U.S. Supreme Court Maui Decision: Allan Gates (Mitchell Williams) American College of Environmental Lawyers Post Addresses EPA Guidance

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

01/22/2021

Mitchell Williams Attorney Allan Gates authored a January 21st post in the American College of Environmental Lawyers blog titled:

Leaving on the Midnight Train to Maui (Going Back to Find a Simpler Place in Time)("Post")

Allan is the immediate Past President of the American College of Environmental Lawyers.

The United States Supreme Court issued an April 23rd decision in 2020 in *County of Maui v. Hawaii Wildlife Fund, et al.* No. 18-260, 500 U.S. ____ 2020. The case involved 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 obtained 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.

Whether, and to what extent, a discharge of pollutants into ground water can potentially encompass this term is a significant issue.

The Supreme Court in *Maui* determined that the Clean Water Act is potentially applicable to pollution that migrates through groundwater. It held that NPDES permitting requirements were applicable if there was a direct discharge from a point source into navigable waters or when there is a "functional equivalent" of a direct discharge. It further concluded that a lower court's "fairly traceable" test is broader than what the statutory language provides.

Allan's Post focuses on draft guidance that was issued by the United States Environmental Protection Agency ('EPA") on December 4th addressing application of the Supreme Court's decision. (A link to the draft EPA guidance can be found in the Post.)

The Post notes that the draft EPA guidance addresses certain jurisdictional terms required to trigger NPDES permitting in a straightforward manner. However, Allan notes:

. . . According to the draft guidance document, the design and performance of a system should be viewed as something of a higher-order consideration that "can affect or inform all seven factors identified in Maui." Thus, if a system's design and performance slows transit time of the pollutant, increases distance the pollutant travels, promotes dilution, or otherwise affects one of the Maui opinion's seven enumerated factors, the fact that the system is designed and performing to achieve that result apparently should weigh against requiring an NPDES permit. The draft guidance then proceeds to identify a number of specific systems that would be less likely to require an NPDES permit based on the new eighth factor:

- Septic systems, cesspools, settling ponds and similar systems designed to provide storage or treatment;
- Stormwater controls, infiltration or evaporation systems, green infrastructure, and other runoff management systems; and
- Water reuse, recycling, or groundwater recharge facilities.

The Post then focuses on the draft guidance's addition of an eighth factor to the Supreme Court's opinion which, apparently, goes beyond a "mere interpretation of the Court's decision." He points out EPA's assertion that the majority opinion in Maui:

. . . expressly invites EPA to develop interpretive guidance that would illuminate application of the Court's "functional equivalence" test.

The remainder of the Post focuses on issues associated with this ace factor and concludes:

It is not clear whether the draft guidance will ever be finalized or otherwise survive the transition to the Biden administration. But if it survives, the new eighth factor is likely to be the target of a number of questions. For example, why should a system that is deliberately designed and operated in a manner that delivers pollutants to waters of the United States be given more lenient regulatory treatment than a less deliberate activity that delivers the same amount of pollutants to jurisdictional waters in an otherwise similar manner? Isn't a system with deliberate design and identifiable performance expectations exactly the kind of operation that fits logically into the scheme of NPDES individual and general permits? And what are we to make of the list of specific systems that are to be given special consideration under the eighth factor? Is this list anything more than a last minute attempt to put a finger on the scales whenever one of the enumerated systems may come under scrutiny for adding pollutants to waters of the United States?

Against this backdrop it is fair to ask whether the draft guidance document offers the kind of assistance in applying the functional equivalence test the Maui Court invited EPA to provide.

A link to Allan's Post can be found here.