



PROGRAM MATERIALS

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Making Waves: The Ripple Effects of the Supreme Court's New "Functional Equivalent" Test on Clean Water Act NPDES Discharge Permitting

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Making Waves: The Ripple Effects of the Supreme Court's New "Functional Equivalent" Test on Clean Water Act NPDES Discharge Permitting

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Brenda has over 25 years of experience representing clients in environmental matters, including wastewater discharge permitting, compliance and enforcement. She also leads the firm's sustainability practice group.



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Overview

- Introduction
- Clean Water Act Framework and Background
- Maui County Case Supreme Court Decision
- Remand and Discovery
- Potential Ripple Effects of Decision – 5 Takeaways
- Impact on other CWA Cases in Litigation



Clean Water Act Framework

- The Clean Water Act prohibits the discharge of any pollutant from a point source into navigable waters without a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. §1251 et seq. (1972).
- Per a 2016 Congressional Research Service report, more than 65,000 conventional industrial and municipal dischargers must obtain an NPDES permit. NPDES permits are also required for industrial and municipal sources of stormwater discharges.
- Although seemingly straightforward, many of the terms involved have been heavily litigated.
 - Pollutant - any type of industrial, municipal, and agricultural waste discharged into water. Some examples are dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste.
 - Point source - any discernible, confined and discrete conveyance, such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container. It also includes vessels or other floating craft from which pollutants are or may be discharged.
 - Navigable waters – navigable waters, tributaries to navigable waters, interstate waters, the oceans out to 200 miles, and intrastate waters which are used: by interstate travelers for recreation or other purposes, as a source of fish or shellfish sold in interstate commerce, or for industrial purposes by industries engaged in interstate commerce.
- CWA puts states in charge of nonpoint source pollution. States must identify “best management practices,” and must also monitor and report their progress to EPA. State programs regulate sources of pollution such as, agricultural runoff, surface and underground mine runoff, and residual waste disposal.
- Question posed by the Supreme Court “is whether, or how, this statutory language applies to a pollutant that reaches navigable waters only after it leaves a ‘point source’ and then travels through groundwater before reaching navigable waters.”



Clean Water Act Framework (cont'd)

