MINES AND *MAUI*: SO MUCH FOR REGULATORY CERTAINTY

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The Supreme Court's decision in *County of Maui*[3] disrupted long-settled understandings of the scope of the Clean Water Act (CWA) and has created uncertainty for the mining industry and others. The Court's ruling not only expands the discharge pathways subject to NPDES permitting, but also suggests that federal permits might be required for surface discharges dozens of miles and decades away from a traditional navigable water.

Courts and stakeholders have famously struggled to define which surface waters are regulated under the Act. Although the statutory synonym for a "water of the United States" (WOTUS) is "navigable water," courts have long agreed that Congress intended to regulate more than waters that are navigable-in-fact.[4] At the same time, it has long been understood that discharges to groundwater unconnected to surface waters were not subject to federal regulation. So, despite uncertainty about when discharges to wetlands or intermittent streams require a CWA permit, it has been understood that subsurface injections and discharges to groundwater generally did not.[5]

In *Maui*, however, the Court held that the CWA regulates discharges into underground waters that impact surface waters "if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters."[6] That ruling brought an unceremonious end to the three days of modest regulatory certainty offered by the Trump administration's Navigable Waters Protection Rule.[7]

Had the Court's opinion been limited to its unique facts, the looming fallout might not be so severe. In that case, the underground injections were a half mile away from the Pacific Ocean, which is indisputably a WOTUS, and there was no dispute that at least some of the discharge was reaching the ocean within a few months. However, the Court established a new "functional equivalence" test and the majority opinion, written by Justice Breyer, provided little guidance on its interpretation. Some *dicta* in the majority opinion may also create uncertainty.

Impacts of *Maui*: Clean Water Act Permitting for Discharges to Groundwater

The first-order impacts of the ruling require evaluating whether a National Pollutant Discharge Elimination System permit can ever be required for discharges initially made into groundwater. At base,

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[3] Cty. of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020).

[4] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

[5] They may, however, require an underground injection control permit under the federal Safe Drinking Water Act. *See* 42 U.S.C. §§ 300f through 300j-26; 40 C.F.R. pts. 144–148.

[6] *Cty. of Maui*, 140 S. Ct. at 1468 (emphasis added).

[7] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020). The uncertainty increased thereafter as courts reached different conclusions about whether it was properly promulgated. *Compare, e.g.*, California v. Wheeler, No. 20-CV-03005, 2020 WL 3403072, at *1 (N.D. Cal. June 19, 2020) ("plaintiffs have not made a sufficient showing to support an injunction or an order delaying the effective date of the new rule") *with* State v. U.S. Envtl. Prot. Agency, No. 20-CV-01461, 2020 WL 3402325 (D. Colo. June 19, 2020) (enjoining agencies from implementing the rule in Colorado).

of course, the CWA prohibits (1) the discharge/addition of (2) pollutants[8] (3) to navigable waters[9] (4) from a point source[10] (5) without a permit. Since penalties under the CWA can be steep—currently up to $55,800 per day per violation[11]—determining its application to a discharge is not a trifling matter.

Into this strict-liability regime, the Court in *Maui* injected a less-than-clear test for determining when discharges to groundwater require a permit. According to the Court, factors relevant to determining whether a discharge to groundwater is "functionally equivalent" to a direct discharge to surface water may include:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the 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.[12]

In *dicta*, the majority opinion states that "permitting requirements likely do not apply" to an underground discharge 50 miles and "many years" away from the nearest navigable water, since such a discharge would not be the functional equivalent of a direct discharge to surface water.[13] The negative implication is that a discharge within 49 miles of a traditional water *might* be subject to regulation. The Court's test offers only slightly more clarity than the Ninth Circuit formulation that discharges of pollutants into groundwater require a permit when they are "fairly traceable" to surface water impacts.[14]

Justice Alito's dissent lamented that the majority "adopts a nebulous standard, enumerates a non-exhaustive list of potentially relevant factors, and washes its hands of the problem."[15] He then added: "We should not require regulated parties to 'feel their way on a case-by-case basis' where the costs of uncertainty are so great."[16]

It did not take long for Justice Alito to be proven right, and mining companies are among those who have been swept up in the immediate fallout of *Maui*. Environmental groups have already cited the ruling in a challenge to Constantine Metals' Palmer project, a proposed underground copper, zinc, silver, and gold mine. Among the permits necessary for the mine is a state waste management permit for discharges into groundwater. In the aftermath of the Ninth Circuit *Maui* decision, the company agreed to conduct a dye tracer study to assess the path of wastewater discharged from the mine through

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[8] The term "pollutant" is broadly defined, and includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

[9] *Id.* § 1362(7). The term is defined as "the waters of the United States, including the territorial seas." The failure by Congress to define just what "waters of the United States" means has caused decades of litigation.

