Beyond Maui: Groundwater Guidance Still Needed

By **Kenneth Reich and Stephen Reich** (August 11, 2021)

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In Hawaii Wildlife Fund v. County of Maui, the U.S. District Court for the District of Hawaii held on July 15 that the county of Maui's daily discharges of millions of gallons of wastewater into groundwater wells half a mile from the Pacific Ocean were the functional equivalent of direct discharges to the ocean, thus requiring a Clean Water Act permit.[1] This is the first reported decision applying the U.S. Supreme Court's 2020 decision in County of Maui v. Hawaii Wildlife Fund.[2]

The Maui decision closed a loophole in the Clean Water Act, and provided useful guidance on the issue of whether to require permits for discharges to waters of the United States from groundwater. However, the standard remains muddy, and the U.S. Environmental Protection Agency or Congress needs to act to provide more clarity — through guidance, a general permit, regulation or amendment of the CWA.

Beyond the Maui decision, due to the significant political and economic impacts riding on the overall definition of "waters of the United States," this issue has spawned and will continue to spawn significant litigation and regulatory ping-pong, unless the opposing interests can arrive at a consensus on a congressional or regulatory fix — which is not likely to happen any time soon.

In Maui, the Supreme Court held that certain discharges of pollutants to groundwater that are the functional equivalent of a direct discharge to waters of the United States must obtain a CWA permit. The court ruled that this was a question of fact, based on such factors as the proximity of the discharge to the surface waters, and the time it took for the discharge to reach the surface waters.

Justice Stephen Breyer, who authored the 6-3 opinion, acknowledged that this was not a bright-line test, but rather a middle ground reflective of the vagueness of the act and the need to balance the dual interests of protecting waters of the Unied States and recognizing the states' traditional jurisdiction over their lands and waters.

Prior to the Supreme Court's decision, the U.S. Court of Appeals for the Fourth Circuit, in Upstate Forever v. Kinder Morgan Energy Partners LP,[3] also held that a discharge of pollutants from a point source through groundwater into a water of the United States is covered by the Clean Water Act. In that case, the discharge was a leak from an underground gasoline pipeline that traveled 400-1,000 feet via the groundwater into two tributaries of the Savannah River.

The Maui decision was the most recent of a number of Supreme Court opinions and federal regulations attempting to define the line between waters of the United States that are subject to federal jurisdiction, and other waters that are not.

For example, in Rapanos v. U.S.,[4] a plurality opinion by former Justice Antonin Scalia, former Justice Anthony Kennedy's concurring opinion defined "waters of the United States" as waters that have a "significant nexus" to navigable waters, that "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and

biological integrity of other covered waters understood as navigable in the traditional sense."[5]

In U.S. v. Riverside Bayview,[6] the high court upheld the U.S. Army Corps of Engineers regulation of wetlands adjacent to a navigable waterbody. In SWANCC v. Army Corps of Engineers,[7] however, the court held that the fact that migratory birds inhabited an isolated wetland did not, for that reason alone, qualify the wetland as a water of the United States.

In 2015, the Obama administration EPA and Army Corps of Engineers amended the CWA regulations defining waters of the United States to arguably broaden federal jurisdiction over wetlands and similar nonnavigable water bodies — although notably, the amended regulation did not include groundwater in the new definition.[8] It used Justice Kennedy's significant nexus test with respect to defining nonadjacent wetlands.

In 2019, the Trump administration EPA rescinded the Obama-era rule, and, in 2020, promulgated the Navigable Waters Protection Rule,[9] which, not surprisingly, limited federal jurisdiction over certain waters and applied Justice Scalia's more restrictive Rapanos test rather than Justice Kennedy's test for nonadjacent wetlands.[10] That rule is now in limbo, as the Biden administration seeks to revoke the Trump rule and restore the Obama rule.

Since many of the issues in defining waters of the United States are ultimately political as well as scientific, there will always be litigation over attempts by different administrations to broaden or narrow federal jurisdiction over such waters. Is a pothole in the Midwest a regulated wetland? What about intermittently flowing ditches? Each of these regulatory definitions have tremendous economic impact.

However, the issue of whether a discharge via groundwater to a navigable water is covered by the CWA permitting requirements should be simpler to define, at least in theory. We start with the CWA itself, which Justice Breyer observed was not intended to regulate discharges to groundwater, an arena left primarily to the states.[11]

The thrust of the Supreme Court's Maui decision, and the district court's application of that decision, is rather straightforward: In the case of discharges to groundwater that are proximate to and flow directly to a water of the United States, these should be viewed as an attempt to bypass (literally) the federal CWA point source discharge permitting system and should be covered.

