GET Committee

From: Gov.Transmit.Docs <transmit.docs@hawaii.gov>
Sent: Wednesday, August 28, 2019 7:33 PM
To: GET Committee
Subject: GET-26 1908039
Attachments: 1908039-gov reply.pdf

Aloha:

Please see the attached document(s).

Thank you,

Office of the Governor, State of Hawai'i
(808) 586-0034

The pdfs require Adobe Reader.

EXECUTIVE CHAMBERS

HONOLULU

DAVID Y. IGE
GOVERNOR

August 23, 2019

The Honorable Kelly T. King
Chair, Maui County Council
Kalana O Maui Building
200 S. High Street
Wailuku, Hawai'i 96793

Re: County of Maui v. Hawai'i Wildlife Fund,
Pending before the United States Supreme Court

Dear Chair King:

I am responding to your letter, dated July 31, 2019 regarding the County of Maui v. Hawai'i Wildlife Fund, et al. Clean Water Act (CWA) case currently pending before the United States Supreme Court. You discuss the brief by thirteen states and the District of Columbia that cautions the Supreme Court against adopting the view of the CWA advocated by the Trump Administration. You state that the Maui County Council's Governance, Ethics, and Transparency ("GET") Committee "would benefit from hearing the State's views on the case." You also indicate that the State's commentary to the Committee could advance the settlement proposal, and support for the other states' brief could also be beneficial.

The State of Hawai'i is not a party to the action. However, we did participate in settlement discussions at the trial level. I agree that the settlement is a good option to revisit at this time, and I will support any effort to settle this matter. As with the discussions at the trial level, we will again assist in the settlement process, if requested.

With warmest regards,

David Y. Ige

David Y. Ige
Governor, State of Hawai'i

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

July 31, 2019

Honorable David Y. Ige, Governor
State of Hawaii
State Capitol
Honolulu, HI 96813

Dear Governor Ige:

SUBJECT: **COUNTY OF MAUI V. HAWAII WILDLIFE FUND, PENDING BEFORE THE UNITED STATES SUPREME COURT** (PAF 19-173)

Thirteen states and the District of Columbia have submitted the attached brief to the United States Supreme Court in opposition to the positions of the Trump Administration and the County of Maui in the Clean Water Act case of County of Maui v. Hawaii Wildlife Fund, regarded as the biggest environmental case in decades.

The brief's coalition includes coastal states with environmental concerns, not including the State of Hawai`i.

The brief cautions the Supreme Court against adopting the view of the Clean Water Act advocated for by the Trump Administration. The Court's acceptance of the Trump position would "threaten the quality of navigable waters that receive discharges of pollutants from point sources via groundwater," and "it would give polluters an incentive to skirt Clean Water Act regulation simply by relocating point source discharges of pollution to nearby groundwater," according to the brief.

Settlement negotiations may continue among the parties in the case prior to oral arguments on November 6, 2019.

Please see the attached resolution, entitled "AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL NO. 12-00198 SOM BMK, U.S. SUPREME COURT CASE NO. 18-260."

The resolution is pending before the Maui County Council's Governance, Ethics, and Transparency ("GET") Committee, designated as GET-26.

The Committee has received the attached correspondence from Council Presiding Officer Pro Tempore Tasha Kama, dated July 17, 2019, attaching correspondence from the Department of Health, advising that cesspool users will not face enforcement actions if the case is settled.

I am sure the GET Committee would benefit from hearing your views on the case. Your commentary to the Committee could advance the settlement proposal. Other Councilmembers have requested the physical presence of the Department of the Health when the Committee next considers this matter. The State of Hawai`i's support of the other states' brief could also be beneficial.

Because this matter is pending in the GET Committee and time is short, I would respectfully urge you to respond to this correspondence by emailing the Committee at get.committee@mauicounty.us, referencing GET-26.

Should you have any questions, please contact me.

Sincerely,

Kelly T. King

KELLY T. KING
Council Chair

paf:dmr:19-173l

Attachments

No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI, HAWAI'I,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, CONNECTICUT, ILLINOIS, MAINE, MICHIGAN, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING RESPONDENTS

BRIAN E. FROSH
Attorney General of Maryland
JOSHUA M. SEGAL*
STEVEN J. GOLDSTEIN
Special Assistant
Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-6446

**Counsel of Record*

[Additional Counsel Listed on Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

XAVIER BECERRA
Attorney General
STATE OF CALIFORNIA

WILLIAM TONG
Attorney General
STATE OF CONNECTICUT

AARON M. FREY
Attorney General
STATE OF MAINE

DANA NESSEL
Attorney General
STATE OF MICHIGAN

HECTOR BALDERAS
Attorney General
STATE OF NEW MEXICO

PETER F. NERONHA
Attorney General
STATE OF RHODE ISLAND

BOB FERGUSON
Attorney General
STATE OF WASHINGTON

KARL A. RACINE
Attorney General
DISTRICT OF COLUMBIA

KWAME RAOUL
Attorney General
STATE OF ILLINOIS

MAURA HEALEY
Attorney General
COMMONWEALTH OF
MASSACHUSETTS

GURBIR S. GREWAL
Attorney General
STATE OF NEW JERSEY

ELLEN F. ROSENBLUM
Attorney General
STATE OF OREGON

THOMAS J. DONOVAN, JR.
Attorney General
STATE OF VERMONT

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INTERESTS OF AMICI CURIAE

Amici curiae the States of Maryland, California, Connecticut, Illinois, Maine, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia ("the Amici States") have a substantial interest in the appropriate application of the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit program and the Act's prohibition against unpermitted discharges of pollutants into navigable waters. The Amici States rely on the Clean Water Act's cooperative federalism framework to ensure that discharges to navigable waters are monitored and comply with permits that take into account the capabilities of treatment technologies, impacts on water quality, and the Act's overall goal of protecting the nation's waters. More specifically, the Amici States rely on the Act to ensure a stable nationwide regulatory floor protecting their surface waters against pollution flowing downstream across state lines.

This case is not about harnessing the Clean Water Act to regulate groundwater pollution, a subject that is largely a matter of traditional state regulation. Rather, it is about regulating pollution in navigable waters, where that pollution is traceable from a defined point source—the indisputable subject of national regulation under the Clean Water Act. Reversing the court of appeals' decision, or creating a Clean Water Act exception for point source discharges that pass through groundwater or other conduits before reaching navigable waters, would be incongruous with the Act's text

and purposes alike.[1] Not only would such an exception threaten the quality of navigable waters that receive discharges of pollutants from point sources via groundwater, it would give polluters an incentive to skirt Clean Water Act regulation simply by relocating point source discharges of pollution to nearby groundwater. The Amici States urge the Court to affirm the court of appeals' decision and hold that, where pollutants are fairly traceable from a point source to navigable waters through groundwater or other conduits, the underlying point source discharge falls within the scope of the Clean Water Act's NPDES program.

SUMMARY OF ARGUMENT

1. The Clean Water Act bars "any addition of any pollutant to navigable waters from any point source" unless authorized by a permit and in compliance with the Act's requirements. 33 U.S.C. §§ 1311(a), 1362(12). Nothing in the Act's text requires that point sources discharge pollutants *directly* to navigable waters. The Act also contains no exception for discharges that pass

[1] Some of the Amici States filed comments asking the United States Environmental Protection Agency ("EPA") to withdraw the "interpretive statement" it recently issued on this question. *See* Attorneys General of Maryland, California, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Michigan, Oregon, Rhode Island, and Vermont, Comment Letter on Proposed Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants from a Point Source to Groundwater (June 7, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0166-0220.

through groundwater before reaching navigable waters. Instead, such point source discharges are subject to NPDES permitting if the pollutants are fairly traceable from the point source to navigable waters—a requirement ensuring that pollutants entering navigable waters are truly "from" the point source, as the statute requires.

