GET Committee

From: Fisher, Sherry L. <sfisher@hunton.com>
Sent: Thursday, May 16, 2019 1:35 PM
To: County Clerk; GET Committee; Kelly King; Keani N. Rawlins; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura; Tasha A. Kama
Cc: Doyle, Colleen; Martin, Diana Pfeffer
Subject: Hawai'i Wildlife Fund et al. v. County of Maui
Attachments: HuntonAK_Council_GETcommiteeTestimonyWithEnclosure.pdf

Sent on behalf of Colleen Doyle:

Council Chair, Council Members, GET Committee Members, and County Clerk:

Hunton Andrews Kurth submits this testimony to be entered as part of the record in the following dockets regarding the proposed settlement of the injection well case.

CC-19-224 and CC-19-225 – Hawai'i Wildlife v. County of Maui
GET-26 – Hawai'i Wildlife v. County of Maui

Note that, as the testimony states, there will be an additional two emails submitted as well. One will be a link to documents. We request the County Clerk and the Committee staff include these documents as part of the record for both of the dockets. The other will be an email describing how to open the link.

Please let me know if you have any questions.

Thank you.

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May 16, 2019

Via Electronic Mail

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Re: CC-19-224 and CC-19-225 – Hawai'i Wildlife v. County of Maui
GET-26 – Hawai'i Wildlife v. County of Maui

Dear County Council and GET Committee Members:

The Maui County Council approved a resolution appointing our firm as special counsel to represent the County in the *Hawai'i Wildlife Fund v. County of Maui* matter in 2012. Since then, we represented the County before the district court and the Ninth Circuit Court of Appeals, and now before the United States Supreme Court. We write to explain the legal basis for the County's appeal and to highlight the impacts of allowing the Ninth Circuit's ruling to go unchallenged, which would occur if the County withdrew this case from the United States Supreme Court.

The federal Clean Water Act (CWA) regulates pollutants that reach navigable water by two primary means: (i) point source permitting (referred to as National Pollution Discharge Elimination System (NPDES) permits); and (ii) nonpoint source management programs. NPDES permits are required when there is a discharge of pollutants *from* a point source *to* navigable waters. "Point source" is a defined term under the CWA and means "any discernible, confined and discrete conveyance." A pipe is a classic example of a point source. Likewise, groundwater is specifically excluded from the definition of navigable waters.

From the Lahaina facility, pollutants reach navigable waters through diffusely flowing groundwater (*i.e.*, pollutants are released from underground injection control wells into groundwater, and the groundwater ultimately carries the pollutants to navigable waters). As there is no discharge of pollutants *from* a point source *to* navigable waters, NPDES permitting is inapplicable to the Lahaina facility.

Under the CWA, all pollution that is not point source pollution (*i.e.*, does not enter navigable waters from a discernible, confined and discrete conveyance) is considered nonpoint source pollution. The CWA regulates nonpoint source pollution through State-issued management programs that must be approved by the United States Environmental Protection Agency (EPA). Nonpoint source pollution is also regulated under other state and federal programs including the Safe Drinking Water Act.

Hawai'i's EPA-approved Nonpoint Source Management Plan (2015-2020) implements requirements under both the CWA and the Coastal Zone Act Reauthorization Amendments of 1990. West Maui is one of the three priority watersheds identified in the plan where the Hawai'i Department of Health (HDOH) is "establishing partnerships to align goals and leverage resources." As the plan explains, this involves coordination among federal, state and local water quality management programs, with nonpoint source pollution controlled through water quality monitoring and assessment, watershed prioritization, total maximum daily loads and watershed-based plans.

Hawai'i's nonpoint source plan identifies an estimated 88,000 cesspools statewide (over 12,000 on Maui alone) and over 21,000 septic tanks as nonpoint sources of pollution. These cesspools and septic tanks convey pollutants to navigable waters in a similar fashion to the roughly 6,600 underground injection control wells in use throughout Hawai'i. *See* EPA National Underground Injection Control Inventory-Fiscal Year 2016. At present, none of these cesspools, septic tanks or underground injection control wells have NPDES permits. In all three cases, pollutants move through groundwater before ultimately reaching navigable waters. If the Ninth Circuit ruling is allowed to stand, these 115,600 cesspools, septic tanks and underground injection control wells could require NPDES permits. This is a daunting task. According to EPA records, only 137,885 individual NPDES permits have been issued nationwide. *See* EPA NPDES Permit Status Reports (Fiscal Year 2017).

To be clear, the County is not disputing that the CWA applies to its Lahaina facility operations. Rather, the County maintains that the CWA nonpoint source management program provisions apply, not the NPDES permit provisions.