In Maui, the county apparently made a choice not to apply for a CWA discharge permit — in order to avoid the expense and complexity of building a pipe from its wastewater treatment plant to the ocean, and instituting the pretreatment that would have been required under the permit.

The problem is in applying the Maui standard in practice. For example, in discussing the factor of the travel distance from the initial discharge to groundwater to the ultimate discharge point to a water of the United States, Justice Breyer posited a range from clearly jurisdictional to likely nonjurisdictional discharges, spanning a few feet of travel to 50 miles.[12] These examples are not terribly helpful to the regulated community — or the regulators.

In the recent district court decision, the judge developed a complete and arguably bulletproof record, showing:

- The volume of wastewater discharged into groundwater wells — millions of gallons;

- The amount detected directly discharging to the ocean through dye testing and other means — thousands of gallons;

- The distance the contaminants traveled in groundwater — half a mile;

- The time of travel — 84 days to greater than a year; and

- The fact that the contaminants had not changed substantially in their travel through groundwater.

In cases where such a record must be developed, and the initial discharge point is between half a mile and 50 miles, this will require significant effort, although it is certainly doable through testing and expert opinions. This is not much different than practices with regard to other environmental permitting issues, e.g., determining whether a wet area is a wetland as defined in the regulations, or whether a proposed air emission is likely to exceed certain limits beyond the fenceline of a factory.

However, to avoid complex and expensive permitting proceedings in most cases, and to mitigate the muddiness of Justice Breyer's opinion in Maui for the benefit of the regulated community, the regulators and the public, the EPA should provide immediate guidance on this issue, or issue a general permit, rather than proceeding through individual permitting in all cases or awaiting slow development through caselaw.[13]

Alternatively, the EPA could amend the waters of the United States regulations to provide a clearer definition of when discharges to groundwater require a CWA permit. But given the litigious history of the waters of the United States program, a final regulation may be a long way off. The same goes for an amendment to the CWA, which is not realistic at this date, given the current makeup of the Congress.

Note that under the Safe Drinking Water Act and its underground injection control program, the EPA or delegated states are authorized to issue permits for underground injections of wastewater, so long as they do not threaten a drinking water aquifer. Whether such programs are applicable to the type of discharges addressed in Maui is beyond the scope of this article.[14]

Conclusion

Maui closed a loophole in the CWA, and provided useful guidance on the issue of whether to require permits for discharges to waters of the United States from groundwater. But the devil will always be in the details, unless the EPA or Congress act to provide more clarity.

As to defining waters of the United States in general, due to the significant political and economic impacts riding on such a definition, affecting such diverse stakeholders as farmers, ranchers, real estate developers, industry, environmentalists, and states and municipalities, this definitional issue has spawned — and will continue to spawn — significant litigation and regulatory ping-pong, unless the different interested parties are able to agree on some sensible and clear regulatory standards, or Congress amends the CWA to provide clear definitions.

Realistically, that may be too much to expect at this time. So, we may have to continue to muddle through the muddied waters of a post-Maui regulatory environment.

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[1] Hawaii Wildlife Fund v. County of Maui, CIVIL NO. 12-00198 SOM/KJM (D. Haw. July 15, 2021).

[2] County of Maui v. Hawaii Wildlife Fund, 140 S.Ct. 1462 (2020) (affirming the Ninth Circuit's decision that the county of Maui required a CWA permit for its discharges).

[3] Upstate Forever et al. v. Kinder Morgan Energy Partners LP, 887 F. 3rd 637 (4th Cir. 2018).

[4] Rapanos v. U.S., 547 U. S. 715 (2006).

[5] Rapanos, 547 U.S. 715, 759.

[6] 474 U.S. 121 (1985).

[7] SWANCC v. Army Corps, 531 U.S. 159 (2001).

[8] 80 Fed.Reg. 37,053 (June 29, 2015).

[9] 85 Fed. Reg. 22,250 (April 21, 2020).

[10] Justice Scalia required proof of a direct surface connection between the subject water and a navigable water. Rapanos, 574 U.S. 715, 742. Further, "[T]he phrase ['waters of the United States'] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Id. at 739.

[11] County of Maui, 140 S. Ct. 1462, 1472.

[12] Id. at 1476.

[13] See the discussion of EPA guidance in a recent article by Juan Carlos Rodriquez in Law360. https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-

control-program.

[14] 42 U.S.C. 300f et seq. According to EPA's website as of July 28, 2021, 33 states and three territories have received approval from the EPA to run this program. https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program.