

**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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On Appeal From the United States District Court for the District of Hawai'i  
Honorable Susan Oki Mollway, Chief Judge  
Case No. 12-00198 SOM/BMK

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**MOTION FOR LEAVE TO FILE *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 IN  
SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF MAUI  
AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S  
DECISION**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici* represent that no parent corporation(s) or publicly held corporation(s) own 10% or more of the stock in any *amici*.

## **STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)**

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 curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the proposed brief.

## **CONSENT OF THE PARTIES**

Defendant and appellant, County of Maui, has consented to the filing of the proposed *amici* brief. Counsel for Plaintiffs Earthjustice Legal Defense Fund, has not granted consent to the filing of the proposed brief.

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

The Association of California Water Agencies ("ACWA") is the largest 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 local public agencies, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water

districts, and municipal utility districts. CASA's member agencies 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.

*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 National Pollutant Discharge Elimination System ("NPDES") permit is required for the continued operation and innovative development of *amici*'s members' services to its public constituents.

## **ARGUMENT**

### **I. THE DISTRICT COURT'S DECISION HAS NO BASIS IN THE TEXT OF THE CLEAN WATER ACT, ITS LEGISLATIVE HISTORY, REGULATIONS OR CONTROLLING CASE LAW**

The district court issued a series of summary judgment rulings that collectively apply the Clean Water Act's NPDES permit program to the migration of pollutants from four underground injection control wells at the Lahaina Waste Reclamation Facility through groundwater to the Pacific Ocean.<sup>1</sup> The district court reached this conclusion by applying a novel "conduit" theory that requires an NPDES permit whenever pollutants leave an original point

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<sup>1</sup> Relevant here are the first two decisions, where the district court determined that discharges from well numbers 3 and 4 require an NPDES permit, Hawai'i Wildlife Fund v. County of Maui, 24 F.Supp.3d 980 (D. Haw. May 30, 2014) ("Maui I"); and relied on the same reasoning to require an NPDES permit for discharges from well numbers 1 and 2, Hawai'i Wildlife Fund v. County of Maui, No. 12-00198, 2015 U.S. Dist. LEXIS 82395 \*18 (D. Haw. June 25, 2015) ("Maui II")

source and ultimately reach navigable waters “regardless of *how* they get there . . . .” Maui I, 24 F.Supp.3d at 1000 (emphasis in original). *How* pollutants get to navigable waters, however, is the threshold trigger for the NPDES program. Or. Natural Desert Ass’n v. U.S. Forest Svc., 550 F.3d 778, 780 (9th Cir. 2008).

Despite acknowledging the lack of controlling appellate or statutory authority to support its approach, the district court disregarded the NPDES program’s threshold “point source” requirement and erroneously imposed liability based on the migration of pollutants through a diffuse, non-point source. If upheld by this Court, the decision will effectively rewrite the NPDES program by eliminating the distinction between point source discharges, which require an NPDES permit, and non-point source discharges, which do not require an NPDES permit.

**A. The District Court’s Analysis Ignores the Point Source Requirement of the NPDES Program**

The NPDES program is triggered by the “discharge of a pollutant” or “pollutants,” which the Clean Water Act defines jointly as “any addition of any pollutant to navigable waters from any point source . . . .” See 33 U.S.C. §§ 1311(a), 1342(a); 1362(12); 40 C.F.R. § 122.2; see also Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001). A “point source” is “any discernible, confined, and discrete conveyance,” which may include a discernible, confined and discrete “conduit[.]” 33 U.S.C. § 1362(14); 40 C.F.R.

§ 122.2. The district court’s holding, however, is based on the erroneous theory that for the NPDES program to apply, a point source need not actually deposit the pollutant into the navigable water, because a “conduit” “need not also be ‘confined and discrete.’” Maui I, 24 F.Supp.3d at 999.<sup>2</sup>

By definition, the NPDES program only applies to additions of pollutants to navigable waters from point sources, not to additions from non-point sources. When pollutants are added to navigable waters from a non-point source, states regulate the addition. 33 U.S.C. § 1342(a); Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) (“Nonpoint sources, because of their very nature, are not regulated under the NPDES. Instead, Congress addressed non-point sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans.”). This disparate treatment of discharges from point sources and non-point sources is “an organizational paradigm of the Act.” Or. Natural Desert Ass’n, 550 F.3d at 780. Thus, contrary to the district court’s analysis, “how” pollutants “get” to navigable water is the threshold question to consider when assessing whether the NPDES program applies.

