

## GET Committee

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**From:** Paul Arrington <paul@iwua.org>  
**Sent:** Thursday, August 29, 2019 10:18 AM  
**To:** GET Committee; Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura  
**Cc:** Paul Arrington; Andre Monette  
**Subject:** County of Maui v. Hawaii Wildlife Fund (Appeal No. 18-260)  
**Attachments:** 20190829 Comments to Maui County (IWUA).pdf

Chair Molina & Members of the Governance, Ethics and Transparency Committee:

Please see the attached comment letter regarding the County of Maui appeal pending before the Supreme Court.

Thank you,

Paul L. Arrington  
Executive Director & General Counsel  
**Idaho Water Users Association**  
1010 W. Jefferson, Ste. 101  
Boise, ID 83702  
(208) 344-6690 (office)  
(208) 404-9436 (cell)  
(208) 344-2744 (fax)



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P: 208-344-6690 F: 208-344-2744 E: [iwua@iwua.org](mailto:iwua@iwua.org)

August 29, 2019

Sent via email to:

[GET.committee@mauicounty.us](mailto:GET.committee@mauicounty.us)  
[Kelly.King@mauicounty.us](mailto:Kelly.King@mauicounty.us), Council Chair  
[Keani.Rawlins@mauicounty.us](mailto:Keani.Rawlins@mauicounty.us), Council Vice-Chair  
[Tasha.Kama@mauicounty.us](mailto:Tasha.Kama@mauicounty.us), Presiding Officer Pro Tempore  
[Riki.Hokama@mauicounty.us](mailto:Riki.Hokama@mauicounty.us), Councilmember  
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[Tamara.Paltin@mauicounty.us](mailto:Tamara.Paltin@mauicounty.us), Councilmember  
[Shane.Sinenci@mauicounty.us](mailto:Shane.Sinenci@mauicounty.us), Councilmember  
[Yukilei.Sugimura@mauicounty.us](mailto:Yukilei.Sugimura@mauicounty.us), Councilmember

RE: *County of Maui v. Hawaii Wildlife Fund (Appeal No. 18-260)*

Chair Molina & Members of the Governance, Ethics and Transparency Committee:

On behalf of the members of the Idaho Water Users Association (IWUA), I write to urge you to continue your appeal before the United State Supreme Court in the matter of *County of Maui v. Hawaii Wildlife Fund* (Appeal No. 18-260). This appeal addresses and issue of upmost importance. IWUA has followed this case and participated as amicus before the 9<sup>th</sup> Circuit and Supreme Court in support of the County's appeals.

IWUA is a non-profit corporation representing approximately 300 canal companies, irrigation districts, ground water districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms and individuals throughout Idaho. Our purpose is to promote, aid and assist in the development, control, conservation, preservation and utilization of Idaho's water resources.

IWUA is concerned about recent efforts to try to convince the County to dismiss its case. The 9<sup>th</sup> Circuit's decision severely infringes on the ability of state and local governments to manage water quality under the Clean Water Act (CWA). If allowed to stand, that decision will have significant negative impacts on the ability of IWUA members to continue to operate infrastructure that is critical to the public health, safety and economic vitality of the State of Idaho.

The CWA gives states (and local governments) the flexibility to engage in a variety of activities to promote and protect clean water outside of the NPDES program. Activities include those necessary "to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources." The programs are robust and rely on the ability of state and

Council of Maui County  
August 29, 2019  
Page 2

local governments to use their land use and police powers to impose requirements that are more appropriately implemented at the local level.

We are concern that, if the County withdraws it appeals, the 9<sup>th</sup> Circuit decision will remain in place and impose the technical aspects of the NPDES program on projects that have never been subject to the program before. This would limit the ability of state and local governments to maximize their resources and environmental efforts.

States and local governments take their water quality obligations very seriously. For example, Idaho's Department of Environmental Quality (IDEQ) has implemented an extensive drinking water program, <https://www.deq.idaho.gov/water-quality/drinking-water/>, and has adopted a ground water quality rule, <https://www.deq.idaho.gov/water-quality/ground-water/>. Idaho stakeholders work closely with state and local governments to address water quality.

We realize the County must do what is in its best interest. However, we respectfully implore the Council to stay the course and continue with the Supreme Court Appeal. Doing so, will protect the state and local government's roles in regulating water quality and to ensure consistent application of the CWA.

Sincerely,



Paul Arrington, Executive Director  
Idaho Water Users Association

## GET Committee

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**From:** Adam Link <alink@casaweb.org>  
**Sent:** Thursday, August 29, 2019 11:19 AM  
**To:** GET Committee  
**Cc:** Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura  
**Subject:** Hawaii Wildlife Fund et al. v. County of Maui, GET-26 - CASA Letter  
**Attachments:** CASA 8-28-19 Maui Letter[1].pdf

Chair Molina and GET Committee,

Please find attached a letter on behalf of the California Association of Sanitation Agencies (CASA) pertaining to the County's continuing participation in the *Hawaii Wildlife Fund et al. v. County of Maui* litigation. Thank you.

- Adam Link

Adam D. Link  
Director of Operations  
California Association of Sanitation Agencies  
916.446.0388, ext 102 (office)  
916.947.2900 (mobile)  
*Ensuring Clean Water for California*  
[www.casaweb.org](http://www.casaweb.org)



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# CALIFORNIA ASSOCIATION of SANITATION AGENCIES

1225 8<sup>th</sup> Street, Suite 595 • Sacramento, CA 95814 • TEL: (916) 446-0388 • [www.CASAweb.org](http://www.CASAweb.org)

August 28, 2019

*Submitted via email to [GET.committee@mauicounty.us](mailto:GET.committee@mauicounty.us)*

Mike Molina  
Chair, Governance, Ethics, and Transparency Committee  
County Council of Maui  
Kalana O Maui Building, 8th floor  
200 S. High St.  
Wailuku, Hawai'i 96793

Subject: *Hawaii Wildlife Fund et al. v. County of Maui*, GET-26

Dear Committee Chair Molina and Committee Members:

The California Association of Sanitation Agencies appreciates the opportunity to provide our perspective on the County of Maui's continued participation in *Hawaii Wildlife Fund, et al v. County of Maui*. CASA is a nonprofit trade association representing more than 120 local public wastewater agencies in the State of California. We are the leading California association dedicated to advancing wastewater interests, including the recycling of wastewater into usable water, generation of renewable energy, biosolids and other valuable resources. Through our efforts, we help create a clean and sustainable environment for California.

CASA is also an amicus in the *Hawaii Wildlife Fund, et al v. County of Maui* litigation. CASA has been supporting the County case as an amicus since the case first went to the 9th Circuit. We understand that the County is considering settling and dismissing its case before it is heard by the U.S. Supreme Court. While we realize the County must do what is in its individual best interest, we respectfully implore the Council to reject that course of action and consider the negative precedent it will set for other public wastewater agencies across the country.

If allowed to stand, this case could have significant negative implications for public infrastructure, including many of CASA's member agencies. The current ruling could call into question existing law, standards and liabilities on discharger responsibilities related to groundwater, and would completely undermine permitting certainty in the NPDES program. This is especially true for those agencies located in the 9th Circuit (like our members), where the nebulous standard and questionable rationale used by that court would be the law of the land.

Notably, the 9th Circuit's decision severely infringes on the ability of state and local government to manage water quality under the Clean Water Act. The CWA gives states (and local governments) the flexibility to engage in a variety of activities to promote and protect clean water outside of the NPDES program. Activities include those necessary "to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources." The programs are robust, and rely on the ability of state and local government to use their land use and police powers to impose requirements that are beyond federal authority or more appropriately implemented at the local level. If the County does not see this through, the 9th Circuit decision will remain in place and impose the technical aspects of the NPDES program on projects that have never been subject to the program before, and in a manner that will limit the ability of state and local government to maximize their resources and environmental efforts.