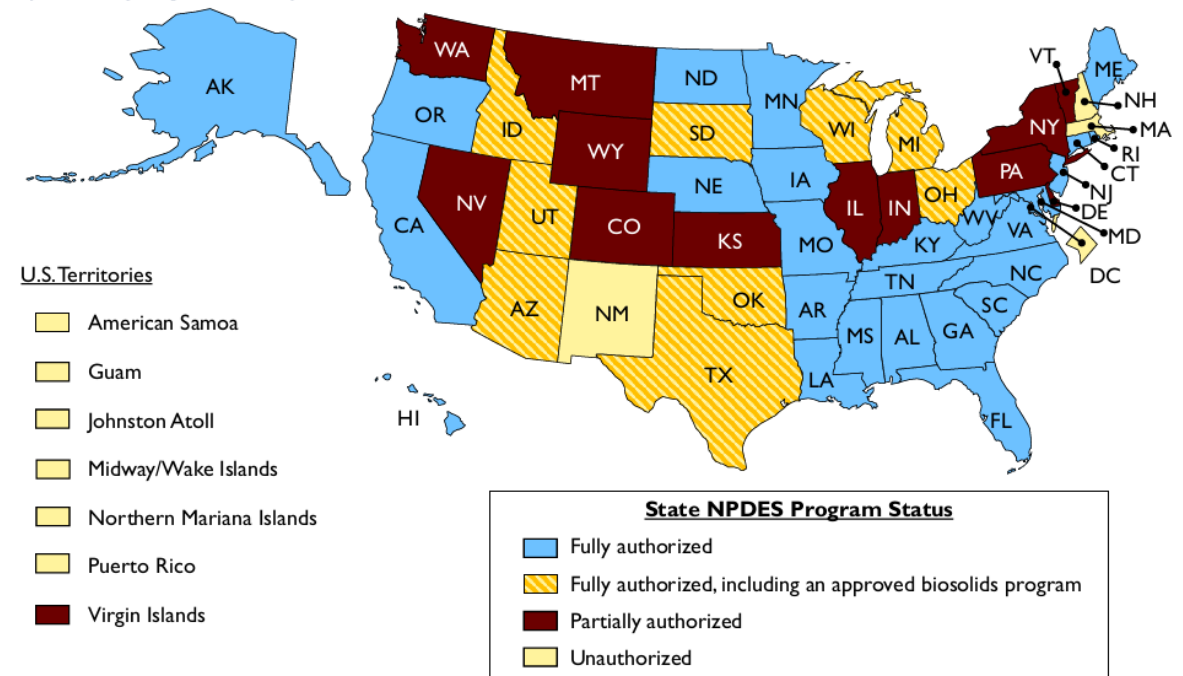
■ NPDES Permits

- General Permit – dischargers meeting established parameters can submit a Notice of Intent to operate under the general permit, typically quicker process
- Individual Permit – reflects site-specific conditions, can take several months
- Permits are issued for up to five years
- EPA enforces NPDES permits by issuing compliance orders and initiating civil suits
- Criminal penalties are also authorized
- Citizen suits are authorized by the CWA – both against entities that violate standards, and against the Administrator of EPA for failure to carry out a non-discretionary duty

■ State government involvement varies

- Some states are fully authorized to administer the program, some partially, some not at all
- States also have their own permitting structures which may impose separate requirements

NPDES Program Authorizations (as of July 2019)



Map Credit: Environmental Protection Agency



Law Prior to Maui

Differing Requirements Across Circuits and Lower Courts

- Ninth Circuit – “fairly traceable”
- Fourth Circuit – “direct hydrological connection” – See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 652 (4th Cir. 2018).
- Sixth and Seventh Circuit – groundwater is excluded from CWA’s permitting requirements altogether – See *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F.3d 925, 932–938 (6th Cir. 2018); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 966 (7th Cir. 1994)



Law Prior to Maui (cont'd)

EPA's Position

- Between approx. 1990 and 2016, EPA had taken the position that discharges to groundwater could potentially require an NPDES permit where there is a hydrological connection between the groundwater and surface water – but the determination was fact-specific and the degree to which this was pursued changed with the different administrations.
- “Interpretative Statement” – April 15, 2019
 - ALL releases of pollutants to groundwater are categorically excluded
 - Statement specifically noted that the exclusion applied “even where pollutants are conveyed to jurisdictional surface waters via groundwater.”
 - Attempt to create a bright-line rule



Factual Background

- County of Maui operates the Lahaina Wastewater Reclamation Facility (“LWRF”) on the island of Maui, Hawaii.
- The facility includes 4 injection wells.
 - Wells 1 and 2 installed in 1979 as part of original 1975 plant design.
 - Wells 3 and 4 installed in 1985 as part of expansion project.
- The LWRF receives approximately 4 million gallons of sewage per day.
- Sewage is treated at the LWRF and either sold for irrigation or injected into the wells for disposal.
- County injects approximately 3 to 5 million gallons of treated wastewater per day into the groundwater.



Factual Background (cont'd)

- In 2013, EPA, Hawaii Department of Health, and others conducted a study (known as the “Tracer Dye Study”) on Wells 2, 3, and 4 to gather data on whether there is a hydrological connection between the injected wastewater and the Pacific Ocean.
- 84 days after injection, tracer dye introduced into Wells 3 and 4 began to emerge along the North Kaanapali Beach (about a half mile southwest of the LRWF).
- The Tracer Dye Study concluded that a “hydrogeologic connection exists between . . . Wells 3 and 4 and nearby coastal waters of West Maui.”
- In 2012, several environmental groups filed a citizens’ suit under the Clean Water Act against the County of Maui. Claimed that Maui was discharging a pollutant to navigable waters (Pacific Ocean) without the required NPDES permit.





Issue Presented

- Does the Clean Water Act require a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source such as groundwater?