Congress considered the “vexing nonpoint source problem[.]” when it

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<sup>2</sup> In its liability determination, the district court disregarded the requirement that a “point source” be “confined and discrete” to conclude that “not ... all conduits must be ‘confined and discrete conveyances.’” Maui I, 24 F.Supp.3d at 999.

amended the Clean Water Act in 1972 and decided not to apply the NPDES program to non-point sources. S. Rep. 95-370, at 10.<sup>3</sup> In its considerations, Congress recognized that many non-point sources of pollution are “beyond present technology of control,” and those that are controllable are generally regulated by states through their land use controls. *Id.* at 9; S. Rep. No. 92-414, at 39 (1972); *see also* 117 Cong. Rec. 38,722, 38,825 (Nov. 2, 1971) (statement of Sen. Muskie) (explaining that “[t]here is no effective way as yet, other than land use control, by which you can intercept [non-point] runoff and control it in the way that you do a point source”). In the face of these concerns, Congress also recognized that “it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control.” S. Rep. 95-370 at 10. Congress’ “clear and precise” distinction between point sources, which are subject to the NPDES program, and non-point sources, which are subject to other regulatory programs, was intentional.

This Court, as well as other courts, have honored Congress’ clear intent, and repeatedly recognize that the NPDES program and other Clean Water Act

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<sup>3</sup> *Amici* believe the statutory text is unambiguous, however, to the extent there is any ambiguity, the legislative history illustrates that Congress made a precise distinction between point and non-point sources. *See Caminetti v. United States* (1917) 242 U.S. 470, 490 (referring to legislative intent is appropriate to resolve ambiguity).



requirements apply only to the addition of pollutants to navigable waters from point sources, not from non-point sources. See Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 505 (9th Cir. 2013); Greater Yellowstone Coalition v. Lewis, 628 F.3d 1143, 1153 (9th Cir. 2010); United States v. Plaza Health Lab., 3 F.3d 643, 646 (2d Cir. 1993); Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45 (5th Cir. 1980).

In Greater Yellowstone Coalition, for example, this Court determined that a discharge to surface water from a pit through the ground did not require a Section 401 certification, because “[t]he § 401 certification requirement applies only to discharges from point sources.” Greater Yellowstone Coalition, 628 F.3d at 1153.<sup>4</sup> The ground is not a “point source” because water traveling through the ground to a surface water is “not collected or channeled” even though the discharge may have originated from a point source. Ibid.<sup>5</sup>

Consistent with the Ninth Circuit’s recognition that the NPDES program

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<sup>4</sup> Mining pits have been found to be point sources in certain circumstances; however, when water travels through the ground and into surface water, the ultimate discharge from the ground to surface water does not qualify as a point source discharge. Greater Yellowstone Coalition, 628 F.3d at 1153; see also Abston Constr. Co., 620 F.2d at 45 (water discharging from the top of a pit dug by miners into a creek constitutes a point source discharge).

<sup>5</sup> Similarly, discharges of pollutants to surface water from utility poles, animals, and humans are non-point sources. Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 505 (9th Cir. 2013) (utility poles); Oregon Natural Desert Ass’n v. Dombeck, 172 F.3d 1092, 1097-1099 (9th Cir. 1998) (cows); United States v. Plaza Health Lab., 3 F.3d 643, 646 (2d Cir. 1993) (humans).

applies only to discharges from point sources to navigable waters, the Fifth Circuit also rejected the argument that liability arises under the Clean Water Act whenever pollutants enter a waterway “regardless of how the pollutant found its way from that original source to the waterway.” Abston Constr., 620 F.2d at 44. In rejecting this argument, the Fifth Circuit correctly recognized that “[t]he focus of this Act is on the ‘discernible, confined and discrete’ conveyance of the pollutant[.]” Ibid. Absent a “discharge[] from [a] ‘discernible, confined, and discrete conveyance(s)’ ... into a navigable body of water[.]” there is no liability under the Clean Water Act’s NPDES program. Id. at 45.

Using a novel theory it refers to as the “conduit theory,” the district court ignored the NPDES program’s point source requirement and determined instead that liability is triggered when pollutants reach navigable water, “regardless of *how* they get there.” Maui I, 24 F.Supp.3d at 1000. However, *how* pollutants enter navigable waters is the threshold question for the NPDES program. See Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984); Abston Constr. Co., 620 F.2d at 44; Greater Yellowstone Coalition, 628 F.3d at 1153.

