



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

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Solicitor General Supreme Court Filing Addressing Maui

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The United States Solicitor General (“SG”) filed a brief related to the Petitions for Writs of Certiorari addressing Ninth and Fourth Circuit decisions titled:

County of Maui, Hawaii, Petitioner v. Hawaii Wildlife Fund et al.

Kinder Morgan Energy Partners, L.P., et al., v. Upstate Forever, et al.

The cases involve 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.

The SG takes the position that the United States Supreme Court (“U.S. Supreme Court”) should grant the Writ of Certiorari in No. 18-260 (*Maui*). The office further takes the position that the writ should be limited to whether:

... a discharge of a pollutant, 33 U.S.C. 1362(12)(A), occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable water.

The SG contends that No. 18-268 (*Kinder Morgan*) should be held pending the U.S. Supreme Court’s disposition of the *Maui* case.

A Clean Water Act NPDES permit must be acquired if the 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 and Countermeasure Regulations

As a result, whether, and to what extent, a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

The Fourth Circuit Court of Appeals in *Maui* had ruled that discharges from a point source to groundwater can be subject to the Clean Water Act.

The Hawaii Wildlife Fund and other organizations had filed a Clean Water Act citizens suit against the County of Maui arguing that its discharge of pollutants from injection wells into the groundwater triggered Clean Water Act jurisdiction requiring the 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 (i.e., the Pacific Ocean). The Court in *Maui* held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters (waters of the United States).

The SG's brief states in part:

Review Is Warranted To Resolve A Circuit Conflict On The Question Whether The CWA's Prohibition On The Unpermitted Discharge Of Pollutants Covers Activities That Cause Pollutants To Be Conveyed Through Groundwater To Waters Of The United States

A copy of the brief can be found [here](#).