No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,
v.
HAWAI'I WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,
Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IDAHO WATER USERS ASSOCIATION, IDAHO WATER RESOURCES BOARD, LEAGUE OF CALIFORNIA CITIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL WATER RESOURCES ASSOCIATION, WATEREUSE ASSOCIATION AND WESTERN COALITION OF ARID STATES IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

Amici are organizations from across the United States whose members are public and private entities that provide water supply, water conservation, flood and stormwater management, and wastewater treatment services to the public.[1]

The Association of California Water Agencies ("ACWA") is the largest coalition of public water agencies in the nation, representing 440 water agencies. ACWA's members range in size from small irrigation districts to some of the largest water wholesalers in the world.

The California Association of Sanitation Agencies ("CASA") is a nonprofit mutual benefit corporation comprised of more than 100 local public agencies that provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries, and institutions.

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization of more than 3,000 local government entities, including cities, counties, and special districts. IMLA's

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. All counsel of record have consented to the filing of this brief.

mission is to advance responsible development of municipal law through education and advocacy.

The Idaho Water Users Association ("IWUA") is a nonprofit corporation representing over 300 canal companies, irrigation districts, water districts, groundwater districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms, and individuals dedicated to the wise and efficient use of the Idaho's water resources.

The Idaho Water Resources Board ("IWRB") is an agency of the State of Idaho responsible for the formulation and implementation of the Idaho state water plan, financing of water projects, and the operation of programs that support sustainable management of Idaho's water resources. Of relevance to the matters in this case, IWRB assists with the planning and operation of managed aquifer recharge programs designed to increase sustainability of the Eastern Snake River Plain Aquifer ("ESPA") in the State of Idaho consistent with the Eastern Snake Plain Aquifer Comprehensive Aquifer Management Planning Process ("CAMP"). IWRB currently funds operation of seven off-canal managed aquifer recharge sites and numerous on-canal recharge projects on the ESPA.

The League of California Cities ("LCC") 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 National Association of Counties ("NACo") is the only national association that represents county governments in the United States. NACo serves as an advocate for county government and works to ensure that counties have the resources, skills and support needed to successfully lead their communities. NACo's members provide water, wastewater and flood control services to the nation's 3,069 counties.

The National Association of Clean Water Agencies ("NACWA") is a nonprofit 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. Clean water utilities provide services that are essential to protecting public health and the environment; regulatory certainty is necessary to allow utilities to make and plan prudently for investments of public funds.

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. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

The National Water Resources Association ("NWRA") is a nonprofit, 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. NWRA has member associations in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Washington.

The WateReuse Association is an internationally-recognized organization made up of water utilities, businesses, government agencies and not-for-profit organizations dedicated to recycling water to ensure communities have a safe, reliable and cost-effective supply of water. WateReuse advocates for policies, laws and funding at the state and federal level to increase the practice of recycling water.

The Western Coalition of Arid States ("WESTCAS") is an organization of water and wastewater service providers who advocate for water resources in the arid southwest. Members are from Arizona, California, Colorado, Nevada, New Mexico and Texas. WESTCAS was formed in 1992 to collectively address water quality issues in an area of the country where precipitation is limited and unique arid ecosystems are the norm.

Amici submit this brief based on their compelling interest in ensuring that the Clean Water Act National Pollutant Discharge Elimination System ("NPDES")[2] permitting scheme, and attendant Clean Water Act liability, remains predictable and lawfully within the scope of the Clean Water Act.

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[2] Codified at 33 U.S.C. §§ 1251 *et seq*. (1972).

SUMMARY OF ARGUMENT

On February 1, 2018, the Ninth Circuit Court of Appeals entered judgment in *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), and on March 30, 2018, entered an order and amended opinion denying the County of Maui's petition for *en banc* rehearing.

The Ninth Circuit's decision in the Maui case created a new test for determining whether a Clean Water Act NPDES permit is required. The Court of Appeals held the County of Maui liable for violating the Clean Water Act "because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis." (*County of Maui*, 886 F.3d. at 749.)