Lower Court Decisions

- Environmental groups moved for partial summary judgment against the County of Maui.
- *Hawai'i Wildlife Fund v. County of Maui*, 24 F.Supp.3d 980 (D. Hawai'i 2014).
 - ✓ Granted motion for partial summary judgment.
 - ✓ District Court applied the “conduit theory” holding a discharge to groundwater may be subject to NPDES permitting requirement if the discharge is “functionally equivalent to a discharge into the ocean itself.” Further, liability under the CWA arises “as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.”
 - ✓ The District Court held that it was undisputed that the County had discharged pollutants through the conduit of groundwater into the Pacific Ocean.



Lower Court Decisions (cont'd)

- *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018)
 - Affirmed District Court decision.
 - Ninth Circuit described the relevant standard somewhat differently.
 - A permit is required when “the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”
 - The Ninth Circuit declined to determine if there would ever be a situation where the connection between a point source a navigable water is too tenuous to support liability.
 - Ninth Circuit held that the Tracer Dye Study and the County’s concessions conclusively established that pollutants discharged from all four injection wells emerged at discrete points in the Pacific ocean, with 64 percent of the wells’ pollutants reaching the ocean.
- County of Maui appealed the decision to the U.S. Supreme Court



Key Statutory Text

- CWA prohibits “the discharge of any pollutant by any person” without a NPDES permit. 33 U.S.C. § 1311(a)
- The term “discharge” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* at 1362(12).
- What does it mean for a pollutant to come “from” a point source? To be subject to the permitting requirement, does the pollutant just have to originate from a point source to be “from” a point source, or does it have to come directly “from” the point source?



Positions Argued – Environmental Groups

- Adopted Ninth Circuit test: CWA permitting requirement applies so long as the pollutant is “fairly traceable” to a point source even if it traveled long and far (through groundwater) before it reached navigable waters.





Positions Argued – County of Maui

- Maui argued that the CWA creates a “bright line test.” A point source must be the “***means of delivering pollutants*** to navigable waters.”
 - If at least one nonpoint source such as groundwater lies between the point source and navigable waters, then the NPDES permit requirement does not apply.
 - A pollutant is only “from” a point source if a point source is the last conveyance that conducted the pollutant navigable waters.





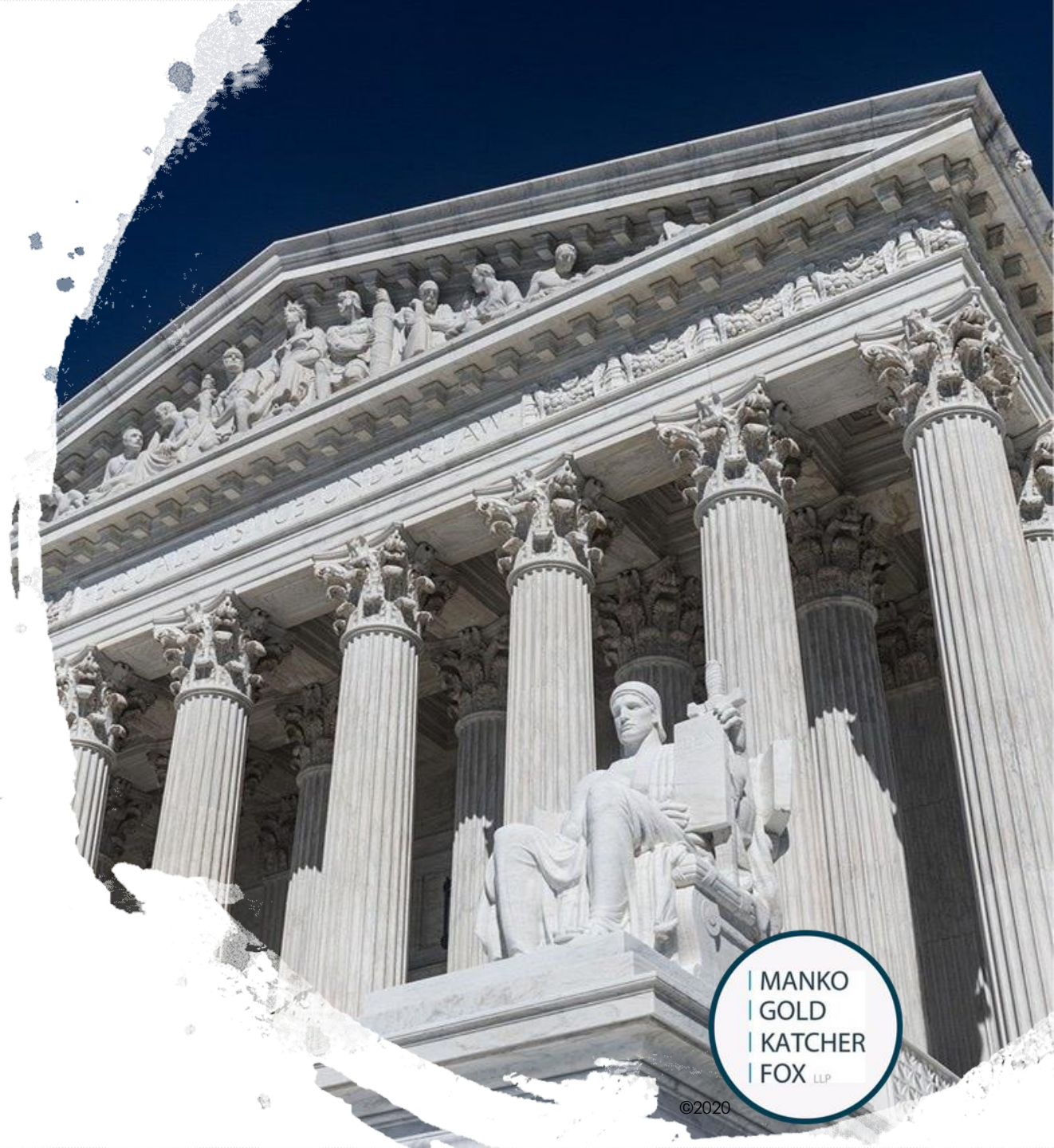
Positions Argued – U.S. Solicitor General

