Allegations that pollutants leaked from coal ash ponds into groundwater to navigable waters.
- Sixth Circuit:
  - NPDES permit not required for pollutants that are discharged to groundwater before reaching navigable waters.
  - Explicitly rejected the hydrological connection and groundwater conduit theories
  - CWA covers discharges “into” navigable waters “from any point source.”
- *TVA* case settled in July, asked to withdraw cert petition.



## 4th Circuit: *Kinder Morgan*



- *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018)
- Pipeline ruptured and spilled gas into groundwater, some of which was conveyed to navigable waters.
- **Fourth Circuit:**
  - Release of gasoline to WOTUS from groundwater was a discharge of a pollutant subject to NPDES requirements because of the “direct hydrological connection” between the groundwater and the WOTUS, and
  - Release was “ongoing.”
- **Status:** Cert petition pending – dependent on *Hawai’i Wildlife* holding.



## Practical Considerations – *Gwaltney* and the Importance of “Ongoing”

- ***Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987)**
  - CWA only authorizes citizen suits for continuous or ongoing intermittent violations
- This was an issue in *Upstate Forever* – what if the point source is no longer discharging, but the contaminant continues to migrate toward a WOTUS?
- Fourth Circuit: the CWA does not require that the point source continue to release a pollutant – only that the discharge from the point source continue to release a pollutant.

# Indirect Discharges and the Supreme Court – What Happens Now?

- ***Hawai'i Wildlife***

- Supreme Court oral argument set for November 6, 2019
- September 6:
  - Maui County Committee on Governance, Ethics, and Transparency voted 5-3 to recommend that the full County Council settle.
- September 20:
  - Maui County Council voted 5-4 to settle.

- **What now?**

- Circuit split remains
- SCOTUS might grant cert. in *Kinder Morgan*



## Additional “Indirect Discharge” Cases (part 1)

- ***Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994)**
  - Court addressed whether a six-acre artificial retention pond associated with a warehouse/distribution center, where that artificial pond drained into groundwater, was within scope of “waters of the U.S.”
  - Answer? No.
  - Court: The CWA does not “assert authority over ground waters, just because these may be hydrologically connected with surface water.”
  - Relied on Legislative History: In 1972 the Senate Committee on Public Works specifically denied proposals to add ground water to the scope of the CWA. *Id.*





## Additional “Indirect Discharge” Cases (part 2)

- *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001)
  - Holding: subsurface waters are not WOTUS under OPA, because OPA defines WOTUS in the same manner as the CWA, and the CWA does not regulate groundwater pollution.
  - Holding: “a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA.”





## Additional “Indirect Discharge” Cases (part 3)

- ***Concerned Area Residents for Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994)***
  - “The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges.”
  - Was the field itself the point source? Didn’t really matter.
  - There was a point source discharge because (1) the pollutant was released from the tanker – definitely a point source; and (2) there was a “direct” connection between the field and the navigable water.



## Additional “Indirect Discharge” Cases (part 4)

- ***Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018)**
  - Affirmed *Upstate Forever* but reversed the District Court’s finding of CWA violations because the landfill and settling ponds were not point sources: they “were not created to convey anything and did not function in that manner...”
  - The Court also noted that, in contrast, “groundwater pollution from solid waste falls squarely within the regulatory scope of the RCRA.”



## Additional “Indirect Discharge” Cases (part 5)

- *Peconic Baykeeper v. Suffolk Cty.*, 600 F.3d 180 (2d Cir. 2010)



- CWA applied where helicopters and trucks sprayed pesticides: the spray applicators attached to the trucks and helicopters were “point sources” and CWA could apply even though the pesticides traveled through the air, making the discharges indirect.



