THE CHANGING SCOPE OF FEDERAL POWER UNDER THE CLEAN WATER ACT: ARE DISCHARGES OF POLLUTANTS FROM A POINT SOURCE TO GROUNDWATER REGULATED UNDER THE CLEAN WATER ACT?

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Environment, Land and Natural Resources Alert

On Wednesday, November 6, 2019, the U.S. Supreme Court heard oral argument in *County of Maui, Hawai´i v. Hawai´i Wildlife Fund*,[1] a case that considers whether the Clean Water Act ("CWA") applies to discharges of pollutants from point sources into groundwater that eventually flows into navigable waters.

The Supreme Court's consideration of that question comes at a time when there is disagreement between the U.S. Environmental Protection Agency ("EPA") and federal courts about whether such discharges are regulated by the CWA. In April, EPA released guidance that interpreted the CWA as categorically excluding the release of pollutants to groundwater from regulation under the CWA.[2] EPA's interpretation, however, runs counter to last year's Ninth Circuit's decision in *Hawai'i Wildlife Fund v. County of Maui*,[3] which held that certain discharges of pollutants to groundwater are subject to CWA regulation. That decision is now on review in the Supreme Court in *County of Maui*.

The Supreme Court's decision in *County of Maui* has the potential to have far-reaching impacts on the scope of the CWA.[4]

BACKGROUND

The CWA prohibits the discharge of pollutants from a point source into "the Waters of the United States, including the territorial seas" without a National Pollutant Discharge Elimination System Permit ("NPDES").[5]

In 2012, the Hawai´i Wildlife Fund ("HWF") tested this language when it sued Maui County over the County's sewage treatment plant, alleging that the treatment plant was violating the CWA by discharging pollutants into the Pacific Ocean without an NPDES permit. The County's treatment plant pumps approximately 3 to 5 million gallons of treated sewage to underground injection wells each day. In the wells, the sewage mixes with groundwater and eventually discharges to the Pacific Ocean. The County has a permit from the state of Hawai´i which regulates its discharge to groundwater under the Safe Drinking Water Act.

The lawsuit focuses on whether the discharge of pollutants from a point source to groundwater that migrates to a navigable water triggers CWA jurisdiction. The HWF asserted that it must because the CWA prohibits any

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unpermitted addition of a pollutant to navigable waters from any point source and does not require that pollutants reach navigable waters directly from point sources. Instead, the HWF argued that, because the County discharged pollutants to groundwater via a point source, and because those pollutants traveled a short distance before foreseeably reaching the ocean, the County was required to obtain a permit under the CWA.

In contrast, the County argued that a pollutant must travel through a "confined and discrete conveyance" to navigable waters for CWA liability to attach. Because its wells discharged pollutants to groundwater, which is neither a navigable water nor a point source, before the pollutants are discharged into the ocean, the County argued that its discharges did not require a permit under the CWA.

When the case reached the Ninth Circuit, the court agreed with the HWF. The Ninth Circuit found the County liable because it discharged pollutants from a point source (i.e., the injection wells) and those pollutants were fairly traceable from that point source to a navigable water "such that the discharge is the functional equivalent of a discharge into the navigable water."[6] The Ninth Circuit noted that allowing the County to avoid liability under the CWA because it indirectly discharged pollutants to the ocean by discharging them to groundwater first would allow the County to do something indirectly that it could not do directly under the law and would "make a mockery of the CWA's prohibitions."[7] The County petitioned the U.S. Supreme Court for review, which agreed to take up the case.[8]

ORAL ARGUMENT BEFORE THE SUPREME COURT

On Wednesday, November 6, 2019, the Supreme Court heard oral argument in *County of Maui*. The Supreme Court appeared concerned by the potential impacts of adopting either side's proposed rule. A focus of the argument was on what limiting principles exist to prevent the extreme issues inherent in both sides' proposed rule.

Justices Breyer and Kagan expressed apprehension of the County's position that any discharge to groundwater, regardless of whether it leads to a discharge to navigable waters, is not regulated by the CWA's point source provisions. Justice Breyer explained that, if the Supreme Court were to adopt the County's position that a discharge to groundwater eliminates CWA liability, then people who want to avoid the point source regulation would be given "an absolute road map" of how to do so by merely building a pipe that ends five feet from the ocean and discharges to groundwater.

The justices, however, also seemed to struggle with how to limit a potential rule that discharges to groundwater are regulated under the CWA to avoid unintended impacts to individuals. Justice Breyer posed hypotheticals about a homeowner's leaky septic tank, or a miner who throws his shaving water outside his house, asking the HWF what prevents those from qualifying as point-source discharges. The HWF responded that the limiting principles would be "traceability and proximate cause," which Justice Breyer stated "don't quite seem to do it."

Overall, the justices seemed concerned with finding a middle ground that would provide CWA coverage for certain discharges of pollutants to groundwater that reach navigable waters, while avoiding a broad rule that would either be overinclusive or underinclusive.

The Supreme Court's decision in the case is expected next year.

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NOTES

[1] Hawai'i Wildlife Fund v. Cty of Maui, 886 F.3d 737 (9th Cir. 2018), cert. *granted sub nom,* Cty of Maui, Hawai´i v. Hawai´i Wildlife Fund, 87 U.S.L.W. 3079 (U.S. Feb. 19, 2019) (No. 18-260).

[2] 84 Fed. Reg. 16,810, 16,811(Apr. 23, 2019).

[3] 886 F.3d 737.

[4] Notably, the *County of Maui* case is one of many developments in CWA regulations and litigation in the last year. The Trump Administration's efforts to restrict federal jurisdiction over wetlands and waterways through a repeal of the Obama-era regulation defining "waters of the United States," and the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), *reh'g denied*, 2019 WL 3928669 (D.C. Cir. Apr. 26, 2019), *reh'g denied* 2019 WL 3958147 (D.C. Cir. Apr. 26, 2019) (per curium), *petition for cert. filed*, 88 U.S.L.W. 3064 (U.S. Aug. 26, 2019) (No. 19-257), concerning state waiver of Section 401 authority, also have the potential to significantly change CWA regulation and compliance going forward.

[5] 33 U.S.C. §§ 1362; 1342(a)(1).

[6] *Hawai'i Wildlife Fund*, 886 F.3d at 749.

[7] *Id*. at 752.

[8] The United States filed an amicus brief contending that the CWA does not regulate a release of pollutants to groundwater even if they subsequently migrate to navigable waters because the NPDES regime does not regulate releases of pollutants to groundwater.

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