The backdrop for this litigation is particularly disturbing to CASA, as it must be for the County as well. Nongovernmental organizations have sued the County where no state or federal agency has ever brought a similar enforcement action, and against a facility that has operated in compliance with state and federal permits for decades. They have done so in the hopes of dramatically expanding the scope of the Clean Water Act, hoping to achieve through litigation what would be more appropriately addressed through legislation. Maui County Mayor Michael Victorino said it best in his recent column:

*Despite rhetoric aimed at persuading our lawmakers to withdraw from the Supreme Court, Maui County's appeal is not to "gut" the Clean Water Act.*

It is the plaintiffs in this case who are trying to undo 30 years of Clean Water Act precedent and throw into chaos much of the good work being done by public wastewater agencies across the country whose job it is to protect public health and the environment. If the County of Maui were to withdraw from this case, it may allow those entities to do just that.

CASA works on behalf of public agencies like yours, whose focus and goal is to protect public health and the environment. Our agencies are concerned that without a hearing at the U.S. Supreme Court, this case will result in the improper regulation of discharges to groundwater that would be detrimental to their ability to provide services to the public. This is why the continuation of the case and a chance for a full hearing at the Supreme Court is a high priority for us.

If you have any questions or want to discuss the potential implications of the case, I am happy to answer them or refer you to our amicus counsel. Thank you for your consideration.

Sincerely,



Adam D. Link  
Director of Operations

Cc:

Kelly.King@mauicounty.us, Council Chair  
Keani.Rawlins@mauicounty.us, Council Vice-Chair  
Tasha.Kama@mauicounty.us, Presiding Officer Pro Tempore  
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Yukilei.Sugimura@mauicounty.us, Councilmember

## GET Committee

---

**From:** Richelle Thomson <Richelle.Thomson@co.maui.hi.us>  
**Sent:** Thursday, August 29, 2019 11:26 AM  
**To:** GET Committee  
**Cc:** Mike J. Molina  
**Subject:** Fwd: Hawaii Wildlife Fund v. County of Maui (USSC 18-260) GET-26  
**Attachments:** Acrobat.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Please see below and attached.

Begin forwarded message:

**From:** "Kermish, Laurie" <[Kermish.Laurie@epa.gov](mailto:Kermish.Laurie@epa.gov)>  
**Date:** August 29, 2019 at 11:01:38 AM HST  
**To:** "Richelle Thomson" <[Richelle.Thomson@co.maui.hi.us](mailto:Richelle.Thomson@co.maui.hi.us)>  
**Cc:** "Sylvia Quast" <[Quast.Sylvia@epa.gov](mailto:Quast.Sylvia@epa.gov)>, "DavidW Smith" <[Smith.DavidW@epa.gov](mailto:Smith.DavidW@epa.gov)>  
**Subject:** Hawaii Wildlife Fund v. County of Maui (USSC 18-260)

Ms. Thomson,

Attached please find correspondence to Mr. Molina. I appreciate your assistance in ensuring this is promptly received.

Laurie Kermish  
Water & General Law, Branch Chief  
Office of Regional Counsel (ORC-2)  
U.S. EPA, Region 9  
75 Hawthorne St.  
San Francisco, CA 94105  
(415) 972-3917  
(415) 947-3570 (fax)  
[kermish.laurie@epa.gov](mailto:kermish.laurie@epa.gov)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

AUG 29 2019

Mr. Michael J. Molina  
Chair, GET Committee  
County Council  
County of Maui  
200 S. High Street  
Wailuku, Maui, HI 96793

Subject: Hawaii Wildlife Fund, et al. v. County of Maui (USSC 18-260)

Dear Mr. Molina:

On behalf of EPA, this is in response to your correspondence dated August 27, 2019 inviting Mr. David Smith, EPA Region 9, to make a presentation at the Committee's meeting on September 3, 2019. Consistent with Ms. Anna Wildeman's August 28, 2019 email to Ms. Richelle Thomson, EPA Region 9 will not be submitting a presentation. For more information on this matter, please refer to the August 28, 2019 email a copy of which is enclosed for your convenience.

Sincerely,

A handwritten signature in cursive script, reading "Laurie Kermish".

Laurie Kermish  
Water & General Law, Branch Chief  
Office of Regional Counsel

Enc.

cc: Sylvia Quast, Regional Counsel  
David Smith, Manager Water Division



**From:** Wildeman, Anna [<mailto:wildeman.anna@epa.gov>]  
**Sent:** Wednesday, August 28, 2019 1:04 PM  
**To:** Richelle Thomson <[Richelle.Thomson@co.maui.hi.us](mailto:Richelle.Thomson@co.maui.hi.us)>  
**Cc:** David Fotouhi <[Fotouhi.David@epa.gov](mailto:Fotouhi.David@epa.gov)>  
**Subject:** RE: Hawaii Wildlife v. County of Maui (USSC 18-260)

Hi Richelle,

Thank you for the note and the call this afternoon. As we discussed, it is unusual for EPA to provide live or written testimony for local government proceedings, so EPA will not be submitting formal testimony for the Committee meeting next week. However, I am providing this email to address some of the questions you raised on the phone about EPA's April 23, 2019 *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants >From a Point Source to Groundwater* (84 FR 16810) (Interpretive Statement) and the interaction with the Clean Water Act NPDES permit programs.

As explained in detail in the Interpretive Statement, EPA has concluded that the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water. However, EPA has chosen not to apply the Interpretive Statement in the Ninth and Fourth Circuits to maintain the status quo pending further clarification by the Supreme Court. 84 FR 16812 n. 1.

The County of Maui is subject to the Ninth Circuit Court of Appeals' decision in *Hawai'i Wildlife Fund v. Cty of Maui*, 886 F.3d 737 (9th Cir. 2018), and therefore discharges of pollutants to groundwater that ultimately reach jurisdictional surface waters and are "fairly traceable" back to a point source and more than *de minimis* are currently subject to the NPDES permit program. *Id.* at 749. If the Ninth Circuit's decision is upheld by U.S. Supreme Court, all releases of pollutants from a point source to groundwater that ultimately reach a surface water could be subject to the NPDES permit program. This expansion of the Act's coverage could require NPDES permits for commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems that find their way to jurisdictional surface waters through groundwater. 84 FR 16823. These activities would therefore fall within EPA's state program oversight responsibilities and could subject unpermitted discharges to state or federal enforcement or citizen suit liability under the Clean Water Act.

Regards,  
Anna

**Anna Wildeman**  
Principal Deputy Assistant Administrator  
Office of Water  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
202-564-5700  
[Wildeman.Anna@epa.gov](mailto:Wildeman.Anna@epa.gov)

## GET Committee

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**From:** Nathan Gardner-Andrews <NGardner-Andrews@nacwa.org>  
**Sent:** Thursday, August 29, 2019 12:36 PM  
**To:** GET Committee  
**Cc:** Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura  
**Subject:** Hawaii Wildlife Fund et al. v. County of Maui, GET-26  
**Attachments:** 2019\_08\_29 NACWA Letter to GET Final.pdf

Please see the attached correspondence related to the Committee's upcoming consideration the *Hawaii Wildlife Fund et al. v. County of Maui* litigation. Please don't hesitate to contact me with any questions.

Thank you,

 **Nathan Gardner-Andrews**  
Chief Advocacy Officer | NACWA

1130 Connecticut Ave NW, Suite 1050, Washington DC 20036  
ngardner-andrews@nacwa.org  
(202) 833-3692 [office]  
(703) 774-6513 [cell]



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August 29, 2019

Mike Molina  
Chair, Governance, Ethics, and Transparency Committee  
County Council of Maui  
Kalana O Maui Building, 8th floor  
200 S. High St.  
Wailuku, Hawai'i 96793

*Submitted via email to [GET.committee@mauicounty.us](mailto:GET.committee@mauicounty.us)*

**Subject: *Hawaii Wildlife Fund et al. v. County of Maui*, GET-26**

Dear Committee Chair Molina and Members of the Governance, Ethics, and Transparency Committee:

I write on behalf of the National Association of Clean Water Agencies (NACWA) to express strong support for the County of Maui ("County") to continue its litigation in the case *Hawaii Wildlife et al. v. County of Maui* currently before the U.S. Supreme Court.

