

*Appeal No. 15-17447*

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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COUNTY OF MAUI,

*Appellant,*

vs.

HAWAII WILDLIFE FUND; SIERRA CLUB - MAUI GROUP; SURFRIDER  
FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

*Appellees.*

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
CIRCUIT JUDGES MARY M. SCHROEDER, DOROTHY W. NELSON,  
AND M. MARGARET MCKEOWN

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***AMICI CURIAE* BRIEF OF THE ASSOCIATION OF CALIFORNIA  
WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION  
AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES,  
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEAGUE  
OF CALIFORNIA CITIES, NATIONAL ASSOCIATION OF CLEAN  
WATER AGENCIES, NATIONAL ASSOCIATION OF COUNTIES,  
NATIONAL LEAGUE OF CITIES, NATIONAL WATER RESOURCES  
ASSOCIATION AND WATEREUSE ASSOCIATION IN SUPPORT OF  
DEFENDANT AND APPELLANT COUNTY OF MAUI AND IN SUPPORT  
OF THE PETITION FOR REHEARING *EN BANC***

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*Amici Curiae*, Association of California Water Agencies, California Association of Sanitation Agencies, California State Association of Counties, International Municipal Lawyers Association, League of California Cities, National Association of Clean Water Agencies, National League of Cities, National Association of Counties, National Water Resources Association, and WaterReuse Association (collectively, “*Amici*” respectfully submit this brief in support of Defendant and Appellant County of Maui’s (“Maui”) Petition for Rehearing *En Banc* (the “Petition”) pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2 and 29-3.<sup>1</sup>

### **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* represent that no parent corporation(s) or publicly held corporation(s) own 10% or more of the stock in any *Amici*.<sup>2</sup>

### **INTEREST OF THE *AMICI CURIAE***

The Association of California Water Agencies (“ACWA”) is the largest

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<sup>1</sup> Defendant and Appellant, County of Maui, has consented to the filing of the proposed *amici* brief. Counsel for Plaintiffs have not consented to the filing of the proposed brief.

<sup>2</sup> No party’s counsel authored the proposed *amici* brief in whole or in part. No party or party’s counsel contributed money intended to fund preparing or submitting the proposed brief. No person, other than *Amici*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the proposed brief. Fed. R. App. Proc., Rule 29(a)(4)(E).

coalition of public water agencies in the nation, representing 440 public water agencies, which provide water supplies for urban and agricultural use.

The California Association of Sanitation Agencies (“CASA”) is a non-profit mutual benefit corporation comprised of more than 100 public agencies, including cities, sanitation and sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. CASA’s members provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries, and institutions.

The California State Association of Counties (“CSAC”) is a non-profit corporation whose membership consists of the 58 California counties. CSAC’s Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The International Municipal Lawyers Association (“IMLA”) is a non-profit, nonpartisan professional organization comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state leagues, and individual attorneys. Established in 1935 and consisting of more than 2,500 members, IMLA is the oldest and largest association of attorneys representing United States municipalities,

counties, and special districts.

The League of California Cities (“League”) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League’s Legal Advocacy Committee has identified this case as having statewide or national significance.

The National Association of Clean Water Agencies (“NACWA”) is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA’s members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

The National Association of Counties (“NACo”) is the only national association that represents county governments in the United States. NACo’s members provide water, wastewater and flood control services to residents of the nation's 3,069 counties.

The National League of Cities (“NLC”) is the country’s largest and oldest organization serving municipal governments and represents more than 19,000

United States cities and towns. Many of NLC's members provide water and wastewater services.

The National Water Resources Association ("NWRA") is a non-profit, voluntary organization of state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the western states.

The WateReuse Association ("WateReuse") is a not-for-profit association (501c6) of utilities, government agencies and industry that advocates for laws, policies and funding to promote water reuse. WateReuse advocates for policies, laws and funding at the state and federal level to increase the practice of recycling water.

*Amici's* members are responsible for important water supply, water conservation, water treatment and stormwater management services that all discharge to groundwater in some way. The issues presented in this case will define the circumstances under which a Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit is required for the continued operation and innovative development of *Amici's* members' services to their public constituents.

## ARGUMENT

### I. EN BANC REVIEW IS NECESSARY TO ADDRESS ISSUES OF EXCEPTIONAL IMPORTANCE REGARDING THE NEWLY CREATED “FAIRLY TRACEABLE” THEORY OF LIABILITY UNDER THE CLEAN WATER ACT’S NPDES PROGRAM

*Amici* urge this Court to undertake *en banc* rehearing of the Panel’s decision to affirm the summary judgment against Maui in the case of *Hawai’i Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018) (the “Decision”). *En banc* rehearing is necessary to address issues of exceptional importance arising from the newly articulated “fairly traceable” standard which affect *Amici* and their members.<sup>3</sup>

The Panel’s decision upends an existing regulatory framework that when implemented and enforced appropriately works wells to protect public health and the environment. Changing that framework threatens the ability of *Amici*’s members to deliver essential public services.

