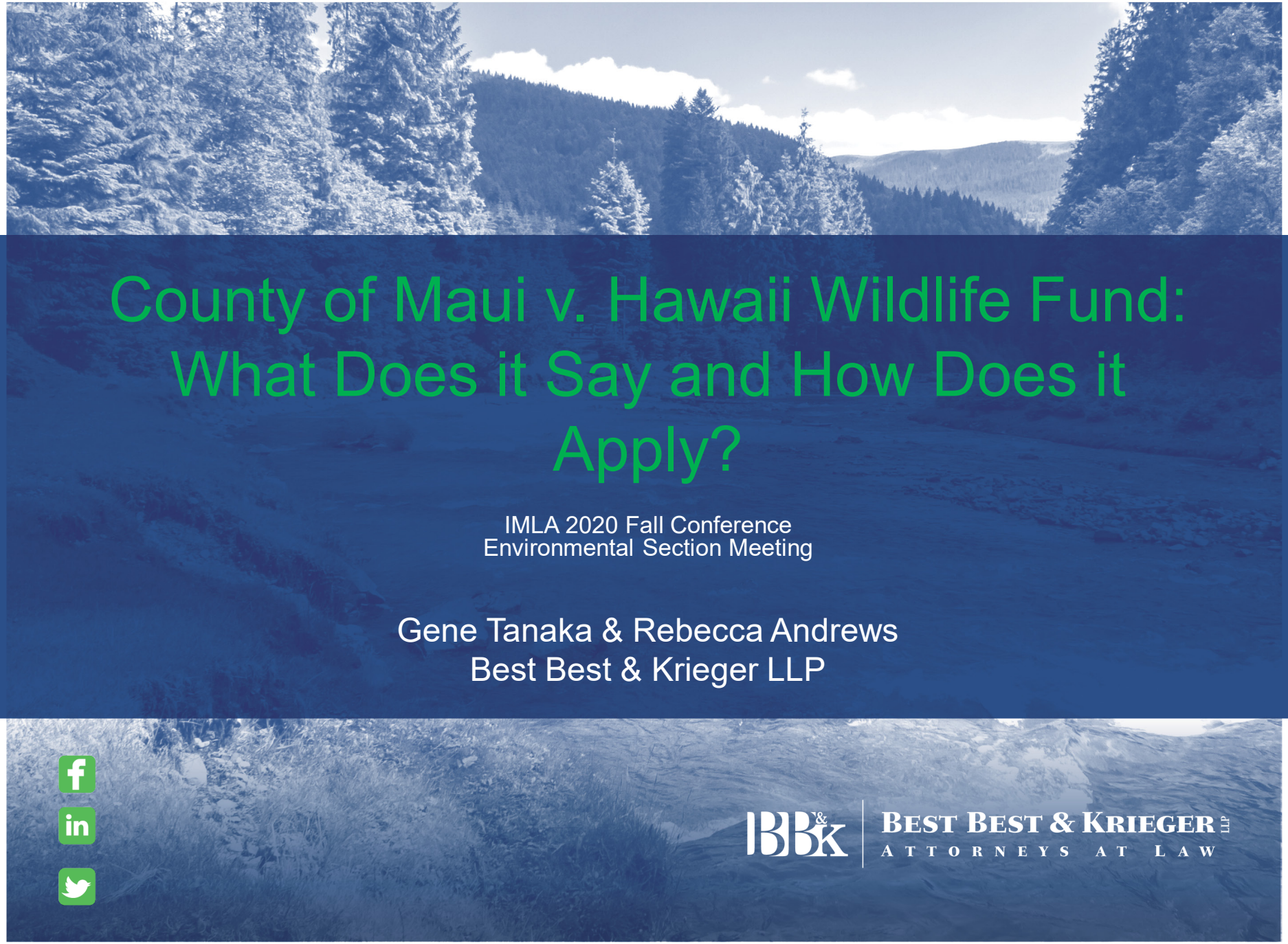

County of Maui v. Hawaii Wildlife Fund: What Does it Say and How Does it Apply?