2. NPDES coverage of point source discharges of pollutants to navigable waters through groundwater or other conduits protects state interests. The NPDES program promotes federalism by empowering states to protect their waters without fear that their efforts will be undercut by pollution crossing jurisdictional boundaries. Excepting discharges that travel through groundwater or other conduits before reaching navigable waters would jeopardize those waters and leave a dangerous and textually unjustified gap in the Clean Water Act's protections. Other federal environmental statutes and purely state-law regulation would not fill that gap.

3. Continuing federal regulation of the discharges at issue is feasible without undue burden. Although Petitioner and its amici cast the lower court's ruling as a vast expansion of the NPDES program, EPA has—until recently—long rejected the categorical exception they propose, and the sky has not fallen. Quite the contrary: agencies have issued just the sorts of permits that Petitioner and its amici claim are impracticable. Further, the only discharges covered by the court of appeals' ruling are those that are fairly traceable from particular point sources to navigable

waters. In appropriate circumstances, general permits provide agencies with a tool to streamline and simplify the process of permitting large numbers of similar sources. Any burdens associated with affirming the court of appeals' ruling do not warrant an exception that Congress itself did not create.

ARGUMENT

I. THE CLEAN WATER ACT'S NPDES PROGRAM DOES NOT CATEGORICALLY EXCEPT POINT SOURCE DISCHARGES TO NAVIGABLE WATERS VIA GROUNDWATER OR OTHER CONDUITS.

A. The Clean Water Act Broadly Prohibits Pollutant Discharges Unless Authorized by NPDES Permits.

Congress enacted the Clean Water Act with the primary objective of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To help achieve that objective, Congress prohibited "the discharge of any pollutant by any person," except in compliance with listed provisions of the Act. *Id.* § 1311(a).

Consistent with the Clean Water Act's overall objective, Congress broadly defined the prohibited conduct. The Act defines "discharge of a pollutant" to include "*any* addition of any pollutant to navigable waters from *any* point source." *Id.* § 1362(12) (emphasis added). "Pollutant," too, is a broad term. Subject to exceptions inapplicable here, it includes "dredged spoil,

solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). Similarly, "point source" is defined broadly to include (again subject to exceptions inapplicable here) "*any* discernible, confined and discrete conveyance, including but not limited to *any* pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants *are or may be* discharged." *Id.* § 1362(14) (emphasis added).

Despite these broad definitions, Congress did provide a mechanism for otherwise prohibited discharges to occur. Under the NPDES program, EPA may "issue a permit for the discharge of any pollutant[] or combination of pollutants" in compliance with certain conditions. *Id.* § 1342(a)(1).

States may implement the NPDES program within their respective jurisdictions in lieu of EPA. EPA must approve a state's proposal to do so if it determines that certain mandatory components are included. *Id.* § 1342(b). To date, 47 states and the U.S. Virgin Islands have assumed at least partial responsibility for administering the NPDES program. *See* EPA, NPDES State Program Information: State Program Authority, https://www.epa.gov/npdes/npdes-state-program-information (last visited July 12, 2019).

B. The Prohibition on Unpermitted Point Source Discharges to Navigable Waters Contains No Exception for Discharges Through Groundwater or Other Conduits.

On its face, the Clean Water Act's prohibition on the unauthorized "addition of any pollutant *to* navigable waters *from* any point source," 33 U.S.C. § 1362(12) (emphasis added), encompasses both direct and indirect additions of pollutants to navigable waters. Justice Scalia's opinion in *Rapanos v. United States* acknowledged as much:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

547 U.S. 715, 723 (2006) (plurality op.) (emphasis in original; citations omitted). Notably, the opinion's reference is to pollutants that pass through "conveyances," not just through those conveyances that are also point sources.

The prohibition on unauthorized point source discharges of pollutants to navigable waters contains no

express exception for those discharges that pass through groundwater. With such an exception absent from the text, this Court should not read one in. *See, e.g., City of Chi. v. Environmental Def. Fund*, 511 U.S. 328, 334-38 (1994). Indeed, as the United States notes, Congress mentioned groundwater repeatedly in the Clean Water Act. *See* Br. for U.S. as Amicus Curiae Supporting Pet'r ("U.S. Br.") 16-19. But contrary to the conclusion that the United States draws, these repeated references confirm that the subject of groundwater was very much before Congress and that the absence of a groundwater conduit exception must therefore be treated as deliberate. Not only that, but the Act's definition of "point source" specifically includes "well," 33 U.S.C. § 1362(14), and it is unclear how a well could discharge pollutants to navigable waters in any manner *other than* via groundwater.

Equally absent from the statute is the broader exception that Petitioner proposes. According to Petitioner, point source discharges to navigable waters are subject to the Clean Water Act if they pass through conduits that are themselves point sources, yet are excepted if any of the conduits is *not* a point source. *E.g.*, Pet'r Br. 54. But the Clean Water Act does not distinguish among different kinds of conduits; the "addition of any pollutant" must only be "*to* navigable waters" and "*from* any point source." 33 U.S.C. § 1362(12) (emphasis added). And although Petitioner attempts to ground its "means of delivery" test in the phrase "from a point source," Pet'r Br. 28-30, that phrase most logically refers to the regulated point source itself, rather

than the types of conduits that carry pollutants to navigable waters.[2]

Regulating point source pollutants that reach navigable waters through groundwater is not the same as regulating groundwater as a "navigable water" or invading state prerogatives regarding groundwater regulation.[3] The court of appeals' decision does not define "navigable waters" to include groundwater, nor does it otherwise extend the Clean Water Act to cover discharges of pollutants into groundwater as such. Rather, the decision stands for the unremarkable proposition that a point source discharge to navigable waters (*i.e.*, jurisdictional waters) remains a point source discharge to navigable waters even if it passes through groundwater along the way. Whether or not Congress "intend[ed] for the CWA to expand federal jurisdiction to groundwater," Br. of Amici Curiae State of W. Va., *et al.* ("W. Va. Br.") 11, is therefore irrelevant.

Nor does the court of appeals' decision raise the specter of unfettered liability for discharges into

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[2] Those conduits may themselves be regulated, however, if they are point sources. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 104-05 (2004).

[3] The precise contours of "navigable waters," which the Clean Water Act defines by reference to "the waters of the United States," have been the subject of considerable litigation and regulation. *See, e.g., Rapanos*, 547 U.S. 715; Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019). This brief takes no position on the proper definition of "navigable waters" or "the waters of the United States," and in submitting this brief, no Amicus State intends to change any position it previously has taken on those questions.

groundwater. For such discharges to be subject to the NPDES program, the fact that groundwater connects to navigable waters is not enough. Rather, such discharges are covered only if the pollutants can be fairly traced from navigable waters to the point source, for only then can it be said that the discharge to navigable waters is "*from* [the] point source." 33 U.S.C. § 1362(12) (emphasis added). In those circumstances, it is only sensible—and consistent with the statutory text—to require the point source to comply with effluent limitations designed to protect navigable waters, as the text requires.