The Ninth Circuit's newly created "fairly traceable" test redefines and significantly expands the circumstances under which an NPDES permit is required for *amici*'s member's critical services. Implementation of the test will affect core functions of government and public infrastructure, and, by extension, those public and private entities that provide such services.

Amici respectfully submit this brief in support of Petitioner and Appellant County of Maui's ("County") Petition for Writ of Certiorari pursuant to Rule 37 of the Rules of the Supreme Court of the

United States, and request the Court grant the County's Petition for the following reasons:

1. The Ninth Circuit's decision created a split of opinion[3] among the Courts of Appeals that impacts *amici's* member agencies. Following the *Maui* case, whether a Clean Water Act NPDES permit is required for discharges to groundwater depends on which part of the country the discharge is occurring in.

   Inconsistent application of the NPDES program subverts the federal interest in protecting water quality while preserving the states' autonomy over groundwater and water supply. It also infringes on the ability of *amici's* members to manage their own operations in a consistent manner, and potentially penalizes public agencies who have invested in infrastructure under the reasonable belief that their activities do not implicate the Clean Water Act's NPDES program.

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[3] Since the Ninth Circuit issued its decision in *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), other circuits have issued decisions in line with the Ninth Circuit that further contribute to the circuit split. See e.g., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637, 641 (4th Cir. 2018) petition docketed No. 18-268 (Sept. 4, 2018); *Kentucky Waterways All. v. Kentucky Utilities Co.*, __F.3d __, No. 18-5115, 2018 WL 4559315, at *1 (6th Cir. Sept. 24, 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth.,* __F.3d __, No. 17-6155, 2018 WL 4559103, at *1 (6th Cir. Sept. 24, 2018).

2. The Ninth Circuit's decision upends existing regulatory structures and imposes duplicative requirements on *amici*'s members. There are other authorities, including other provisions of the Clean Water Act and other federal and state laws, that are better designed to address pollution resulting from discharges to groundwater.

3. The County of Maui's Petition for Certiorari provides the Supreme Court with an opportunity to consider regulation of discharges to groundwater in terms of how such regulation will impact public infrastructure and resources. Subjecting *amici's* members' operations to additional or independent Clean Water Act jurisdiction will have broad implications for their ability to run their systems. Cases brought under the theory that a hydrologic connection is sufficient to trigger NPDES liability are already impacting members' operations. For example, in *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 WL 2960506 (D. Conn. July 11, 2017), appeal docketed, No. 17-2426 (2d Cir. Aug. 4, 2017), the plaintiffs allege that the local sewer agency must obtain an NPDES permit for each basement backup that allows pollutants to seep into groundwater and enter navigable waters. If the *26 Crown* plaintiffs succeed, the potential implications are extreme, requiring an

NPDES permit for basements across the country.

It is not *amici*'s position that releases of pollutants into groundwater should go unregulated. To the contrary, releases of pollutants into groundwater are regulated through other legal mechanisms. Amici and their members are committed to protecting public health and the environment but feel strongly that the NPDES program is not the appropriate legal and practical solution for managing groundwater. *Amici* therefore respectfully request that the Court grant Petitioner and Appellant County of Maui's Petition for Writ of Certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION DIVIDES THE CIRCUITS AND IMPOSES LIABILITY ON PROJECTS THAT HAVE BEEN IN PLACE FOR DECADES

The Ninth Circuit's decision in the *County of Maui* case has created a split of opinion among the Circuit Courts of Appeal.[4] Since the Ninth Circuit

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[4] Compare *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (relying on hydrologic connection theory) and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637, 641 (4th Cir. 2018) (same), petition docketed No. 18-268 (Sept. 4, 2018) with *Kentucky Waterways All. v. Kentucky Utilities Co.*, __F.3d __, No. 18-5115, 2018 WL 4559315, at *1 (6th Cir. Sept. 24, 2018) (rejecting hydrologic connection theory); *Tennessee Clean Water Network v. Tennessee Valley Auth.,* __F.3d __, No. 17-6155, 2018 WL 4559103, at *1 (6th Cir. Sept. 24, 2018) (same).

issued its decision in February 2018, decisions in the Fourth and Sixth Circuits have further compounded the split and increased regulatory uncertainty nation-wide.