Although the district court assumed that the County’s injection wells are point sources, Maui I, 24 F.Supp.3d at 989,<sup>6</sup> and recognized that the wells do

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<sup>6</sup> Several provisions in the Clean Water Act raise questions about whether wells are covered by the NPDES program. Sections 208 and 304 of the Clean Water Act treat disposal of pollutants in wells and subsurface excavations as

not add pollutants directly to a navigable water, it concluded nonetheless that the NPDES program applies because pollutants actually enter navigable waters. Id. at 996 (“It is the migration of the pollutant into navigable-in-fact water that brings groundwater under the Clean Water Act.”). In reaching this conclusion, the district court acknowledged that no controlling appellate law or statutory text supports the application of the NPDES program through the so-called conduit theory. Ibid.

There is no support for the conduit theory because there is no basis in the Act, its legislative history or caselaw for such an approach. As explained above, the NPDES program only applies when there is an addition of a pollutant to navigable water from a point source. 33 U.S.C. §§ 1311(a), 1342(12); 1362; 40 C.F.R. § 122.2. The district court imposed liability based on the indirect migration of pollutants to the ocean from diffuse groundwater, without identifying a discharge to navigable water directly from a “confined and discrete” point source. Maui I, 24 F.Supp.3d at 997-98; see ER 410 (diffuse flow has no identifiable discharge point); ER 534, 537, 544, 593 (¶ 24), 599-601

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non-point sources subject to state regulatory programs. 33 U.S.C. §§ 1288(b)(2)(K) (treating disposal of pollutants on land or in subsurface excavations as part of state areawide waste treatment management plan), 1314(f)(D)(2) (describing disposal of pollutants in wells or in subsurface excavations as “nonpoint sources of pollution”). The NPDES program also distinguishes “the disposal of pollutants into wells” which is subject to state regulation, 33 U.S.C. § 1342(b)(1)(D), from the general discharge of pollutants to navigable waters, which is subject to an NPDES permit, 33 U.S.C. § 1342(a).

(¶ 37) (seeps are ephemeral). There is no factual or legal basis for applying the NPDES program to non-point source discharges to navigable waters. For this reason, the district court’s decision must be reversed.

**B. The Conduit Theory Confuses Point Source Analysis with the Significant Nexus Test and Waters of the United States Jurisprudence**

Despite the lack of legal support for its approach, Maui I, 24 F.Supp.3d at 996, the district court relied on cases it believed applied the NPDES program to indirect discharges. See id. at 994-1000.<sup>7</sup> The district court’s fundamental error, however, was to apply the “significant nexus” test for assessing whether a water qualifies as a “waters of the United States” to the question of whether the County was adding pollutants to navigable waters from a point source. Id. at 1001 (“the indirect discharge theory does not treat groundwater as itself ‘water of the United States,’ but as a conduit to such water”).<sup>8</sup>

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<sup>7</sup> Citing to Rapanos v. United States, 547 U.S. 71 (2006); Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), in N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007), Williams Pipe Line Co. v. Bayer Corp., 964 F.Supp. 1300 (S.D. Iowa 1997), Wash. Wilderness Coal. v. Hecla Min. Co., 870 F.Supp. 983 (E.D. Wash. 1994), United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).

<sup>8</sup> As the Supreme Court noted in Lingle v. Chevron U.S.A., it is inappropriate to transmute a test applicable in one context into a different context with its own applicable test. Lingle v. Chevron U.S.A., 544 U.S. 528 (2005). Lingle overturned the transmutation of the “substantially advances” test, applicable in due process challenges, into the context of a regulatory takings challenge. Id. at 544. The Supreme Court noted that using a due

The “significant nexus” test was developed in the “waters of the United States” context and is used to determine when discharges to wetlands that are not traditionally navigable waters are still discharges to waters of the United States. Rapanos v. United States, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring). When a point source discharges to a wetland, it may become necessary to determine whether a “significant nexus” between the non-navigable wetland and traditional navigable waters brings the wetland within the Clean Water Act’s definition of “water of the United States.” Ibid. If so, point source discharges into that wetland may be subject to the NPDES program because there is a discharge from a point source to a water of the United States. Ibid.