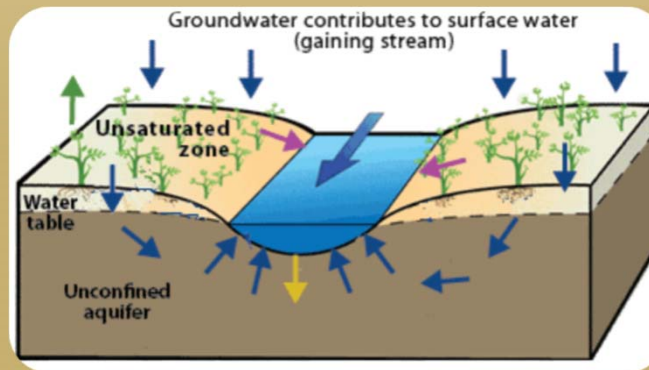
## EPA Weighs In

- **1970s-80s: EPA takes the position that the NPDES program does not cover discharges to groundwater, even if they reach WOTUS.**
- Memorandum from the U.S. EPA Acting Deputy Gen. Counsel to the U.S. EPA Region IX Reg'l Counsel 2–3 (Dec. 13, 1973):
  - “Under § 502(12) the term ‘discharge of a pollutant’ is defined so as to include only discharges into navigable waters (or the contiguous zone or the ocean). Discharges into ground waters are not included.”
- *Kelley on behalf of Michigan v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985):
  - United States argued that discharges to groundwater – including groundwater with a direct hydrological connection to jurisdictional water – are excluded from the CWA.



## EPA Changes Course? (part 1)

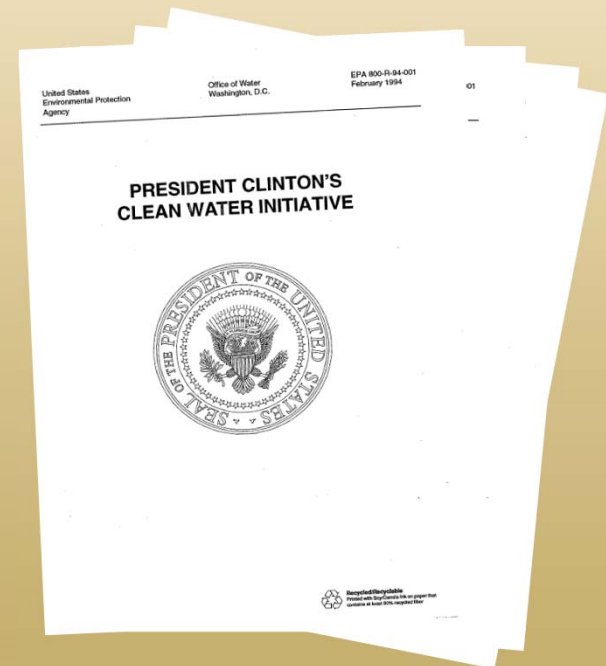
- **1990 – 2016: EPA repeatedly, but not consistently, states that the CWA applies to discharges to navigable water via groundwater.**
- Preamble, NPDES Permit Application Regulations for Storm Water Discharges, EPA Final Rule, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990):
  - “[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.)”





## EPA Changes Course? (part 2)

- President Clinton's Clean Water Initiative at 104, EPA 800-R-94-001 (Feb. 1994):
- “[P]resently unclear whether a discharge to the ground or to ground water that rapidly moves into surface water through a ‘direct hydrologic connection’ between the point of discharge and the surface water is subject to NPDES regulation.”



## EPA Changes Course? (part 3)



- Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998):
  - “EPA interprets the CWA’s NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection.”
- 2001: EPA considered revising NPDES requirements for CAFOs to require same to address discharges to WOTUS via groundwater.
  - Not finalized with this addition.

