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Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: Brief of Amici Curiae National Association of Clean Water Agencies/Maui U.S. Supreme Court Case

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The National Association of Clean Water Agencies (“NACWA”) and other municipalities filed an Amicus Brief in the pending Supreme Court of the United States case styled *County of Maui v. Hawai’i Wildlife Fund, et al.*

The other parties on the brief include:

- City of New York
- City and County of San Francisco
- Metro Wastewater Reclamation District

The United States Supreme Court granted a Petition for Writ of Certiorari in the Ninth Circuit decision *Hawai’i Wildlife Fund v. County of Maui*, ___F.3d___(9th Cir, February 1, 2018).

The case involves whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permitting requirements.

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are met:

- A person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source.

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

The Ninth Circuit Court of Appeals decision in the *Maui* case held that discharges from a point source into groundwater can in certain circumstances be subject to the Clean Water Act. Courts had arguably, with

limited exceptions, never interpreted groundwater to be a water of the United States under the Clean Water Act.

Environmental groups argued in the *Maui* case that jurisdiction was triggered by the migration of pollutants from municipal wastewater injection wells released into the groundwater hydrologically connected to surface water (i.e., the Pacific Ocean). The Ninth Circuit Court of Appeals held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters.

The Amici state that they represent public entities from across the United States that provide water, supply water conservation, flood and stormwater management, and wastewater treatment services to the public. They or their members are stated to own, operate, or manage infrastructure that may face additional regulatory burdens and uncertainty if the Clean Water Act's permitting requirements expand to cover releases conveyed to navigable waters as non-point source pollution.

The Amici brief concludes:

The distinction between point and nonpoint source pollution is critical to maintaining the CWA's structure and the proper functioning of the NPDES permitting program. Requiring NPDES permits for mediated releases—releases from discrete sources that are conveyed by nonpoint sources—is inconsistent with the Act's language and would eviscerate this critical distinction. Such a requirement would also create disincentives for public investment in cutting-edge water management practices needed to address the water supply and quality problems of the 21st century. The Court should adhere to the limitations that Congress imposed on the scope of the NPDES program and reverse the Ninth Circuit.

A copy of the Amici brief can be downloaded [here](#).