Practical considerations underscore the problems with the exception that Petitioner seeks. Accepting Petitioner's position would allow savvy entities to avoid altogether the Clean Water Act's prohibition on unpermitted discharges from point sources. Instead of discharging directly into a river, a polluter might move its discharge pipe into immediately adjacent groundwater and, if Petitioner's position were correct, thereby evade the Clean Water Act.[4] Petitioner and its amici do not

[4] This sort of gamesmanship is by no means fanciful. In Colorado, the operator of a silver mine sought to terminate its discharge permit because it had moved its discharges from surface water to a nearby pipe buried in waste rock material. The state permitting agency denied the termination request because the unconsolidated nature of that material, coupled with the discharge's proximity to the surface water at issue, created a direct hydrologic connection between the discharge and that surface water. *See* Colorado Department of Public Health & Environment, Permit Termination Request Denial—December 2016 Request Permit No. CO0000003 (June 1, 2017), https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/1013777/File/Document.

explain why Congress would have meant to give polluters a road map to evade Clean Water Act permitting requirements, threaten the integrity of the nation's waters, and jeopardize the interests of states downstream. Such a result would be antithetical to the Act's prohibition against unpermitted discharges of pollutants to navigable waters, as well as its stated goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

II. EXCEPTING DISCHARGES VIA GROUNDWATER OR OTHER CONDUITS WOULD UNDERMINE STATES' ABILITY TO PROTECT THEIR NAVIGABLE WATERS.

Petitioner and its amici argue that the court of appeals' decision denigrates states' interests because it encroaches on state sovereignty and leaves states with untenable regulatory burdens. *See, e.g.*, Pet'r Br. 51-52; W. Va. Br. 27-34. The Amici States disagree. An interpretation of the Clean Water Act that is consistent with the statutory text and furthers the Act's purposes—including coverage of the discharges at issue in this case—is necessary to *protect* state interests, and concerns about increased burdens are significantly overstated.

A. The Clean Water Act Promotes Federalism by Empowering States to Protect Their Navigable Waters.

The Clean Water Act gives states a central role in regulating point source discharges. "[I]t is the policy of Congress," the Clean Water Act declares, "that the States . . . implement the permit programs under sections 1342 and 1344 of this title." 33 U.S.C. § 1251(b); *see* 33 U.S.C. § 1342(b) (providing that, if EPA determines that certain conditions are satisfied, EPA "shall" authorize a state to administer the NPDES program). Congress's stated desire for states to implement the NPDES permit program—the Clean Water Act's principal means of regulating point source pollution—is one reflection of its solicitude for "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

At the same time, the Act establishes minimum standards to which NPDES programs must adhere. Delegation of permitting authority depends on a state's ability to "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 [of Title 33]." 33 U.S.C. § 1342(b)(1)(A). And although states are free to implement water quality protections that are more stringent than the standards established under the Clean Water Act, they may not fall below those standards. *See id.* § 1370 (providing that states cannot "adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent" than

those established "under this chapter"). Thus, while some variation is allowed from state to state, the Act ensures that no state can adopt or enforce water quality controls that fall below a national regulatory floor.

States rely on this regulatory floor in two ways. First, they rely on the Clean Water Act's minimum nationwide standards to protect their waters against upstream, out-of-state pollution that they cannot regulate directly. Although pollutants discharged in one state can travel downstream to the waters of another, states typically cannot apply their own laws to polluters outside their boundaries. *See generally International Paper Co. v. Ouelette*, 479 U.S. 481, 491-97 (1987). The Clean Water Act's NPDES program protects downstream states by ensuring that upstream, out-of-state point source discharges are subject at least to nationwide minimum standards. *See, e.g.*, 33 U.S.C. § 1370 (state standards cannot be "less stringent" than federal standards); *id.* § 1342(b) (requirements for states to exercise delegated permitting authority, including that their NPDES programs must "insure that the public, and *any other State the waters of which may be affected*, receive notice of each application for a permit" and "provide an opportunity for public hearing before a ruling on each such application" (emphasis added)); 40 C.F.R. § 122.4(d) (NPDES permits must ensure compliance with water quality standards of downstream states). The NPDES program's protections become meaningless, however, when a source is not subject to the program at all.

Second, states rely on the Clean Water Act's regulatory floor for assurance that protecting water quality will not cause businesses to relocate to jurisdictions with less stringent water quality protections. Indeed, these concerns hamstrung state efforts to control water pollution prior to 1972. *See, e.g.*, A Legislative History of the Water Pollution Control Amendments of 1972, at 452 (1972) (statement of Rep. Reuss, quoting Governor Wendell Anderson of Minnesota, that "[e]very governor in the country knows what is the greatest political barrier to effective pollution control," namely, "the threat of our worst polluters to move their factories out of any State that seriously tries to protect its environment" and "the practice of playing off one State against the other"). Congress responded by prohibiting all point sources from discharging pollutants to navigable waters (absent a permit) and barring states from setting standards below the national floor. *See* 33 U.S.C. §§ 1311(a), 1370. Far from encroaching upon states' rights, that national floor empowers states to protect their navigable waters without fear that other states will undermine those efforts.

B. An Exception for Discharges Through Groundwater or Other Conduits Would Significantly Erode the National Regulatory Floor and Degrade Water Quality.

A bar on unauthorized point source discharges to navigable waters via groundwater (or other conduits) is one component of the federal regulatory floor on

which the Amici States depend. Petitioner and its amici, however, suggest that excepting such discharges from the NPDES program would pose little cause for concern because they already are subject to other federal statutes, as well as state regulation not required by the Clean Water Act. *See, e.g.*, Pet'r Br. 43-44; W. Va. Br. 21-24; U.S. Br. 31-33. These contentions are incorrect.

1. Other Federal Laws Do Not Ameliorate the Consequences of Creating an Exception for Discharges Via Groundwater or Other Conduits.

Petitioner and its amici cite a host of federal laws that would remain in place even if this Court were to reverse the court of appeals' decision. None of those laws adequately mitigates the consequences of such a ruling.

First, Petitioner and its amici are wrong to suggest that the Clean Water Act's *nonpoint* source programs are relevant here. *See, e.g.*, Pet'r Br. 23-26; W. Va. Br. 15-17. Those programs provide funding and technical support to help states control the discharge of pollutants to navigable waters from diffuse sources, such as some storm water and farm field runoff.[5] *See, e.g.*, 33 U.S.C. § 1329. This support is useful, to be sure, but it is beside the point. The discharges of pollutants in this case—as well as other discharges implicating the

[5] Concentrated animal feeding operations, by contrast, are regulated as point sources. 33 U.S.C. § 1362(14).

question presented—are from *point* sources, such as wastewater injection wells, coal ash impoundments, and leaking pipelines. *See, e.g.*, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 744-45 (9th Cir. 2018) (injection wells discharging to Pacific Ocean via groundwater); *Yadkin Riverkeeper v. Duke Energy Carolinas LLC*, 141 F. Supp. 3d 428, 436-37, 444 (M.D.N.C. 2015) (coal ash lagoons discharging to the Yadkin River via groundwater); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 647-48 (4th Cir. 2018) (gasoline pipeline leaking via groundwater into creeks, adjacent wetlands, and lakes); *see also* 33 U.S.C. § 1362(14) (defining "point source"). The pollutants merely pass through a groundwater conduit before reaching navigable waters. And because they are traceable from a particular point source (as required by the decision below), controlling their discharge does not pose the challenges ordinarily associated with controlling nonpoint source pollution.

Nor do other federal pollution control and remediation statutes adequately fill the gap that would result from a groundwater-conduit exception, as Petitioner and its amici argue. *See, e.g.*, Pet'r Br. 43-44; U.S. Br. 31-33. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 – 6992, for instance, does not substitute for regulation under the Clean Water Act. The "primary purpose" of RCRA, this Court has observed, "is to reduce the generation of hazardous wastes and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996).

The "hazardous waste" that RCRA regulates is a narrower category than the "pollutants" that the Clean Water Act regulates.[6] And RCRA is primarily focused on the management of wastes, rather than the protection and overall health of navigable waters.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 – 9675, is an even poorer substitute. CERCLA is not designed to limit pollutant discharges or contamination in the first instance. Instead, it is primarily focused on promoting the "timely cleanup of hazardous waste sites" once they are created and "ensur[ing] that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citations omitted). Moreover, CERCLA governs "hazardous substances," generally defined to include substances with particular characteristics or substances that have been specially designated under certain other statutes, *see* 42 U.S.C. § 9601(14), again in contrast with the Clean Water

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[6] *Compare* 42 U.S.C. § 6903(5) (defining "hazardous waste" for purposes of RCRA to mean certain solid waste that may "cause, or significantly contribute to[,] an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness" or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed") *with* 33 U.S.C. § 1362(6) (defining "pollutant" under the Clean Water Act to include, among other things, "sewage, garbage, . . . biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, [and] cellar dirt").