## EPA Changes Course? (part 4)

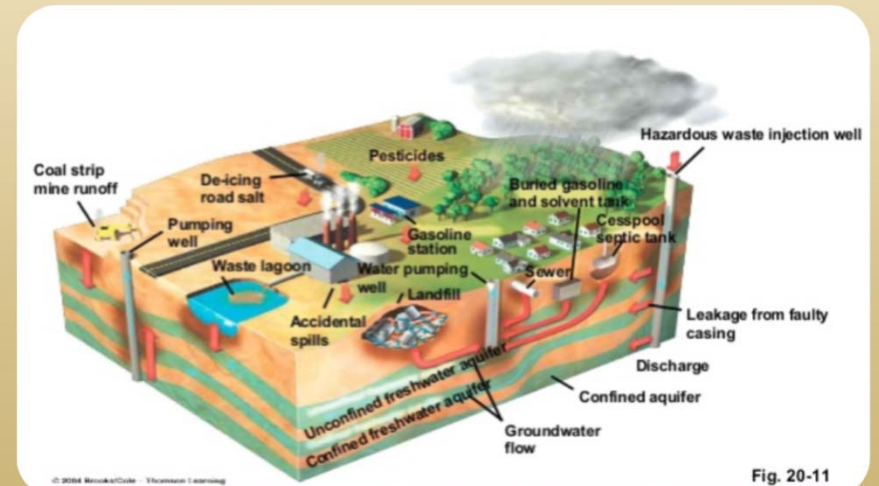
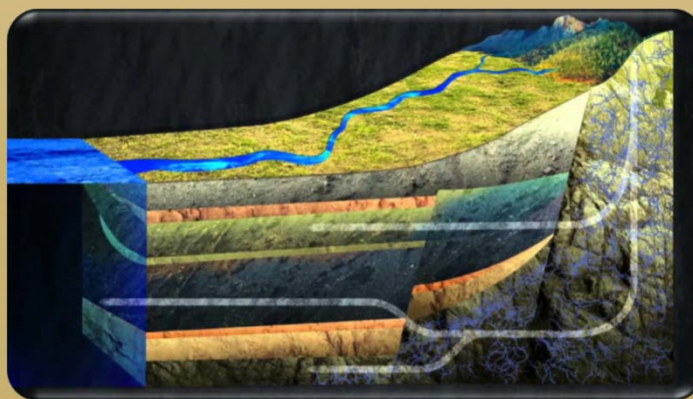


Fig. 20-11

## EPA Reverses Course?

- **EPA's April 2019 "Interpretative Statement" (84 Fed. Reg. 16,810)**
  - EPA categorically excludes discharges to and through groundwater from the NPDES program.
  - "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."

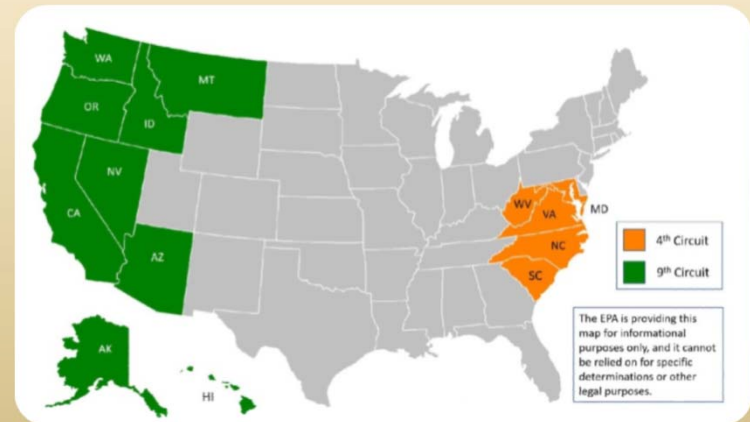




# Effect of EPA

## April 2019 Interpretative Statement

- “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”
- But query: Supreme Court Deference? Enforceability?







# What if “Indirect Discharges” Are Excluded from NPDES Program?

- **CWA Section 319**

- Authorizes state action on nonpoint source pollution (33. U.S.C. § 1329).
- States authorized to identify impaired waters, nonpoint sources contributing to impaired water quality, and implement BMPs to address the same.