The “significant nexus” test does not determine whether there has been a discharge from a point source or bring a wetland, or any other waterbody, within the Act’s definition of “point source.” The district court’s decision, however, misapplies the “significant nexus” test (which considers indirect impacts) to the question of whether there has been a discharge from a point

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process test in this manner is “not only doctrinally untenable as a takings test -- its application as such would also present serious practical difficulties.” Ibid. Here, the district court misappropriated the “significant nexus” test for “waters of the United States” in the wholly separate “point source” context, a mixing of analytical approaches discouraged by the Supreme Court. As in Lingle, such a misapplication of different Clean Water Act approaches is doctrinally untenable and creates immense practical challenges.

source (which focuses on direct, not indirect, non-point source discharges).<sup>9</sup>

As noted above, the line between point and non-point sources delineates the scope of the NPDES program. Dombeck, 172 F.3d at 1096-97. The danger in the district court's reliance on cases applying the "significant nexus" test is that application of the test in the point source context eliminates the line between point and non-point sources and applies the NPDES program to any migration of pollutants to navigable waters, regardless of *how* the pollutants get to navigable waters.

**C. The Groundwater at Issue is Neither a Water of the United States nor a Point Source**

There appears to be no dispute that the groundwater at issue in this case is not "waters of the United States;" and the district court did not hold otherwise.<sup>10</sup> Maui I, 24 F.Supp.3d at 996 ("An unpermitted discharge into the groundwater,

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<sup>9</sup> For the same reason, the district court's reliance on Healdsburg, 496 F.3d 993 is misplaced. Maui I, 24 F.Supp.3d at 1000-1005. Healdsburg applied the significant nexus test to the question of whether discharges to Basalt Pond were discharges to a navigable water. Healdsburg, 496 F.3d at 995. This Court determined that the hydrologic connection between Basalt Pond and the Russian River qualified Basalt Pond as a navigable water. Healdsburg did not address the point source question.

<sup>10</sup> The Act's language, structure and legislative history supports the exclusion of groundwater from regulation under the NPDES program. 40 C.F.R. § 122.2 (explicitly excluding groundwater from the definition of water of the United States). As noted in the extensive discussion on the Act's legislative history in Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc., both the House and the Senate considered and declined to extend the Act to groundwater, in part, because "the jurisdiction regarding groundwaters is so complex." 962 F. Supp. 1312, 1316-1319 (D. Or. 1997).

without more, does not constitute a violation of the Clean Water Act”). Circuit Court cases considering whether groundwater is a water of the United States correctly conclude it is not.<sup>11</sup> The district court’s determination that the groundwater at issue is not a water of the United States is thus correct.

The groundwater here is also not a point source. 33 U.S.C. 1362(14); 40 C.F.R. § 122.2. Despite the district court’s reliance on the groundwater at issue functioning as a “conduit,” the court declined to rule that the groundwater is a “point source.” Maui II, 2015 U.S. Dist. LEXIS 82395 at \*18 (“[t]his court did not rely on the proposition that the groundwater in this case served as a point source.”) The district court properly concluded that the groundwater here is not a point source.

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<sup>11</sup> See Rice v. Harken Exploration Co., 250 F.3d 264, 272 (5th Cir. 2001) (“We must construe the [Act] in such a way as to respect Congress’s decision to leave the regulation of groundwater to the States”); Vill. Of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 966 (7th Cir. 1994) (“As the statute and regulations stand, however, the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters”); Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977) (“the legislative history ... belies an intention to impose direct federal control over any phase of pollution of subsurface waters. Instead, the congressional plan was to leave control over subsurface pollution to the states”). Although some district court cases reach the opposite conclusion, they do so by ignoring the Act’s language, structure, and legislative history to focus on the Act’s broader goals – often to achieve the outcome-oriented result of avoiding dismissal or to deny summary judgment. See, e.g., Coldani v. Hamm, No. 07-660, 2007 WL 2345016; 2007 U.S. Dist. LEXIS 62644 (E.D. Cal. 2007) (denying motion to dismiss); Idaho Rural Council v. Bosma, 143 F.Supp.2d 1169 (D. Idaho 2001) (denying summary judgment); Williams Pipe Line Co., 964 F.Supp. at 1319 (finding Hecla persuasive); Hecla, 870 F.Supp. at 991 (denying motion to dismiss).

Because the groundwater at issue is not a navigable water, Maui I, 24 F.Supp.3d at 996, or a point source, Maui II, 2015 U.S. Dist. LEXIS 82395 at \*18, and because the “conduit theory” has no textual, legislative or case law support, there is no tenable legal or factual basis for applying the NPDES program to migrations from the County’s wells. See 33 U.S.C. §§1311(a), 1342; 1362; 40 C.F.R. § 122.2. Accordingly, the district court’s ruling should be reversed.