As noted by the County of Maui in its Petition, the Ninth Circuit decision significantly expands the NPDES program into areas that Congress defined as nonpoint sources. These sources are not unregulated under the Clean Water Act, but regulation is explicitly excluded from the NPDES program and much of the regulatory authority is reserved to the states. *Amici* support the County's position and view of the split.

Amici write separately on this issue to highlight the uncertainty created by the Ninth Circuit's decision and the risk now posed to *amici's* members who built infrastructure in reliance on a regulatory scheme that the Ninth Circuit has now upended. Expansion of the NPDES program to numerous new categories of nonpoint sources has created a complicated regulatory patchwork, such that whether a Clean Water Act NPDES permit is required depends not on the text of the Act, but on the part of the country in which the discharge occurs.

Some of the earliest cases to consider the issue held that such discharges are not subject to the Clean Water Act's NPDES program.

As far back as 1977, in dicta, the 5th Circuit described the NPDES program as excluding discharges to groundwater. *Exxon v. Train*, 554 F.2d 1310 (5th Cir. 1977). Congress declined to amend the Clean Water Act to address the situation, and in

1994, the Seventh Circuit, in *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994) found that fact critical in holding that Congress did not intend to regulate discharges to groundwater with the NPDES program:

> The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated, and the EPA evidently has decided not to wade in on its own. . . . [W]e are confident that the statute Congress enacted excludes some waters, and ground waters are a logical candidate. Two courts have held that ground waters are not part of the (statutory) 'waters of the United States.' [citation]. The possibility of a hydrological connection cannot be denied [citation] but neither the statute nor the regulations makes such a possibility a sufficient ground of regulation.

Village of Oconomowoc, 24 F.3d at 965.

Amici's members have relied on the basic premise that discharges to groundwater are not subject to the Clean Water Act's NPDES program, both because that interpretation it truest to the text of the Act, and because until 2018, the only court of appeal to issue a decision on the matter held that this is the case. As described below, *amici*'s members engage in many activities that result in discharges to groundwater – sometimes inadvertently and

sometimes intentionally. In issuing its decision in the *Maui County* case, the Ninth Circuit upended a regulatory regime that has been in place for decades.

Now, like the Scarecrow in the Wizard of Oz, Circuit Courts across the country are pointing in opposite directions. Shortly after the Ninth Circuit issued its decision, the Fourth Circuit adopted the *Maui* rationale in a case involving discharges from a fractured pipeline, that flowed through groundwater, and into surface waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637, 641 (4th Cir. 2018), petition docketed No. 18-268 (Sept. 4, 2018).

Most recently, on September 24, 2018, the Sixth Circuit addressed the issue in two companion cases: *Kentucky Waterways Alliance v. Kentucky Utilities*, No. 17-6155, 2018 WL 4559315, *7 (6th Cir. Sept. 24, 2018), and *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 3:15-cv-00424, 2018 WL 4559103, *6 (6th Cir. Sept. 24, 2018).

In both cases, the court rejected the theory that an NPDES permit is required where pollutants are discharged *through* groundwater that conveys them to navigable waters, explaining that "[the pollutants] are not coming *from* a point source; they are coming from groundwater, which is a nonpoint-source conveyance." *Kentucky Waterways Alliance*, WL 4559315 at *7 - *8. As the court explained, groundwater itself cannot be a point source because of its diffuse nature, and as a result "[t]he CWA has no say over that conduct." *Id*. The Sixth Circuit went on to emphasize Congress' clear intent to reserve power over discharges to groundwater to the

states, focusing on the Act's specific purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources." *Id*. at *8, quoting 33 U.S.C. § 1251(b).

Maui County built its groundwater discharge facility using United States Environmental Protection ("EPA") funding in reliance on the Safe Drinking Water Act's underground injection control ("UIC") permits as authorized by both EPA and the State of Hawaii. For almost 40 years, these agencies maintained that UIC permits were the proper mechanism to regulate well disposal. The state of Hawaii maintained that NPDES permits were not required because the discharge was to groundwater. EPA only took a position after the district court issued a decision in favor of Hawaii Wildlife Fund.