Act's broad definition of "pollutant," *see* 33 U.S.C. § 1362(6).

Likewise, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f – 300j-27, would not fill the gap in Clean Water Act coverage that would result from reversal of the court of appeals' decision. *See* Pet'r Br. 43. The SDWA protects drinking water—not navigable waters—by authorizing EPA to set maximum contaminant levels to protect the public health and welfare, 42 U.S.C. § 300f(1) – (2), and by establishing standards governing the operation of underground injection wells, *id.* §§ 300h – 300h-8. Even those provisions are limited in scope. For instance, the statute does not regulate any contaminant unless EPA has made certain findings in connection with its impact on drinking water. *See, e.g., id.* § 300g-1(b)(1)(A) – (B) (directing regulation of contaminants that, among other things, have the potential to adversely affect human health and are sufficiently likely to occur in public water systems "with a frequency and at levels of public health concern"). And as the record in this case demonstrates, the SDWA in fact is insufficient to incidentally protect navigable waters. *See Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 999, 1003-04 (D. Haw. 2014) (finding that even after compliance with a permit issued under the SDWA, "more than 50% of the effluent originating at the [facility] is finding its way into the ocean," significantly damaging nearby coral).[7]

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[7] Additionally, neither the Coastal Zone Management Act (Pet'r Br. 44) nor the Oil Pollution Act of 1990 (U.S. Br. 33)

2. State Regulation Does Not Adequately Protect Against the Consequences of Reversal.

Petitioner and its amici also insist that a Clean Water Act exception for discharges through groundwater or other conduits poses little cause for concern because, they say, state regulation is and will remain robust. *See, e.g.*, W. Va. Br. 20-27. These reassurances are mistaken. Although state regulation plays an important role in protecting water quality, overall it is too uneven to fill the gap left by Petitioner's requested exception.

For instance, Petitioner's amici generally emphasize the degree to which existing state law protects groundwater. *See* W. Va. Br. 21-24 (arguing that listed state laws "highlight [that the] absence of a requirement to obtain an NPDES permit is not equivalent to an unfettered license to discharge pollutants into groundwater"). Again, however, this case is not about protection of groundwater as such. It is about protection of *navigable* waters from point source discharges of pollutants that traceably travel *through* groundwater. Regulation of groundwater quality (or discharges into groundwater) may incidentally offer a measure of

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provides an adequate substitute for Clean Water Act coverage. The Coastal Zone Management Act's requirement that each participating state prepare a "Coastal Nonpoint Pollution Control Program," 16 U.S.C. § 1455b(a)(1), does not regulate point source pollution, and the Oil Pollution Act establishes damages liability for certain oil spills, *see* 33 U.S.C. § 2702(a).

protection for navigable waters, but it is not designed to do so.

Further, the state laws that Petitioner's amici cite offer little in the way of consistency. Some provisions are drafted broadly. *See* Mich. Comp. Laws § 324.3109(1) (providing that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious"). Others, however, appear to be drawn more narrowly. *See, e.g.*, Kan. Stat. § 65-164(a) – (b) (prohibiting the discharge of "sewage," defined as "any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals or chemical or other wastes from domestic, manufacturing or other forms of industry," into state waters). This inevitable lack of uniformity prevents states from relying dependably on a consistent baseline level of regulation nationwide. *See supra* at 12-13.

In some instances, moreover, the level of state regulation is tied to federal standards, so that weakening the latter can weaken the former. In certain states, state law currently *prohibits* regulation that goes beyond federal requirements (even though federal law, of course, permits it). *See, e.g.*, Ariz. Rev. Stat. Ann. § 49-203(A)(2) (instructing the director to adopt "a permit program that is consistent with but no more stringent than the requirements of the clean water act for the point source discharge of any pollutant or combination of pollutants into navigable waters"); Ky. Rev. Stat. Ann. § 224.16-050(4) (providing that "the cabinet shall not impose . . . any effluent limitation, monitoring

requirement, or other condition which is more stringent than . . . federal regulation"); Miss. Code Ann. § 49-17-34(2) ("All rules, regulations and standards relating to air quality, water quality or air emissions or water discharge standards . . . shall be consistent with and shall not exceed the requirements of federal statutes and federal regulations, standards, criteria and guidance."). In other states, state law references or directly incorporates federal standards. *See, e.g.*, W. Va. Code § 22-11-4(a)(1) (instructing director to "perform any and all acts necessary to carry out the purposes and requirements of this article and of the [Clean Water Act] . . . relating to this state's participation in the [NPDES]"). State regulation thus is not independent of the level of federal regulation and cannot dependably fill the gap resulting from an atextual groundwater-conduit exception. Indeed, adopting that exception might well preclude some states from regulating discharges to navigable waters via groundwater, given existing state law prohibiting or restricting regulation more stringent than federal standards. *See, e.g.*, Ariz. Rev. Stat. § 49-203(A)(2); Ky. Rev. Stat. Ann. § 224.16-050(4); Miss. Code Ann. § 49-17-34(2).

Finally, any protections currently provided by state law do not guarantee similar protections in the future, in the absence of Clean Water Act protection. Without such protection, a state that vigorously protects its waters today may, for whatever reason, decide to protect its waters less vigorously tomorrow. It would be a mistake, therefore, to treat the current landscape of state regulation as a basis for creating the exception

that Petitioner and its amici seek, and that Congress did not provide.

III. Regulating Groundwater-Conduit Discharges Under the NPDES Program Is Feasible Without Undue Burden.

Alternatively, Petitioner and its amici argue that discharges to navigable waters via groundwater should be excepted from Clean Water Act coverage because (they say) the process of issuing permits for such discharges would be unduly burdensome for applicants and for state permitting authorities alike. *See, e.g.*, W. Va. Br. 27-34. Not so. Any consideration of burden is beside the point, because Congress did not include an exception for groundwater-conduit discharges. But even if it were appropriate to consider regulatory burdens, the lower court's ruling is far less onerous than Petitioner and its amici claim, and any resulting burdens are fully justified.

As an initial matter, claims about dramatically increased burdens rest on an incorrect premise, namely, that the court of appeals' decision amounts to a novel expansion of the NPDES program. *See, e.g.*, Pet'r Br. 45-48. EPA's own position—until recently—had long been that discharges to navigable waters via groundwater are not exempt from Clean Water Act regulation. For nearly twenty-five years, EPA's manual for NPDES permit writers has expressly provided that discharges via groundwater can fall within the NPDES program. In 1996, that manual recognized that

groundwater is not part of the "waters of the United States," but that "[i]f . . . there is a discharge to groundwater that results in a 'hydrological connection' to a nearby surface water, the Director may require the discharger to apply for an NPDES permit." U.S. EPA, EPA-833-B-96-003, NPDES Permit Writers' Manual 13 (1996), https://www3.epa.gov/npdes/pubs/owm0243.pdf. The 2010 manual—which remains the latest version—takes a similar tack. Although that manual acknowledges that "[t]he CWA does not give EPA the authority to regulate ground water quality through NPDES permits," it makes clear that "[i]f a discharge of pollutants to ground water reaches waters of the United States, . . . it could be a discharge to the surface water (albeit indirectly via a direct hydrological connection, i.e., the ground water) that needs an NPDES permit." U.S. EPA, EPA-833-K-10-001, NPDES Permit Writers' Manual 1-7 (2010), https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. These statements in EPA's most comprehensive guidance to agencies implementing the NPDES program are consistent with multiple EPA regulatory preambles over the years.[8] They are also consistent with

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[8] *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001) ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act."); Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to

EPA's previous explanation of its "longstanding position" at an earlier stage of this very case.[9] That EPA's pronouncements have long reflected the lack of a categorical exception for discharges through a groundwater conduit confirms that the court of appeals' decision is far from novel.

