

No. 18-260

**In The
Supreme Court of the United States**

COUNTY OF MAUI, HAWAII,

Petitioner,

v.

HAWAII WILDLIFE FUND, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF HOME
BUILDERS OF THE UNITED STATES IN
SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Amicus National Association of Home Builders of the United States (“NAHB”) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Home Builders of the United States (“NAHB”) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB’s goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB’s approximately 140,000 members are home builders or remodelers, and construct 80 percent of all homes in the United States annually.

NAHB is a vigilant advocate in the nation’s courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights, and business interests, of its members and those similarly situated.

This case involves treated wastewater entering groundwater that is hydrologically connected to the Pacific Ocean. Residential septic systems also add treated wastewater to groundwater. Therefore, NAHB is concerned that this case may have a negative impact on the way those systems are regulated.

¹ Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Approximately 20 percent of all homes in the United States have their wastewater treated by an onsite treatment system, often referred to as a septic system. Those systems are not regulated as “point sources” under the Clean Water Act but are regulated by state health and/or environmental departments. NAHB is concerned that a decision for the Respondents in this case could negatively impact the current regime for regulating septic systems and would require wholesale changes to numerous federal programs.

ARGUMENT

On-site wastewater treatment systems, commonly referred to as septic systems, serve an estimated 20 percent (26.1 million) of total U.S. housing units. One half (13.1 million) of the total housing units with septic systems in the U.S. are located in rural areas, 47 percent (12.3 million) are located in suburbs, and 3 percent (774,000) are found in cities. U.S. Dep't of Hous. & Urban Dev., U.S. Dep't of Commerce and U.S. Census Bureau, *American Housing Survey for the United States: 2007* (issued Sept. 2008), <https://www.census.gov/prod/2008pubs/h150-07.pdf>.

Most states have comprehensive laws in place establishing minimum standards and enforceable requirements for the location, design, installation, inspection and maintenance of residential septic systems. Construction and operating permits are typically issued by health departments at the county or township level with critical inspection and enforcement responsibilities delegated to local governments.

This decentralized but flexible management approach is necessary to ensure that septic systems are tailored to suit local site conditions and circumstances. For example, local zoning ordinances may impose minimum buildable lot sizes and protective setbacks to protect environmentally "sensitive" areas. Separation between septic and closely hydrologically connected groundwater may need adjustment based on local topography and soil resource variation. The Environmental Protection

Agency (“EPA”) recognizes the varied nature of septic management across the states and local governments, and the importance of maintaining this flexibility to best meet a high level of public health and natural resource protection. U.S. EPA Office of Water, *Voluntary National Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems*, EPA 832-B-03-001, at 17 (March 2003), <https://nepis.epa.gov/Exe/ZyPDF.cgi/20009NAM.PDF?Dockey=20009NAM.PDF>.

I. SEPTIC SYSTEMS ARE NOT POINT SOURCES.

A septic system consists of three main parts—the tank(s), the distribution grid and the soil.² The tanks used for residential treatment vary depending on the system manufacturer. The most basic treatment tanks are “anaerobic”—waste enters the tank(s) from the home, solid waste settles and bacteria break down the wastes in an oxygen free environment. Other tanks are aerobic. In those systems, oxygen is introduced into the system and aerobic bacteria break down the waste. U.S. EPA Office of Water, *Decentralized Systems Technology Fact Sheet, Aerobic Treatment*, EPA 832-F-00-031 (Sept. 2000), <https://www.epa.gov/septic/>

² *Amicus* is not describing small residential sewage treatment plants, referred to as “package plants” or straight line septic systems, that discharge to surface waters. Those systems require a CWA section 402 permit because they do not use the soil as part of the system and they add pollutants to navigable waters from a pipe or other confined discrete conveyance.

decentralized-wastewater-systems-technology-factsheets. Although both the anaerobic and aerobic environments remove many of the pollutants, further treatment is required. Therefore, the clarified liquid is then either pumped or gravity fed from the tank(s) to the distribution grid. The grid disperses the liquid to the soil. Finally, the soil conducts three major functions:

- (i) Certain pollutants are adsorbed by the soil; thus, it acts as a filter;
- (ii) Microorganisms in the soil treat the wastewater to eliminate pollutants (bacteria, viruses, phosphorous, forms of nitrogen) before releasing it to the groundwater; and
- (iii) The soil disposes of the treated wastewater so that it moves away from the site, making room for more treated wastewater.