The situation in Maui is not unique. Wastewater treatment operators, water supply purveyors, flood control districts, and stormwater management agencies have all made investments in infrastructure based on the reasonable belief that the NPDES program would not apply to activities involving discharges to groundwater. The Ninth Circuit's decision in the *Maui* case has upended that regulatory structure. To remedy this situation, and to consider the full range of impacts associated with regulating discharges to groundwater under the Clean Water Act, *amici* request that the Court grant the *County of Maui's* Petition for Certiorari.

II. *AMICI'S* MEMBERS' FACILITIES ARE EXTENSIVELY AND ADEQUATELY REGULATED UNDER OTHER PROGRAMS

Congress did not create the NPDES program to address every situation in which pollutants make their way into surface waters. *26 Crown Assocs.*, 2017 WL 2960506, at *6 (CWA does not prohibit "every act that involves the noxious pollution of clean water."). The Clean Water Act was established on the premise that states would retain authority over, among other things, water supply and groundwater. This is evident in Congress' decision to include in the CWA an express reservation for state authority over water supplies, 33 U.S.C. §§ 1251(g); 1370, and to decline to amend the CWA to expressly regulate groundwater. *See Village of Oconomowoc, infra.*

To that end, Congress and the states have relied on numerous other authorities to regulate groundwater while protecting traditional interests in state and local regulation. *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") *Kentucky Waterways Alliance v. Kentucky Utilities*, No. 17-6155, 2018 WL 4559315, *7 (6th Cir. Sept. 24, 2018), and *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 3:15-cv-00424, 2018 WL 4559103, *6 (6th Cir. Sept. 24, 2018).

The Clean Water Act itself contains a variety of programs and alternatives to NPDES permitting, which account for potential contributions from groundwater to surface waters that are subject to the Act. These include Section 311, which regulates discharges of oil and hazardous substances to surface waters and adjoining shorelines, and tools such as total maximum daily loads; "processes, procedures, and methods to control [nonpoint source] pollution" and nonpoint source management programs. 33 U.S.C. §§ 1288(b), 1314(f)(2)(A)-(F), 1321, 1329(b).

The CWA is just one part of the larger web of applicable federal law. Other federal statutes are also specifically intended to handle pollutants that reach groundwater or otherwise affect surface waters, such as the Safe Drinking Water Act's UIC program, which was at issue in the *Maui* case, 42 U.S.C. §§ 300h-300h-80; the Coastal Zone Act, which regulates discharges of pollutants into coastal waters, 16 U.S.C. § 1451-1466; the Comprehensive Environmental Response, Compensation, and Liability Act, which addresses hazardous substances released into the "environment," a term that expressly includes groundwater 42 U.S.C. § 9601(8); and the Resource Conservation and Recovery Act which provides "cradle to grave" control and responsibility over hazardous waste, 42 U.S.C. § 6973(a); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984) (Congress expressly intended that [RCRA] … close loopholes in environmental protection.").

In addition, states may adopt more stringent requirements beyond federal regulations. *See* 33

U.S.C. § 1370 (preserves States' ability to adopt any requirement to control pollution). All 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. Because the release of pollutants into groundwater is already prohibited and/or regulated in *every state*, there is no practical reason to extend the NPDES program beyond what Congress intended.

But, the Ninth Circuit's "fairly traceable" test does just that. The test adds a duplicative overlay of regulations through a permitting program that was never intended to address the type of sources at issue in the *Maui* case.

III. THE NINTH CIRCUIT'S DECISION WILL HAVE FAR REACHING IMPACTS TO PUBLIC INFRASTRUCTURE AND RESOURCES

There are multiple cases pending before this Court, or in Courts of Appeals across the country that involve regulation of discharges to groundwater under the Clean Water Act. *See, e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637, 641 (gasoline pipeline), petition docketed No. 18-268 (4th Cir. Sept. 4, 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth.,* __F.3d __, No. 17-6155, 2018 WL 4559103, at *1 (6th Cir. Sept. 24, 2018) (coal powered power plant); *Kentucky Waterways All. v. Kentucky Utilities Co.,* __ F.3d __, No. 18-5115, 2018 WL 4559315, at *1 (6th Cir. Sept. 24, 2018) (coal combustion residuals).