IMLA 2020 Fall Conference
Environmental Section Meeting

Gene Tanaka & Rebecca Andrews
Best Best & Krieger LLP

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Hypothetical

- Your City experiences periodic flooding / drought and is considering a low impact development project that would decentralize stormwater management and install detention ponds.
- The detention ponds would slow and capture the stormwater flows that continue to increase with new development. The ponds would reduce flooding, reduce pollutant loads in surface discharges, and infiltrate the stormwater.



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Photo: http://commons.wikimedia.org/wiki/Image:North-Bend-Uplands-Runoff-pond-3942.jpg

A system of stormwater infiltration ponds in the Uplands neighborhood of North Bend, Washington.

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Abacoa, Florida greenway filtration and recharge system.

Source: http://www.epa.gov/smartgrowth/case/abacoa_p2.htm

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Hypothetical

- Now, on the verge of final approvals, an NGO informs you that your project violates the CWA based on the SCOTUS decision in County of Maui.
- Convinced this must be a mistake since you are 100 miles from the Pacific Ocean, you call your water lawyer.
- You want to know - what is this decision, does it apply, and what can you do?



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Maui Background

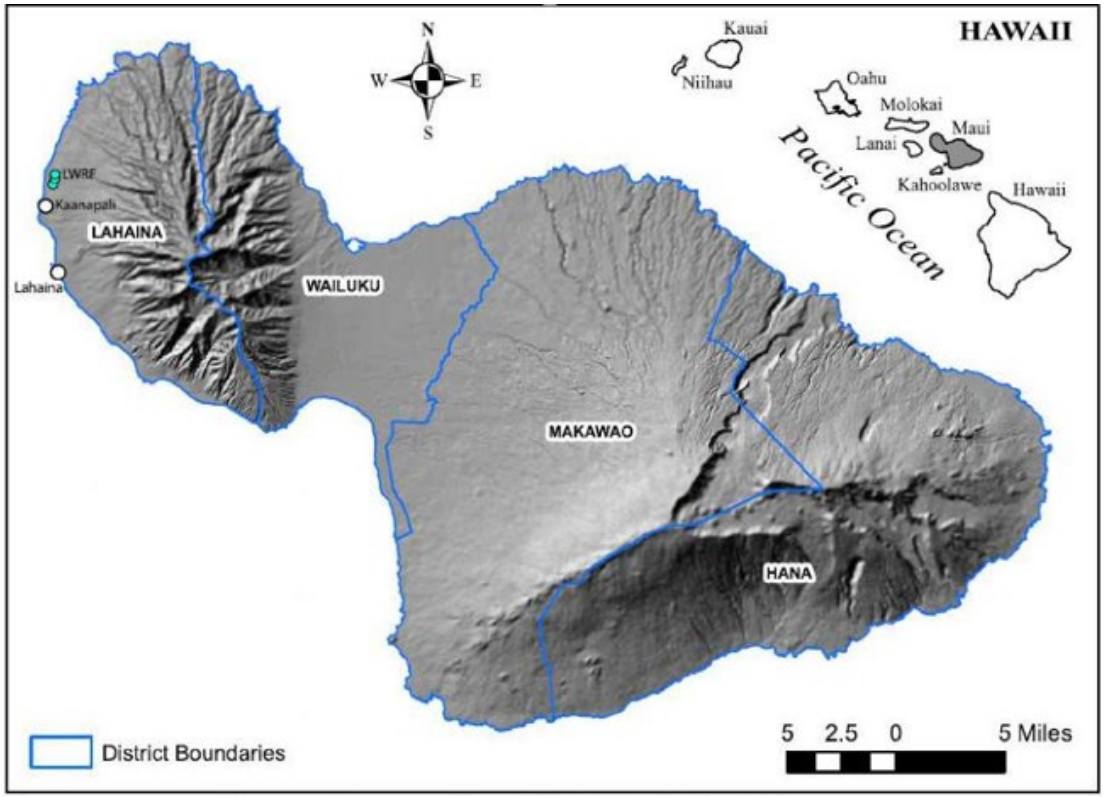