**II. EXPANDING THE NPDES PROGRAM TO THE MIGRATION OF POLLUTANTS THROUGH GROUNDWATER REWRITES THE EXISTING REGULATORY SCHEME, RESULTS IN AN INFEASIBLE PROGRAM AND UNDERMINES INNOVATIVE APPROACHES TO WATER MANAGEMENT**

If upheld, the district court’s decision will intrude on the extensive field of existing groundwater regulation, result in an overlapping and unnecessary regulatory regime, create regulatory uncertainty, and threaten *amici*’s members’ operation of important water, wastewater, stormwater, flood control, and water conservation projects. It should, therefore, be reversed.

**A. Expansion of the Act Overburdens Existing Groundwater Regulatory Structures**

The area of groundwater regulation is already occupied by multiple federal and state laws. See, e.g., 42 U.S.C. § 300f, et seq.; 40 C.F.R. 144.1 et seq.; 42 U.S.C. 6901, et seq.; 42 U.S.C. 9601, et seq.; 7 U.S.C. 136, et seq.; 40 C.F.R. Parts 9, 141, and 142; Haw. Admin. Rules 13-168-1 et seq.; Cal. Water



Code § 10750 et seq.; Or. Rev. Stat. § 468B.150 et seq.; Wash. Admin. Code § 173-200 et seq.; Mo. Rev. Stat. § 644.061.1 et seq. The district court's decision will superimpose a regulatory scheme not designed to regulate groundwater on top of these laws and regulations, and in many cases, interfere with these laws and regulations.

**1. The District Court's Decision Interferes with Existing Federal Groundwater Regulations**

By requiring NPDES permits for indirect discharges through groundwater, the district court adds unneeded duplication to the already extensive federal and state-administered regulatory schemes. Comprehensive federal laws, such as the Safe Drinking Water Act and its Underground Injection Control ("UIC") Program, 42 U.S.C. § 300f, et seq., 40 C.F.R. 144.1 et seq., the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901, et seq., the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136, et seq., and EPA's Groundwater Rule, 40 C.F.R. Parts 9, 141, and 142, establish nationwide standards applicable to the discharge of pollutants to groundwater, injection wells, underground storage tanks, and groundwater quality. Together, these laws are specifically designed to prohibit the contamination of groundwater, regulate underground storage and injection of pollutants, limit the use of pollutants that may migrate into groundwater, and

impose significant liability for polluting groundwater.

For example, the wells at issue in this case have EPA- and State-issued UIC permits. The Safe Drinking Water Act's UIC program addresses pollution of groundwater, by imposing construction, operation, monitoring and reporting requirements on discharges from the wells. 40 C.F.R. §§ 146.1-146.14, 144.25. The direct disposal of waste into the wells is therefore fully regulated to prohibit migration of pollutants into underground sources of drinking water. 40 C.F.R. § 144.12. If subject to the NPDES program, these same wells would be regulated by overlapping and even contradictory discharge, operation, monitoring, reporting and permitting requirements. Cf., e.g., 40 C.F.R. § 122.41-122.50 (NPDES requirements) with 40 C.F.R. §§ 146.1-146.14 (UIC program regulations). As described below, application of the NPDES program to these wells and other discharges to groundwater is impractical. Congress did not intend this application.

## **2. The District Court's Decision Interferes with State Law and State Authority Over Water Resources**

States also have extensive regulatory authority over groundwater and water supply through laws adopted pursuant to state land use, waste disposal, water quality, well drilling, and other reserved authority. In accordance with the Supremacy Clause, such state programs must be consistent with federal programs, but are otherwise independent regulatory schemes. Virginia v.

Browner, 80 F.3d 869, 882-883 (4th Cir. 1996). Within this context, state laws regulate the spacing, drilling, construction, operation, and abandonment of wells, as well as pumping of groundwater. They establish standards for water supply, wastewater management and quality, and discharges of storm flows from property into groundwater. See, e.g., Haw. Rev. Stat. § 340E-2 et seq. (drinking water regulations); Cal. Water Code § 13000 et seq. (water quality control); Or. Admin. Rules § 340-041-001 et seq. (water quality standards: beneficial uses, policies and criteria).