Specifically, the Panel’s decision would hold a discharger liable for discharges of pollutants to groundwater if any pollutant in the discharge is “fairly traceable” from the point source to a navigable water.<sup>4</sup> Because of the connective nature of water, discharges to groundwater will often migrate to

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<sup>3</sup> Fed. R. App. Proc., Rule 35(a)(2).

<sup>4</sup> *County of Maui*, 881 F.3d at 765, 767.

surface waters, even if the journey takes thousands of years. As a result, many currently lawful discharges to groundwater could fall within the new standard.

As detailed by Petitioner in multiple pleadings, CWA was adopted with the nature of groundwater in mind. *Amici's* members have relied on the regulatory surety provided by the Act to develop water supply systems, wastewater treatment systems and stormwater treatment systems that in turn rely on groundwater or the ability to discharge to groundwater while maintaining compliance with applicable law. These projects provide substantial public benefit and would be put at risk by the Panel's decision.

Importantly, the text of the CWA does not call for a "fairly traceable" standard at any point.<sup>5</sup> *Amici* urge the 9th Circuit to consider, *en banc*, the implications that the propriety of the "fairly traceable" standard and its implications to *Amici's* members.

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<sup>5</sup> This issue is more fully briefed by Petitioner, however *Amici* are compelled to point out that a court's conclusion must be based on a textual reading of the statute. (See *Nat'l Assoc. of Mfr. v. Dep't of Defense.*, 583 U.S. \_\_\_\_ (2018), 138 S.Ct. 617.) The Supreme Court's decision in *Nat'l Assoc. of Mfr.* is instructive. There, the Court held that "Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them." The Court expressly rejected interpretations of the CWA that were outside the plain meaning of the text of the Act. *En banc* review is further supported by the Panel's apparent failure to consider *Nat'l Assoc. of Mfr.*, which was issued on January 22, 2018, in its decision, issued February 1, 2018.

## II. EN BANC REVIEW IS NECESSARY TO RESOLVE SIGNIFICANT LEGAL UNCERTAINTY RESULTING FROM THE “FAIRLY TRACEABLE” STANDARD

*Amici* and their members urge *en banc* review of the Panel’s decision because of the legal uncertainty of complying with the “fairly traceable” standard in their operations.

### A. The Panel’s “Fairly Traceable” Test is not necessary to protect Navigable Waters

Congress foresaw that an NPDES permit is not always the solution. 26 *Crown Associates, LLC et al. v. Greater New Haven Regional Water Pollution Control Authority*, 2017 WL 2960506, at \*6, 2017 WL 2960506, at \*6 (CWA does not prohibit “every act that involves the noxious pollution of clean water.”). There are other authorities to utilize. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529-30 (2d Cir. 2017) (interpretation exempting water transfers reasonable, in part, because “several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme”).

The CWA itself contains alternatives, including, most notably, Section 311. (33 U.S.C. §1321.) Other tools include total maximum daily loads (“TMDLs”); planning; grants; “processes, procedures, and methods to control [nonpoint source] pollution;” and nonpoint source management programs.<sup>6</sup> Other

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<sup>6</sup> 33 U.S.C. §1313(d)(1)(C); *see also Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 299 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 1246 (2016) (TMDLs “tie together point-source

federal statutes can also be utilized, such as the Resource Conservation and Recovery Act (“RCRA”). 42 U.S.C. §6973(a); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984) (RCRA is “designed to deal with situations in which the regulatory schemes break down or have been circumvented.... Congress expressly intended that [RCRA] ... close loopholes in environmental protection.”).

Critically, States may adopt more stringent requirements, *see* 33 U.S.C. §1370 (preserves States’ ability to adopt any requirement to control pollution), and many States have adopted laws relevant to these circumstances.<sup>7</sup>

A finding that NPDES permits are not required for discharges to groundwater will not result in rampant pollution. Applying the correct interpretation of the Act will prohibit releases both above and below ground *when* the means of the addition to navigable waters is a discernible, confined and discrete conveyance.

**B. Requiring an NPDES permit any time a project interacts with groundwater is infeasible.**

There are several significant challenges to *Amici* members’ ability to

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and nonpoint-source pollution issues in a manner that addresses the whole health of the water.”).

