

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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COUNTY OF MAUI,

*Appellant,*

vs.

HAWAII WILDLIFE FUND; SIERRA CLUB - MAUI GROUP; SURFRIDER  
FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

*Appellees.*

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On Appeal From the United States District Court for the District of Hawai'i  
Honorable Susan Oki Mollway, Chief Judge  
Case No. 12-00198 SOM/BMK

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE  
ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA  
ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE  
ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION, LEAGUE OF CALIFORNIA CITIES,  
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,  
NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF  
CITIES, NATIONAL WATER RESOURCES ASSOCIATION IN  
SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF MAUI  
AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S  
DECISION**

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## **MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

This motion for leave to file an *amici curiae* brief by the Association of California Water Agencies, the California Association of Sanitation Agencies, the California State Association of Counties, the International Municipal Lawyers Association, the League of California Cities, the National Association of Clean Water Agencies, the National Association of Counties, the National League of Cities, and the National Water Resources Association is made pursuant to Federal Rules of Appellate Procedure (“FRAP”) 29(b). The grounds for the motion and the interest of the *amici* are set forth in the attached memorandum of points and authorities. The *amici* brief is also attached to this motion.

The *amici* have attempted to obtain the consent of all parties to the filing of this brief, as required by Circuit Rule 29-3. As of the date of this motion, defendant and appellant, County of Maui, has consented to the filing of the proposed *amici* brief. Counsel for Plaintiffs Earthjustice Legal Defense Fund, has not granted consent to the filing of the proposed brief.

## **CERTIFICATE OF INTEREST**

(1) The *amici* are the Association of California Water Agencies, the California Association of Sanitation Agencies, the California State Association of Counties, the International Municipal Lawyers Association, the League of

California Cities, the National Association of Clean Water Agencies, the National Association of Counties, the National League of Cities, and the National Water Resources Association.

(2) No party's counsel authored the proposed *amici* brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the proposed brief. No person, other than *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the proposed brief.

(3) The Corporate Disclosure Statement is provided below.

#### **CORPORATE DISCLOSURE STATEMENT**

*Amici* represent that no parent corporation(s) or publicly held corporation(s) own 10% or more of the stock in any *amici*. FRAP 26.1

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO FILE *AMICI CURIAE* BRIEF**

Under Federal Rules of Appellate Procedure (“FRAP”) 29(b), a motion for leave to file an *amicus* brief must state the movant’s interest, and the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. As explained below, the *amici*’s brief meets these requirements.

**I. IDENTITY AND INTEREST OF *AMICI CURIAE* (FRAP 29(c)(4))**

*Amici* are organizations from across the United States whose members are primarily governmental entities, including counties, cities, special districts and public utilities that provide water, wastewater and stormwater management services to their citizens.

**A. Identity of *Amici Curiae***

The Association of California Water Agencies (“ACWA”) is the largest coalition of public water agencies in the nation, representing 440 public water agencies, which provide water supplies for urban and agricultural use. ACWA’s member agencies range in size from small irrigation districts to the largest water wholesalers in the country.

The California Association of Sanitation Agencies (“CASA”) is a non-profit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of more than 100 local public agencies,

including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries, and institutions.

The California State Association of Counties ("CSAC") is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state leagues, and individual attorneys. Established in 1935 and consisting of more than 2,500 members, IMLA is the oldest and largest association of attorneys representing United States municipalities,

counties, and special districts. IMLA's mission is to advance responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country.

The League of California Cities ("League") is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The National Association of Clean Water Agencies ("NACWA") is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. NACo

serves as an advocate for county government and works to ensure that counties have the resources, skills and support needed to successfully lead their communities. NACo's members provide water, wastewater and flood control services to residents of the nation's 3,069 counties.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments and represents more than 19,000 United States cities and towns. Many of NLC's members provide water and wastewater services. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

The National Water Resources Association ("NWRA") is a non-profit, voluntary organization of state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the western states. NWRA has member associations in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Washington.

**B. Interest of *Amici Curiae***

*Amici* and their members have a significant interest in the issues presented in this case. *Amici*'s members are largely public agencies and public utilities that provide important water supply, water conservation, water treatment and



stormwater management services. They are responsible for managing water resources in a complex web of overlapping laws and ever-changing environmental and societal demands. *Amici*'s members use recycled water to augment groundwater and drinking water supplies, and to irrigate recreational and agricultural lands. Members collect and treat wastewater, which may then be stored in percolation ponds and spreading grounds where it can add to groundwater supplies. They own and operate surface water impoundments, subsurface water distribution systems, and wastewater collection lines. They employ low impact development ("LID") and other "green infrastructure" strategies to retain, infiltrate, and percolate storm water flows into groundwater, prevent sewage spills, and otherwise capture and reuse stormwater through means such as aquifer storage and recovery.