- Supported Maui's position at the Supreme Court
 - EPA Interpretative Statement
 - A release of pollutants to groundwater is not subject to the CWA permitting requirement even if the pollutants subsequently migrate to navigable waters.



Court's Holding

- 6-3
 - Majority - Breyer delivered opinion jointed by Roberts, Ginsburg, Sotomayor, Kagan, and Kavanaugh
 - Kavanaugh filed concurring opinion
 - Thomas dissented joined by Gorsuch
 - Alito filed a separate dissent
- The Court rejected both Maui's and the Environmental Groups' standards and established a new standard that was broader than Maui's position but narrower than the Environmental Groups' position.



Court's Holding – Rejected “Fairly Traceable” Standard



- Rejected the Environmental Groups’/Ninth Circuit’s “fairly traceable” standard as overly broad.
- The “fairly traceable” standard would allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release from a well, a pipe, or compost heap and in highly diluted forms.
 - To interpret CWA this broadly would require a permit in bizarre situations.
 - The structure of the CWA indicates that Congress intended to leave substantial responsibility for groundwater pollution and nonpoint source pollution to the States.
 - Legislative history - Multiple references to groundwater but Congress did not grant EPA authority over groundwater.
 - Regulatory practice – EPA had required permits for discharges traveling through groundwater but in narrower circumstances than the “fairly traceable” standard



Court's Holding – Rejected the Never/Bright-line Standard

- The Court rejected Maui and Solicitor General's position as too narrow.
 - The Court believed that the narrow interpretation would interfere with EPA's ability to regulate even ordinary point sources.
 - Owner's of pipes that discharge to navigable could avoid permitting requirements by moving the pipe back a few yards and discharging to groundwater instead of directly to the surface water.
 - Congress did not intend such a large and obvious loophole.
- EPA's interpretation not given deference (Solicitor General did not ask for deference)





Court's Holding – “Functional Equivalent”

- “We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the ***functional equivalent of a direct discharge.***”
- An addition of a pollutant is “from a point source” when a point source either directly deposits the pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.



Court's Holding – What is “Functional Equivalent”?

- Whether pollutants that arrive at navigable waters after traveling through groundwater are “from” a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.
- “Functional Equivalent” or “Breyer” Factors:
 - (1) transit time
 - (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
 - (7) The degree to which the pollution (at that point) has maintained its specific identity.