This conclusion is unaffected by the fact that EPA has reversed course and *now* believes, erroneously, that discharges to navigable waters via groundwater are exempt from NPDES permitting. *See* Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System

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regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection . . . between the groundwater and the surface water."); Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (discharges to groundwater with a direct hydrological connection to surface water "are regulated because such discharges are effectively discharges to the directly connected surface waters"); EPA National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (stating that rulemaking addressed only "discharges to waters of the United States," so that "discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)").

[9] *See* Br. for the U.S. as Amicus Curiae Supporting Pls.-Appellees, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (No. 15-17447), ECF No. 40, 2016 WL 3098501, at *22 ("EPA's longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a 'direct hydrological connection' between the groundwater and the surface water.").

Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019). That EPA has reached this conclusion by way of "interpretive guidance" in 2019—in an apparent effort to influence this litigation[10]—cannot erase the historical fact that, for nearly three decades, the lack of a groundwater-conduit exception has been the agency's repeatedly articulated position. There is no reason to think that the consequences of that prior "longstanding position" have been grievous or destabilizing.

In fact, it is just the opposite. Permitting agencies have issued permits for discharges reaching navigable waters via groundwater. As the following examples demonstrate, coverage of such discharges is not novel and does not create unmanageable burdens:

- The NPDES permit renewed in 2012 by the State of Colorado for the Western Sugar Company's sugar beet factory and associated wastewater treatment facility authorizes the company to discharge effluent into groundwater via a series of unlined ponds in accordance with certain limitations and conditions, based on a hydrologic connection between the groundwater and the South Platte River. *See* Colorado Discharge Permit System Fact

[10] EPA's "interpretive statement" asserts that it is meant to "provide[] necessary clarity on the Agency's interpretation of the statute" in connection with the grant of certiorari in this case. 84 Fed. Reg. at 16,812. EPA's newfound interpretation accordingly should be treated as a "convenient litigating position," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), and receive no deference here.

Sheet to Permit Number CO-0041351, https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/237726 (last visited July 16, 2019).

- The NPDES permit issued by EPA in 2017 for the Hollywood Casino Wastewater Treatment Plant, located in Jamul, California, authorizes the plant to discharge effluent into groundwater infiltration basins in accordance with certain limitations and conditions. The infiltration basins are located within 100 feet of Willow Creek. EPA concluded that "wastewater discharged to the infiltration basins has potential to result in surface water discharges to Willow Creek and is therefore subject to regulation through an NPDES permit." NPDES Permit No. CA0084284 Fact Sheet, at 2, https://www.epa.gov/sites/production/files/2017-08/documents/ca0084284-jamul-hollywood_casino_waste_water_treatment_plant-npdes-permit-factsheet-2017-08.pdf (last visited July 16, 2019).

- The NPDES permit issued by EPA in 2015 for the Tahola Village Wastewater Treatment Plant, located on the reservation of the Quinault Indian Nation, authorizes the plant to discharge effluent into groundwater in accordance with certain limitations and conditions. The effluent "is mixed and diluted into a groundwater plume prior to entering the Quinault River as surface water." NPDES Permit No. WA0023434 Fact Sheet, at 9, https://www.epa.gov/sites/production/files/2017-09/

documents/r10-npdes-taholah-wa0023434-fact-sheet-2015.pdf (last visited July 16, 2019).

- The NPDES permit reissued by EPA in 2016 to Chevron Mining, Inc. at Questa Mine in New Mexico, authorizes various discharges that ultimately reach the Red River. The permit acknowledges that it is not regulating groundwater quality, but includes provisions specifically addressing discharges to the Red River via groundwater seeps and springs. *See* NPDES Permit No. NM0022306, at 4, 6-10, 23, 48, https://www. env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf (last visited July 16, 2019).

- The NPDES permit reissued by EPA in 2016 for the Neopit Wastewater Treatment Facility, located on the Menominee Indian Reservation, authorizes the tribe's wastewater treatment plant to discharge effluent "to groundwater via seepage cells to Tourtillotte Creek" in accordance with certain limitations and conditions. *See* NPDES Permit No. WI-0073059-2, at 1, https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf (last visited July 16, 2019).

Permits such as these confirm that regulating groundwater-conduit discharges to navigable waters is neither novel nor infeasible.

Even assuming some novelty, though, there is no merit to the argument that NPDES regulation of groundwater-conduit discharges would be unduly

burdensome. That argument is difficult to square with the suggestion that states *already* regulate discharges directly to groundwater in a manner sufficiently protective of navigable waters. *See* W. Va. Br. 20-27. If this is really true (although the Amici States dispute that it is, *see supra* at 18-20), then regulating discharges that are fairly traceable to navigable waters through a groundwater conduit should add only an incremental burden.

In all events, Petitioner and its amici drastically overstate the administrative burden of regulation. Affirming the court of appeals' decision will not mean that *every* point source discharging into groundwater must seek an NPDES permit, only those with discharges that can fairly be traced to navigable waters. That important limitation is consistent with the Clean Water Act's focus on protecting navigable waters and ensures that regulated discharges are indeed "*from* [the] point source." 33 U.S.C. § 1362(12) (emphasis added).

Besides glossing over this limitation, Petitioner and its amici ignore the availability of general permits to minimize administrative burdens. Petitioner and its amici raise the specter of massive numbers of permit applications, each requiring individualized analysis and assessment. *See*, *e.g.*, Pet'r Br. 45-48; W. Va. Br. 30-31. Yet permitting agencies—whether state or federal—are empowered to issue general permits that address numerous similar point sources in a streamlined

process.[11] EPA's regulations provide that a general permit, written to cover a particular geographic area, may be issued for a *category* of similar sources. *See* 40 C.F.R. § 122.28(a)(2). Once an agency has issued a general permit, a discharger generally need only submit a "notice of intent," not a full individualized application, to be authorized by the general permit and bound by its conditions. *Id.* § 122.28(b)(2). Further, even the requirement to submit a notice of intent can be forgone in certain circumstances. *Id.* § 122.28(b)(2)(v); *see Miccosukee Tribe*, 541 U.S. at 108 n.* (explaining that "[g]eneral permits greatly reduce [the] administrative burden [associated with NPDES applications] by authorizing discharges from a category of point sources within a specified geographic area," and that "[o]nce EPA or a state agency issues such a permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions").

Thus, by way of example, it is simply not the case that affirming the court of appeals' decision would require the submission and review of millions of individualized permit applications for residential septic tanks, as Petitioner and its amici contend. *See, e.g.*, Pet'r Br. 47; W. Va. Br. 30-32. To begin, the permitting

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[11] Courts have upheld or approved of the use of general permits in the NPDES program. *See Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003) (explaining that "[g]eneral permitting has long been recognized as a lawful means of authorizing discharges"); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1380-82 (D.C. Cir. 1977) (noting that the Clean Water Act allows the use of general permits).

requirement applies only where a source's discharged pollutants are fairly traceable to navigable waters, and Petitioner and its amici provide no reason to think this is commonly the case for residential septic tanks.[12] But even setting that point aside, a state could issue a single general NPDES permit for residential septic tanks with certain characteristics within its boundaries. That general permit would specify certain conditions for permittees to satisfy, but it would not require the individualized application and review process that Petitioner and its amici portend. A septic tank owner or operator concerned about the possibility of traceable discharges to navigable waters via groundwater would simply submit a notice of intent to be bound by that general permit. Indeed, in appropriate circumstances, the state might provide that discharges complying with applicable conditions are authorized even without a notice of intent. 40 C.F.R. § 122.28(b)(2)(v); *cf. Miccosukee Tribe*, 541 U.S. at 108 (noting argument that "the States or EPA could control regulatory costs by issuing general permits" to the category of point sources at issue).