In providing the services described above, *Amici*'s members discharge to groundwater in some way. The issues presented in this case will define the circumstances under which a Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit is required for the continued operation and innovative development of *amici*'s members' programs.

*Amici* bring a broad, national perspective on the use of innovative programs, including groundwater management, to help supply water throughout the country and improve water quality. *Amici* view water as a single supply in

different phases. *Amici*'s members have designed their projects and operations to maximize water treatment, quality, storage and production under the current regulatory scheme. If the Court of Appeals upholds or in any way endorses the district court's decision below, *amici*'s members may be required to comply with a new paradigm for groundwater and water quality regulation. This new paradigm will result in overlapping regulatory structures, create infeasible obligations and undermine the ability of *amici*'s members to implement current and innovative programs to meet the needs of their residents while protecting water quality. Thus, *amici* have a significant interest in the issues presented in this case.

**II. THE *AMICI* BRIEF IS DESIRABLE, BECAUSE IT ADDRESSES ISSUES RELEVANT TO THE DISPOSITION OF THE CASE AND WILL CONTRIBUTE TO THE COURT'S UNDERSTANDING OF THE COMPLEX ISSUES RAISED IN THIS LITIGATION.**

The *amici* brief is desirable, because it addresses relevant issues in this litigation and will contribute to the court's understanding of the complex issues raised in this litigation.

*Amici* urge this Court to reject the district court's legally unsupportable holding that discharges to groundwater require an NPDES permit. The Clean Water Act requires an NPDES permit for the (1) "discharge of any pollutant" (2) to "navigable waters" (3) from a "point source." 33 U.S.C. §§ 1311(a), 1342, 1362; 40 C.F.R. § 122.2. The district court eliminates the "point source"

requirement by concluding that “liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of *how* they get there.”

Hawai’i Wildlife Fund v. County of Maui, 24 F.Supp.3d 980, 1000 (D. Haw. May 30, 2014) (“Maui I”) (emphasis in original).

The district court recognizes its conclusion is legally unsupportable, stating that “it cannot point to controlling appellate law or statutory text expressly allowing this theory in the present context.” Id., p. 996. Indeed, the applicable statutory text requires the opposite conclusion: a “point source” is defined by the Clean Water Act as “any discernible, confined and concrete conveyance,” 33 U.S.C. §§ 1362(14). Despite the directive of the NPDES program, the district court finds that liability arises when pollutants reach navigable waters, and that discharges from point sources “need not also be ‘confined and discrete.’” Maui I, 24 F.Supp.3d at 999. In effect, the district court transmutes the “significant nexus” test for “waters of the United States” into the point source context in order to rewrite the point source definition. Id., pp. 997-1000.

Elimination of the requirement that a “point source” be “confined and discrete” imposes liability under the NPDES program for discharges to groundwater, even though groundwater is not a “navigable water” or a “point source.” Id., p. 996 [groundwater is not “necessarily *itself* part of the navigable

waters of the United States.”]; Hawai’i Wildlife Fund v. County of Maui, No. 13-00198, 2015 U.S. Dist. LEXIS 8189, \*18 (Jan. 23, 2015) [the “court did not rely on the proposition that the groundwater in this case served as a point source”].

Such expansion of the Clean Water Act has serious policy implications for members of *amici*. It overburdens regulatory agencies and members of *amici* by duplicating existing, extensive state and federal groundwater laws and regulations. It creates uncertainty as to how, both in scope and manner, the NPDES program’s requirements are to be applied to groundwater. Perhaps most significantly, if affirmed by the Ninth Circuit, the district court’s decision threatens *amici* members’ projects that provide clean, reliable drinking water to millions of people across the nation and protect the nation’s “navigable waters” by exposing thousands of lawfully operating water supply and water conservation projects to citizen suit liability in the midst of serious scientific and regulatory uncertainty.

*Amici* believe the brief will significantly contribute to the Court’s understanding of the issues raised in this proceeding. The *amici* have substantial knowledge, experience and expertise concerning water and wastewater management and development throughout the country, including the statutory systems regulating groundwater. The *amici*’s brief addresses issues

relevant to the disposition of this litigation, and *amici* are directly affected by the issues raised in this case. For these reasons, the filing of the *amici*'s brief is desirable and relevant to the issues.

### **CONCLUSION**

For the foregoing reasons, the *amici* have an interest in the issues presented in this case; the *amici* brief addresses relevant issues in this litigation; and the filing of the *amici*'s brief is desirable. Therefore, the motion for leave to file the *amici* brief should be granted.

Dated: March 28, 2016

Respectfully submitted,

By: /s/ Shawn Hagerty

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed:

**MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL WATER RESOURCES ASSOCIATION IN SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF MAUI AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S DECISION** with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF System on March 28, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Executed on March 28, 2016 at Walnut Creek, California.

/S/ Irene Islas  
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