Remand Back to Hawaii

- Supreme Court vacated and remanded case to 9th Circuit

“Because the Ninth Circuit applied a different standard, we vacate its judgment and remand the case for further proceedings consistent with this opinion.” *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct 1462 (April 23, 2020)

- 9th Circuit remanded to U.S. District Court, Hawaii (June 3, 2020)
- Parties submitted briefing to District Court on whether to reopen discovery for further investigation (June 22, 2020)
 - Environmental groups opposed reopening, stating that the existing record sufficiently addresses the Supreme Court’s Functional Equivalent factors.
 - Maui County argued that it is critically important to reopen discovery, stating that application of the new Functional Equivalent standard requires more investigation and consideration of additional factual data, empirical observation, and scientific analysis not adequately addressed in the record. Also, noted that rulings in this case will be forward-looking and may impact future NPDES permit determinations across the country.



Plaintiffs' Position on Further Discovery

- No good cause to reopen discovery. The discharges were the subject of considerable investigation and scrutiny by scientists and federal/state authorities for over 10 years prior to the 2012 lawsuit and parties have been in litigation for 8+ years. There has been substantial discovery and expert reports addressing each of the Functional Equivalent factors. Plaintiffs cited evidence in record on each of the 7 factors. For example, they argued:
 - Transit time: It was undisputed that dye placed in Wells 3 & 4 reached the ocean in 84 days and that average transit time for pollutants from the wells to reach the ocean was 14 to 16 months. As to Wells 1 & 2, Plaintiffs' expert calculated projected transit time and Maui had the opportunity to respond.
 - Distance traveled: Parties agreed that effluent discharged from Wells 3 & 4 travels approx. ½ mile before entering ocean. Distance from Wells 1 & 2 would be similar, even if the parties disagreed about where such discharge would enter ocean.
- Plaintiffs would suffer undue prejudice from further delay. Until the court determines that the discharges violate the CWA, Maui is not required to comply with the 2015 settlement agreement on remedies, which requires Maui to invest \$2.5 million in a Supplemental Environmental Project to divert wastewaters from the injection wells for reuse, pay Plaintiffs' attorneys' fees, and pay \$100K in civil penalties.



Maui County's Position on Further Discovery

- Further discovery is critical. According to the Supreme Court, not all indirect discharges require a permit, only those that are the “functional equivalent” of a direct discharge. This determination requires a multi-faceted analysis of potentially relevant factors related to the discharge.

- Recall, the Supreme Court had explained:

As we have said (repeatedly), the word “from” seeks a “point source” origin, and context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. **Whether pollutants that arrive at navigable waters after traveling through groundwater are “from” a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.**

- The Supreme Court’s non-exclusive list of factors clearly indicate the inquiry involves consideration and analysis of an expanded range of factual, empirical and scientific data and observation that are not adequately addressed in the Tracer Dye Study largely relied upon for the court’s earlier CWA liability determination (applying conduit theory of liability).



Maui County's Position (cont'd)

- Tracer Dye Study not sufficient to evaluate functional equivalent factors
 - Well 1 - No dye ever injected
 - Well 2 - No seepage observed in ocean
 - Wells 3 & 4 – Study was inconclusive as to or did not address key FE factors such as:
 - ✓ time and distance through geology to ocean, geological substrate, quantity of discharge reaching ocean, dilution/diffusion within groundwater, chemical changes between injection and ocean, background pollutants in groundwater and ocean, and geothermal activity.
- Significant uncertainties in estimates of effluent quantity that reached ocean
- Substantial dilution/mixing within aquifer
- Contaminants in ocean seeps that could not be associated with effluent from the injection wells

Supreme Court Factors

1. transit time
2. distance traveled
3. Nature of material through which pollutant travels
4. Extent to which pollutant is diluted or chemically changed as it travels
5. Amount of pollutant entering NWs relative to amount leaving point source
6. Manner by or area in which pollutant enters NWs
7. Degree to which pollution maintains its specific identity at point of entry to NWs



Court Order and Schedule

District Court decided to allow further discovery in the case and set the following schedule (Second Amended Scheduling Order, dated July 6, 2020).