- **State Role**

- Nearly (all?) states have programs and regulations applying to releases or discharges to groundwater.
  - Think sanitary wastewater systems, UST regulations, underground injection well controls, etc.
  - i.e., Hawaii, Maryland, California, Massachusetts, Colorado, Michigan, etc.
- States widely understood to be authorized by the CWA to act on issues relating to pollution of groundwater.

# What if “Indirect Discharges” Are Excluded from NPDES Program?

- **Resource Conservation & Recovery Act, 42 U.S.C. § 6901 et seq.**
- “Cradle to grave” regulation applying to hazardous and solid waste.



- Applies to releases to groundwater: “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid . . . so that the [waste] may . . . be . . . discharged into any waters, including groundwater.”
- RCRA “solid waste” excludes “industrial discharges which are point sources subject to [NPDES] permits.”



## What Now?

- **Circuit split / EPA conflict**
- **Open questions**
  - Where should the discharge be measured for compliance with effluent limitations?
  - How to determine if discharges to groundwater might reach surface waters?
- **Potential displacement of existing laws and regulations**
- **Predictions?**

# Questions ?



**Sarah Peterman Bell**

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# Hawai'i Wildlife Fund v. County of Maui

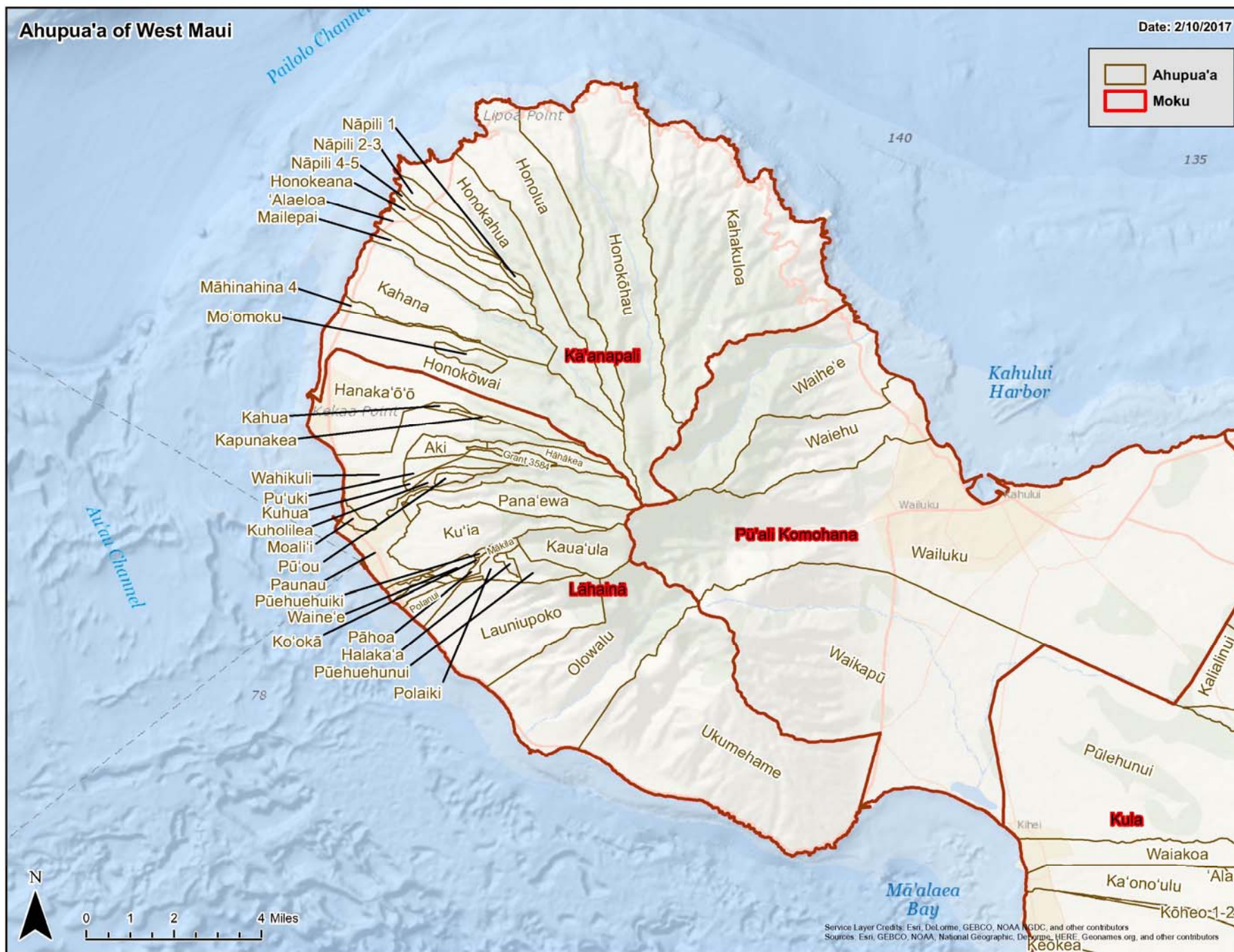


Mahalo:  
Wendy W  
Mahesh C



# Ahupua'a of West Maui

Date: 2/10/2017



# The many names of this place

‘ili: Hā‘enanui

ahupua‘a: Honokōwai

moku: Kā‘anapali

LCAw No. 76 to William Shaw

L Ct. App. 1744 (Pioneer Mill)

(Old) Airport Beach

North Beach

Kahekili (Kahekilinuī‘ahumanu) Beach Park

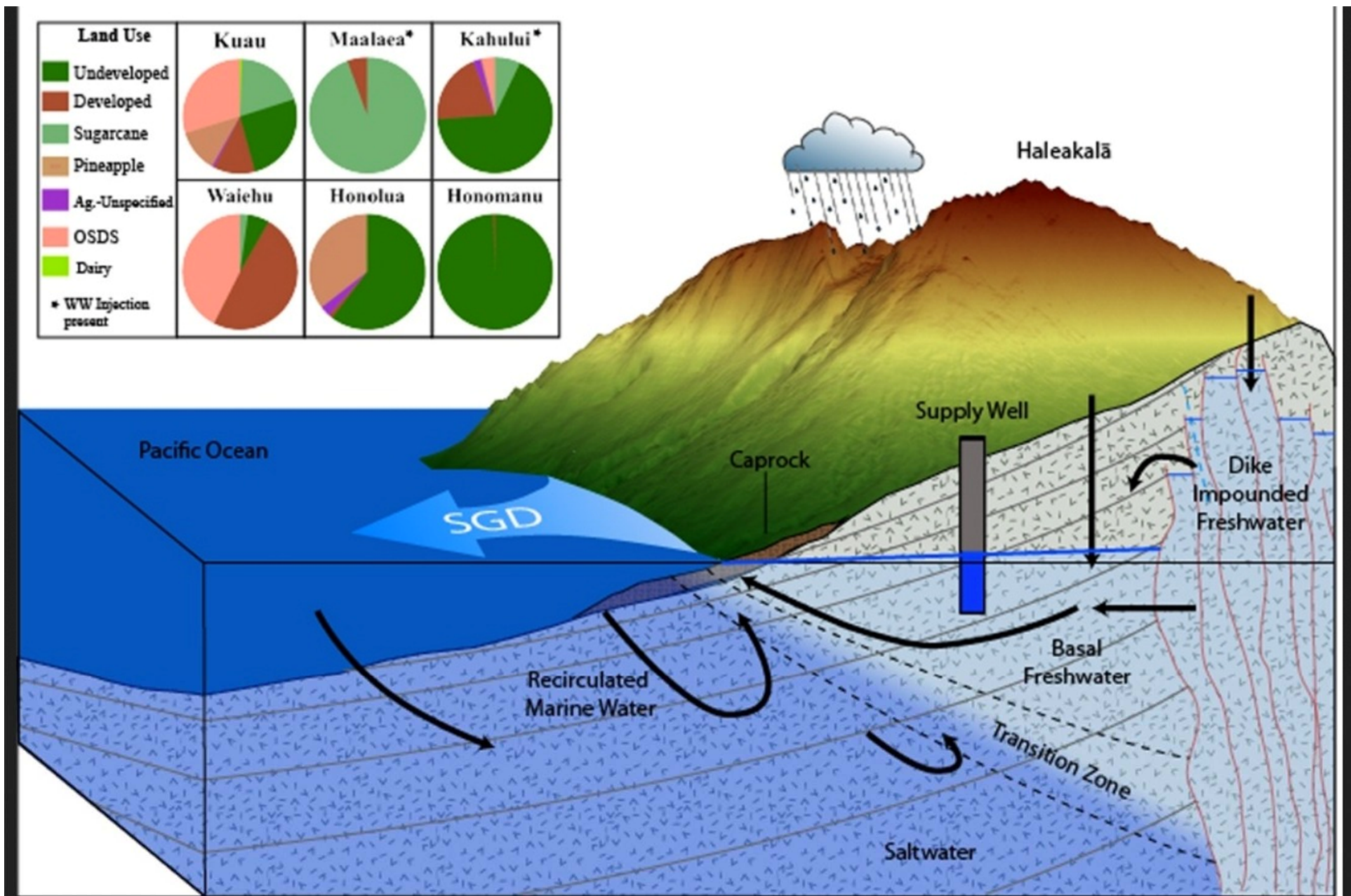
Kahekili Herbivore Fisheries Management Area