NACWA is the leading nonprofit association representing the interests of publicly owned wastewater and stormwater utilities across the United States, with over 315 members nationwide. The Maui County Department of Environmental Management is a NACWA member.

Our utility members provide services that are essential to protecting public health and the environment and require regulatory certainty in order to make and plan prudently for investments of public funds. Our members are true public servants that support a strong regulatory framework to protect water resources, the environment, and public health.

NACWA is aware that certain interests are actively pressuring the County to settle this case before Supreme Court arguments. NACWA strongly encourages the County to deny these requests and proceed with the litigation, for the reasons outlined below.

Despite the false narratives and scare tactics being used by some to encourage the County to settle the litigation, this case is not about "rolling back" Clean Water Act (CWA) requirements or "gutting" the CWA. It has nothing to do with other environmental policies being pursued by the Trump Administration. Instead, this case is about appropriately implementing the CWA as intended by Congress and providing local governments with predictable legal and regulatory requirements to best spend local ratepayer dollars for maximum protection of the environment and public health. Local governments and public clean water utilities all across the nation – including NACWA's members – stand strongly behind Maui in this litigation.

The underlying issues in this case are not about leaving groundwater pollution unregulated, nor are they about lessening environmental protections. Discharges to groundwater are already regulated under other federal and state environmental statutes better suited to address such releases. The federal CWA was never intended to regulate discharges to groundwater and using the CWA permit program for this purpose is like trying to fit a square peg in a round hole. Doing so will have unintended and harmful consequences for local governments, while simultaneously failing to have any meaningful beneficial environmental or public health impacts.

What this case is about is ensuring that discharges to groundwater are regulated properly in the manner Congress intended, and that public clean water utilities like the Maui County Department of Environmental Management – public utilities that are on the front lines of environmental and public health protection every day – have consistency and predictability in how they are regulated. It is also about making sure local governments and public clean water agencies can be responsible financial stewards of their citizen's resources by spending money on investments that will actually result in meaningful environmental and public health improvements and not spending tens of millions of dollars on unnecessary regulatory schemes that have no demonstrable benefit.

By settling this case, Maui would leave in place a flawed legal decision that exposes the County and other public clean water utilities nationwide to regulatory uncertainty and an increased risk of unjustified enforcement and frivolous third-party lawsuits. If the decision stands, it could result in an extraordinary expansion of discharges subject to the requirements of the CWA permit program beyond what Congress intended.

Further, despite claims to the contrary, the theory of CWA liability being advanced by the plaintiffs in this case has *never* been used by EPA to regulate local governments and public clean water utilities before. It is an entirely judicially created construct that is not found anywhere in the CWA or its implementing regulations, nor has EPA ever used it in this context before. For that reason, it is impossible to “roll back” something that never existed before. It would be very unfortunate if, by settling this litigation, Maui County ends up creating a new CWA theory of liability that will negatively impact municipal governments all across the country.

If the litigation is settled, NACWA is also concerned that beneficial public and private infrastructure like green infrastructure, recycled water systems, groundwater recharge basins, and other innovative approaches to water management will become sources of legal liability under the CWA even though they are already regulated in other ways. Settlement of this case threatens the ability of public clean water utilities nationwide to protect their communities from new liability and costs for clean water management approaches lawfully done in the best interests of their citizens.

I hope the Committee will take these legitimate concerns into consideration when deciding whether to proceed with the litigation. If Maui moves forward with the litigation, NACWA intends to continue to stand by the County to allow the Supreme Court to definitively resolve this issue. NACWA and its members greatly appreciate the Maui County Department of Environmental Service's strong history of environmental and public health protection around wastewater treatment and stand with the County as it continues to serve its residents with the highest level of service.

I respectfully request that this communication be entered as testimony in the Committee's upcoming consideration of matters related to *Hawaii Wildlife et al. v. County of Maui*, U.S.

NACWA Letter re *Hawaii Wildlife Fund et al. v. County of Maui*  
Page 3

Supreme Court Docket No. 18-260. If you have any questions or concerns, please do not hesitate to contact me at [ngardner-andrews@nacwa.org](mailto:ngardner-andrews@nacwa.org) or 202-833-3692.

Sincerely,



Nathan Gardner-Andrews  
Chief Advocacy Officer

Cc: [Kelly.King@mauicounty.us](mailto:Kelly.King@mauicounty.us), Council Chair  
[Keani.Rawlins@mauicounty.us](mailto:Keani.Rawlins@mauicounty.us), Council Vice-Chair  
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[Yukilei.Sugimura@mauicounty.us](mailto:Yukilei.Sugimura@mauicounty.us), Councilmember

## GET Committee

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**From:** Rep. Tina Wildberger <repwildberger@capitol.hawaii.gov>  
**Sent:** Thursday, August 29, 2019 1:42 PM  
**To:** GET Committee  
**Cc:** Natalia Hussey-Burdick  
**Subject:** Testimony for GET-26 re: Injection Wells  
**Attachments:** 2019.08.29 Testimony GET Injection Wells.pdf

Aloha Council staff,

Please include the attached letter as testimony for the 09/03 GET committee hearing @9am, for the resolution on injection wells.

Let me know if there is anything else you need.

Mahalo,

Tina Wildberger  
Representative – South Maui  
District 11  
[repwildberger@capitol.hawaii.gov](mailto:repwildberger@capitol.hawaii.gov)  
808 586 8525



## HOUSE OF REPRESENTATIVES

STATE OF HAWAII  
STATE CAPITOL  
HONOLULU, HAWAII 96813

August 29, 2019

Maui County Council  
200 S. High St.  
Kalana O Maui Bldg,  
Wailuku, HI 96793

### Governance, Ethics, and Transparency Committee

Mike Molina, Chair

Keani Rawlins-Fernandez, Vice-Chair

Riki Hokama, Voting Member

Tasha Kama, Voting Member

Kelly T. King, Voting Member

Alice L. Lee, Voting Member

Tamara Paltin, Voting Member

Shane Sinenci, Voting Member

Yuki Lei Sugimura, Voting Member

### **Agenda Item: File #: GET-26 CC 19-178, Version: 3 Position: STRONG SUPPORT.**

Aloha Chair Molina, Vice Chair Rawlins-Fernandez, and members of the Committee,

As a fellow elected official who has also taken an oath to uphold and protect the Public Trust as outlined in our State Constitution, I beseech you to drop this appeal in this precedent-setting suit brought by the County of Maui, v. Hawai'i Wildlife Fund, *et al.*

There is no question that our current injection-well systems pollute the ocean, as shown in a 2013 EPA study. This appeal is a misuse of taxpayer dollars to continue these expensive, prolonged legal proceedings in a last-ditch attempt to shirk our oath-bound kuleana to find a better solution to deal with our waste. We owe it to our constituents and our environment to invest this money instead, into funding distribution of R1 water to be used where it could replace potable water for irrigation.

How did we get here? How are we still here? For Maui to align with this malevolent administration hell-bent on destroying all environmental protections on behalf of industry polluters, and have a hand in the dismantlement of the Clean Water Act is unconscionable. It will be a scourge on Maui and our entire state's reputation forever.

It is the county's kuleana to protect our water sources mauka and makai. Please, kōkua, this cannot stand.