Figure 1-1: Location and topography of the Island of Maui

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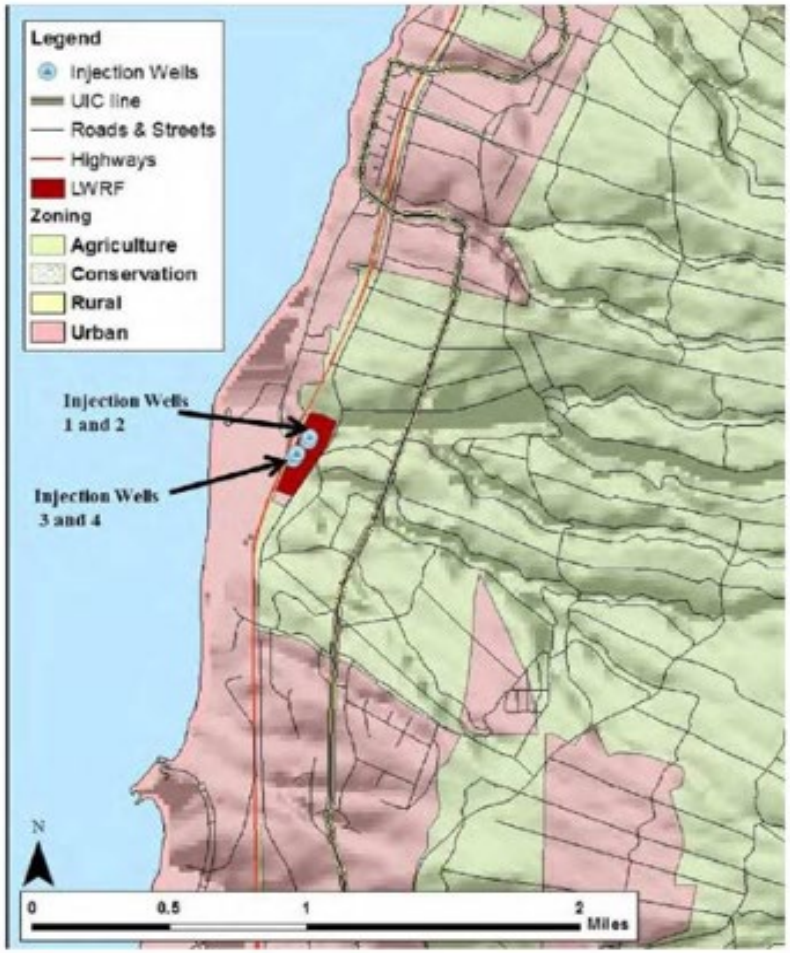
Maui Background





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Maui Technical Issues



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County of Maui v. Hawaii Wildlife Fund
590 U.S. __,140 S.Ct. 2462 (2020)

- Held – The CWA requires a permit for pollutants from a point source if the path through groundwater to navigable waters is "the functional equivalent of a direct discharge."
- The test is based on: (1) transit time; (2) distance traveled; (3) material through which the pollutant travels; (4) dilution or chemical change to pollutant; (5) amount of pollutant entering waters vs. discharged; (6) manner or area in which the pollutant enters the waters; (7) degree pollutant maintains its specific identity.



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Maui Factors Applied to Maui

County of Maui, Hawaii v. Hawaii Wildlife Fund (2020) 140 S.Ct. 1462	Hawai"i Wildlife Fund v. County of Maui (2014) 24 F.Supp.3d 980
transit time	3 months
distance traveled	0.5 mile
material through which the pollutant travels	
dilution or chemical change to pollutant	
amount of pollutant entering waters vs. discharged	"64% of the treated wastewater injected into [the] wells currently discharges from the submarine spring areas"
manner or area in which the pollutant enters the waters	Submarine springs; submarine seeps
degree pollutant maintains its specific identity	