Kahekili reef

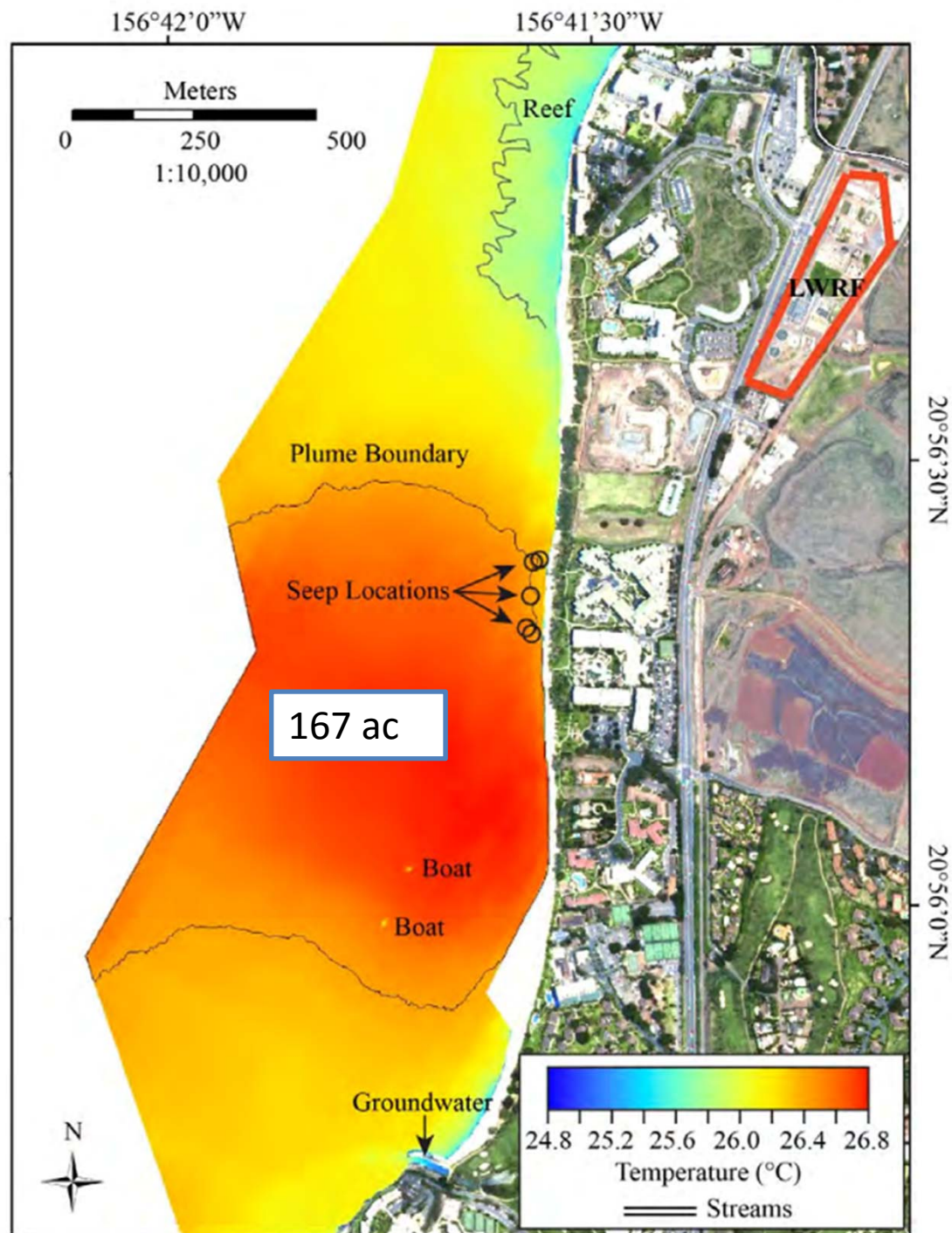
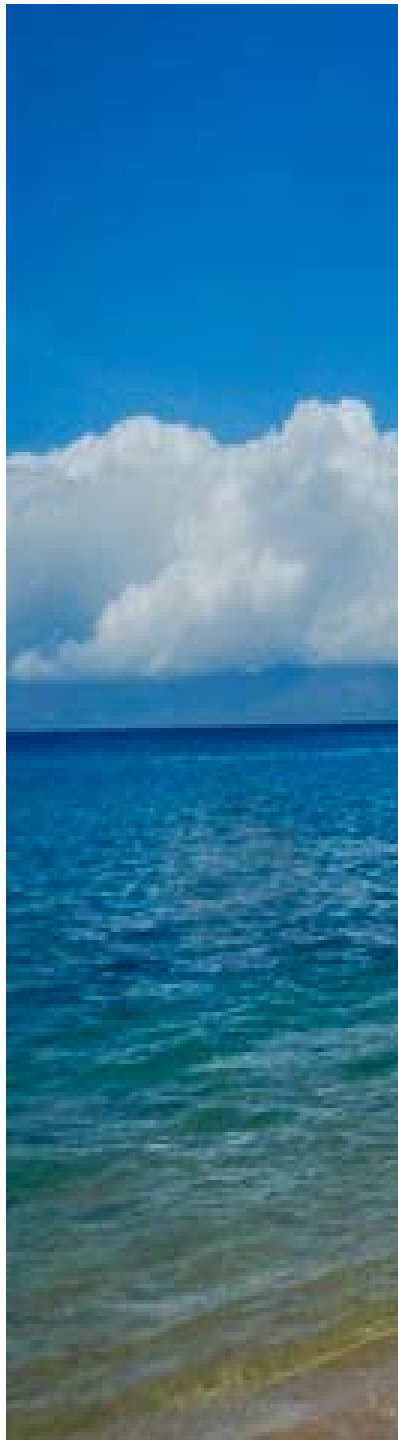
Kahekili

Lahaina Wastewater Reclamation Facility





Conceptual hydrogeologic model of groundwater and SGD flow on Maui. From Bishop, Glenn, Amato, Dulai, 2015