Representative Tina Wildberger  
House District 11 - South Maui  
Kīhei · Wailea · Mākena

#### **Office of Representative Tina Wildberger**

*Proudly serving the 11<sup>th</sup> House District*

415 S. Beretania St. Honolulu, HI 96813, Room 327

Phone: 808.586.8525 | Fax: 808.586.8529 | email: repwildberger@capitol.hawaii.gov

## GET Committee

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**From:** Unemori, Darren T. <dtu@wsue.com>  
**Sent:** Thursday, August 29, 2019 3:20 PM  
**To:** GET Committee  
**Subject:** Submission of Testimony for Sept. 3 GET Meeting: Hawaii Wildlife Fund et al. v. County of Maui, GET-26  
**Attachments:** Darren Unemori Testimony on GET-26 for 9-03-2019.pdf

Please find my testimony on the subject item attached to this message.

Thank you,

Darren Unemori

---

WARREN S. UNEMORI ENGINEERING, INC.  
Civil & Structural Engineers/Land Surveyors

Wells Street Professional Center  
2145 Wells Street Suite 403  
Wailuku, Maui, Hawaii 96793  
Office: (808) 242-4403  
Fax: (808) 244-4856

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August 27, 2019

Committee Chair Mike Molina and  
Members of the Governance, Ethics, and Transparency Committee:

Kelly King, Council Chair

Keani Rawlins-Fernandez, Council Vice Chair

Tasha Kama, Presiding Officer Pro Tempore

Riki Hokama, Councilmember

Alice L. Lee, Councilmember

Tamara Paltin, Councilmember

Shane Sinenci, Councilmember

Yuki Lei Sugimura, Councilmember

200 South High Street, 8<sup>th</sup> Floor

Wailuku, Hawaii 96793

Dear Chair Molina and Committee Members:

SUBJECT: Hawaii Wildlife Fund et al. v. County of Maui, GET-26  
Testimony OPPOSED TO SETTLEMENT

I am vice president of Warren S. Unemori Engineering, Inc., which is an engineering firm located in Wailuku, Maui, that has provided professional engineering design and construction services to both private landowners and public agencies for the last 50 years, since our founding in 1969. We are actively involved in a number of public and private-sector projects that are essential to our Community, including the expansion of public infrastructure and delivery of affordable housing.

I strongly urge the Council to heed the advice of its Department of Environmental Management and Department of the Corporation Counsel in pursuing a resolution to *Hawaii Wildlife Fund, et al. v. County of Maui* for the following reasons.

1. It is vital to those who plan, fund and improve our nation's infrastructure to clearly understand what the law requires. Without such clarity, planning may be flawed and funds misdirected as vital, well-intentioned infrastructure projects requiring years to plan and deploy at the cost of vast amounts of public and private capital can suddenly be deemed irrelevant or invalid. Regardless of whether the ultimate

Hawaii Wildlife Fund et al. v. County of Maui, GET-26  
Testimony OPPOSED TO SETTLEMENT  
August 27, 2019

Page 2

decision of the U.S. Supreme Court favors plaintiff or defendant; liberal, moderate or conservative; a final, adjudicated resolution to *Hawaii Wildlife Fund, et al v. County of Maui* will, at long last, provide clarity to an area of environmental law that sorely needs it.

2. Should the decision by the U.S. Supreme Court reveal the existence of a defect or deficiency in existing environmental law, the same clarity provided by Court's decision will unambiguously define the scope of new legislation that must be enacted to remedy the deficiency.
3. A decision by the U.S. Supreme Court favoring defendant County of Maui will in no way bar or hamper the County from pursuing wastewater reuse. Rather, it will offer Maui County the greatest flexibility to set and achieve its reuse goals on its own terms -- and create an opportunity to lead the nation by its example.

Thank you very much for the opportunity to share these thoughts.

Warmest regards,



Darren Unemori, P.E., P.L.S.  
Vice President and Senior Civil Engineer

## GET Committee

---

**From:** Alyssa-Marie Kau <alyssamk@oha.org>  
**Sent:** Thursday, August 29, 2019 3:42 PM  
**To:** GET Committee  
**Cc:** Hulu Lindsey; Lehua Itokazu; Keani N. Rawlins; Jennifer Y. Karaca  
**Subject:** Trustee H. Lindsey Testimony Regarding GET-26 and CC 19-08292019 Testimony Regarding GET-26 and CC 19-1978.docx  
**Attachments:**

Aloha e Chair Molina and Staff:

On behalf of Trustee Hulu Lindsey from the Office of Hawaiian Affairs, I have attached her testimony regarding GET-26. Please let our office know if you have any questions or concerns. Mahalo for your time and attention on this critical measure.

Me ka ha'a ha'a,

**Alyssa-Marie Y. H. Kau, J. D.**

Ke Kua Kako'o, Trustee Aide

Ke Kua Maui, Trustee Carmen Hulu Lindsey

560 N. Nimitz Hwy, Suite 200 | Honolulu, HI 96817

**Office:** 808-594-1899 | **Mobile:** 808-218-9455 | **Fax:** 808-594-1907 | **Email:** [alyssamk@oha.org](mailto:alyssamk@oha.org)

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TESTIMONY REGARDING GET-26 HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL No. 12-00198 SOM BMK, U.S. SUPREME COURT DOCKET 18-260, AND REGARDING COUNTY COMMUNICATION No. 19-178 RESOLUTION “REQUIRING SETTLEMENT OFFERS IN HAWAII WILDLIFE, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT, TO BE TRANSMITTED TO THE COUNCIL FOR APPROVAL OR DISAPPROVAL”

Maui County Council  
Governance, Ethics, and Transparency Committee Meeting  
September 3, 2019  
9:00 A.M.

Aloha e Chair Molina, Vice-Chair Rawlins-Fernandez, and members of the GET Committee:

My name is Carmen Hulu Lindsey, and I am a Trustee with the Office of Hawaiian Affairs representing Maui island. I appreciate that the Maui County Council is considering a resolution to settle Hawaii Wildlife Fund, et al., v. County of Maui, and I speak in **SUPPORT** of the measure. This case pits those who are committed to environmental protection against polluting industries who wish to freely use our precious wai as a sewer to dump waste and toxic pollutants into our nation’s waterways.

Ola i ka wai. Since time immemorial, Kanaka Maoli practiced a form of land tenure that emphasized mutual benefit and resource conservation, which extended to the management of ocean resources. These aquaculture practices ensured year-round food availability and demonstrated indigenous, economic, technological, religious, and political management of the kai’s resources for the use of past, present, and future generations. While a U.S. Supreme Court decision in favor of the County will affect communities of all socioeconomic and political statuses on Maui, there will be specific and immediate threats to Kanaka Maoli communities if unregulated discharges continue to damage the nearshore ecosystems of West Maui.

Further pursuing this litigation could undo forty years’ worth of protections enforced under the Clean Water Act (“CWA”). Despite the history and significance of wai and kai for Maui, Maui County has continued to obscure the letter and spirit of the CWA by refusing to regulate or mitigate its discharge of treated wastewater from the Lahaina Wastewater Reclamation Facility (“LWRF”) into Pacific Ocean waters. Instead, Maui County’s refusal to address this pollution is being used as a vehicle for the nation’s worst polluters to gain access to the U.S. Supreme Court with the sole purpose of undermining the CWA, which will no doubt result in rampant degradation of the United States’ waterways. If Maui County’s efforts are successful, the consequences will be tremendous, opening the door to further contamination from mines, oil spills, toxic waste, sewage, and fracking operations. Even though we cannot see pollution moving through groundwater, studies have shown that it is in fact happening, and when the full consequences of this pollution come to fruition, it will be too late to rehabilitate the health of our people and our reefs. And This pollution via groundwater seeks to think this will all be to the benefit of America’s dirtiest industries, and the most virulently anti-environment Presidential Administration in the history of the EPA, who seek

to maximize profits by being allowed to freely pollute with zero accountability for the damages done to public waters.