Also inapt is the suggestion that discharges to navigable waters via groundwater should be exempt from the Clean Water Act because of the supposed difficulty of setting effluent limitations for such discharges. *See* W. Va. Br. 32-33. Nothing in the definition of "effluent limitation" requires that compliance be

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[12] Indeed, existing state law often limits septic tanks' proximity to surface waters. *See, e.g.*, Colo. Code Regs. § 1002-43:43.7; Md. Code Regs. 26.04.02.04; 25 Pa. Code § 73.13; S.C. Code Ann. Regs. 61-56.200.

assessed where a pollutant leaves the point source, rather than where it enters or affects navigable waters. *See* 33 U.S.C. § 1362(11) (defining "effluent limitation" as "any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters"); *Natural Res. Def. Council, Inc. v. County of L.A.*, 725 F.3d 1194, 1200, 1209 (9th Cir. 2013).

Still, to the extent that there are burdens associated with obtaining and issuing permits for groundwater-conduit discharges or complying with conditions necessary to protect the quality of navigable waters, these provisions provide no reason to create the extra-textual exception that Petitioner and its amici seek. Congress included no such exception in the Clean Water Act. Moreover, the Act's stated purpose of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters" dictates that it is fair to require polluters to bear those burdens, rather than saddling the public with the burdens of added pollution to navigable waters.[13]

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[13] Nor is a categorical groundwater-conduit exception justified by the claimed burdens associated with determining whether a discharge is subject to NPDES permitting. *See* W. Va. Br. 32-33. For many sources, the prospect of Clean Water Act liability should be clear both to the source's owner or operator and to state regulators. Coal ash impoundments, for instance, often are located immediately adjacent to navigable waters, because of power plants' need for cooling water. *See, e.g.*, *Yadkin*, 141 F. Supp. 3d at 436-37. To the extent that there is doubt about whether discharges would be fairly traceable to navigable waters, Petitioner

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland
JOSHUA M. SEGAL*
STEVEN J. GOLDSTEIN
Special Assistant
Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-6446

**Counsel of Record*

[Additional Counsel Listed on Following Page]

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and its amici provide no reason why it is sensible to require the public to tolerate the ensuing pollution, rather than require the polluting source to either take the measures necessary to forestall such discharges or apply for an NPDES permit.

XAVIER BECERRA
Attorney General
STATE OF CALIFORNIA

WILLIAM TONG
Attorney General
STATE OF CONNECTICUT

AARON M. FREY
Attorney General
STATE OF MAINE

DANA NESSEL
Attorney General
STATE OF MICHIGAN

HECTOR BALDERAS
Attorney General
STATE OF NEW MEXICO

PETER F. NERONHA
Attorney General
STATE OF RHODE ISLAND

BOB FERGUSON
Attorney General
STATE OF WASHINGTON

KARL A. RACINE
Attorney General
DISTRICT OF COLUMBIA

KWAME RAOUL
Attorney General
STATE OF ILLINOIS

MAURA HEALEY
Attorney General
COMMONWEALTH OF
MASSACHUSETTS

GURBIR S. GREWAL
Attorney General
STATE OF NEW JERSEY

ELLEN F. ROSENBLUM
Attorney General
STATE OF OREGON

THOMAS J. DONOVAN, JR.
Attorney General
STATE OF VERMONT

Resolution

No. _____

AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL NO. 12-00198 SOM BMK, U.S. SUPREME COURT CASE NO. 18-260

WHEREAS, Plaintiffs Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court (the "District Court") on April 16, 2012, Civil No. 12-00198 SOM BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act; and

WHEREAS, on January 23, 2015, and June 25, 2015, the District Court granted Plaintiff's motions for partial summary judgment; and

WHEREAS, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, the County Council approved a Settlement Agreement by Resolution 15-75 ("2015 Settlement Agreement"); and

WHEREAS, the 2015 Settlement Agreement was lodged with the District Court on September 24, 2015, and following federal government review pursuant to 40 C.F.R. §135.5, the District Court entered the Settlement Agreement and Order and entered its Judgement on November 17, 2015; and

WHEREAS, pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal

the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the U.S. Supreme Court; and

WHEREAS, the County of Maui appealed the District Court's decision to the Ninth Circuit Court of Appeals, No. 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018; and

WHEREAS, County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition, No. 18-260; and

WHEREAS, in accordance with Section 3.16.020(F), Maui County Code, the Department of Corporation Counsel may transmit to Council settlement offers involving claims not specified by the Council pursuant to Section 3.16.020(D), Maui County Code; and

WHEREAS, the Department of the Corporation Counsel has received "Confidential Settlement Communication – FRE 408" dated April 26, 2019, (with amendments made on May 9, 2019) from Plaintiff's counsel, which are attached hereto as Exhibits "A" and "B" ("Plaintiffs' 2019 Settlement Proposals"); and

WHEREAS, the terms, conditions, ramifications, and consequences of the Plaintiffs' 2019 Settlement Proposals will be discussed in a duly

called executive meeting before the Governance, Ethics, and Transparency Committee; and

WHEREAS, having reviewed the facts, circumstances, ramifications, and consequences regarding this case and pending appeal before the U.S. Supreme Court, and being advised in the premises, the Council wishes to authorize the settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Governance, Ethics, and Transparency Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case; and

3. That it hereby authorizes the Director of Finance to satisfy said settlement of this case; and

4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY:

RICHELLE M. THOMSON
Deputy Corporation Counsel
County of Maui
Lit 4996

EARTHJUSTICE

April 26, 2019

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408[1]

By Electronic Mail Only

Moana Lutey
Edward Kushi
Richelle Thomson
Department of the Corporation Counsel
County of Maui
Moana.Lutey@co.maui.hi.us
Edward.Kushi@co.maui.hi.us
Richelle.Thomson@co.maui.hi.us

Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 18-260 (U.S. S. Ct.)

Counsel,

For more than a decade, Maui community groups Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association (collectively, "the Community Groups"), represented by Earthjustice, have sought to work with the County of Maui to address the harm to the nearshore marine environment associated with use of the injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). We have never expressed or shown any interest in having the County spend money on litigation or pay Clean Water Act penalties to the federal treasury. On the contrary, the Community Groups have consistently sought to encourage the County to invest its taxpayer dollars to find solutions, including investments in infrastructure to increase re-use of treated wastewater from the LWRF to meet the irrigation needs of West Maui agriculture, golf courses and commercial landscaping.

Now that the County has a new Mayor and a new Council, we are hopeful that we can work productively together. We provide this offer in the interest of bringing to a close the litigation over the LWRF injection wells, which is now pending before the United States Supreme Court and, with the national attention such a case attracts, threatens the County of Maui's reputation as a champion of environmental quality and stewardship. We offer to work cooperatively and in good faith with the County to reduce reliance on the injection wells to dispose of treated

[1] Please note that, in the spirit of public transparency, our preference and request is to have this settlement offer be made public and not be sealed for purposes of County deliberations. We cite Federal Rule of Evidence 408 here solely for the purpose of ensuring that this good faith settlement offer will not be used against us in any court proceedings.

