



1130 Connecticut Ave NW
Suite 1050
Washington DC 20036

T (202) 833-2672
F (888) 267-9505
www.nacwa.org

August 29, 2019

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

Submitted via email to GET.committee@mauicounty.us

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Nathan Gardner-Andrews
Chief Advocacy Officer

Cc: Kelly.King@mauicounty.us, Council Chair
Keani.Rawlins@mauicounty.us, Council Vice-Chair
Tasha.Kama@mauicounty.us, Presiding Officer Pro Tempore
Riki.Hokama@mauicounty.us, Councilmember
Alice.Lee@mauicounty.us, Councilmember
Mike.Molina@mauicounty.us, Councilmember
Tamara.Paltin@mauicounty.us, Councilmember
Shane.Sinenci@mauicounty.us, Councilmember
Yukilei.Sugimura@mauicounty.us, Councilmember