However, Maui County can begin to address the LWRF's failures. Maui County can settle this case and withdraw the appeal; and prevent potentially devastating consequences. If Maui County chooses to do so, a settlement will proactively protect the health and well-being of our residents, the strength and dignity of our reefs, and would preserve public waters and the ecosystems that depend on them for future generations.

#### **I. CONTINUING TO DISCHARGE POLLUTANTS AT THE LWRF WILL FURTHER DESTROY THE REEFS AT KAHEKILI.**

Maui County's operation of the injection wells at LWRF are in violation of the CWA. Since the 1980s, the County has operated four injection wells at the LWRF to dispose of treated sewage. The wells inject treated sewage directly into groundwater below the LWRF, which is located less than half a mile from the Pacific shoreline at Kahekili Beach. The Maui County's wells inject three to five million gallons of treated sewage daily, with about 90% of the effluent from two of those wells going into the ocean. The resulting discharges of pollutants into ocean waters continue to adversely affect the environmental, aesthetic, recreational, scientific, and educational interests of Maui residents.

In 2012, researchers from the University of Hawaii found that algae samples grown over freshwater seeps in Kahekili's nearshore waters contained the highest values of nitrogen associated with wastewater treatment facilities ever reported in scientific literature. Additionally, researchers with the U.S. Geological Survey, University of Hawaii, Woods Hole Oceanographic Institution, and State of Hawaii Division of Aquatic Resources recently published a peer-reviewed study confirming that discharges from the LWRF injection wells have contributed to rates of bioerosion that are tremendously higher than expected.

The effluent has decimated the fringing reef, which is already reeling from warmer and more acidic waters thanks to global climate change. The nutrient-rich wastewater causes algae blooms that smother the corals, meaning less habitat for fish and endangered sea turtles, but also breakdown the coral, which acts a protector of coastal roads and properties from stronger storms and surf. Nearshore coral reef ecosystems (the cornerstone of Maui tourism, shoreline protection, and local fisheries) are affected by land-based sources of pollution that are also magnified by effects of coastal acidification.

The discharge of wastewater effluent into the ocean via groundwater injection creates a risk of harm to persons, land and chattels, including but not limited to destroying coastal reefs, encouraging harmful macroalgae blooms, and diminishing the quality of coastal waters and beaches. Continuing this practice without accountability or mitigation will lead to further degradation of the reefs, leading to less marine life, increased property damage, and potentially a downturn in tourism. As Maui County eagerly searches for solutions to increase food security, combat climate change, and improve its economic health, it should be imperative to protect the

reefs at Kahekili. If our fish are not there on the reefs, our kama'āina and our malihini alike will depart Maui, in hopes of finding clean water, active marine life, and natural beauty elsewhere.

## II. CONTINUED DISCHARGE INTO LAHAINA IS DETRIMENTAL TO KIA'I KAI WHO ENGAGE IN TRADITIONAL AND CUSTOMARY NATIVE HAWAIIAN PRACTICES.

He puko'a kani 'āina. The Kumulipo (our Hawaiian creation chant) delineates our shared genealogy and teaches us that life in the sea and land are inexorably connected; what we do on land has a direct connection and impact on all organisms in the kai. In the Kumulipo, the ko'a, or coral polyp, was the first organism created on Earth, and our first ancestor as Kanaka. The Kumulipo teaches us that it is our kuleana to preserve and protect all living organisms because we all come from the same primordial beginnings – from the coral polyp. The protection and maintenance of reefs and marine ecosystems continues to be central to the protection and preservation of our practices of aquaculture, fishing, gathering, and religion.

In 1978, the Hawai'i State Constitution was amended to specifically recognize traditional and customary Hawaiian practices in adopting Article XII, Section 7. Other constitutional provisions proclaim that the state has an obligation to protect, control, and regulate the use of Hawai'i's natural resources for the benefit of its present and future generations. In deliberating on this provision, the constitutional framers recognized that Native Hawaiian “sustenance, religious, and cultural practices...are an integral part of their culture, tradition, and heritage, with such practices forming the basis of Hawaiian identity and value systems,” and viewed the amendment as a vehicle to “preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights.”

Maui County's wastewater injection at LWRF ~~have~~has caused the alteration, damage, ~~or~~and destruction of natural resources. The integrity of these resources is critical for Kanaka Maoli to engage in religious worship, gather marine foods, and fish along the West Maui shoreline and in its coastal waters. The reefs off Kahekili were once known to provide sustenance, were a significant place for leisure and commercial activity, and a site of religious practice. The fish found at this location play an important cultural, spiritual, and economic role in the life of Kānaka Maoli, and the pollutants emitted by the injection wells will continue to have devastating consequences for these resources. The treated wastewater has left parts of the reef looking like coral ghost lands, lacking the thriving marine life necessary for healthy ecosystems and critical to our physical and spiritual wellbeing.

If Maui County seeks to be proactive in protecting our kia'i kai's ability to continue practicing their traditional and customary practices, it should settle this case. Maui County's interpretation leaves these environmental resources unprotected from wastewater pollution by any federal or remaining state scheme. LWRF wastewater that is recycled and reused, rather than injected, provides a multitude of beneficial uses for businesses, commercial tenants, and residents to meet their irrigation needs. Responsible irrigation also has the potential to lead to an increase in Native Hawaiian agricultural practices in West Maui.

**III. ALTHOUGH THE UNDERGROUND INJECTION PROGRAM PERMITS CANNOT ADEQUATELY ADDRESS CONCERNS ABOUT COASTAL WATER QUALITY, THE COUNTY CAN SECURE CLEAN WATER ACT PERMIT COVERAGE FOR INJECTION WELL DISCHARGES.**

The intent of the CWA is to ensure the protection and regulation of surface water quality throughout the United States; specifically, the CWA seeks to restore and maintain the chemical, physical, and biological integrity of the nation's waters by prohibiting discharge of pollutants from any point source into navigable waters without a CWA permit. The Underground Injection Control (UIC) permitting system falls under the Safe Drinking Water Act (SDWA) and is intended to protect underground sources of drinking water from underground injection and does not address protection of surface waters or the marine life that lives in waters the injected pollutants may reach.

UIC and NPDES permits use different standards for acceptable pollutant concentration; UIC permits protect human health from chemical exposure through drinking, while NPDES permits are protective of aquatic and marine life living in streams and marine waters. Dr. Wendy Wiltse's testimony demonstrates that CWA limits on nitrite and phosphorus concentrations are far more stringent than the UIC limits, and the current UIC permits have not provided adequate protection for the water off Kahekili as evidenced by poor water quality, algal blooms, and degradation of coral, as well as direct measurement of nitrite and phosphorus levels at the nearshore seeps.

The EPA is willing to work with DOH and the County to develop a legally adequate permit for the LWRF injection wells. NPDES permits have historically been developed and issued to address discharges to navigable waters via hydrologically connected groundwater.

**IV. A NPDES PERMIT FOR LWRF WILL NOT REQUIRE NPDES PERMITS FOR CESSPOOLS.**

A NPDES permit can regulate discharges of chemicals to levels that are safe for humans and marine organisms. Some County Councilmembers have suggested that a finding in favor of clean water will immediately subject homeowners to Clean Water Act liability for their domestic septic systems and cesspools. -The EPA already requires NPDES general permits for septic systems that discharge pollutants to surface waters. This requirement has not burdened homeowners because siting requirements for septic systems already seek to avoid discharges to navigable waters. In any event, when the EPA or DOH determines that a category of numerous discharges poses a threat to surface waters that can be managed without requiring individual permits, the agency can issue a general permit for activities conduct pursuant to proper practices specified in a general permit.