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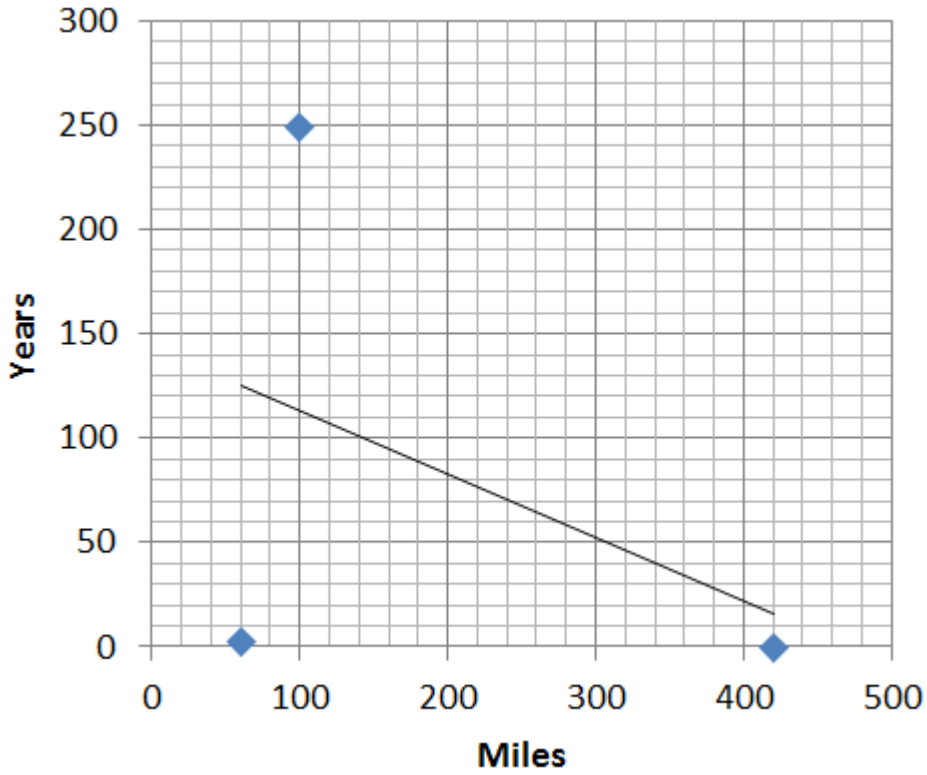
Examples in Maui

No Permit Required	
Time (years)	Distance (miles)
420	1
100	250
60	4
“Many”	50



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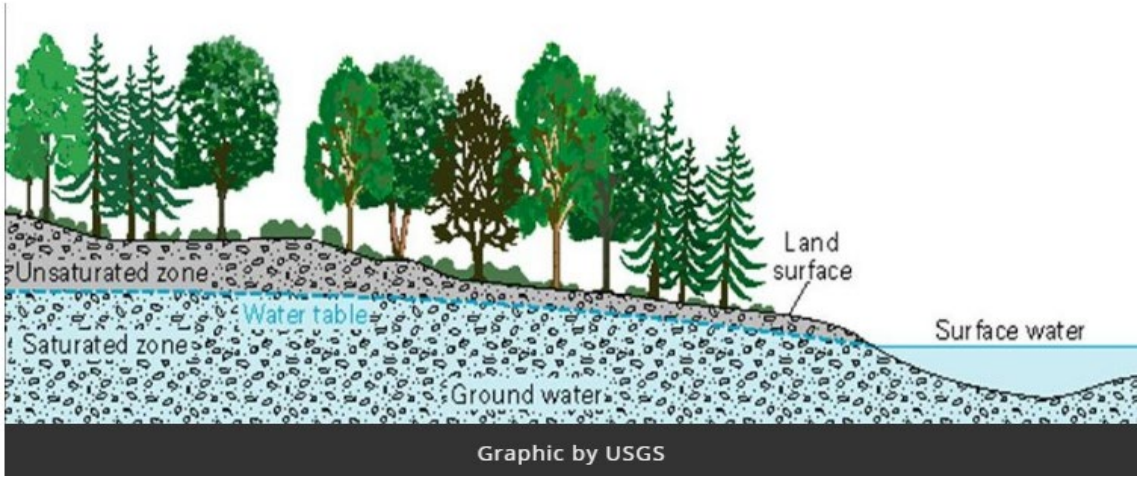
Hypothetical (cont.)