Septic systems cannot be located everywhere. Since the soil is an integral part of the system, it must be suitable to treat the clarified liquid. Traditionally, soil is evaluated using a “percolation rate,” a measure of the water migration rate through the onsite soil. If the rate is too low the clarified liquid cannot flow through the soil. If it is too high the liquid flows too quickly, thereby not allowing the liquid to be properly treated in the soil. More advanced soil measurements require trained personnel to conduct soil morphology evaluations to determine the loading rate that the onsite soil can

manage. See, U.S. EPA Office of Water, *Onsite Wastewater Treatment Systems Manual*, EPA/625/R-00/008, at 1-10 (Feb. 2002), https://www.epa.gov/sites/production/files/2015-06/documents/2004_07_07_septics_septic_2002_osdm_all.pdf (“The site evaluation process is becoming more refined and comprehensive . . . and has moved from simple percolation tests to a more comprehensive analysis of soils, restrictive horizons, seasonal water tables, and other factors.”).

Clean Water Act (“CWA”) sections 301 and 502 combined, provide that a permit is required when a person adds pollutants from a point source to a navigable water. 33 U.S.C. §§ 1311(a), 1362(5), (6), (12), (14). Congress defined “point source” as a “confined discrete conveyance.” 33 U.S.C. § 1362(14). The treated liquid in a residential septic system does not leave the system from a “defined discrete conveyance.” It exits the system diffusely from the soil. One might argue that a septic system is a point source simply because it uses pipes to carry the waste from the home to the tanks or to transport the clarified liquid to the soil. But that would be incorrect because the soil is an essential part of the system and the CWA does not provide EPA with authority over an entire system. Its authority is restricted to the discharge of pollutants to navigable water. *Nat. Res. Def. Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (“EPA’s jurisdiction under the [CWA] is limited to regulating the discharge of pollutants. Thus, . . . the agency is powerless to impose permit conditions unrelated to the discharge itself.”); *Am. Iron & Steel Inst. v. E.P.A.*, 115 F.3d 979, 996 (D.C. Cir. 1997)

(recognizing that discharges within a facility are nonpoint source discharges.) Thus, the way pollutants exit a system is critical. When viewed as an entire system, pollutants do not exit a septic system from a “confined discrete conveyance.” Therefore, septic systems do not create “point source” pollution.

II. THE EPA DEEMS SEPTIC SYSTEMS TO BE NONPOINT SOURCES.

The EPA has never treated properly functioning septic systems as point sources under the CWA.³ Releases from septic systems are treated as

³ See U.S. EPA, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas, Management Measure 6: New and Existing On-Site Wastewater Treatment Systems*, EPA-841-B-05-004 (Nov. 2005) https://www.epa.gov/sites/production/files/2015-09/documents/urban_ch06.pdf; U.S. EPA, *Managing Nonpoint Source Pollution from Households*, EPA-841-F-96-DD4J (March 1996), <https://nepis.epa.gov/Exe/ZyPDF.cgi/20004PZY.PDF?Dockey=20004PZY.PDF> (providing that septic systems are nonpoint sources of pollution); see e.g. Esther Bartfeld, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 *Envtl. L.* 43, 106 n.16 (1993) (“Urban nonpoint sources of nutrients include lawn fertilizers, septic systems, and stormwater runoff.”); Robert D. Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?* 19 *Envtl. L.* 807, 811–12 (Summer 1989) (explaining that nonpoint source pollutions includes “urban runoff, runoff from fields, forest lands, construction activities, mining activities, septic tank systems, and landfills.”)

nonpoint source pollution under various EPA programs.

