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Current Events and Roiling Waters: A Series Update on Recent Clean Water Act Developments

This is the conclusion to a five-part series addressing the latest changes in legal standards regulating water resources in the United States. Part 5 explains the ruling issued by the U.S. Supreme Court holding that certain discharges of pollutants into the groundwater may require a permit under the Clean Water Act.

To view Parts 1-4 in this series, click here.

Part 5: Permitting Discharges That Enter Groundwater

One fundamental requirement of the Clean Water Act (CWA) is that anyone discharging a pollutant through a "point source" into a "water of the United States" (WOTUS) must have a permit authorizing that discharge. Without a permit, the discharge is illegal and prohibited. Those permits are issued under the National Pollutant Discharge Elimination System (NPDES), or in New York State, under the State Pollutant Discharge Elimination System (SPDES). Because WOTUS have historically been defined in terms of surface waters, there had been a general belief that this permitting scheme did not apply to discharges to groundwater. The U.S. Environmental Protection Agency (EPA) supported that position at different points (and at other points contended certain groundwater discharges did require a permit), as did many in the regulated community. Prior lawsuits in different courts, however, led to differing conclusions about when or how the CWA regulated groundwater discharges. In particular, environmentalists lamented that this issue creates a loophole whereby pollutants have entered WOTUS through some indirect means, like groundwater, without being subject to the CWA's limitations and caused harm to our water resources.

In its April 23, 2020 decision in County of Maui, Hawaii v. Hawaii Wildlife Fund, the Supreme Court squarely addressed whether the CWA "'requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source,' here, 'groundwater.'" The Court's decision, however, leaves more questions than it answered.

The Court held that the CWA requires a permit for a discharge "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source" into a WOTUS. The Court reasoned that this standard "best captures" the circumstances where Congress intended to require a federal permit. However, uncertainty remains about when a discharge entering groundwater qualifies as the "functional equivalent" of a direct discharge to a WOTUS under this standard.

The Court indicated that because the CWA covers discharges that directly deposit pollutants into a WOTUS, the "functional equivalent" test would be met when a discharge "reaches the same result through roughly similar means." This imprecise language leaves ample room for interpretation—by agencies, by the regulated community, and by citizens who may commence citizen suits against dischargers—about when a discharge through groundwater must be permitted. The Court offered seven factors that could be weighed for making this assessment, emphasizing that time and distance will be important considerations, but the Court also expressly observed that a multitude of different factors could come into play for any specific scenario.

The Court identified two factual examples of how its holding would apply: a permit is "clearly" required where a pipe "ends a few feet from navigable waters" and "emits pollutants that travel those few feet through groundwater (or over

the beach)," but a permit "likely" is not required if the pipe "ends 50 miles from navigable water" and emits pollutants that travel in groundwater then "mix with much other material, and end up in navigable waters only many years later . . . ." Of course, the circumstances that could fall on either side of these extremes are innumerable. In those cases, the statutory purpose to regulate discharges of pollutants "from a point source" should be a guiding principle when conducting this analysis.

This new standard creates many questions that will likely be tested by regulated entities and environmental groups in the coming years. For example:

- Would a pipe located somewhere between a "few feet" and "50 miles" from the WOTUS be close enough to qualify as the "functional equivalent" of a direct discharge?
- If the pollutants travel through groundwater some time less than "many years," will that discharge be the "functional equivalent" of a direct discharge?
- How many instances of intervening mixing of the discharge while it travels is enough to render it different from a direct discharge?
- How will this ruling interact with the new definition of WOTUS to make this "functional equivalent" determination? Importantly, the Court did not address or decide whether groundwater itself is a WOTUS under the CWA, so the explicit exclusion of groundwater from the WOTUS definition under the new WOTUS regulations still appears valid.

It is unclear at this point what action, if any, EPA will take to enforce this ruling nationally. It was EPA's position before the Supreme Court that these discharges through groundwater are not subject to the CWA, but the administration changes that may arise following the upcoming election could reprioritize these concerns. However, it should be noted that in New York State, where the State Department of Environmental Conservation administers the NPDES permitting program under authority delegated by EPA, point source discharges to groundwater are already subject to SPDES permitting.

If you are have questions about this series or how the Maui ruling may impact your current operations or future plans, please contact any attorney in the Environmental and Energy practice or the attorney at the firm with whom you are regularly in contact.