Amici support Supreme Court review of any of these cases. However, because the Ninth Circuit's decision in the *Maui* case presents the issue in the

context of public infrastructure – and the case will have broad implications for public infrastructure – *amici* feel strongly that the Court should the County's Petition.[5]

Under the Ninth Circuit's "fairly traceable" test, if an entity releases any pollutant into the ground from a conveyance that could be classified as a point source,[6] and that pollutant migrates to any "waters of the United States," the release will require an NPDES permit. The decision will significantly expand the number and type of wastewater, stormwater, water supply and other types of critical infrastructure sources that are subject to the requirements of the Clean Water Act's NPDES program. Many activities that the public rely on and that local government has invested in will be required to meet unattainable standards. In some cases, projects that benefit public health and the environment will not be implemented.

A. Wastewater Treatment Operations

Public clean water utilities operate wastewater treatment plants and other critical infrastructure to convey, store, and treat wastewater and stormwater. These utilities provide services that are essential to protecting public health and the environment.

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[5] *Amici* have additional concerns about the unique geology of Maui and its applicability to groundwater conditions in the rest of the United States. If the Court grants review in the *Maui* case, *amici* will provide additional briefing on this issue.

[6] The Clean Water Act's definition of the term "point source" is extremely broad, including any "discrete conveyance." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

Working closely with state and federal regulators, clean water utilities have collectively achieved an astonishing level of pollution reduction under the Clean Water Act, both at their own facilities and at thousands of industrial facilities regulated under the federal pretreatment program. Given their reliance on public ratepayer funds, the ability of these utilities to continue the critical work they do requires careful planning and regulatory certainty.

Clean water utilities own, operate, and manage the nation's most critical infrastructure systems for protecting public health and the environment, including publicly owned treatment works ("POTWs") that are subject to stringent NPDES permit requirements for discharges to surface waters. These permits include limits on the pollutants in those discharges to meet water quality standards in the receiving waters.

Clean water utilities also operate collection systems that convey wastewater to their POTWs, ranging in size from a few hundred miles to several thousands of miles of buried pipe. NPDES permits generally require utilities to operate and maintain these collection systems, *but collection systems are not typically covered by the PDTW's permit.* Consequently, utilities implement a number of methods to locate and address issues, including collection system inspection using closed circuit television inspections and rehabilitation and repair of any leaks. Some states, such as California, also have separate requirements for collection systems that are specifically designed to ensure proper system maintenance and repair.

Regardless of diligent and rigorous maintenance and repair, these facilities and systems—many of which may be more than 100 years old—can leak. Such leaks could fall within the scope of the "fairly traceable" theory. Clean water utilities work diligently to prevent any leak. With tens of thousands of miles of pipelines in wastewater treatment systems, leaks can and do happen because they are difficult to predict and locate, and impossible to completely eliminate.

If the Ninth Circuit decision stands, each leak would potentially be regulated as a distinct discharge under the CWA, which would be impractical, if not impossible, to regulate and manage. And—particularly in light of the potential for citizen suits—such regulation could undermine the ability of utilities to plan and prioritize investments to maximize overall benefits to public health and the environment.

B. Water Supply and Reuse

Regulation of discharges through groundwater under the NPDES program will interfere with water supply and reuse operations in multiple ways. The Clean Water Act's definition of the term "pollutant" is extremely broad, *see* 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2, and many constituents that are present in potable water can be classified as pollutants under the Act. An NPDES permit would, by definition, impose limits on how and where those "pollutants" can be discharged.

In the groundwater setting, even releases that contain low levels of pollutants would be required to attain standards that were developed to manage

discharges that go directly into surface waters. Compliance would require water utilities to spend millions (potentially billions) of dollars controlling releases that in most cases pose little threat to the environment and that Congress and the states have appropriately regulated with other programs.

1. Water Supply System

Potable water delivery in the United States involves the use of pipelines and aqueducts that can and do leak to groundwater. In order to ensure that untreated groundwater cannot enter potable water lines, water in the lines is kept at high pressure so that the potable water will flow out in the event of a leak. Older systems have leaks that, in many cases, are not discoverable.