- After speaking with your lawyer, you realize the stormwater in your ponds will likely be contaminated with heavy metals, pesticides, salts, and pathogens. It percolates about 100 feet to groundwater. The nearest river is 2 miles away.
- To analyze whether this constitutes the functional equivalent of a direct discharge, you meet with a professional engineering firm.



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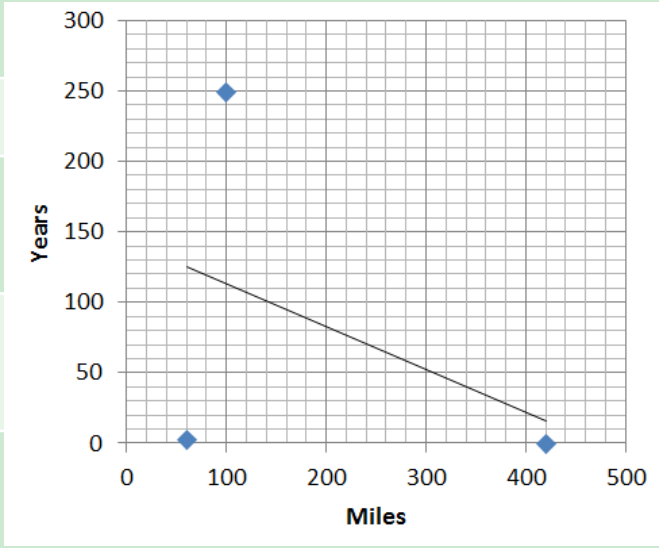
Application of "Functional Equivalent" To Detention Ponds

County of Maui, Hawaii v. Hawaii Wildlife Fund (2020) 140 S.Ct. 1462	Hawai"i Wildlife Fund v. County of Maui (2014) 24 F.Supp.3d 980
transit time	Function of all of the following
distance traveled	2 miles
material through which the pollutant travels	
dilution or chemical change to pollutant	
amount of pollutant entering waters vs. discharged	
manner or area in which the pollutant enters the waters	
degree pollutant maintains its specific identity	



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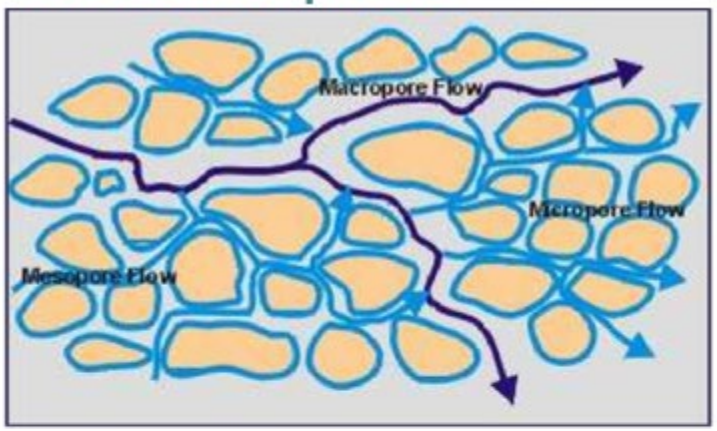
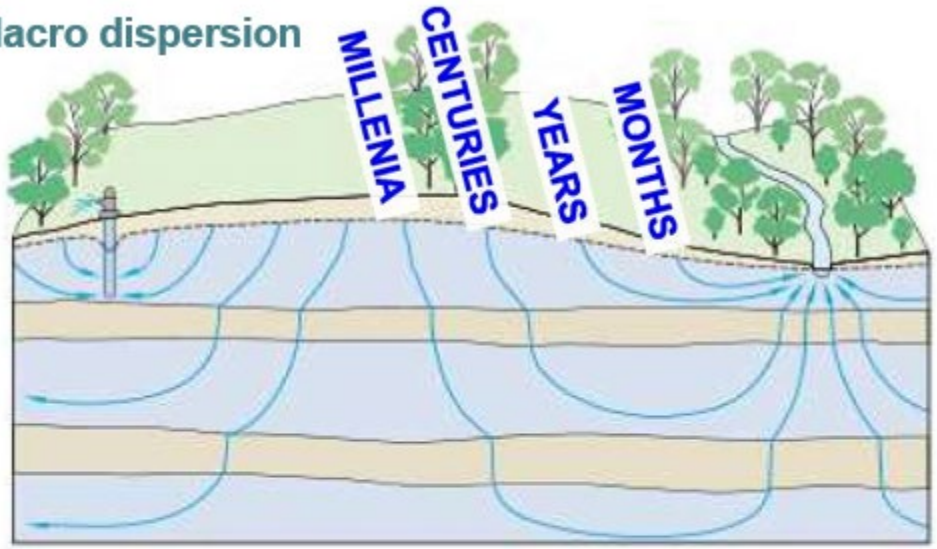
Maui Technical Issues

