

App. No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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COUNTY OF MAUI,

*Petitioner,*

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB – MAUI GROUP;  
SURFRIDER FOUNDATION;  
WEST MAUI PRESERVATION ASSOCIATION,

*Respondents.*

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ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR  
A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETITIONER'S APPLICATION TO EXTEND TIME TO  
FILE A PETITION FOR A WRIT OF CERTIORARI

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**COUNTY OF MAUI**  
PATRICK K. WONG  
RICHELLE M. THOMSON  
200 South High Street  
Wailuku, Maui, Hawai'i 96793  
Phone: (808) 270-7740

**HUNTON ANDREWS KURTH LLP**  
MICHAEL R. SHEBELSKIE  
(counsel of record)  
ELBERT LIN  
951 East Byrd Street, East Tower  
Richmond, Virginia 23219  
Phone: (804) 788-8200

COLLEEN P. DOYLE  
550 South Hope Street, Suite 2000  
Los Angeles, California 90071  
Phone: (213) 532-2000

Attorneys for Petitioner

To the Honorable Anthony M. Kennedy, Jr., Associate Justice of the Supreme Court of the United States and as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner County of Maui (County) respectfully requests that the time for a petition for writ of certiorari in this matter be extended for 60 days to and including August 27, 2018. The Court of Appeals issued its opinion on February 1, 2018 (see App. A, *infra*). On March 30, 2018, the Court of Appeals issued an order and an amended opinion (see App. B, *infra*) in which it denied the County's timely petition for rehearing *en banc*. The County's petition therefore would be due on June 28, 2018 absent an extension. The County is filing this application at least ten days before that date. The Court has jurisdiction over the judgment under 28 U.S.C. §1254(1).

### **BACKGROUND**

This case concerns whether the ban on the discharge of pollutants under the Clean Water Act (CWA or Act) reaches the addition of pollutants to groundwater. The Act's ban on the discharge of pollutants is limited to the addition of pollutants from point sources to waters of the United States. 33 U.S.C. §§1311, 1362. It has been recognized throughout the CWA's 40-year history that groundwater does not constitute "waters of the United States." The addition of pollutants to groundwater thus falls beyond the Act's ban on the discharge of pollutants.

The Court of Appeals upset that statutory scheme by holding that the County violated the CWA by discharging treated wastewater into groundwater via underground injection control (UIC) wells. UIC wells are a widespread method to dispose of treated municipal wastewater and, as is true for the County's wells, are regulated under federal and state Safe Drinking Water Acts. The Court of Appeals nonetheless held the well disposal violates the CWA because more

than a *de minimis* amount of pollutants in the ocean over half mile south of the injection site is “fairly traceable” to the wells, having traveled to coastal waters via subterranean groundwater flow.

The Court of Appeals’ ruling radically expands “the reach and systemic consequences of the [CWA],” which continues to be “a cause for concern.” *U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, J., concurring). More than 90% of groundwater is hydrologically connected to surface water and is now subject to CWA jurisdiction under the logic of the Court of Appeals’ decision.

The County intends to seek certiorari. The Court of Appeals’ decision conflicts with the CWA’s text, structure, and legislative history. It also conflicts with this Court’s decision in *South Florida Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and the decisions of several federal courts of appeals, including the Fifth and Seventh Circuits in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1992), which held the CWA does not prohibit the addition of pollutants to groundwater even if the groundwater is hydrologically connected to surface water. And not least, it conflicts with this Court’s admonition in *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014), against interpreting a federal statute in ways that dramatically expand agency authority and newly require permits for “tens of thousands” of applications previously outside the statute’s purview.

### **REASONS FOR GRANTING AN EXTENSION OF TIME**

The time to file a petition for a writ of certiorari should be extended for 60 days for these reasons:

1. The issue raised by this appeal is currently the subject of five appeals in three other circuits—the Second, Fourth and Sixth. *26 Crown Assocs., LLC v. Greater New Haven*

*Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir.); *Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir.); *Sierra Club v. Virginia Electric & Power Co.*, No. 17-1895(L) (4th Cir.); *Tennessee Valley Authority v. Tennessee Clean Water Network*, No. 17-6155 (6th Cir.); *Kentucky Waterways All. v. Kentucky Utils. Co.*, No. 18-5115 (6th Cir.).

2. One or more of those appeals is likely to result in a certiorari petition to this Court raising the same issue as the County's. In one (*Upstate Forever*) the Fourth Circuit panel issued a decision siding with the Ninth Circuit. A divided Fourth Circuit denied a petition for *en banc* consideration on May 30, 2018, so the time for a certiorari petition in that appeal is now running. In two (*Sierra Club* and *26 Crown Assocs.*) the appeals have been submitted on the merits after oral argument. The appeals in the remaining two (*Tennessee Valley Authority* and *Kentucky Waterways All.*) are scheduled for argument on August 2, 2018.

3. By extending the date for the petition in this case, the Court is more likely to have the benefit of the rulings in these other cases when deciding whether to grant the County's petition. The Court also may have certiorari petitions in those other appeals that it could consider along with the County's.

4. In addition, the United States Environmental Protection Agency (EPA) submitted an amicus brief before the Ninth Circuit advocating for the extension of the CWA to groundwater with a direct hydrological connection to surface water. But by notice published in the Federal Register on February 20, 2018, the EPA requested comment on its "previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA

regulation.” 83 Fed. Reg. 7126 (Feb. 20, 2018). Public comments on EPA’s notice were filed May 21, 2018.

5. The requested extension makes it more likely the Court would have the benefit of EPA’s decision and the Government’s position when considering the County’s petition.

6. An extension will not prejudice Respondents. The mandate from the Court of Appeals has issued (See App. C, *infra*).

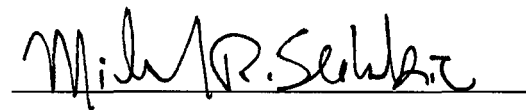
**CONCLUSION**

For the foregoing reasons, the Court should extend the time to file a petition for a writ of certiorari in this appeal 60 days to and including August 27, 2018.

Dated: May 31, 2018

Respectfully submitted,

**COUNTY OF MAUI**



COUNTY OF MAUI  
Patrick K. Wong  
Richelle M. Thomson  
200 South High Street  
Wailuku, Maui, Hawai‘i 96793  
Phone: (808) 270-7740

HUNTON ANDREWS KURTH LLP  
Michael R. Shebelskie  
(counsel of record)  
Elbert Lin  
951 East Byrd Street, East Tower  
Richmond, Virginia 23219  
Phone: (804) 788-8200

Colleen P. Doyle  
550 South Hope Street, Suite 2000  
Los Angeles, California 90071  
Phone: (213) 532-2000

*Counsel for Petitioner*