Congress preserved the states' central role in water management when it adopted the Clean Water Act.<sup>12</sup> The U.S. Supreme Court, this Court, and the EPA recognize that the states' role should not be compromised.<sup>13</sup> Protection of

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<sup>12</sup> 33 U.S.C. §§1251(b), (g) (“the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter,” and “nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.”); 1370 (the Act “shall [not] be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.”); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 (1940) (describing federal power to regulate navigable waters); The Daniel Ball, 77 U.S. 557, 563 (1870) (same); California v. United States, 438 U.S. 645, 662 (1978) (describing states' traditional authority to regulate water); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158, 163-164 (1935) (same).

<sup>13</sup> S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004) (“the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the Act”) (internal citations omitted); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 963(9th Cir. 2006) (same).

state authority under the Clean Water Act is especially important for projects undertaken by *amici*'s members, which develop and protect reliable water supplies in a complex regulatory structure and in an increasingly water-scarce environment.

Extending the NPDES program to apply to groundwater through the conduit theory adds another layer of regulation to a comprehensively regulated field, increases the burden on regulatory agencies to administer yet another permitting program, and creates inevitable conflicts between the expanded NPDES program and state regulation of water supply. For this reason, the Court should reverse the district court's decision.

**B. Implementation of the NPDES Program in the Groundwater Context Would be Infeasible**

Implementing the NPDES program whenever a pollutant migrates into navigable waters through groundwater is infeasible and leads to the absurd result that every discharge to land, air, non-navigable surface water and groundwater may require an NPDES permit. See Ariz. State Bd. for Charter Schools v. U.S. Dep't of Educ., 464 F.3d 1003, 1008 (9th Cir. 2006) (“statutory interpretations which would produce absurd results are to be avoided.”); see also 131 Cong. Rec. 15,616, 15,657 (June 13, 1985) (declaring it “absurd” to “require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source” and warning

that such a permitting program “would be an administrative nightmare [and] ... prohibitively expensive to administer.”).

**1. Diffuse Points of Discharge are Difficult or Impossible to Locate**

Groundwater often has diffuse, unascertainable or ephemeral points of discharge, making it nearly impossible to know in advance whether, when or where a discharge from groundwater to navigable waters will occur. See, e.g., ER 410; (diffuse flows have no identifiable entry point); 534, 537, 544, 593 (¶ 24), 599-601 (¶ 37) (seeps are small and ephemeral). The uncertainty surrounding whether a particular pollutant will ever discharge from groundwater to a navigable water creates a situation where *amici*'s members and their permitting agencies will not know if an NPDES permit is required until after a discharge commences. The uncertainty also makes it infeasible to determine when, where, and how compliance is measured when there is “no confined and discrete” point of discharge from groundwater to a navigable water.

Courts recognize that it may be impossible to predict, regulate or control the discharge of a pollutant from groundwater to a navigable water. See Greater Yellowstone Coal, 641 F.Supp.2d at 1141 (“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.”).

Applying the NPDES program in a context where a discharge point is

unascertainable or ephemeral is infeasible. In light of the civil and criminal penalties applicable to violations of the NPDES program, the rule of lenity compels a narrow construction of “point source” and rejection of the expansive and unsupported “conduit theory.” See Plaza Health Labs, 3 F.3d at 649; Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1336 (2011).

## **2. Physical Differences between Surface and Groundwater Make Permit Requirements Impossible to Formulate and Implement**

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 unique to groundwater include subsurface geology; multiple and diffuse points of discharge; other sources of pollution such as pollutant plumes; chemical reactions related to the groundwater geology that may alter the nature of a pollutant once it enters a groundwater formation; saltwater intrusion; and “naturally occurring” elements that qualify as “pollutants” under the Clean Water Act (e.g., selenium or arsenic).<sup>14</sup>

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<sup>14</sup> See, e.g., 80 Fed. Reg. 63552 (2015) (Reopening of Request for Scientific Views on the Draft Aquatic Life Ambient Water Quality Criterion for Selenium--Freshwater 2015); Pac. Coast Fedn. of Fishermen's Ass'ns v. Glaser, 2013 U.S. Dist. LEXIS 132240 at \*21 (E.D. Cal. Sept. 16, 2013) (“discharges [containing naturally-occurring selenium] would otherwise ... require an

Water quality based effluent limits (“WQBELs”) provide one example of how the differences between groundwater and surface water make it infeasible to implement the NPDES program’s requirements to groundwater. Section 122.44 of 40 C.F.R. requires NPDES permits to include WQBELs if there is a reasonable potential that a discharge will interfere with water quality standards. 40 C.F.R. 122.44(a). Development of effluent limitations requires, in part, characterization of the effluent flow, flow variability, pollutant concentration, and stormwater influence within the navigable waters that receive the discharge. 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.