Pore-scale dispersion

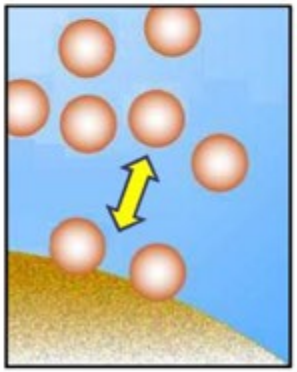


Macro dispersion

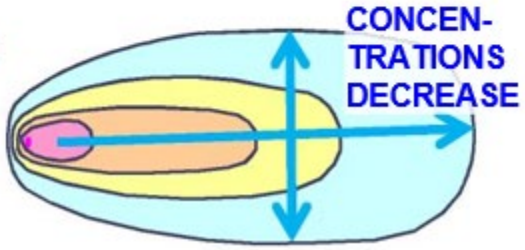


Contaminant concentrations attenuate with distance due to:

- Dispersion
- Sorption
- Degradation (physical, geochemical, biological)



Sorption slows movement



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Maui Technical Issues

- Maui conditions unrepresentative
- Not a simple matter to trace a pollutant through the subsurface to a point of surface-water discharge
- Complexity and uniqueness of hydrogeologic conditions
- Difficulty of conducting scientific tests that provide useful results
- Difficulty of knowing if projects require NPDES permit or how a permit could be implemented



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Maui Permitting Issues

- The CWA prohibits discharging "pollutants" through a "point source" into a "water of the United States" without an NPDES permit.
- The permit will contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people's health.
- In essence, the permit translates general requirements of the CWA into specific provisions tailored to the operations of each person discharging pollutants.
- After Maui, when will an NPDES permit be necessary?



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Maui Permitting Issues

New Projects under more typical groundwater conditions:

- NPDES permitting difficult to implement given uncertainties, yet discharger liable if contaminants become detectable in surface water.
- Dye or other tracer tests infeasible when groundwater movement is only a few feet per year.
- Requires an understanding of the groundwater system and contaminant behavior sufficient to predict future concentrations post-project.
- Uncertainty drives level of study required, including use of computer models.



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Maui Permitting Issues

Existing projects with no detections in receiving surface water (similar to new projects):

- NPDES permitting difficult to implement.
- Tracer studies likely infeasible.
- Hydrogeologic study and possibly modeling needed.

Existing projects with reported detections*:*

- Assertion that detected pollutants derive from particular source a *de facto* tracer test.
- Focused hydrogeologic study needed to evaluate the technical merits of this “hypothesis.”
- Actual tracer test likely take too long. Groundwater modeling probably required.

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Maui Permitting Issues

Project applicability:

- Incidental groundwater recharge from non-recharge projects (e.g., wastewater ponds) is often less regulated than projects that intentionally recharge groundwater. Maui could change this.
- Many recharge projects are unlikely to discharge to surface water unless the objectives include habitat enhancement, channel conveyance, intrusion barriers, etc., where the pathway to surface water is implicit. CWA may now apply.
- The water balance formulated by a hydrogeologic assessment can help determine whether the subsurface discharge to surface water is potentially significant relative to other flows.



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Discussion?



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