Date	Deadline/Event
October 29, 2020	Deadline for additional fact discovery and supplemental expert reports
December 29, 2020	Deadline for Discovery Motions
July 7, 2021	Non-Jury Trial (Judge Susan Oki Mollway)



Potential Ripple Effects of Decision – 5 Takeaways

1. Greater Uncertainty and Risk for Dischargers
2. Increased Demand on Permitting Agencies
3. More Prevalent Citizen Suits
4. New Risks for Existing Operations
5. Higher Costs and Longer Permitting Process



1. Greater Uncertainty and Risk for Dischargers

- What degree of case-specific factual analysis will be needed to determine if a permit is required?
- How will the (very general) Functional Equivalent factors be defined or interpreted?
- Is it worth the additional time, expense, administrative burden, and future compliance risk of seeking a permit on a protective basis where there is some question as to whether it is required?
- What limitations and compliance requirements would be placed in a permit?
- An agency decision that no permit is required may not prevent citizen suit challenges.
- Advocacy groups may be more likely to use lack of NPDES permit as another basis to challenge new or existing projects they don't like.
- Likelihood of potentially arbitrary or inconsistent decisions or interpretations by permit writers, enforcement personnel, or judges?



2. Increased Demand on Permitting Agencies

- More complex permitting may now be necessary for indirect discharges
 - Site-specific fact-finding for individual permits
 - Geology, hydrology, land use, and Functional Equivalent Factors
 - Development of appropriate monitoring requirements
 - point of compliance location (e.g., end of pipe, monitoring well, seep in navigable water)
 - ability to collect appropriate sample at selected location
 - influence of other contaminants in groundwater (background)
 - dilution/diffusion in groundwater and mixing zone options
 - Applicable water quality criteria, effluent limits (relationship to groundwater/remediation standards?)
 - Potentially complicated permit terms to address site-specific conditions
- Development of General Permits (litigation?)
- New EPA interpretive guidance or rulemaking (litigation?)



3. More Prevalent Citizen Suits

- Citizen Suits authorized under CWA § 505 (33 U.S.C. §1365)
 - Grants citizens the right to bring suit in federal court to enforce CWA
 - Authorizes actions against:
 - any person for CWA violations
 - EPA for failure to perform non-discretionary duties
 - Requires 60-days advance notice to alleged violator, EPA and State prior to suit to allow time to negotiate and/or address alleged non-compliance
- Available remedies:
 - Civil penalties (currently up to \$55,800 per day for each violation)
 - Injunctive relief
 - Litigation costs (incl. reasonable attorneys' and expert witness fees) for prevailing or substantially prevailing party, where appropriate



3. More Prevalent Citizen Suits (cont'd)

- May see more citizen suit claims since environmental advocacy groups now have Supreme Court ruling (resolving split in lower courts) that indirect discharges, through groundwater, can qualify as point source discharges to navigable waters.
- Advocacy groups likely to work toward development of CWA jurisprudence on indirect discharges to navigable waters through court cases.
- Supreme Court ruling potentially provides stronger hook:
 - to challenge unpopular projects on CWA basis if there is discharge to groundwater
 - to pursue civil penalties for an unpermitted discharge in cases of:
 - accidental spills
 - existing operations with no NPDES permit that potentially impact groundwater
- More significant civil penalty amounts?



4. New Risks for Existing Operations

- Host of existing operations that may now be potentially at risk of claims that a discharge to groundwater is the “functional equivalent” of a discharge to navigable waters.
 - Claimants still need to establish operation as a “point source” – how will interpretation of that term evolve with the new Functional Equivalent test?
- **Injection wells**
 - **Coal ash ponds**
 - **Sediment basins**
 - **Surface impoundments, lagoons**
 - **Landfills**
 - **Remediation sites**
 - **Agricultural operations**
 - **Septic tanks and cesspools**
 - **Natural gas fracking**

4. New Risks for Existing Operations (cont'd)

- Supreme Court refused cert on the issue of “[w]hether the County of Maui had fair notice that a CWA permit was required for its underground injection control wells that operated without a permit for nearly 40 years”
- Addressing the concern that existing dischargers who now need a permit under the new Functional Equivalent standard may face significant civil penalties for past non-compliance, the Supreme Court stated:
 - Judges can mitigate hardship or injustice when they apply the statute’s penalty policy.
 - “We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act’s penalties when, for example a party could reasonably have thought that a permit was not required.”