<sup>7</sup> *E.g.*, S.C. Code Ann. §§48-1-90(A)(1), 48-1-10(2), (20); W. Va. Code §22-11-8(b); N.C. Gen. Stat. §143-215.2(a); Md. Code Ann., Envir. §9-322; Va. Code Ann. §62.1-44.5.A(1), (3); D.C. Code §8-103.06.

implement an NPDES program in conjunction with their projects. First, groundwater often has diffuse, unascertainable points of discharge, making it nearly impossible to know in advance whether, when or where a discharge might occur.<sup>8</sup> Applying the NPDES program in a context where a discharge point is unascertainable is simply infeasible.

Second, differences between hydrologic conditions in groundwater and surface water limit regulators' and dischargers' ability to implement the NPDES program in the groundwater context. Important features that distinguish groundwater from surface water include the fact that migration of a pollutant from land through groundwater cannot be readily observed. Additionally, subsurface geology can impact subsurface flow and the chemical characteristics of groundwater; multiple and diffuse points of discharge may not be ascertainable; other sources of pollution that preexist in the groundwater formation can join flows that ultimately reach surface waters; and chemical reactions related to the groundwater geology may alter the nature of a pollutant once it enters a groundwater formation.

In this regard, the Panel's decision creates a new standard of compliance

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<sup>8</sup> See, e.g., *Greater Yellowstone Coal. V. Larson*, 641 F.Supp.2d 1120 at 1141 (2009) ("The Court can also envision future monitoring and enforcement issues. How do you accurately decide if the contamination originated from this source, or perhaps another source?").

based on a geologic setting that is unique to Maui. The fractured volcanic bedrock through which the discharges at issue flow are generally not present throughout the rest of the Ninth Circuit.<sup>9</sup> Nonetheless, the Decision would apply in alluvial basins and other hydrologic settings with entirely different subsurface characteristics. Rehearing is justified for consideration of this issue alone.

From a technical perspective, discharge through groundwater makes compliance with the effluent limitation development and related end of pipe discharge requirements of the CWA functionally impossible. Permitting discharges to surface waters requires characterization of the effluent flow, pollutant concentration, and ambient conditions within the receiving water.<sup>10</sup> Permitting discharges to groundwater would require calculation of these factors in terms of their flow through groundwater. The dynamics of groundwater flow and the potential changes to pollutant phases that can occur in groundwater would make this a process that is fraught with uncertainty and likely to result in incorrect assumptions and unnecessary restrictions on otherwise lawful activity.<sup>11</sup>

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<sup>9</sup> See Cal. Dep't of Water Resources, *California's Groundwater* (Bulletin 118 (2003)) pp. 80-81 (discussing differences between groundwater in California's "alluvial aquifers" and groundwater in "fractured volcanics").

<sup>10</sup> See 33 U.S.C. § 1311(e); 40 C.F.R. § 122.44; U.S. EPA, *NPDES Permit Writer's Manual 2010*: 6-12 – 6-22.

<sup>11</sup> 40 C.F.R. § 122.21(j)(4)(i) (requiring outfall monitoring - groundwater generally does

**C. The Panel’s Decision Creates Uncertainty for Water Supply Operations**

Although the western United States has experienced drought conditions since at least 2013, water shortages are not limited to the western United States. Water conservation projects, such as groundwater recharge and recycled water projects, take place across the country. The “fairly traceable” standard creates significant legal uncertainty that puts these projects at risk.

**1. Groundwater Recharge**

To avoid losses from evaporation, and the negative environmental impacts associated with constructing new reservoirs, many water supply agencies rely on groundwater aquifers to store water for future use. The stored water is either native to the watershed; imported from another watershed; or recycled, getting a new lease life. To protect these operations, some projects also rely on injecting recycled and potable water into groundwater basins to create a barrier around what will become the potable supply.

Under the “fairly traceable” standard, if an agency puts any pollutant into the ground as part of a groundwater recharge project and that pollutant migrates to any “waters of the United States,” the discharge may require an NPDES

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not generally have a discernible outfall), 40 C.F.R. § 122.41(l) (requiring reporting of noncompliant discharges - no “person” discharges naturally occurring arsenic or selenium, for example).

permit. Given the unseen and complex relationship between active recharge to groundwater, and potential surface water discharges, the “fairly traceable” will discourage recharge projects that would help manage groundwater throughout the Ninth Circuit.

## **2. Recycled Water**

Recycled water is a major component of water supply across the west. The “fairly traceable” standard puts recycled water projects at risk because the water can have constituents that may be considered pollutants and is in fact regulated as waste in some settings. Land application (for irrigation purposes) impoundment (where it can seep into the ground, then to navigable waters) and groundwater recharge, could trigger NPDES requirements under the “fairly traceable” test. This would in turn hinder the use of recycled water and limit the availability of an important supply.

