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ALERT

The Potentially Enormous Impacts of the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision

May 7, 2020

Businesses and others that discharge pollutants into groundwater—perhaps even those who simply use septic tank systems—need to understand the potentially enormous significance of the U.S. Supreme Court's recent Clean Water Act (CWA) decision in *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (U.S. Apr. 23, 2020). These entities may now face both governmental and private suits if they fail to obtain a National Pollutant Discharge Elimination System (NPDES) permit from state or federal authorities—even though they are not directly discharging pollutants into a waterway. And if those suits are successful, these entities may also be responsible for both penalties and the plaintiff's legal fees.

It has long been established that an NPDES permit is required when there is a direct discharge from a point source into navigable waters —essentially, almost any flowable surface water. Now, in *Maui*, the Supreme Court held 6-3 that the CWA also "requires a permit . . . when there is the *functional equivalent of a direct discharge*." While further definition of the boundaries of "functional equivalence" will have to await future court decisions, *Maui* implies that permits may be required if evidence demonstrates leakage of pollutants from subsurface drainage fields or even septic tanks.

Thus, as more fully discussed below, this decision will require new evaluations of whether businesses (and potentially even individual homeowners) currently comply with the CWA and the NPDES permitting scheme. No doubt, some uncertain potentially covered entities will want to engage the regulators proactively. And entities that are currently engaged in litigation involving indirect discharges,

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or threatened with such litigation, will want to consider how the factors the Court gave as examples influence their prospects.

Background

The CWA prohibits "any addition of any pollutant to *navigable waters* from any *point source*" without an NPDES permit. Under the CWA, the term "navigable waters" includes streams, rivers, the ocean, coastal waters, and even some wetlands. The CWA further defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

At least until *Maui*, however, the CWA was not understood to require an entity to obtain an NPDES permit for an addition of pollution to *groundwater* or to surface waters from a *non-point source*. The most obvious sources of non-point sources are farm fields—even though pollutants may run off the field, when those discharges are not confined to a ditch or pipe, they have not been regulated under federal law or federal mandates to states. It has long been understood that Congress left regulation of groundwater and/or non-point source pollution to state and local authorities.

But what happens if a point source, such as a pipe, leaks a pollutant into groundwater and then only later *indirectly* reaches navigable waters? Lower federal courts previously were divided on whether this type of *indirect discharge* to navigable waters was even subject to the CWA. Some courts had held that the CWA covered only direct discharges (e.g., a pipe directly releasing a pollutant into navigable waters). Others had found that the CWA covers some indirect discharges but did not agree on when such discharges became subject to the CWA.

The Decision

In *Maui*, the Supreme Court was called upon to address a relatively egregious situation: a wastewater reclamation facility collected sewage from the surrounding area, partially treated it, and pumped the treated water through underground wells to groundwater. Some of the discharged material then ultimately reached the Pacific Ocean. The Court found that in these circumstances, a permit could be required, depending on the consideration of "many potentially relevant factors" that might make the discharge the "functional equivalent" of a direct discharge. The Court largely left it to lower courts and the U.S. Environmental Protection Agency (EPA) (through administrative guidance) to provide further direction to regulated entities as to what that rule means. But the opinion provides some helpful factors to be considered when future courts evaluate a discharge:

1. Transit time from deposit until pollutants reach navigable waters;
2. Distance traveled;
3. The nature of the material through which the pollutant travels;

4. The extent to which the pollutant is diluted or chemically changed as it travels;
5. The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
6. The manner by or area in which the pollutant enters the navigable waters; and
7. The degree to which the pollution (at that point) has maintained its specific identity.

Notably, the Court emphasized that "[t]ime and distance will be the most important factors in most cases."

Impact on Regulated Entities

It remains to be seen how this newly minted "functional equivalent" approach will look in practice, but one thing is inevitable: litigation is coming, and compliance will require regulated entities' proactive and responsive involvement.

- More litigation is certain. Not only did the Supreme Court remand the *Maui* case back to the U.S. Court of Appeals for the Ninth Circuit for further attention, it also remanded a related CWA case, *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, back to the U.S. Court of Appeals for the Fourth Circuit for further proceedings in light of *Maui*. Other suits are virtually certain. And since the CWA authorizes citizen suits, these need not await any future judicial or administrative guidance. Trade associations, in particular, should be watching for suits that could establish precedents particularly threatening to their members and consider intervening in or filing *amicus* briefs in such cases.
- Proactive involvement in regulatory decision-making process is necessary. There could be a regulatory action by the EPA in the near future. Although the Supreme Court rejected restrictive interpretation of the CWA taken by the government in *Maui* (i.e., that permitting is only required for direct discharges), the opportunity exists for administrative action that even would be subject to *Chevron* deference (at least until the Court narrows that deference, as seems possible—but that's an issue for another day). The Supreme Court's opinion notes that "EPA and the States . . . [could] develop[] general permits for recurring situations or . . . issu[e] permits based on best practices." This creates an opportunity for regulated entities to engage with the regulators on what the best practices in certain recurring situations are.
- There are ways to mitigate liability exposure. The Court observed that judges can "mitigate any hardship or injustice when they apply the [CWA] penalty provision" by taking into account "any good-faith efforts to comply" with the CWA; the "seriousness of the violation"; "the economic impact of the penalty of the violator"; and "such other matters as justice may require." Potentially impacted entities should begin immediately to develop pertinent facts that can be offered in defense, should they be unfortunate enough to be early targets of post-*Maui* litigation.

Conclusion

The Supreme Court's *Maui* decision may prove to be one of the most impactful environmental law decisions in recent years. It is certain that environmental citizen groups and administrative agencies will test the outer limits of this newly pronounced application of the CWA in the years to come. Much like how some environmental groups have used the Endangered Species Act to block industrial expansions and modern agricultural practices, a new round of litigation, now under the CWA, should be expected. Businesses and industries that know they are potentially subject to the CWA's reach should be especially concerned and prepared.