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

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The United States through the Solicitor General (“U.S.”) 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 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 United States indicates in its brief that it has a strong interest:

. . . in ensuring that the respective roles of the federal government and the States in regulating the release of pollutants are appropriately balanced under the Act.

The United States in its brief argues in part that the NPDES permitting requirement does not apply where a pollutant is released from a point source to groundwater – even if the pollutant ultimately migrates to navigable waters. The points raised in the Summary of Argument include:

- “Discharge of a pollutant” only applies to one of three categories of water:
- Navigable waters
- Waters of the contiguous zone
- The ocean
- Groundwater is distinct from surface water
- Several Clean Water Act provisions treat groundwater pollution in the same manner as nonpoint source pollution
- The United States Environmental Protection Agency has correctly concluded that the interposition of the groundwater between a point source and a navigable water may be said to break the causal chain between the two or is an intervening cause
- Adoption of the Ninth Circuit’s “fairly traceable standard” would substantially enlarge the EPA’s regulatory authority beyond what Congress intended
- In enacting the Clean Water Act Congress was aware of the link between groundwater and surface water
- Congress safeguarded the quality of groundwater (and surface water connected to groundwater) through other federal legislation

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