[10] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[11] *See* Civil Monetary Penalty Inflation Adjustment, 85 Fed. Reg. 1751, 1754 (Jan. 13, 2020), available at https://www.federalregister.gov/documents/2020/01/13/2019-28019/civil-monetary-penalty-inflation-adjustment.

[12] *Cty. of Maui*, 140 S. Ct. at 1476–77.

[13] *Id.* at 1476.

[14] *Id.* at 1469.

[15] *Id.* at 1491 (Alito, J., dissenting).

[16] *Id.* (citing Rapanos v. United States, 547 U.S. 715, 758 (2006)).

groundwater, which will then inform permitting decisions by the state of Alaska in light of the final Supreme Court ruling.[17]

Meanwhile, the Seventh Circuit is already reviewing, in *Prairie Rivers Network*,[18] a case that explicitly raises the same issues. Dynegy's retired Vermilion Power Station contains three unlined coal ash impoundments that lie on the banks of the Middle Fork of the Vermilion River.[19] Plaintiff alleges that pollutants leach from the unlined pits through groundwater and into the river.[20] The district court had dismissed the case, holding that "[d]ischarges from artificial ponds into groundwater are not governed by the CWA, even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as 'navigable waters' of the United States."[21]

What's the Solution for the Ambiguity Created by *Maui*?

The Court's opinion seemed to suggest that the process of addressing the ambiguity left by its ruling will be painless. Saying that "courts can provide guidance through decisions in individual cases"[22] is heart-warming for lawyers but cold comfort for clients. The assertion that "district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required,"[23] seems to ignore the Court's own experience. In its most famous case concerning what constitutes a water of the United States, *Rapanos*, the Court acknowledged that, "for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines."[24]

The Court also suggested that EPA could proceed with "development of general rules,"[25] but did not mention the rule EPA issued three days before the Court's decision was announced. And, of course, the Court has rejected at least in part the prior attempts by EPA and the Army Corps of Engineers to define waters of the United States by regulation.

Only the Court's suggestion that EPA promulgate additional general permits holds any realistic promise. Under the CWA, a permitting authority may issue individual permits pursuant to 40 C.F.R. § 122.21 and general permits under 40 C.F.R. § 122.28. While individual permits cover one specific discharger, general permits cover an entire category of dischargers within a geographic area.[26]

Despite the Court's suggestion that the administration can provide clarity, real regulatory certainty will probably require action by Congress. The original shortcoming of the CWA was the failure of Congress to define for itself "waters of the United States." For forty years the agencies have tried and failed to fill that gap in a manner that satisfies the Supreme Court. If the agencies' most recent attempt does not succeed, then Congress may need to return to the issue.

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[17] *See* Margaret Bauman, "Proposed Mine Challenged on Environmental Grounds: DEC Reviews U.S. Supreme Court Decision as It Relates to the Palmer Project," *The Cordova Times* (June 5, 2020), https://www.thecordovatimes.com/2020/06/05/proposed-mine-challenged-on-environmental-grounds/, last visited on August 6, 2020.

[18] Prairie Rivers Network v. Dynegy Midwest Generation, LLC, No. 18-3644 (7th Cir. filed Dec. 14, 2018).

[19] Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 350 F. Supp. 3d 697 (C.D. Ill. 2018).

[20] *Id.* at 699–701.

[21] *Id.* at 704.

[22] *Cty. of Maui*, 140 S. Ct. at 1477.

[23] *Id.*

[24] Rapanos v. United States, 547 U.S. 715, 721 (2006).

[25] *See Cty. of Maui*, 140 S. Ct. at 1477.

[26] 40 C.F.R. §§ 122.21, 122.28.