Seeps discharge injected wastewater

- HIGH Nitrogen and Phosphorus
- Low pH
- Pharmaceuticals and pesticides

← Seep

2012 photo

Peizometer ---->





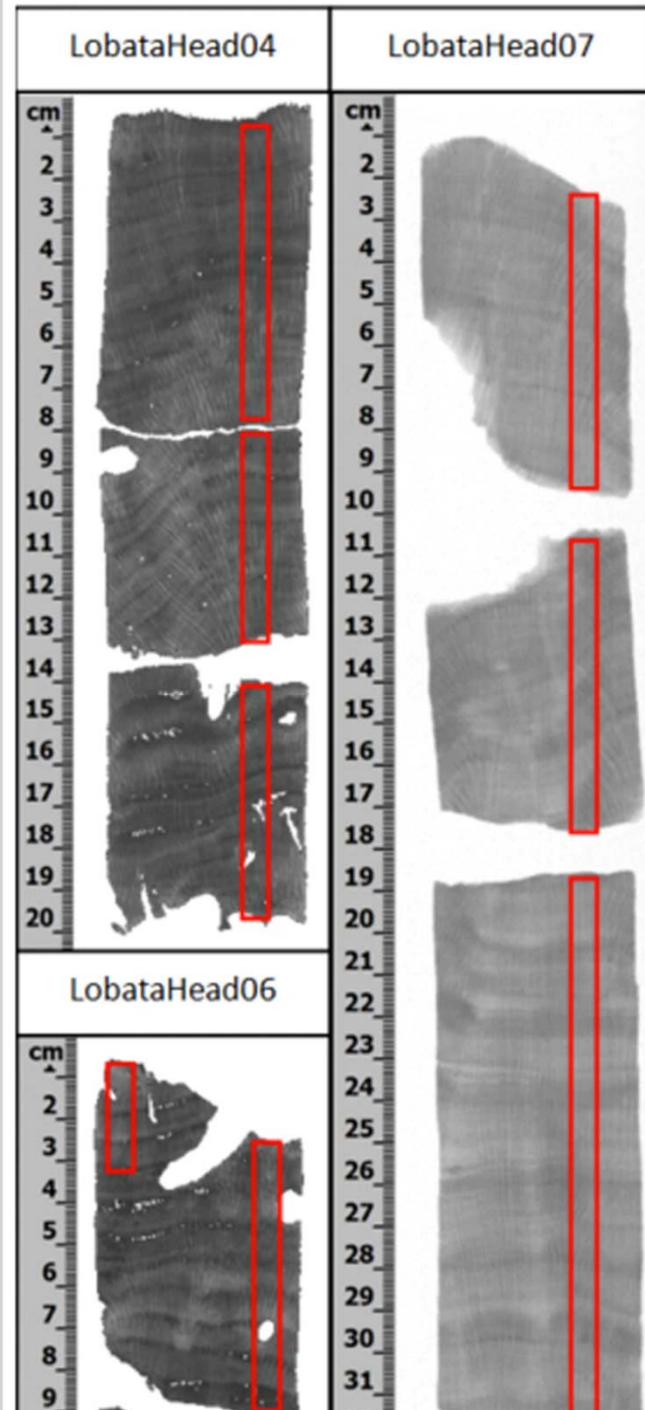
# Lahaina Wastewater is Harming Corals at Hāʻenanui

Cores into *Porites lobata*  
corals at Hāʻenanui:

- Left corals near  
wastewater seep show  
high bioerosion.

Right coral is at Hāʻenanui  
but away from the  
wastewater seeps.

Figure 3



“Our results confirm that  
corals living within the SGD  
seep area are impacted by  
sewage-effluent injected at  
the LWRF.” Murray, et.al.  
2019



Dead and living corals in vicinity of seeps

# CWA-NPDES vs. SDWA-UIC

Goal:

Protect “beneficial uses” of waters,  
including marine life

Goal:

Protect human health for drinking water

(UIC permit does not protect marine life)

	NPDES max. conc.	UIC max. conc.
Nitrate	0.005 mg/L	10 mg/L
Copper	0.0029 mg/L	1.3 mg/L





Ka'a iho i kai o Hā'enanui  
I ka papa holo i'a a ka nui manu

Reaching the sea of  
Hā'enanui  
In the abundant reef of the  
flock of birds