A. Clean Water Act Section 319

The 319 Program of the CWA focuses exclusively on the management of nonpoint sources⁴ of water pollution. 33 U.S.C. § 1329. After EPA has approved a state-submitted Nonpoint Source Assessment Report and Nonpoint Source Management Program (“NSMP”), the state becomes eligible to receive section 319(h) grant funds to control nonpoint sources of pollution. 33 U.S.C. § 1329(h)(1). State NSMPs that address the reduction or prevention of activities that threaten groundwater quality, such as malfunctioning residential septic systems, are entitled to priority by EPA in its grant decision-making process. *Id.* at (h)(5).

Nearly every state, including the Commonwealth of Puerto Rico, identifies septic systems in their NSMPs as a potential source of nonpoint pollution. EPA believes when properly designed, sited, installed and managed such wastewater systems can, and do, satisfy public health and water quality protection goals, just as well as centralized wastewater systems. U.S. EPA, EPA 832-R-97-

⁴ EPA defines “nonpoint source discharges” as “[r]elatively diffuse contamination originating from many small sources whose locations may be poorly defined. Onsite wastewater systems are one type of Nonpoint source discharge.” U.S. EPA, *Response to Congress on Use of Decentralized Wastewater Treatment Systems*, EPA 832-R-97-001b, Appendix A at A-2 (April 1997) <https://nepis.epa.gov/> (then search field for “832r97001b”).

001b, at 5-6. To this end, EPA has distributed more than \$4.5 billion in section 319 nonpoint source grants for septic projects. U.S. EPA, *Polluted Runoff: Nonpoint Source (NPS) Pollution, 319 Grant Program for States and Territories*, 319 Overview, <https://www.epa.gov/nps/319-grant-program-states-and-territories>. Examples of projects include: Demonstration of Alternative Onsite Systems; Analysis of Onsite Sewage Systems Impacts on Groundwater Quality; Onsite Septic System Demonstration and Training; Septic System Survey; Septic System Inventory and Inspection Education Program; and Evaluation and Upgrades of Onsite Systems. U.S. EPA, EPA 832-R-97-001b, at 29.⁵ By approving state NSMPs with septic components and authorizing section 319 grants for septic projects, EPA clearly considers releases from septic systems nonpoint source pollution.

B. Coastal Zone Act Section 6217

Section 6217 of the Coastal Zone Act Reauthorization Amendments, codified at 16 U.S.C. § 1455b, requires every state with a federally approved Coastal Zone Management Program to develop and implement an enforceable Nonpoint Pollution Control Program (“Coastal Nonpoint Program”). 16 U.S.C. § 1455b(a)(1). State programs must be submitted to, and jointly approved by, EPA

⁵ For a comprehensive list of Section 319(h) grant “success stories about restoring water bodies impaired by nonpoint source pollution,” many of which address onsite septic systems, see <https://www.epa.gov/nps/success-stories-about-restoring-water-bodies-impaired-nonpoint-source-pollution>.

and the National Oceanic and Atmospheric Administration (“NOAA”). *Id.* at 1455b(c)(3). States that fail to secure approval can have portions of their allotted grant funds under CWA section 319 and Coastal Zone Management Act (“CZMA”) section 306 withheld by EPA and NOAA, respectively. *Id.* at 1455b(c)(4).

EPA and NOAA have published Program Development and Approval Guidance (“Program Guidance”) detailing their joint interpretation of the statutory requirements for Coastal Nonpoint Programs. NOAA and EPA, Coastal Nonpoint Pollution Control Program, *Program Development and Approval Guidance* (1993), <https://coast.noaa.gov/czm/pollutioncontrol/media/6217proguidance.pdf>. The Program Guidance clarifies that septic systems, which are not covered by the NPDES stormwater program, must be covered by Coastal Nonpoint Programs. *Id.* at Appendix B, Section C; U.S. EPA Office of Water, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, EPA 840-B-92-002, at 4-4 (Jan. 1993) <https://nepis.epa.gov/> (then search field for “840b92002”). As a regulatory tool, the Program Guidance encourages the use of general and individual state permits for the proper siting, design, installation, operation, inspection and maintenance of new septic systems. Program Guidance at 29.

As required by section 6217(g), EPA has also published national guidance on “management measures” for controlling sources of nonpoint pollution in coastal waters. 16 U.S.C. § 1455b(g).