Consistent with nonpoint source management programs, the Lahaina facility underground injection control wells are regulated under two different Safe Drinking Water Act permits-one

issued by EPA and the other by HDOH. Both these permits contain requirements to protect groundwater and ocean water quality, with the EPA permit imposing a nitrogen limit on the treated wastewater. Prior to injection, the Lahaina facility wastewater is treated to meet R-1 standards, the highest quality reuse standards in Hawai'i. All treated wastewater meets R-1 standards regardless of whether it is reused or injected. As the work of the County's experts, Dr. Dollar and Dr. Hochberger confirm, the combined treated wastewater/groundwater mixture entering the nearshore ocean waters at Kahekili Beach is not adversely impacting the coral reef nor causing algal blooms.

If the Ninth Circuit ruling remains unchallenged by the County's withdrawal of the United States Supreme Court review, it will likely impact the County's ability to sell and reuse the R-1 treated wastewater. While the Lahaina facility treated wastewater meets the highest quality reuse standards, for CWA purposes, the treated wastewater still contains "pollutants." When this water is applied to land through golf course and resort irrigation, pollutants from the wastewater migrate through soil to groundwater, and ultimately may reach navigable waters. Under the Ninth Circuit ruling, NPDES permitting applies to pollutants that travel through groundwater and reach navigable waters. It is a simple step to extend this ruling to the reuse of R-1 treated wastewater.

Following the filing of the lawsuit, in 2012, the County submitted an NPDES permit application for the Lahaina facility to HDOH. The County's application has been pending ever since. Likewise, the County's NPDES permit applications for its other wastewater treatment plants have been pending since 2015. HDOH has historically not required NPDES permits for injection wells because these wells inject treated wastewater into groundwater, not navigable waters. Both the County and HDOH need the Supreme Court to provide clarity and certainty as to when an NPDES permit is required. While EPA recently issued interpretative guidance explaining that releases into groundwater are categorically exempt from NPDES permitting, this guidance does not apply to facilities located in the Ninth Circuit. Absent a Supreme Court decision, these facilities will be treated differently than those in the rest of the United States.

The 18 amicus briefs filed with the United States Supreme Court in support of the County's position that NPDES permitting is not applicable to pollutants that reach navigable waters through groundwater is evidence of the unprecedented impacts of the Ninth Circuit's ruling. Over 75 parties ranging from municipalities (*e.g.*, City of New York and the San Francisco Public Utilities Commission), municipal associations (*e.g.*, National Association of Clean Water Act Agencies, National Association of Counties), 21 states, agricultural interests, resorts, industry and other associations (*e.g.*, US Chamber of Commerce and National Association of Home Builders), United States Senators, and the Solicitor General of the United States joined these briefs. These parties are concerned about the adverse impacts on

water reuse, green infrastructure, potable water delivery, groundwater recharge and reuse, sewage collection, stormwater pollution control, underground storage tanks, surface impoundments, septic tanks, cesspools, injection wells, and pesticide application. The attached summary highlights some of these concerns. Pollutants released from any of these that make it through groundwater to navigable water could require NPDES permits if the Ninth Circuit's ruling is allowed to stand.

After the district court ruled that the County needed an NPDES permit for its Lahaina facility wells, rather than proceed to trial on the amount and types of damages it was entitled to, Earthjustice approached the County about settlement. Fundamental to Earthjustice's settlement proposal was the County's ability to challenge the district court's ruling all the way to the Supreme Court before the County was required to implement projects or pay a fine. Earthjustice made this offer because it recognized the unprecedented nature of the district court's ruling and the need for the County to have clarity about the scope of the CWA NPDES permitting program before spending millions of taxpayer dollars on an overhaul of its wastewater treatment operations. Now that the Supreme Court is poised to hear the case, Earthjustice is attempting to re-write the deal.

As counsel for the County, we strongly recommend that the Council not prematurely settle this case and withdraw its petition. The County, HDOH, and people across the Country need clarity and certainty as to when an NPDES permit is required. Allowing the Supreme Court to rule will provide that.

In addition to this letter and enclosed summary of excerpts from the amicus briefs filed today, our submittal for inclusion in both the Council and GET committee record includes all of the following:

- County Supreme Court Opening Brief filed May 9, 2019;
- 18 amicus briefs in Support of the County filed on May 16, 2019;
- The expert reports (including exhibits) of Dr. List (2 reports), Dr. Dollar (2 reports) and Dr. Hochberger (1 report) prepared on behalf of the County as part of the district court litigation. These reports provide detailed information on the quality of the County's treated wastewater as well as the state of the coral reef off Kahekili Beach; and
- EPA's April 2019 Interpretative Guidance on the categorical exemption from NPDES permitting for pollutants that reach navigable waters via groundwater. As the guidance explains, in light of the Ninth Circuit ruling, the categorical exemption is inapplicable in Hawai'i.

