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Op-Ed

COMMENTARY

## Alito confirmation could harm Isle waters

By D. Kapua Sproat

The U.S. Senate is now considering whether or not to confirm Judge Samuel Alito Jr. to a lifetime appointment to the U.S. Supreme Court. Unfortunately, many media outlets have failed to focus on Alito's extreme appellate court record of legislating from the bench on issues central to the protection of public health and the environment.

Alito's record threatens Congress' authority to enact laws under the Constitution's Commerce Clause — the legal basis for most federal environmental laws, and threatens Congress' ability to ensure that citizens have the right to go to court to enforce these laws. That's why he is the first Supreme Court nominee environmental groups have opposed since Robert Bork in 1987.

Alito imposed severe restrictions on citizen enforcement efforts under the Clean Water Act. In *PIRG v. Magnesium Elektron*, Alito was the decisive vote — ruling that evidence that people had stopped drinking water from, and swimming and fishing in, a river because of 150 uncontested, upstream violations of the Clean Water Act was not enough to show that they had standing to sue the corporate polluter.

The standard he embraced would have forced victims of illegal pollution to scientifically prove harm to the environment, even though they were harmed by clear violations of the act. The Supreme Court rejected this untenably restrictive standing test in *Friends of the Earth v. Laidlaw*, reiterating that the proper measure of standing is "injury to the plaintiff."

If confirmed, Alito could be the deciding vote in two of the most important Clean Water Act cases to come before the court in 30 years. In these cases, developers and polluters are arguing that headwater streams and tributaries, and all of the wetlands adjacent to these waters, must lose all existing federal anti-pollution protections.

What does this mean for Hawai'i? The majority of our streams, wetlands and other waters could lose all federal protection under the Clean Water Act if the polluters now making their case before the U.S. Supreme Court get their way. These represent the vast majority of waters that all of us in Hawai'i use for fishing, swimming, surfing, other recreation, and as an important source of food, as well as for filtering pollutants and helping to prevent floods.

The destruction of these natural and cultural treasures is not only damaging in and of itself, but will also harm the quality of downstream coastal waters, which we all use and love.

The theory proposed by the polluters currently arguing cases before the Supreme Court is extreme. It would mean that any waterway in Hawai'i that is being polluted but is not an actually "navigable" water (capable of supporting commercial navigation) could no longer be subject to any federal limits on discharges of sewage or other wastes, to restrictions on dredging and filling, to the requirements to clean up waters polluted by mercury or other contaminants, or to state conditions placed on federally licensed projects that can kill fish, destroy habitat or degrade water quality. Auwe.

This destructive theory of clean water law would not only threaten Hawai'i's clean streams and coastal areas, but would undermine efforts to clean up our already-polluted waters.

According to the Environmental Protection Agency, the state Department of Health has identified 241 waters too polluted to support recreation, fish or wildlife habitat or other uses. These waters are polluted by excess turbidity and nutrients, pathogens, ammonia, pesticides, metals and, in the cases of at least one water body, PCBs.

The Clean Water Act tools that we use to identify and create plans to clean up these impaired waters are at risk because the Supreme Court has taken up these cases, and an anti-Clean Water Act ruling would mean not only that

Hawai'i's already-impaired streams and coastal waters would not get cleaned up, but they would likely become more polluted.

For these and other reasons, we oppose Alito's confirmation and pray that our senators, Daniel Inouye and Daniel Akaka, will do the same.

*D. Kapua Sproat is an attorney in the Honolulu office of Earthjustice, a nonprofit, environmental law firm. She wrote this commentary for The Advertiser.*

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