There is no possibility that upholding the CWA in this case would require NPDES permits for approximately 22 million residential septic tanks across the country, as some of the County's *amici* have suggested. A NPDES permit is required only where discharged pollutants are fairly traceable to a point source. DOH has unequivocally stated that the department does not plan require NPDES permits for individual septic systems and cesspools. DOH may issue a single general NPDES permit for residential septic tanks with certain characteristics within its boundaries. A septic tank

owner or operator concerned about traceable discharges to navigable waters via groundwater would simply submit a notice of intent to be bound by that general permit. In appropriate circumstances, the DOH may provide that the discharges complying with applicable conditions are authorized even without a notice of intent. In other words, state regulations and county zoning laws already regulate residential septic tanks to prevent or mitigate point source discharges into navigable waters.

Additionally, some councilmembers have raised concerns that finding in favor of clean water will subject the County to massive costs of upgrading their infrastructure for domestic septic systems. The Legislature is already required to replace all cesspools by 2050 and EPA and DOH are already working to develop appropriate and affordable technologies and funding mechanisms to assist homeowners with upgrades. Maui County is already squandering millions of tax dollars to get the CWA, instead of investing the money in improvements to wastewater reuse infrastructure.

In summary, well-maintained septic tanks should not release pollutants into the navigable waters, therefore, not making them subject to an NPDES requirement. Poorly designed or neglected systems are already subject to regulation and remediation measures under both the Clean Water Act and corresponding state statutes. The so-called threat of unbridled homeowner liability under the CWA is nothing more than a scare tactic designed to drum up public support for the County's misguided appeal.

#### V. RECOMMENDATIONS/CONCLUSION

Maui County and the State of Hawai'i have long been recognized as progressive leaders across the country in our protection and promotion of environmental and indigenous rights. Continuing with counterproductive and regressive litigation jeopardizes that long-fought and storied reputation, instead characterizing Maui County as a willing accomplice in environmental degradation, pollution, and the prioritization of corporate greed over the health of our honua. If the County wins at the U.S. Supreme Court, it will have led the charge to usher in ~~an~~ a new era of environmental degradation and puts Maui County on the wrong side of the fight to preserve our natural environment for present and future generations. Adopting the resolution will not oblige the County to pursue further appeals or similar litigation, and instead **provides the Council the opportunity to settle the suit in the best interest of Maui County residents.**

The proposed settlement allows for Maui County to proactively engage with community groups and encourages a proactive approach in ensuring that Maui's waters are managed to protect our reefs and coastal waters. How we treat these waters affect our lives, and the waters and marine resources that we leave for our keiki and our mo'opuna will no longer nourish them, as they did us, if we continue down this path. Destroying the reefs, which Hawaiians revere as kūpuna, robs our mo'opuna of the opportunity to develop the familial relationship to their natural resources that is so integral to our identity as Hawaiians. Continuing this legal fight is not pono, and it goes against the values of kuleana and pono instilled in us by our kūpuna. As an elected official for



Maui, I believe that it is important to take a hard look at the values that we are embodying and demonstrating to our world.

In conclusion, I speak in **SUPPORT** of settling this case and implore ~~the Maui County government~~ to work with community groups to address the challenges posed by injection wells at LWRF and see this as an opportunity to progressively find solutions to combat environmental degradation, invigorate our economy, and protect our marine life and the people that depend on it.

Me ka ha'a ha'a,



Carmen Hulu Lindsey  
Maui Trustee  
Office of Hawaiian Affairs

## GET Committee

---

**From:** Alyssa-Marie Kau <alyssamk@oha.org>  
**Sent:** Thursday, August 29, 2019 3:48 PM  
**To:** GET Committee  
**Cc:** Keani N. Rawlins; Jennifer Y. Karaca  
**Subject:** RE: Trustee H. Lindsey Testimony Regarding GET-26 and CC 19-08292019 Testimony Regarding GET-26 and CC 19-1978(FINAL).docx  
**Attachments:**

E kala mai, I have attached the correct testimony to this email.

---

**From:** Alyssa-Marie Kau  
**Sent:** Thursday, August 29, 2019 3:42 PM  
**To:** 'get.committee@mauicounty.us' <get.committee@mauicounty.us>  
**Cc:** 'Hulu Lindsey' <kahulu@maui.net>; Lehua Itokazu <lehuai@oha.org>; Keani N. Rawlins <Keani.Rawlins@mauicounty.us>; Jennifer Y. Karaca <Jennifer.Karaca@mauicounty.us>  
**Subject:** Trustee H. Lindsey Testimony Regarding GET-26 and CC 19-

Aloha e Chair Molina and Staff:

On behalf of Trustee Hulu Lindsey from the Office of Hawaiian Affairs, I have attached her testimony regarding GET-26. Please let our office know if you have any questions or concerns. Mahalo for your time and attention on this critical measure.

Me ka ha'a ha'a,

**Alyssa-Marie Y. H. Kau, J. D.**

Ke Kua Kako'o, Trustee Aide

Ke Kua Maui, Trustee Carmen Hulu Lindsey

560 N. Nimitz Hwy, Suite 200 | Honolulu, HI 96817

**Office:** 808-594-1899 | **Mobile:** 808-218-9455 | **Fax:** 808-594-1907 | **Email:** [alyssamk@oha.org](mailto:alyssamk@oha.org)

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TESTIMONY REGARDING GET-26 HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL NO. 12-00198 SOM BMK, U.S. SUPREME COURT DOCKET 18-260, AND REGARDING COUNTY COMMUNICATION NO. 19-178 RESOLUTION “REQUIRING SETTLEMENT OFFERS IN HAWAII WILDLIFE, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT, TO BE TRANSMITTED TO THE COUNCIL FOR APPROVAL OR DISAPPROVAL”

Maui County Council  
Governance, Ethics, and Transparency Committee Meeting  
September 3, 2019  
9:00 A.M.

Aloha e Chair Molina, Vice-Chair Rawlins-Fernandez, and members of the GET Committee:

My name is Carmen Hulu Lindsey, and I am a Trustee with the Office of Hawaiian Affairs representing Maui island. I appreciate that the Maui County Council is considering a resolution to settle Hawaii Wildlife Fund, et al., v. County of Maui, and I speak in **SUPPORT** of the measure. This case pits those who are committed to environmental protection against polluting industries who wish to freely use our precious wai as a sewer to dump waste and toxic pollutants into our nation’s waterways.

Ola i ka wai. Since time immemorial, Kanaka Maoli practiced a form of land tenure that emphasized mutual benefit and resource conservation, which extended to the management of ocean resources. These aquaculture practices ensured year-round food availability and demonstrated indigenous, economic, technological, religious, and political management of the kai’s resources for the use of past, present, and future generations. While a U.S. Supreme Court decision in favor of the County will affect communities of all socioeconomic and political statuses on Maui, there will be specific and immediate threats to Kanaka Maoli communities if unregulated discharges continue to damage the nearshore ecosystems of West Maui.

Further pursuing this litigation could undo forty years’ worth of protections enforced under the Clean Water Act (“CWA”). Despite the history and significance of wai and kai for Maui, Maui County has continued to obscure the letter and spirit of the CWA by refusing to regulate or mitigate its discharge of treated wastewater from the Lahaina Wastewater Reclamation Facility (“LWRF”) into Pacific Ocean waters. Instead, Maui County’s refusal to address this pollution is being used as a vehicle for the nation’s worst polluters to gain access to the U.S. Supreme Court with the sole purpose of undermining the CWA, which will no doubt result in rampant degradation of the United States’ waterways. If Maui County’s efforts are successful, the consequences will be tremendous, opening the door to further contamination from mines, oil spills, toxic waste, sewage, and fracking operations. Even though we cannot see pollution moving through groundwater, studies have shown that it is in fact happening, and when the full consequences of this pollution come to fruition, it will be too late to rehabilitate the health of our people and our reefs. This pollution via groundwater seeks to benefit America’s dirtiest industries and the most virulently anti-environment Presidential

Administration in the history of the EPA, who seek to maximize profits by being allowed to freely pollute with zero accountability for the damages done to public waters.