Pressurizing the lines is a safe, time tested method of delivering potable water to peoples' homes. Nonetheless, because potable water contains disinfectants such as chlorine or chloramine, discharges of potable water to groundwater from pressurized lines could implicate the NPDES program under the Ninth Circuit's *Maui* decision if those discharges reach surface waters.

NPDES permitting could require water purveyors to reduce chlorine to level, which would interfere with the safety of the water provided, to spend millions of dollars on infrastructure improvements that address a problem that poses very little risk to the environment, or to face citizen suits or enforcement actions. This is an untenable outcome that would severely interfere with the ability of water purveyors to deliver healthy, potable water to the public.

On a larger scale, municipal water purveyors move water vast distances across the country. The delivery system is made up of canals, aqueducts, pipelines and reservoirs. Water escapes from these facilities and into underlying or surrounding groundwater formations, and in some cases back to surface waters. Similarly, agricultural water delivery entities employ canals and laterals to deliver water and settling ponds to remove sediment from the water. Many of these facilities – particularly unlined facilities – seep into groundwater that is connected to surface water. The Ninth Circuit's decision would potentially require NPDES permits for every irrigation delivery system with unlined canals or settling ponds and infringe on their ability to operate in the same way permitting would impact potable supply delivery.

2. Managed Groundwater Recharge Projects

States and communities throughout the nation, particularly in the west, are grappling with increasingly limited water supplies. As demand increases, groundwater levels in many parts of the country continue to decline. One way water supply system operators are addressing this problem is through managed recharge projects. In addition, in areas where the surface water and groundwater are connected, recharge is a proven mechanism to revitalize natural streams.

Managed recharge is accomplished by diverting water into unlined canals and/or basins and allowing that water to seep into the ground. Some, if not most, of the recharged water will stay in the aquifer.

However, some portion of the recharged water will flow to springs or seeps that feed surface water streams and rivers. In Idaho, for example, declining groundwater supplies have resulted in reduced spring flows from the Eastern Snake Plain Aquifer that feeds the Snake River and its tributaries. Declining water supplies have affected agricultural and municipal uses and have resulted in multiple water use conflicts throughout the region.

In 2009, Idaho's legislature enacted House Bill 264, Idaho House Bill 264, Ch. 233, eff. Apr. 23, 2009, approving the Eastern Snake Plain Comprehensive Aquifer Management Plan ("CAMP"). The CAMP process established goals managing the aquifer, including managed aquifer recharge. The Idaho Legislature reiterated its commitment to recharge in 2016, through a Senate Concurrent Resolution directing the Idaho Water Resources Board ("IWRB") to develop a program to recharge an annual average of 250,000 acre-feet by 2024. The goal of this managed recharge is to stabilize and recover the ESPA and to restore spring flows that feed the Snake River and its tributaries.

The Ninth Circuit's ruling could unnecessarily subject these managed recharge operations to a requirement to obtain NPDES permit authorization – even though such activities were never intended to be subject to the NPDES permit program.

3. Water Reuse

To address limited supplies, many water agencies are pursuing water recycling projects. Recycled waste is treated wastewater that is given new life by being put to use for irrigation, surface or

groundwater replenishment, watershed restoration, and agricultural purposes.[7]

Communities across the country are incorporating this kind of water reuse into their water management strategies as a proven method for ensuring a safe, reliable, locally controlled water supply. By 2027, the volume of recycled water produced in the United States is projected to increase 37% from 4.8 billion gallons per day to 6.6 billion gallons per day.[8]

Like potable water, recycled water can contain low levels of chlorine, nitrogen, and total dissolved solids. These constituents are present at levels that are safe for public health and (depending on the level of treatment) human consumption. Nonetheless, the Ninth Circuit's ruling could impede the implementation of reuse projects by requiring NPDES permits in cases where the recycled water may end up in surface waters after being discharged to groundwater. This could occur in the case of groundwater recharge or injection (like in Maui), seepage from recycled water storage ponds and use of recycled water for irrigation, or other similar activities.

The demand for recycled water by end users may also decrease as customers fear the potential regulatory costs and legal exposure they may face if

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[7] Notably, recycled water is produced by municipal wastewater treatment plants that are already subject to stringent regulatory requirements, including NPDES permits.