Characterizing the flow of groundwater or the influence of stormwater on groundwater discharges to navigable waters poses significant challenges, especially where groundwater has ephemeral seeps or diffuse discharges. This is the case here, where 90% of the submarine groundwater migrates to the ocean through diffuse flow and 10% migrates through ephemeral seeps. ER 493 (¶ 48), 534, 537, 544, 593 (¶ 24), 599-601 (¶ 37). In addition, as the groundwater at issue flows toward the ocean, it encounters sedimentary capstone formations, leaches nutrients along the flow path, and mixes with saltwater. State of Hawai’i Department of Health, U.S. EPA, and U.S. Army

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NPDES permit”).

Engineer Research and Development Center, Lahaina Groundwater Tracer Study, 60-61 (Nov. 2012).<sup>15</sup> These types of interactions often result in the groundwater accumulating naturally occurring “pollutants,” making effluent limitations impractical: WQBELS do not reduce naturally occurring pollutants.

Similarly, implementing other NPDES permit requirements, such as outfall monitoring (as illustrated here, groundwater generally does not generally have a discernible outfall), 40 C.F.R. § 122.21(j)(4)(i), reporting of noncompliant discharges (no “person” discharges naturally occurring arsenic or selenium, for example) 40 C.F.R. § 122.41(l), and enforcement of discharge violations would likewise be infeasible.

The complexity surrounding subsurface waters was one of the driving factors for Congress’ intentional exclusion of groundwater from the Clean Water Act’s NPDES program.<sup>16</sup> Additional complexity resulting from the conduit theory will overburden regulatory agencies and the regulated community. Uncertainty and complexity justified exclusion of groundwater from the Act since at least the congressional hearings in 1971, and justifies this Court’s reversal of the district court’s decision here.

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<sup>15</sup> Available at <https://www3.epa.gov/region9/water/groundwater/uic-pdfs/lahaina02/lahaina-gw-tracer-study-final-report-june-2013.pdf>. Per Hawai‘i District Court Local Rule 10.2(d), portions of this Study were filed in the district court at DE 79-10, 79-20, 89-4, 127-2, 129-3, 137-4, 139-10, 141-7, 155-5, 173-34, 217-5.

<sup>16</sup> See footnote 10, above.



**C. The District Court’s Decision Improperly Exposes *Amici*’s Members to Liability for Lawful Operations Critical to Public Health and Safety**

Long-term, the district court’s decision will delay or prevent *amici*’s members’ water supply, conservation, treatment and management projects, which directly benefit the public, by requiring compliance with impractical permits and exposing members to enforcement actions and citizen suits.

**1. Groundwater Recharge**

The western United States has experienced drought conditions since at least 2013. Water purveyors throughout the region are developing new water sources and new storage facilities to preserve and augment supplies. A major part of that effort is using subsurface aquifers to store water and highly treated recycled wastewater for potential use in water supply systems, consistent with water quality standards. To protect raw water in aquifers from saltwater intrusion, some members of *amici* also inject recycled and potable water into groundwater basins to create a barrier between saltwater and freshwater.

Groundwater storage allows water supply agencies to increase water storage and reduce losses from evaporation. Under the district court’s reasoning, if water, which an agency puts into the ground as part of a groundwater recharge project, migrates to “waters of the United States,” it will require an NPDES permit in addition to other permits already applicable to the projects.

Requiring an NPDES permit will put existing and future recharge projects at risk. As described above, hydrologic conditions unique to the groundwater setting make implementing the NPDES program infeasible for groundwater recharge projects. If the Court upholds the district court's rationale, regulatory authorities across the Ninth Circuit will be forced to issue NPDES permits for groundwater recharge projects without the ability to develop appropriate or attainable permit requirements. *Amici's* members will be at risk of either having an unachievable permit imposed on their operations, or being sued for operating without a permit. Such open-ended liability will be a major disincentive for investment in new groundwater recharge projects.

## **2. Other Recycled Water**

Other uses of recycled water will also be put at risk by the district court's decision. Land application (for irrigation purposes) and impoundment of recycled water (for other supply purposes) where it can seep into the ground, then to navigable waters, may trigger NPDES requirements under the district court's decision. See, e.g., Cal. Code Regs., tit. 22, div. 4; Or. Admin. Rules, 340-055 et seq.; Wash. Admin. Code, Ch. 173-219; Tx. Admin. Code, tit. 30, Pt. 1, Ch. 210. Requiring *amici's* members, individual property owners and other recycled water users to obtain an NPDES permit, in addition to all other permits for recycled water use, will significantly slow and complicate the

regulatory process, reducing the use of recycled water. States and the EPA are encouraging new recycled water projects as part of protecting our nation's waters. Imposing NPDES requirements by upholding the district court's decision will disincentive recycled water projects and run contrary to state and federal policy.