However, Maui County can begin to address the LWRF's failures. Maui County can settle this case and withdraw the appeal and prevent potentially devastating consequences. If Maui County chooses to do so, a settlement will proactively protect the health and well-being of our residents, the strength and dignity of our reefs, and would preserve public waters and the ecosystems that depend on them for future generations.

#### **I. CONTINUING TO DISCHARGE POLLUTANTS AT THE LWRF WILL FURTHER DESTROY THE REEFS AT KAHEKILI.**

Maui County's operation of the injection wells at LWRF are in violation of the CWA. Since the 1980s, the County has operated four injection wells at the LWRF to dispose of treated sewage. The wells inject treated sewage directly into groundwater below the LWRF, which is located less than half a mile from the Pacific shoreline at Kahekili Beach. Maui County's wells inject three to five million gallons of treated sewage daily, with about 90% of the effluent from two of those wells going into the ocean. The resulting discharges of pollutants into ocean waters continue to adversely affect the environmental, aesthetic, recreational, scientific, and educational interests of Maui residents.

In 2012, researchers from the University of Hawai'i found that algae samples grown over freshwater seeps in Kahekili's nearshore waters contained the highest values of nitrogen associated with wastewater treatment facilities ever reported in scientific literature. Additionally, researchers with the U.S. Geological Survey, University of Hawai'i, Woods Hole Oceanographic Institution, and State of Hawai'i Division of Aquatic Resources recently published a peer-reviewed study confirming that discharges from the LWRF injection wells have contributed to rates of bioerosion that are tremendously higher than expected.

The effluent has decimated the fringing reef, which is already reeling from warmer and more acidic waters thanks to global climate change. The nutrient-rich wastewater causes algae blooms that smother the corals, meaning less habitat for fish and endangered sea turtles, but also breakdown the coral, which acts a protector of coastal roads and properties from stronger storms and surf. Nearshore coral reef ecosystems (the cornerstone of Maui tourism, shoreline protection, and local fisheries) are affected by land-based sources of pollution that are also magnified by effects of coastal acidification.

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**IV. A NPDES PERMIT FOR LWRF WILL NOT REQUIRE NPDES PERMITS FOR CESSPOOLS.**

A NPDES permit can regulate discharges of chemicals to levels that are safe for humans and marine organisms. Some County Councilmembers have suggested that a finding in favor of clean water will immediately subject homeowners to Clean Water Act liability for their domestic septic systems and cesspools. The EPA already requires NPDES general permits for septic systems that discharge pollutants to surface waters. This requirement has not burdened homeowners because siting requirements for septic systems already seek to avoid discharges to navigable waters. In any event, when the EPA or DOH determines that a category of numerous discharges poses a threat to surface waters that can be managed without requiring individual permits, the agency can issue a general permit for activities conduct pursuant to proper practices specified in a general permit.

There is no possibility that upholding the CWA in this case would require NPDES permits for approximately 22 million residential septic tanks across the country, as some of the County's *amici* have suggested. A NPDES permit is required only where discharged pollutants are fairly traceable to a point source. DOH has unequivocally stated that the department does not plan require NPDES permits for individual septic systems and cesspools. DOH may issue a single general NPDES permit for residential septic tanks with certain characteristics within its boundaries. A septic tank owner or operator concerned about traceable discharges to navigable waters via groundwater

would simply submit a notice of intent to be bound by that general permit. In appropriate circumstances, the DOH may provide that the discharges complying with applicable conditions are authorized even without a notice of intent. In other words, state regulations and county zoning laws already regulate residential septic tanks to prevent or mitigate point source discharges into navigable waters.

Additionally, some councilmembers have raised concerns that finding in favor of clean water will subject the County to massive costs of upgrading their infrastructure for domestic septic systems. The Legislature is already required to replace all cesspools by 2050 and EPA and DOH are already working to develop appropriate and affordable technologies and funding mechanisms to assist homeowners with upgrades. Maui County is already squandering millions of tax dollars to get the CWA, instead of investing the money in improvements to wastewater reuse infrastructure.

In summary, well-maintained septic tanks should not release pollutants into the navigable waters, therefore, not making them subject to an NPDES requirement. Poorly designed or neglected systems are already subject to regulation and remediation measures under both the Clean Water Act and corresponding state statutes. The so-called threat of unbridled homeowner liability under the CWA is nothing more than a scare tactic designed to drum up public support for the County's misguided appeal.

#### V. RECOMMENDATIONS/CONCLUSION

Maui County and the State of Hawai'i have long been recognized as progressive leaders across the country in our protection and promotion of environmental and indigenous rights. Continuing with counterproductive and regressive litigation jeopardizes that long-fought and storied reputation, instead characterizing Maui County as a willing accomplice in environmental degradation, pollution, and the prioritization of corporate greed over the health of our honua. If the County wins at the U.S. Supreme Court, it will have led the charge to usher in a new era of environmental degradation and puts Maui County on the wrong side of the fight to preserve our natural environment for present and future generations. Adopting the resolution will not oblige the County to pursue further appeals or similar litigation, and instead **provides the Council the opportunity to settle the suit in the best interest of Maui County residents.**

The proposed settlement allows for Maui County to proactively engage with community groups and encourages a proactive approach in ensuring that Maui's waters are managed to protect our reefs and coastal waters. How we treat these waters affect our lives, and the waters and marine resources that we leave for our keiki and our mo'opuna will no longer nourish them, as they did us, if we continue down this path. Destroying the reefs, which Hawaiians revere as kūpuna, robs our mo'opuna of the opportunity to develop the familial relationship to their natural resources that is so integral to our identity as Hawaiians. Continuing this legal fight is not pono, and it goes against the values of kuleana and pono instilled in us by our kūpuna. As an elected official for Maui, I believe that it is important to take a hard look at the values that we are embodying and demonstrating to our world.

In conclusion, I speak in **SUPPORT** of settling this case and implore Maui County to work with community groups to address the challenges posed by injection wells at LWRF and see this as an opportunity to progressively find solutions to combat environmental degradation, invigorate our economy, and protect our marine life and the people that depend on it.

Me ka ha'a ha'a,

A handwritten signature in black ink that reads "Carmen Hulu Lindsey". The signature is written in a cursive, flowing style.

Carmen Hulu Lindsey  
Maui Trustee  
Office of Hawaiian Affairs



## GET Committee

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**From:** Jason Kagimoto <jkagimoto@kauai.gov>  
**Sent:** Thursday, August 29, 2019 4:32 PM  
**To:** GET Committee  
**Cc:** Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura  
**Subject:** Hawaii Wildlife Fund et al. v. County of Maui, GET-26  
**Attachments:** 20190829 County of Kauai DPW Letter of Support for U.S. Supreme Court Docket No. 18-260.pdf

Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee,

The County of Kaua'i, Department of Public Works is providing the attached letter of support to the County of Maui in its case pending before the Supreme Court of the United States to obtain clarification as to whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Thank you for your consideration.

Mahalo.