MID-PACIFIC 850 RICHARDS STREET SUITE 400 HONOLULU, HI 96813
T 808.599.2436 F 808.521.6841 MPOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

Exhibit "A"

wastewater, to increase the beneficial reuse of that treated wastewater, and to ensure that any wastewater that is injected does not harm the marine environment. As long as the County is making good faith efforts to achieve these goals, we provide assurances that the Community Groups will not bring additional litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells. We also provide assurances that the Community Groups will not bring litigation against businesses and other consumers of recycled water from the LWRF who are irrigating responsibly, so as not to cause pollution of waters of the United States. We are, after all, deeply committed to increasing beneficial reuse of recycled water from the LWRF.

Specifically, we offer to settle the above-captioned case as follows:

1. The parties would jointly dismiss the County's pending appeal to the U.S. Supreme Court pursuant to Supreme Court Rule 46.1. Each party would bear its own costs of litigation (including attorneys' fees) for all proceedings before the Supreme Court.

2. Pursuant to the previously entered Settlement Agreement and Order Re: Remedies in *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Nov. 17, 2015), the County (1) would make good faith efforts to secure and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF injection wells (Settlement ¶ 8); (2) would fund and implement one or more projects located in West Maui, to be valued at a minimum of $2.5 million, the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui (Settlement ¶¶ 9-12);[2] and (3) would pay a $100,000 penalty to the U.S. Treasury (Settlement ¶ 13).[3]

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[2] We understand that, as part of the current budgeting process, the County may include far more than $2.5 million in next year's budget to fund projects to divert treated wastewater from the LWRF injection wells for reuse. If the County does that, it should readily be able to satisfy this settlement provision.

[3] As mentioned, we have no desire to have the County pay penalties to the U.S. Treasury. The parties were required to include this relatively modest penalty in the settlement in order to secure approval from the Environmental Protection Agency, which reviews all settlements in Clean Water Act citizen suits pursuant to 33 U.S.C. § 1365(c)(3).

3. Pursuant to the parties' prior agreements, which have been entered as court orders, the County would reimburse the Community Groups' costs of litigation (including attorneys' fees) for litigation in the district court and Ninth Circuit Court of Appeals. *See* Stipulated Settlement Agreement Regarding Award of Plaintiffs' Costs of Litigation, *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Dec. 29, 2015); Order, *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 15-17447 (9th Cir. Apr. 25, 2018). As mentioned above, each party would bear its own costs of litigation for all proceedings before the U.S. Supreme Court.

4. As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells.

5. The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.

6. The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. The parties also recognize the scientific studies showing the specific impacts of the LWRF injection wells on the nearshore marine environment and commit to addressing those impacts as stated above.

7. The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

We hope that the foregoing settlement will not only resolve the pending litigation, but will promote a more cooperative relationship between the County and the Community Groups, allowing us to move forward and work together on behalf of the people of Maui to address the challenges posed by the LWRF injection wells.

We appreciate your prompt attention to this time-sensitive matter. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext. 6614) should you wish to discuss any aspect of this settlement offer.

Respectfully,

David L. Henkin
Isaac H. Moriwake
Attorneys for the Community Groups

DLH/tt

EARTHJUSTICE

April 26, 2019 (with May 9, 2019 edits)

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408[1]

By Electronic Mail Only

Moana Lutey
Edward Kushi
Richelle Thomson
Department of the Corporation Counsel
County of Maui
Moana.Lutey@co.maui.hi.us
Edward.Kushi@co.maui.hi.us
Richelle.Thomson@co.maui.hi.us

Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 18-260 (U.S. S. Ct.)

Counsel,

For more than a decade, Maui community groups Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association (collectively, "the Community Groups"), represented by Earthjustice, have sought to work with the County of Maui to address the harm to the nearshore marine environment associated with use of the injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). We have never expressed or shown any interest in having the County spend money on litigation or pay Clean Water Act penalties to the federal treasury. On the contrary, the Community Groups have consistently sought to encourage the County to invest its taxpayer dollars to find solutions, including investments in infrastructure to increase re-use of treated wastewater from the LWRF to meet the irrigation needs of West Maui agriculture, golf courses and commercial landscaping.

Now that the County has a new Mayor and a new Council, we are hopeful that we can work productively together. We provide this offer in the interest of bringing to a close the litigation over the LWRF injection wells, which is now pending before the United States Supreme Court and, with the national attention such a case attracts, threatens the County of Maui's reputation as a champion of environmental quality and stewardship. We offer to work cooperatively and in good faith with the County to reduce reliance on the injection wells to dispose of treated

[1] Please note that, in the spirit of public transparency, our preference and request is to have this settlement offer be made public and not be sealed for purposes of County deliberations. We cite Federal Rule of Evidence 408 here solely for the purpose of ensuring that this good faith settlement offer will not be used against us in any court proceedings.

MID PACIFIC 850 RICHARDS STREET, SUITE 400 HONOLULU, HI 96813
T 808 599 2436 F 808 521 6841 MPOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

EXHIBIT "B"

wastewater, to increase the beneficial reuse of that treated wastewater, and to ensure that any wastewater that is injected does not harm the marine environment. As long as the County is making good faith efforts to achieve these goals, we provide assurances that the Community Groups will not bring additional litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells. We also provide assurances that the Community Groups will not bring litigation against businesses and other consumers of recycled water from the LWRF who are irrigating responsibly, so as not to cause pollution of waters of the United States. We are, after all, deeply committed to increasing beneficial reuse of recycled water from the LWRF.

Specifically, we offer to settle the above-captioned case as follows:

1. The parties would jointly dismiss the County's pending appeal to the U.S. Supreme Court pursuant to Supreme Court Rule 46.1. Each party would bear its own costs of litigation (including attorneys' fees) for all proceedings before the Supreme Court.

2. Pursuant to the previously entered Settlement Agreement and Order Re: Remedies in *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Nov. 17, 2015), the County (1) would make good faith efforts to secure and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF injection wells (Settlement ¶ 8); (2) would fund and implement one or more projects located in West Maui, to be valued at a minimum of $2.5 million, the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui (Settlement ¶¶ 9-12);[2] and (3) would pay a $100,000 penalty to the U.S. Treasury (Settlement ¶ 13).[3]

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[2] We understand that, as part of the current budgeting process, the County may include far more than $2.5 million in next year's budget to fund projects to divert treated wastewater from the LWRF injection wells for reuse. If the County does that, it should readily be able to satisfy this settlement provision.

[3] As mentioned, we have no desire to have the County pay penalties to the U.S. Treasury. The parties were required to include this relatively modest penalty in the settlement in order to secure approval from the Environmental Protection Agency, which reviews all settlements in Clean Water Act citizen suits pursuant to 33 U.S.C. § 1365(c)(3).

3. Pursuant to the parties' prior agreements, which have been entered as court orders, the County would reimburse the Community Groups' costs of litigation (including attorneys' fees) for litigation in the district court and Ninth Circuit Court of Appeals. *See* Stipulated Settlement Agreement Regarding Award of Plaintiffs' Costs of Litigation, *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Dec. 29, 2015); Order, *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 15-17447 (9th Cir. Apr. 25, 2018). As mentioned above, each party would bear its own costs of litigation for all proceedings before the U.S. Supreme Court.

4. As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells.

5. As long as the County makes good faith efforts to reduce its reliance on injection wells to dispose of treated wastewater at its other wastewater treatment facilities, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for its injection wells where legally required, the Community Groups will not bring litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of those injection wells.

6. The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.

7. The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. In settling this case, the County makes no admission regarding whether the LWRF injection wells have an adverse effect on the nearshore marine environment.

8. The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

We hope that the foregoing settlement will not only resolve the pending litigation, but will promote a more cooperative relationship between the County and the Community Groups, allowing us to move forward and work together on behalf of the people of Maui to address the challenges posed by the LWRF injection wells.