U.S. EPA, EPA 840-B-92-002. In developing the 6217(g) guidance, EPA identified five significant categories and sources of nonpoint pollution: agriculture, forestry, urban, marinas, and hydromodification. Within the urban category, EPA dedicates a twenty-two page discussion to onsite disposal system (“OSDS,” i.e., septic) management measures. U.S. EPA, EPA 840-B-92-002, at 4-97 to 4-118. The description heading for new septic systems reads:

The purpose of this management measure is to protect the 6217 management area from pollutants discharged by OSDS. The measure requires that OSDS be sited, designed, and installed so that impacts to waterbodies will be reduced, to the extent practicable. Factors such as soil type, soil depth, depth to water table, rate of sea level rise, and topography must be considered in siting and installing conventional OSDS.

Id. at 4-98.

The description heading for existing septic systems reads:

The purpose of this management measure is to minimize pollutant loadings from operating OSDS. This management measure requires that OSDS be modified, operated, repaired, and maintained to reduce nutrient and pathogen loadings in

order to protect and enhance surface waters.

Id. at 4-112.

Given EPA's power to approve Coastal Nonpoint Program submittals, its management measures effectively impose a requirement on states. Indeed, EPA continues to deny approval to states that fail to implement septic management measures consistent with its 6217(g) nonpoint source guidance.⁶ Thus, this program demonstrates that EPA does not regulate septic systems as point sources.

C. Clean Water Act Total Maximum Daily Loads

Finally, under CWA section 303(d) states (with approval from the EPA) must develop total maximum daily loads ("TMDLs") for waterbodies that do not meet their water quality standards. 33 U.S.C. §§ 1313(d)(1)(C), (D). TMDLs set the maximum amount of pollutants a waterbody can assimilate and still meet its water quality standard. A TMDL is the sum of the pollutants that are discharged from point sources and the pollutants that are released from nonpoint sources. 40 C.F.R. § 130.2(i).

⁶ States with deficient management measures on new or existing septic systems include Alabama, Hawaii, Illinois, Indiana, Michigan, Mississippi, Ohio, Texas, and Washington. See Coastal Nonpoint Pollution Control Program, *Program Development and Approval Guidance*.

For decades, EPA and seven states labored to create a plan to improve the water quality of the largest estuary in North America—the Chesapeake Bay. *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 287 (3d Cir. 2015). Between 2000 and 2010, the states developed watershed implementation plans, and from the those plans, the EPA finalized the Chesapeake Bay Total Maximum Daily Load. The Chesapeake Bay TMDL is very specific, “it includes point- and nonpoint-source limitations on nitrogen, phosphorous, and sediment for 92 segments of the Bay identified as overpolluted and further allocates those limits to specific point sources and to nonpoint source sectors.” *Id.* at 292. In describing the TMDL, the Third Circuit explained the TMDL imposed:

daily Land Based [Load Allocation]s for specific nonpoint source sectors: agriculture, forest, nontidal atmospheric deposition, onsite septic, and urban. Land Based [Load Allocations] are presented as delivered load for each of the 92 impaired segments by jurisdiction and by nonpoint source *sector* for [total nitrogen, total phosphorous, and total suspended solids].

Id. at 302-303 (emphasis added). Thus, in the largest and most detailed TMDL ever created, the EPA included “onsite septic” in the nonpoint source category.

The Chesapeake Bay TMDL is not an aberration. EPA continually includes pollution from septic systems in the nonpoint category of TMDLs. U.S. EPA Office of Water, *Protocol for Developing*

Pathogen TMDLs, EPA 841-R-00-002, at 5-2, (1st ed. January 2001) <https://www.epa.gov/tmdl/tmdl-support-documents> (identifying septic systems in the nonpoint source category); U.S. EPA Office of Water, *Draft Guidance for Water Quality-based Decisions: The TMDL Process*, EPA 841-D-99-001, at 3-6 (2d ed. Aug. 1999) <https://www.epa.gov/tmdl/tmdl-support-documents> (identifying “septic disposal systems” in the nonpoint source category); e.g. New Mexico Environment Department, *Tijeras Arroyo Nutrients Total Maximum Daily Load (TMDL)*, at 24, (June 12, 2017), https://www.env.nm.gov/wp-content/uploads/2016/03/EPA_Approved-TIJERAS-ARROYO-TMDL_101217.pdf (approved by the federal EPA on October 12, 2017 and identifying septic systems as nonpoint sources of pollution). A 2007 report of 17 TMDLS from 10 different EPA regions illustrates that septic systems are systematically considered a nonpoint source of pollution. U.S. EPA Office of Wetlands, Oceans and Watersheds, *Total Maximum Daily Loads with Stormwater Sources: A Summary of 17 TMDLs*, EPA 841-R-07-002 (July 2007) https://www.epa.gov/sites/production/files/2015-07/documents/17_tmdls_stormwater_sources.pdf.