### **3. Other Water Supply Infrastructure**

Water supply *amici* also own and operate surface water impoundments, such as terminal reservoirs, and subsurface water pipelines that often percolate and leak water into the surrounding groundwater.<sup>17</sup> 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 conduit theory thus compromises the continued operation of water supply storage facilities and pipelines.

### **4. Low Impact Development and Green Infrastructure**

Many of *amici*'s members operate municipal separate storm sewer

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<sup>17</sup> Potable water is often considered a pollutant. See, e.g., *W.R. Grace & Co. v. United States EPA*, 261 F.3d 330, 333 (3d Cir. 2001) (describing disinfection process creating chloramines to inactivate bacteria); see also, California State Water Resources Control Board Order No. WQ 2014-0194-DWQ, Statewide National Pollutant Discharge Elimination System Permit for Drinking Water System Discharges to Waters of the United States (Nov. 18, 2014).

systems (“MS4”), and are subject to NPDES permits specific to MS4s. 33 U.S.C. 1342(p)(3)(B); 40 C.F.R. 122.26. These permits require agencies across the country to use LID infrastructure to retain, percolate and infiltrate stormwater.<sup>18</sup> The district court’s decision would expose these agencies to liability for infiltrating stormwater as required by their MS4 permits and the EPA. It would also apply to individual property owners who install similar LID infrastructure as part of new development or redevelopment.

In addition, communities nationwide are undertaking massive upgrades to their sewer systems to reduce combined sewer overflows (“CSOs”). An estimated 10 trillion gallons of stormwater rushes off rooftops, roadways, parking lots, and other impervious surfaces.<sup>19</sup> In areas with combined sewers, stormwater combines with sanitary flows, often overwhelming the sewer system, and causing overflows of untreated water and wastewater into

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<sup>18</sup> See, e.g., U.S. EPA, Memorandum: Protecting Water Quality with Green Infrastructure in EPA Permitting and Enforcement Programs, Apr. 20, 2011; see also, Los Angeles Regional Water Quality Control Board Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4, (Nov. 8, 2012) Provision VI.D.7.c.i (requiring new development and redevelopment projects to retain on-site stormwater runoff from the 0.75-inch , 24-hour rain event or the 85th percentile, 24-hour rain event).

<sup>19</sup> See Natural Resources Defense Council, Rooftops to Rivers II: Green Strategies for Controlling Stormwater and Combined Sewer Overflows, <http://www.nrdc.org/water/pollution/rooftopsII/default.asp> (October 2013).

waterways. Wastewater utilities have begun using green infrastructure projects to slow the flow of stormwater, to prevent stormwater from entering the sewer system, and to reduce the occurrence of CSOs.

State and federal regulators and the regulated community rely on LID and green infrastructure to treat stormwater pollution and prevent untreated wastewater from entering the nation's waters. The district court's decision would deal a major blow to these efforts.

#### **5. Regulatory Enforcement and Third Party Lawsuits**

Not only is it often unclear whether and where discharges from groundwater enter a navigable water, in the case of exfiltration from underground pipes, it is nearly impossible to determine whether and where discharges from pipes enter groundwater. In the event a regulatory agency determines an NPDES permit is not required for a water or wastewater system, reservoir, or other project, but later evidence demonstrates a discharge from groundwater to a water of the United States, dischargers may face crippling liability. See 33 U.S.C. § 1365. Even if all of *amici's* members sought NPDES permits for their potential discharges to groundwater, developing specific permit standards is infeasible (see Section II.B, above); poorly written requirements could put dischargers immediately out of compliance, expose them to citizen suit liability and enforcement actions, and provide no possibility of attaining

compliance.

The district court's decision would therefore create a new, burdensome and impractical regulatory program, expose *amici's* members' to significant liability for their lawful operations, and compromise water supply and management across the country.

### **CONCLUSION**

For the reasons set forth above, the district court's decision should be reversed.

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Dated: March 28, 2016

Respectfully submitted,

By: /s/ Shawn Hagerty

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**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 6,726 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 28, 2016.

/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 IN SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF MAUI AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S DECISION** 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 28, 2016.

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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