Because of the size of this submittal, you are receiving the testimony and summary via a direct email. You are also receiving two additional emails. One of the emails will provide you with a link, where you will be able to download all of the documents listed above. The other email will provide you with a passcode to access the link.

Thank you in advance for your time and consideration of our testimony.

Sincerely,

Colleen Doyle

Colleen P. Doyle

Enclosure (excerpt summary)

May 16, 2019

Excerpts from *Amici* Briefs filed in Support of Petitioner in *County of Maui v. Hawai'i Wildlife Fund*, No. 18-260 (U.S.) Regarding the Impacts of the Ninth Circuit's Ruling

***Amici Curiae* Brief for National Association of Clean Water Agencies, City of New York, City and County of San Francisco, and Metro Wastewater Reclamation District (filed May 16, 2019):**

- "Affirming the decision below risks foisting the regulatory burdens and uncertainty outlined above on *amici's* innovative and beneficial infrastructure and practices. Utilities across the country have deployed green infrastructure ("GI"), water reuse, and groundwater recharge programs to address water pollution and resource scarcity. These approaches have demonstrated benefits that have led to the creation of government programs encouraging their use. Recognizing these benefits and consistent with these mandates, amici have made substantial investments in GI, water reuse, and groundwater recharge systems. These valuable practices have the potential to create ... releases that would require NPDES permits under the Ninth Circuit's holding." NACWA et al. *Amici* Br. at 20.

- "Sponsors of GI, reuse, and recharge projects that require NPDES permits may then need to develop and furnish additional data for use in modeling to establish water quality-based permit conditions. ... These burdens and uncertainties could make GI, reuse, and recharge projects more expensive and take longer to implement." NACWA et al. *Amici* Br. at 28.

***Amici Curiae* Brief for Wychmere Shores Condominium Trust and Longwood Venues & Destinations, Inc. (filed May 16, 2019):**

- Many, if not most, on-site wastewater systems [including millions of residential septic-system owners] employ soil absorption methods in which treatment and disposal relies on gradual seepage from leach fields or leach pits into surrounding soils. Even under the best circumstances, such systems include a "planned release" of effluent from the soil into the groundwater. As long as these systems are within shouting distance of an ocean, a bay, a river, or even a wetland, they *may* have a hydrologic connection to waters of the United States, and (if the theory holds sway) they *may* therefore require a federal NPDES permit." Wychmere Shores et al. *Amici* Br. at 12-13 (footnotes omitted).

***Amici Curiae* Brief for Agricultural Business Organizations (Agricultural Retailers Association, American Farm Bureau Federation, CropLife America, Family Farm Alliance, The Fertilizer Institute, National Cattlemen's Beef Association, National Corn Growers Association, National Pork Producers Council) (filed May 15, 2019):**

- "Should the Court uphold the Ninth Circuit's erroneous expansion of the CWA, amici's members (or their customers) would face a significantly increased risk of agency

enforcement and citizen suits. Millions of agricultural enterprises could be newly subject to the CWA's permitting requirements." Agricultural Business Organizations *Amici* Br. at 4.

- "The Ninth Circuit's ruling—or any similar approach—thus has the potential to turn normal agricultural activity without an NPDES permit into a crime. And it does not stop with direct agricultural activities; the industries that support American agriculture (for example, fertilizer production and local farm supply retailers) may also be impacted.

  Nor is the problem just the sheer scope of the activities that would be covered. It would also be very difficult to apply the NPDES permitting scheme to those activities in any sensible way. NPDES effluent limits that are based on the technology available to treat pollutants and meet water quality standards are designed to address highly engineered and discrete systems with direct, end-of-pipe discharges to surface waters. Those conditions do not exist in agricultural production systems, where stormwater drives the movement of nonpoint source pollutants. As a result, the NPDES scheme is ill-suited to regulating many of the agricultural activities that can result in the addition of pollutants into groundwater. Attempting to force NPDES permitting in those circumstances would also undermine the specific agricultural exemptions expressly included in the CWA. And the NPDES scheme could displace other regulatory schemes that better protect groundwater. These risks confirm that Congress could not have intended Section 402's permitting scheme to apply any time a pollutant is conveyed indirectly to navigable waters through a point source discharge to groundwater." Agricultural Business Organizations *Amici* Br. at 20-21.