## **3. Surface Storage**

Water supply *Amici* own and operate include surface water impoundments, such as terminal reservoirs, and subsurface water pipelines that often contribute water into the surrounding groundwater. Determining the point of discharge from reservoirs and underground pipelines, as well as which NPDES permit requirements should apply to infrastructure with thousands of points of discharge is not feasible or within the scope of the Act. The fairly

traceable standard thus compromises the continued operation of water supply storage facilities and pipelines.

**D. The Panel's Decision Creates Uncertainty for Wastewater Treatment Operations**

The Panel's decision creates uncertainty and risk for wastewater treatment plant operators in several ways. First, it is not uncommon for collection systems conveying wastewater for treatment to experience some level of infiltration (groundwater and/or stormwater entering into systems) and exfiltration (wastewater leaking out of the system that may come in contact with groundwater). Discharges from plants to the land surface or to groundwater are not within the ambit of the CWA, and federal regulations at 40 C.F.R. sections 122.21 and 125.60 set maximum levels of infiltration from the environment. The CWA mechanism for regulating excess contact with groundwater is to control overflows and untreated discharges from the plants via their point source discharges to receiving waters. Measures to maximize conveyance of flow to the wastewater treatment plants are often couched in terms of infiltration, but infiltration and exfiltration are two sides of the same coin - addressing one will address the other.

Second, wastewater treatment plants are a major source of recycled water. As noted above, applying the "fairly traceable" standard across the 9<sup>th</sup> Circuit will hinder the use of recycled water. Wastewater treatment plant operators rely on recycled water as a source of income for the plant, and a location to dispose of

treated effluent. If the market for recycled water is hindered by over regulation, it will have a negative impact on the ability of wastewater treatment plants to operate in a cost effective manner.

Lastly, many smaller treatment plants use ponds to store and/or dispose of treated effluent. In most cases, these ponds are designed to allow treated water to percolate into underlying groundwater. Because the discharges are to groundwater, they are not subject to the CWA's NPDES requirements. Compliance with NPDES requirements in this setting is unnecessary and costly and will require many small and otherwise compliant facilities to spend millions of dollars on treatment plant upgrades. Because this kind of treatment plant is common in low income, semi-rural areas, a change in the law will hit disadvantaged communities especially hard.

**E. The Panel's Decision Creates Uncertainty for Stormwater Management and Flood Control Projects**

Many of *Amici's* members operate municipal separate storm sewer systems ("MS4"), and are subject to NPDES permits specific to MS4s.<sup>12</sup> One of the most common ways to manage stormwater is through the use of low impact development ("LID") infrastructure. LID infrastructure is designed to retain,

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<sup>12</sup> 33 U.S.C. 1342(p)(3)(B); 40 C.F.R. §122.26.

percolate and infiltrate storm flows before they reach surface waters.<sup>13</sup>

Pollutants can be filtered out and/or percolated into groundwater to prevent them from fouling downstream waters. The Panel’s decision would expose agencies who operate and maintain LID projects to liability for infiltrating stormwater in a manner that benefits the environment.

State and federal regulators and the regulated community rely on LID and other green infrastructure to treat stormwater pollution and prevent it from entering the nation’s waters. The “fairly traceable” standard would hinder these projects and limit the tools cities, counties and flood control authorities have for managing stormwater.

### **CONCLUSION**

For the reasons set forth above, we request that the Court of Appeals rehear the case *en banc*.

Respectfully submitted,

Dated: March 8, 2018

By: /s/ Shawn Hagerty

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<sup>13</sup> See, e.g., U.S. EPA, *Memorandum: Protecting Water Quality with Green Infrastructure in EPA Permitting and Enforcement Programs*, Apr. 20, 2011.

## **CERTIFICATE OF COMPLIANCE**

In accordance with the Federal Rules of Appellate Procedure, rule 32(a)(7) and Ninth Circuit Rule 32-1, I, Shawn Hagerty, hereby certify that the foregoing was produced on a computer, is proportionately spaced, has a typeface 14 points or more and, according to the word count function on the word processing program used, this brief contains 3,998 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this certificate is dated March 8, 2018.

*/s/ Shawn Hagerty*  
\_\_\_\_\_  
SHAWN HAGERTY

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed: *AMICI CURIAE* BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL WATER RESOURCES ASSOCIATION AND WATEREUSE ASSOCIATION IN SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF MAUI AND IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC* with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF System on March 8, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Executed on March 8, 2018 at Sacramento, California.

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