Jason Kagimoto, P.E.  
Wastewater Management Division  
County of Kaua'i, Department of Public Works  
4444 Rice Street, Suite 275  
Līhu'e, Kaua'i, Hawai'i 96766  
(808) 241-4083  
[jkagimoto@kauai.gov](mailto:jkagimoto@kauai.gov)



DEPARTMENT OF PUBLIC WORKS  
THE COUNTY OF KAUAI

DEREK S. K. KAWAKAMI, MAYOR  
MICHAEL A. DAHLIG, MANAGING DIRECTOR

LYLE TABATA  
DEPUTY COUNTY ENGINEER

August 29, 2019

GET Chair Mike Molina  
200 S. High Street  
Wailuku, HI 96793

SUBJECT: COUNTY OF MAUI, HAWAII v. HAWAII WILDLIFE FUND, et al.,  
U.S. SUPREME COURT DOCKET NO. 18-260

The Honorable Councilmember Molina:

The County of Kaua'i, Department of Public Works conveys its continuing support of the County of Maui in its case pending before the Supreme Court of the United States to obtain clarification as to whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

In particular, the County of Kaua'i, Department of Public Works urges the County of Maui to maintain this case as the County of Kaua'i shares the County of Maui's interest in obtaining clarification regarding the ruling of the United States Court of Appeals for the Ninth Circuit concluding that point source pollution also includes pollutants that reach navigable waters by nonpoint sources so long as the pollutants can be "traced" in more than "de minimis" amounts back to a point source.

After the Ninth Circuit court issued its decision, the Environmental Protection Agency (EPA) published an "Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program (NPDES) to Releases of Pollutants From a Point Source to Groundwater." The Interpretive Statement, released with the intent to advise the public on how EPA interprets the relevant provisions of the CWA, explained that all releases to groundwater are excluded from the scope of the NPDES Program, even where pollutants are conveyed to jurisdictional surface water via groundwater. This directly opposes what the Ninth Circuit court determined. The EPA also identified that "there is sufficient legal authority to address releases of pollutants to groundwater that subsequently reach jurisdictional surface water at both the state and federal level without expanding the CWA's regulatory reach beyond what Congress envisioned."

If the holding of the United States Court of Appeals for the Ninth Circuit is upheld the result could require state and local governments across the country to rework their requirements for the permitting of discharge systems that heretofore have not been regulated as point sources. This could include UIC wells, cesspools, septic systems, drainage basins and surface aquifer treatment (SAT) basins. Additionally, if the CWA is

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read to control the permitting of pollutants originating from a point source but conveyed to navigable waters by a nonpoint source, this would likely necessitate further litigation to establish a quantifiable standard regarding the tracing of pollutants back to the point source. This will be a significant burden to the Counties and their rate payers and private businesses and residents. It would be a nearly impossible burden for many private businesses and residents to obtain and maintain an NPDES permit because they have a cesspool or septic system near the ocean.

Given that the Ninth Circuit court and the EPA do not agree on whether the CWA and thus, the NPDES permit apply in this case, it seems prudent for the County of Maui to have its case heard by the Supreme Court so that the necessary clarification can be provided.

The potential ramifications of withdrawing the case could lead to more lawsuits and undue expenses and penalties because of the uncertainty surrounding the permit requirements and standards for UIC wells and other discharge systems.

In conclusion, although a ruling from the Supreme Court could determine that nonpoint sources, such as UIC wells and other discharge systems, must be permitted under the CWA, it is in the interest of the people of Hawai'i and the governments of its counties to have clarity as to the permitting requirements for their vital sanitary infrastructure.

If you have any questions please contact me at (808) 241-4083 or [jkagimoto@kauai.gov](mailto:jkagimoto@kauai.gov).

Very truly yours,

Jason Kagimoto Digitally signed by Jason Kagimoto  
Date: 2019.08.29 14:54:41 -10'00'

JASON KAGIMOTO, Chief  
Wastewater Management Division

CONCUR:

Lyle Tabata Digitally signed by Lyle Tabata  
Date: 2019.08.29 16:21:25 -10'00'

LYLE TABATA, Deputy County Engineer  
Department of Public Works

cc: Mayor Michael Victorino  
Council Chair Kelly King  
Council Vice-Chair Keani Rawlins  
Presiding Officer Pro Tempore Tasha Kama  
Councilmember Riki Hokama  
Councilmember Alice Lee  
Councilmember Mike Molina  
Councilmember Tamara Paltin  
Councilmember Shane Sinenci  
Councilmember Yukilei Sugimura

## GET Committee

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**From:** Irina Constantinescu <irina.constantinescu@gmail.com>  
**Sent:** Thursday, August 29, 2019 9:24 PM  
**To:** Mike J. Molina; GET Committee  
**Cc:** Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura  
**Attachments:** 20190829 GET Committee\_ILC.pdf

Honorable Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee,

Please consider my testimony (attached) during your discussion regarding the Wildlife Hawaii v. County of Maui at your upcoming GET meeting. I strongly urge you NOT to drop / settle the current legal case. The Supreme Court can provide a clear answer and help all of us protect our environment without the fear of future litigation or misunderstandings.

Mahalo for taking my voice into consideration and mahalo for your continued work for our communities.

Irina Constantinescu  
(808)419-0142  
49 Kokea St Unit 1103  
Wailuku, HI 96793

DATE: August 29, 2019

TO: Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee

SUBJECT: Hawaii Wildlife v. County of Maui, GET-26

Honorable Council,

My name is Irina Constantinescu and I am an environmental engineer. I am writing you today to again urge you NOT to withdraw from the lawsuit against the County regarding the injection wells. I became an environmental engineer because I want to leave the world a little better than I found it. Throughout the years, I have worked on various projects which improved our water quality, reduced the chance of wastewater spills, and protected native species throughout the islands. However, dropping these lawsuits is not the answer. Whether or not the County wins, the environmental and the engineering communities need clarification from the higher courts. Please allow me to explain as best I can.

None of us want to pollute our water (groundwater or ocean) and the engineering community is trying to find reasonable solutions to address the issues raised by the injection wells. Other disposal options would be ocean outfalls or some version of land treatment, all of which would highly minimize the impact our waste has on the environment. Ocean outfalls would need to be built under the reef and extend thousands of feet into the ocean to reach an area where the currents could provide enough dilution to meet current permit requirements. Land treatment would provide additional treatment before the treated water would very slowly percolate through the ground. However, without clarity from the higher courts, it is hard to estimate which specific disposal system would be legal and which may suffer from future litigation. Without an answer from the higher courts, the County may invest in new disposal systems which may later be found controversial and be again subject to litigation.

NPDES permits may also be required for individual cesspool systems. While off the record DOH may have indicated that they would not enforce this on individual home owners, the EPA is ultimately the deciding agency. If the legal case is settled before reaching the Supreme Court, the EPA has indicated that they would have to uphold the current court decision in all cases, including residential cesspools. The state of Hawaii has approximately 88,000 cesspools in operation and the impact of upgrading all cesspools to homewoners throughout the islands would add up to billions of dollars.

I write to you this week as a concerned citizen and a diligent engineer. As part of the engineering licensing exam, I have vowed to do my best to protect the health and safety of the public. Whether or not the County wins the lawsuit, the County's constituents, including myself, would be winners by simply knowing the right course of action. Taxpayers will see their taxes spent on the correct

transition away from the injection wells currently used at all 5 of the County's wastewater treatment reclamation facilities. Without a clear path forward, a lot of money and time will be wasted on solutions that may later be interpreted as inadequate.

As a member of the National Society of Professional Engineers, I have heard communities from across the US express concern over the need for an answer from the Supreme Court. I am certain you have received additional support to continue to the lawsuit from agencies (both private and government) from across the US. I hope you realize that the County is not going against the Clean Water Act and the community at large is not seeing the County of Maui as a rule-breaking institution. Communities and government agencies from ACROSS the United States are eagerly awaiting a final ruling from the Supreme Court in order to better understand HOW to uphold the Clean Water Act and the Safe Drinking Water Act, and which systems required an NPDES permit. Regardless of how the Courts rule, please continue to support the appeal of the lawsuit in order to provide the nation with the clarity needed to move forward in order to better protect our waters. *By water all things find life.*

Sincerely,

A handwritten signature in black ink, appearing to read 'Irina', with a long horizontal flourish extending to the right.

Irina Constantinescu, PE

[irina.constantinescu@gmail.com](mailto:irina.constantinescu@gmail.com)

(808)419-0142

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