We appreciate your prompt attention to this time-sensitive matter. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext. 6614) should you wish to discuss any aspect of this settlement offer.

Respectfully,

David L. Henkin
Isaac H. Moriwake
Attorneys for the Community Groups

DLH/tt

July 17, 2019

MEMO TO: GET Committee Staff

F R O M: Tasha Kama
Councilmember

SUBJECT: **TRANSMITTAL OF CORRESPONDENCE RELATING TO PENDING COMMITTEE ITEM** (GET-26)

The attached correspondence received by my office relates to Item 26 on the Committee's master agenda.

TK/TK/EPD/epd

Attachments

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

May 29, 2019

Honorable David Ige
Governor of Hawaii
Executive Chambers
State Capitol
Honolulu, Hawaii 96813

Dear Governor Ige:

SUBJECT: **DEPARTMENT OF HEALTH NON-PARTICIPATION IN MAUI COUNCIL'S CONSIDERATION OF *HAWAII WILDLIFE FUND ET AL V. COUNTY OF MAUI*, CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT DOCKET 18-260**

As a follow-up to the May 21, 2019, telephone discussion with your representative on Maui, Leah Belmonte, and given the inability of Maui Council to take any action in its consideration of a possible settlement of *Hawaii Wildlife Fund et al v. County of Maui*, I write to you, as an individual member of County Council, to urge you to direct the Hawaii Department of Health (DOH) to provide technical information and support to Maui County Council when it again considers this matter.

On May 20, 2019, the Governance, Ethics and Transparency (GET) Committee of Maui County Council met to receive testimony, presentations from County staff and from the attorneys representing Hawaii Wildlife Fund et al. The large volume of information required the GET Committee Chair, Councilmember Molina, to recess the meeting to May 23, 2019. On that date, the GET Committee went into executive session to receive information from staff on the technical and legal issues involved in the case.

At the conclusion of our executive session, several questions remained with Council that could have been easily addressed by Hawaii DOH staff, in my

opinion. For example, if the Ninth Circuit ruling regarding point sources of effluent that are hydrologically-connected to the "waters of the United States" stands, such that they become governed by the Clean Water Act rather than the Safe Drinking Water Act, the DOH would be responsible for addressing enforcement of any new requirement for National Pollution Discharge Elimination System (NPDES) permitting. As such, DOH could answer the question that Council had regarding the likelihood that the DOH would enforce NPDES permit requirements on other point sources, such as existing septic systems and cesspools.

Committee members have questions regarding the difference between the County's existing Underground Injection Control (UIC) permit and the NPDES permit the County would be required to obtain, if the Ninth Circuit Court decision stands. Since Hawaii DOH is the regulator for both the UIC and the potential NPDES permit, DOH would be able to provide the best understanding of the technical differences between the permits and would likely be viewed by Councilmembers as neutral on this topic.

The Chair of our GET Committee, Councilmember Molina, is on record expressing his similar disappointment in the lack of participation by Hawaii DOH (not that I am empowered to speak on his behalf).

This matter has been deferred to a date uncertain by the inability of the GET Committee to take action. I certainly hope that you will consider the challenges faced by the County of Maui in this period of deferral.

For these reasons, I strongly urge you, in my role as a representative of the people residing in Maui County, to ask your Department of Health to participate in future discussions to be held by the GET Committee of Maui County Council.

Sincerely,

TASHA KAMA
Councilmember

TK/EPD/epd

cc: Councilmember Mike Molina (Chair of Governance, Ethics, and Transparency Committee)
Council Chair Kelly King
Corporation Counsel Moana Lutey
Deputy Corporation Counsel Richelle Thomson

DAVID Y. IGE
GOVERNOR OF HAWAII

BRUCE S. ANDERSON, Ph.D.
DIRECTOR OF HEALTH

In reply, please refer to:
File:
1906032 (GOV)

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HI 96801-3378

June 18, 2019

The Honorable Tasha Kama
Councilmember
County Council
County of Maui
200 S. High Street
Wailuku, Hawai'i 96793

Dear Councilmember Kama:

This is in response to your letter to Governor Ige, dated May 29, 2019, in which you urged him to direct the Hawai'i Department of Health (DOH) to provide technical information and support to Maui County Council regarding the County's case before the United States Supreme Court, Hawai'i *Wildlife Fund et al. v. County of Maui*, Docket 18-260.

My responses to your two (paraphrased) questions are as follows:

1. *If the 9th Circuit ruling regarding point sources of effluent that are hydrologically-connected to the "waters of the United States" stands, ... [what is] the likelihood that the DOH would enforce NPDES permit requirements on other point sources, such as existing septic systems and cesspools?*

   Response: DOH has no plans to enforce NPDES permit requirements against existing septic systems and cesspools.

2. *What are the technical differences between the County's existing Underground Injection Control (UIC) permit and the NPDES permit the County would be required to obtain if the 9th Circuit decision stands?*

   Response: This question cannot be answered briefly. There are numerous technical differences between these two types of permits, as they are pursuant to different statutes and rules (Safe Drinking Water law, HRS ch. 340E and HAR ch. 11-23, versus Hawai'i Water Pollution statute, HRS ch. 342D and HAR chs. 11-54 and 11-55).

DOH would like to see greater beneficial reuse of wastewater under both programs and would be happy to discuss with the County of Maui how to achieve that goal. Please contact me at (808) 586-4424 or via email at keith.kawaoka@doh.hawaii.gov.

Sincerely,

KEITH E. KAWAOKA, D. Env.
Deputy Director for Environmental Health

c: The Honorable David Y. Ige
Bruce S. Anderson, Ph.D., Director of Health
Edward Bohlen, Deputy Attorney General

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

June 26, 2019

Keith E. Kawaoka
Deputy Director for Environmental Health
State of Hawaii
Department of Health
PO Box 3378
Honolulu HI 96801-3378

Dear Deputy Director Kawaoka:

SUBJECT: LETTER OF JUNE 18, 2019 – *HAWAI'I WILDLIFE FUND et al. v. COUNTY OF MAUI* (YOUR FILE 1906032 (GOV))

Thank you for your letter in response to my communication to Governor Ige.

While you did respond to the questions that you drew from my letter to the Governor, this form of communication is lacking compared to having an authorized representative of the Department of Health available to Maui County Council to respond to our questions. For example, your reply to my question regarding the potential of DOH enforcement of Clean Water Act provisions to other point sources may be valid at this particular point in time. The follow-on question to your response would be, if the 9th Circuit ruling stands, what prevents a private party, such as the current plaintiffs or similar parties, from bringing suit against DOH for its now stated position of not enforcing the Clean Water provisions against existing owners/operators of septic systems. I believe we need interaction between Maui County Council, who has the authority to either allow our case to proceed to the United States Supreme Court or accept the settlement offered by the plaintiffs, and the State of Hawaii Department charged with enforcing whatever results from this case.

Your response to the question about the technical differences between the existing UIC permit and NPDES permit that, "This question cannot be answered briefly" emphasizes the value of having direct exchange of information. To me your response suggests that the NPDES permit is a technically inappropriate regulation for point sources like injection wells and septic tanks.

For the reasons noted in this letter, I respectfully request that if and when this matter is reconsidered by Maui County's Governance, Ethics and Transparency Committee, that an authorized representative(s) of the Department of Health attend that meeting. Without the direct participation of the State Department of Health in our discussions of this matter, I remain convinced that it would be in the interest of Maui County and its residents to allow the United States Supreme Court to bring clarity to this issue.

I respectfully request that any response to this and any future letters on this matter be directed to Maui Council's Governance, Ethics and Transparency (GET) Committee so that my colleagues on that committee can benefit for your response.

Sincerely,

TASHA KAMA
Councilmember

TK/EPD/epd

cc: Honorable Governor David Ige