- "[U]nder the Ninth Circuit's approach, nearly *every* application of fertilizer potentially would require an NPDES permit." Agricultural Business Organizations *Amici* Br. at 22.

- "In fact, it may not even be necessary to apply the pesticides to trigger the NPDES scheme; simply handling pesticides is probably enough. A pesticide storage facility, for example—whether on a farm or at a retailer—could be considered a point source under this scheme. If there are any leaks, the pesticide could seep through the soil to groundwater. Similarly, loading and cleaning pesticide spray apparatus in the field could be considered a discharge to groundwater. So too could handling empty pesticide containers as they are collected and recycled. Under the Ninth Circuit's approach, all of these activities could be swept into the Section 402 permitting regime—in addition to the myriad other federal and state regulations that already govern the safe handling, storage, and disposal of pesticide products." Agricultural Business Organizations *Amici* Br. at 24-25.

- "Attempting to implement the Ninth Circuit's holding would also displace regulatory schemes that can and do specifically protect groundwater. ... Few farmers and ranchers can afford the tens of thousands (or even hundreds of thousands) of dollars and months or years of waiting it may take to obtain an NPDES permit. ... The sheer number of potential NPDES permits that would be required for agricultural activities under the Ninth Circuit's approach would be administratively infeasible for federal and state agencies." Agricultural Business Organizations *Amici* Br. at 29-30.

***Amicus Curiae* Brief for Chamber of Commerce of the United States of America (filed May 15, 2019):**

- "The Ninth Circuit's breathtaking expansion of the CWA's National Pollutant Discharge Elimination System (NPDES) permitting program to cover groundwater threatens interests of great importance to the Chamber's members. … Indeed, applying the CWA to point sources that convey pollutants to groundwater—an area already extensively regulated by other state and federal programs—will create a morass of duplicative and potentially conflicting regulation." Chamber *Amicus* Br. at 2.

- "Under the court of appeals' decision, regulated individuals and entities will be forced to navigate a labyrinth of rules with pitfalls at every turn." Chamber *Amicus* Br. at 8.

- "Septic systems—both large commercial ones and the ubiquitous personal ones that dot rural America—could qualify, requiring a federal permit and federal oversight at countless private properties." Chamber *Amicus* Br. at 9."

- "Determining whether a particular release into groundwater meets the latter two of those elements will require hiring experts to conduct a complicated analysis to assess the level of hydrological connectivity between the particular body of groundwater and a specific body of surface water. Both sophisticated commercial enterprises and rural residents alike will have to bear the steep financial cost of such an analysis because it is the only way to determine whether activity that affects groundwater comes within the CWA point source program's expanded scope." Chamber *Amicus* Br. at 9-10.

***Amici Curiae* Brief for the National Conference of State Legislatures, National Association of Counties, National League of Cities, International City/County Management Association, International Municipal Lawyers Association, Association of California Water Agencies, California Association of Sanitation Agencies, Idaho Water Users Association, Idaho Water Resources Board, League of California Cities, National Water Resources Association, WateReuse Association, Western Coalition of Arid States (filed May 16, 2019):**

- "[T]he Ninth circuit's decision could impede reuse projects by requiring NPDES permits in cases where the recycled water may end up in surface waters after being released to groundwater. This could occur in the case of groundwater recharge or injection (like in Maui), seepage from recycled water storage ponds and even in cases where the water is used for irrigation and it seeps through groundwater to surface waters. Recycled water is the future of water supply planning all over the United States – from small scale irrigation projects, to large scale programs designed to strengthen regional water security." NCSL et al. *Amici* Br. at 13-14.

- "Implementing the Ninth Circuit's decision would mean thousands of individually owned LID [low impact development][1] facilities would need NPDES permits." NCSL et al. *Amici* Br. at 21.

- "The Ninth Circuit's decision would put ... projects at risk because it would impose surface water oriented requirements on releases to groundwater, adding a significant layer of expense and liability to private property owners who are required to install LID infrastructure in their development projects. Imposing NPDES requirements in this setting will discourage new LID and green infrastructure." NCSL et al. *Amici* Br. at 22.

- "The Ninth Circuit's decision will impose the Clean Water Act's NPDES program onto a landscape that is already fully regulated, and erase the role of the Nonpoint Source Management Program." NCSL et al. *Amici* Br. at 29-30.

[1] "The term low impact development (LID) refers to systems and practices that use or mimic natural processes that result in the infiltration, evapotranspiration or use of stormwater in order to protect water quality and associated aquatic habitat." *See* https://www.epa.gov/nps/urban-runoff-low-impact-development