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Does a Discharge to Groundwater Require an NPDES Permit?: Jamie Ewing/Allan Gates/Jordan Wimpy Arkansas Environmental Federation Webinar Presentation

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Jamie Ewing (Environmental Assessment Director, Little Rock Water Reclamation Authority), Allan Gates and Jordan Wimpy (Mitchell Williams Law Firm) undertook an Arkansas Environmental Federation webinar presentation on May 21st titled:

County of Maui v. Hawaii Wildlife Fund

Does a Discharge of Groundwater Require an NPDES Permit? (Presentation)

The *Presentation* discussed the April 23rd United States Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund, et al.* (“Maui”). See No. 18-260.

The *Maui* decision addressed whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permitting requirements.

A Clean Water Act NPDES permit must be required if five jurisdictional elements are met:

- A person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements. The scope of the term “waters of the United States” from a Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact that it is also relevant to non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits
- Section 311 oil/hazardous substance release requirements
- Clean Water Act Spill Prevention Control Countermeasure regulations

As a result, whether, and to what extent a discharge of pollutants into ground water is potentially encompassed is a significant issue.

The Ninth Circuit Court of Appeals had ruled that discharges from a point source to groundwater can in certain circumstances be subject to Clean Water Act permitting requirements. See *Hawai'i Wildlife Fund v. County of Maui*, 886 F. 3d 737 (9th Cir., February 1, 2018).

The Hawaii Wildlife Fund and other organizations filed a Clean Water Act citizen suit against the County of Maui arguing that its discharge of pollutants from injection wells into the groundwater triggered Clean Water Act jurisdiction requiring acquisition of an NPDES permit. The basis for the argument was the migration of the pollutants released into the groundwater to hydrologically connect to surface water/waters of the United States ("WOTUS") (i.e., the Pacific Ocean).

The Ninth Circuit held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters (WOTUS). Several other federal Circuit Court of Appeals reached similar or varying conclusions involving groundwater fact patterns. The Supreme Court subsequently granted a Petition for Certiorari in the Ninth Circuit decision.

Both the Ninth Circuit decision and the Supreme Court's granting of certiorari attracted considerable attention from various stakeholders. Environmental organizations, different states, industry groups, agricultural groups, etc., focused significant attention in the form of court filings and advocacy on the issue. In addition, the United States Environmental Protection Agency ("EPA") weighed in arguing that the Clean Water Act is:

. . . best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the Clean Water Act, regardless of the hydrologic connection between the groundwater and jurisdictional surface water.

See April 12, 2019, EPA Interpretative Statement.

EPA stated it based this conclusion on the conflict of the federal court decisions and its comprehensive review of prior agency statements in the matter. It also referenced the "wholistic" analysis of the statute, text, structure, and legislative history of the Clean Water Act. Further, the United States Solicitor General filed a brief arguing that the NPDES permitting requirements do not apply where a pollutant is released from a point source to a groundwater – even if the pollutant ultimately migrates to navigable waters.

The May 21st Arkansas Environmental Federation webinar *Presentation* by Jamie, Allan, and Jordan described the *Maui* decision as the most important Clean Water Act case since the United States Supreme Court *Rapanos* decision in 2006. They noted that the question in *Maui* involved:

. . . whether a point source discharge to groundwater requires a NPDES permit if the pollutants reach navigable waters.

Two "surprises" were identified in the *Presentation* which include:

- A totally new test for Clean Water jurisdiction
- An unexpected lineup of United States Supreme Court votes

The *Presentation* included a description of the Maui Wastewater Reclamation facility that was at issue in the decision, noting facts such as:

- Effluent used for irrigation
- 4 Class V injection wells used for backup
- Agricultural reuse ends
- Current injection rate
- Population served
- Reuse of some water

The origin of the controversy timeline noted:

- 2007: SCUBA researchers identify submarine seeps near shoreline

- 2007-2013: Multiple studies confirm LWRF effluent flows to the seeps
- EPA & Hawaii equivocate on NPDES requirement
- Public protest builds

The timeline for the filing of citizen suit along with the United States Court of Appeals for the Ninth Circuit decision are reviewed.

The relevant prior United States Supreme Court Clean Water Act jurisdictional cases were described, such as:

- Riverside Bayview – Wetlands adjacent to Navigable Waters covered
- SWANCC – Isolated wetlands not covered (“Bird Rule” thrown out)
- Rapanos – Non Adjacent wetlands with clear impacts may be covered
- Kennedy: Significant Nexus Test
- Scalia: Direct adjacency required for wetlands jurisdiction (But discharge “to” does not necessarily mean directly “into”)

The elements of a discharge were described which focused on the key phrase "from."

The historical evolution of the theories was identified as:

EPA₍₁₉₉₀₋₂₀₁₆₎ → Direct Hydrologic Connection (sometimes)

Rapanos₍₂₀₀₆₎ → Significant Nexus (wetland context)

USDC₍₂₀₁₄₎ → Direct Conduit

DOJ₍₂₀₁₆₎ → Direct Hydrologic Connection

9th Cir.₍₂₀₁₈₎ → Fairly Traceable, Not De Minimis

EPA/DOJ₍₂₀₂₀₎ → GW Discharges Categorically Excluded

Further, a chart was provided (see attached slides) noting the lineup of Justices and the question of how five votes were obtained.

The fact that Justice Bryer writes the Majority Opinion (6-3) was identified and key points from the opinion were discussed, which include:

- Everyone agrees “From” is the key term in the statute
- 9th Cir. “Fairly Traceable” test too broad – Every drop of water winds up in the sea eventually
- EPA/DOJ categorical exclusion of GW too narrow -- Invites evasion
- Limiting principle needed → Functional Equivalent Test
- New test supported by CWA’s text, structure, context, purpose & legislative history
- No bright line test possible -- EPA & courts can handle ambiguity
- Seven factors offered for determining functional equivalence

Justice Breyer’s enumerated factors for determining functional equivalence were listed as:

(1) Transit time,

(2) Distance traveled,

(3) Nature of the material through which the pollutant travels,

(4) Extent to which the pollutant is diluted or chemically changed as it travels,

(5) 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

Concurring and dissenting opinions were also reviewed.

A copy of the slide *Presentation* can be downloaded [here](#).