[8] Bluefield Research, U.S. Municipal Water Reuse: Opportunities, Outlook, & Competitive Landscape 2017–2027 (2017).

using or impounding recycled water triggers NPDES compliance requirements. Thus, the court's "fairly traceable" test could cause a significant setback to water reuse policies and public support, which have gained important momentum in recent years.

Critically, EPA has never required NPDES permits for these types of projects, and in fact encumbers them. The Agency recognizes water reuse as "play[ing] a critical role in helping states, tribes, and communities meet their future drinking water needs."[9] Even if federal agencies do not target reuse projects, the uncertainty surrounding whether an NPDES permit may be needed and the potential for citizen suits could be a barrier to further implementation of reuse projects.

C. Stormwater Management and Flood Control Projects

The Ninth Circuit's decision also threatens to impact various types of infrastructure built to store, treat, and otherwise manage storm flows and urban runoff. For example, low impact development and other green infrastructure that is used to help address urban runoff has been strongly encouraged by the EPA and is a required aspect of many municipal separate storm sewer system ("MS4") NPDES permits. EPA has encouraged and funded the development of green infrastructure, which is designed to allow stormwater to percolate into the ground and disperse in order to mitigate impacts on surface waters. Many municipalities have invested

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[9] U.S. Environmental Protection Agencies, 2017 Potable Reuse Compendium (2017).

heavily in green infrastructure with the support and guidance of EPA and state regulatory authorities. Some of this infrastructure is owned by MS4 permittees, some is constructed on private property as part of a development project. The infrastructure is built to improve water quality, but not all of it is covered by an NPDES permit.

Under the Ninth Circuit's decision, however, green infrastructure would potentially require its own NPDES permit, creating regulatory uncertainty, significantly increasing compliance costs, and creating a massive administrative burden for permitting agencies. Indeed, one of the reasons that some municipalities are tasked with imposing green infrastructure requirements on new development is because the EPA and state NPDES permitting agencies lack the resources to issue permits for every discharge that triggers NPDES compliance. The Ninth Circuit's decision increases that burden.

Every instance where stormwater runoff drains into green infrastructure—for the very purpose of preventing pollutants from entering surface waters—could be viewed as a release to groundwater that might be "fairly traceable" to surface water. This type of approach is inconsistent with how states have categorized stormwater and the infiltration of stormwater and is inconsistent with the purpose of the Act. *See, e.g.*, Oyster Pond Embayment System TMDL at 4, 14 (Feb. 7, 2008) (Massachusetts assigned load allocations to stormwater runoff as nonpoint source pollution, knowing that "the vast majority of stormwater percolates into the ground and aquifer and proceeds into the embayment

systems *through groundwater migration*.") (emphasis added).

At the urging of E.P.A., public agencies across the U.S. are increasingly relying on green infrastructure to retain, percolate, and infiltrate stormwater into the ground to control pollutants, and to recharge depleted drinking water aquifers. Green infrastructure is recognized as one of the most effective solutions to the water quantity and quality problems associated with polluted stormwater runoff. EPA has determined that green infrastructure provides a "cost-effective, resilient approach to managing wet weather impacts that provides many community benefits."[10] By subjecting green infrastructure to the NPDES program, the Ninth Circuit's decision would have a chilling effect on the use of this valuable and environmentally beneficial tool for addressing polluted stormwater runoff.

CONCLUSION

Subjecting *amici's* operations to additional NPDES permitting will interfere with important public health and safety operations that Congress never intended the NPDES program to reach. *Amici* strongly believe that the split of opinion among the Circuit Courts of Appeals needs addressing, and that any decision on this matter should consider the environmental and public health benefits that

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[10] U.S. Environmental Protection Agency, What Is Green Infrastructure?, https://www.epa.gov/green-infrastructure/what-green-infrastructure (last visited May 17, 2018).

amici's members provide to the public, and how expanding the NPDES program will interfere with those operations. The *Maui* case provides the Court with that opportunity and *amici* therefore request that the Court grant the County's Petition for Writ of Certiorari.

Respectfully submitted,

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October 1, 2018