5. Higher Costs and Longer Permitting Process

- Potentially higher transaction costs. Site-specific fact-finding and analysis to determine if an indirect discharge is the functional equivalent of a direct discharge may result in:
 - more technical consulting and legal fees to determine if permit is required . . . and to engage with permitting agency on the analysis
 - longer permitting process period due to greater agency review time and development of more complex record and site-specific permit terms
- Will dischargers facing citizen suits settle more quickly or agree to higher settlement amounts in face of potentially significant civil penalty amounts?
- Will judges be inclined to mitigate potential hardship or injustice due to CWA penalties assessed for existing operations, as Supreme Court opined they would?



Impact on Other CWA Cases

- *Upstate Forever v. Kinder Morgan Energy* (Fourth Circuit)— Petition for certiorari granted by Supreme Court, judgment vacated and case remanded for further consideration in light of *Maui*
 - Crack in pipeline leaked gasoline into groundwater
 - Fourth Circuit ruled that because there was a “direct hydrological connection” between the groundwater and navigable waters, the CWA applied
 - Supreme Court remanded in light of *Maui*, and directed the Fourth Circuit to apply the new functional equivalent standard in its analysis
- *Conservation Law Foundation, Inc. v. Longwood Venues & Destinations* (First Circuit) – Settlement entered in response to *Maui*
 - Treated wastewater entered the groundwater and migrated into Wychmere Harbor in Cape Cod
 - First Circuit applied *Chevron* deference to EPA’s Interpretative Statement that a discharge to groundwater could not require an NPDES permit
 - Post-*Maui*, the parties requested vacatur of the judgment and entered into a private settlement with a proposed consent decree requiring the installation of a filtration system



Impact on Other CWA Cases (cont'd)

- Surfrider Foundation challenge to EPA settlement with U.S. Steel – (Seventh Circuit)
 - U.S. Steel responsible for a hexavalent chromium spill into Lake Michigan.
 - Proposed consent decree (CD) filed, but the Surfrider Foundation is challenging the settlement as a plaintiff-intervenor
 - In a brief filed May 11, 2020, Surfrider argued that *Maui* represents a “shift in the law of [the Seventh Circuit],” and believes that the CD is not appropriate in light of the fact that it does not account for “contaminated wastewater [that] seeped through U. S. Steel’s containment trench, and entered the groundwater beneath the facility, which flows into the navigable waters of Burns Waterway and Lake Michigan just a few feet away.”
- *Prairie Rivers Network v. Dynegy Midwest Generation* - (Seventh Circuit)
 - Dynegy and predecessor company produced electricity by burning coal, which resulted in the production of coal ash
 - Coal ash was mixed with water and deposited into three unlined coal pits for disposal – coal pits are located near Middle Fork of Vermillion River
 - In 2018, District Court granted Dynegy’s motion to dismiss on the grounds that discharges from ponds to groundwater that migrate to navigable waters are not governed by the CWA
 - Prairie Rivers Network filed a motion with the Seventh Circuit asking it to reverse and remand in light of *Maui*



Impact on Other CWA Cases (cont'd)

- *Kentucky Waterways Alliance v. Kentucky Utilities Co.* (Sixth Circuit) - judgment abrogated by *Maui*
 - Similar facts to *Prairie Rivers Network*
 - Sixth Circuit also ruled that groundwater was not under the purview of the CWA – found that the conveyance of pollutants via groundwater was neither defined nor discrete enough to be a direct discharge under the CWA
 - No new filings in this case post-*Maui*

- *State of Delaware v. Mountaire Farms of Delaware* –
 - Spray irrigation devices currently discharge more than 2 million gallons of wastewater a day onto 950 acres of farmland
 - Plaintiff-intervenors' memorandum in support for a preliminary injunction (filed in the wake of *Maui*) attempts to apply functional equivalent standard to the spraying of “nitrogen-laden wastewater” from irrigation devices
 - Facts are not directly analogous to *Maui* – will be a test of the new standard's outer limits



Questions?

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