* * *

Thus, since EPA controls septic systems under its various nonpoint source programs, the government clearly does not consider them to be point sources. Moreover, a change in the law that would classify septic systems as point sources of pollution would not only impact the CWA section 402 requirements. It would require wholesale changes to the CWA

section 319 program and the CZMA section 306 program. Furthermore, every TMDL that includes septic systems in its nonpoint source load allocation would need to be re-written to effect the change.

III. **LUCAS ILLUSTRATES THAT SEPTIC SYSTEMS ARE NOT POINT SOURCES THAT CONVEY POLLUTION TO NAVIGABLE WATER.**

The case of *U.S. v. Lucas*, 516 F.3d 316 (5th Cir. 2008) supports amicus's contention that properly operating septic systems are not point sources. In *Lucas*, Defendants were convicted of (among other things) violating CWA sections 402 and 404. The Defendants filled jurisdictional wetlands to create mobile home sites. They then installed septic systems and sold "the lots as dry." *Lucas*, 516 F.3d at 322.

The government charged the Defendants with violating section 404 for filling the wetlands without a permit. They were charged with violating CWA section 402 because "[t]he septic systems failed." "Raw sewage bubbled up and spilled out onto [the homeowners'] yards; drained across from neighbors' lands; ran in ditches on their lots" Brief for the United States at 18-19, *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2007) (No. 06-60289), 2007 WL 5129505.

Consequently, since the Defendants improperly sited the septic systems on saturated wetland soils that would not drain and could not treat the wastewater, the liquid that exited the distribution

grid came to the surface and then entered navigable waters through discrete conveyances, i.e., ditches.⁷ The pollutants did not leave the “system” through the soil. Thus, the Fifth Circuit found that the septic systems “at issue in this case” conveyed pollutants to navigable water through point sources. *Lucas*, 516 F.3d at 332.

The Fifth Circuit also relied on *U.S. v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *16 (M.D. Fla. Aug. 2, 2006) where the government similarly charged the Defendants with violating CWA section 402. In *Evans*, the Defendants bypassed the septic system using a pipe that fed sewage directly to a navigable water. *Id.* at *32. Therefore, like *Lucas*, the sewage left the system from a point source (the pipe), and not through the soil.

Thus, *Lucas* supports amicus’s assertion that the way pollutants leave a system is critical when determining if it is subject to regulation as a point source. In *Lucas* (and *Evans*), the pollutants bypassed the soil treatment and entered the

⁷ Under Mississippi law regulating the installation of below-ground residential septic systems, the systems installed by Defendants would never have been approved but for the criminal conspiracy, of which all Defendants were found guilty. *Lucas*, 516 F.3d at 323, 351. The failure rate of the type of septic systems at issue, placed in saturated soils which cannot aerate the waste, is 100 percent. Brief for the United States, *Lucas*, 516 F.3d at 59. There were even questions of bribery with respect to the approvals Defendants’ received for siting the septic systems in this case. *Lucas*, 516 F.3d at 345-49.

navigable waters from pipes—and therefore the Fifth Circuit held the system was a point source.

CONCLUSION

Septic systems do not satisfy the CWA definition of “point source.” Furthermore, the EPA and courts have long recognized that properly operating septic systems are not point sources of pollution.

As illustrated, above, a decision in this case that alters the way septic systems are regulated under the CWA would require wholesale changes to numerous CWA programs. NAHB, therefore, respectfully requests that the Court not upset the current paradigm for controlling septic systems when issuing a decision in this case.

Dated: May 16, 2019

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