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Binge-Watching the Clean Water Act Cases and Rules

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In these days of working from home and managing countless other demands on our time, we offer this legal update to help you decide whether to add the latest Clean Water Act (CWA) cases and rules to your must-see legal watch list.

On April 23, 2020, the U.S. Supreme Court (SCOTUS) in *County of Maui v. Hawaii Wildlife Fund* announced a standard for determining CWA applicability to water pollution reaching federally-regulated waters through groundwater. Just days before, the Environmental Protection Agency and Department of Defense published the Trump Administration's April 21, 2020, final rule defining these "waters of the United States," (WOTUS) sparking a new set of appeals in that line of CWA cases. The Court's ***Maui*** decision and government's **WOTUS** rule grew out of the same statutory text, but have different implications for manufacturers and other organizations.

Since its inception in 1972, the Clean Water Act has prohibited any unpermitted "discharge," defined as "any addition of any pollutant to navigable waters from any point source." Violators of these CWA provisions are frequently the target of enforcement actions brought by agencies and, under CWA citizen suit provisions, environmental groups. The landmark legislation also created two programs to permit limited instances of such discharges. Under the CWA § 402 program known as the National Pollutant Discharge Elimination System (NPDES), the EPA and EPA-delegated states impose effluent limits and other NPDES permit requirements on various types of point sources discharging to these federally-regulated waters. The CWA's § 404 Dredge and Fill program, administered by the Army Corps of Engineers, permits certain discharges and impacts to wetlands regulated as federally-regulated waters. Under both, the CWA vaguely defines these regulated "navigable waters" as "waters of the United States."

***Maui*: SCOTUS's "Functional Equivalent" Test for Indirect Discharges into Groundwater**

Manufacturers and others that use pipes, tanks, pits and other systems potentially releasing pollutants into the ground are more likely to be impacted by the Supreme Court's interpretation of this CWA text in ***Maui***. These systems often fall within the Act's definition of "point sources" – "any discernible, confined and discrete conveyance." But despite years of litigation and agency input, there has been no clear answer to the fundamental question – does the CWA prohibition against unpermitted pollutant discharges "from any point source" apply if the pollutants impacting a regulated waterbody do not come directly "from" the point source, but instead reach the navigable water through groundwater?

Many hoped the much-anticipated ***Maui*** decision would mend the divide that developed following a series of rulings made by different federal circuit courts in 2018. As we previously reported, two circuits adopted bright-line tests, more broadly imposing CWA jurisdiction. In the ***Maui*** sewage injection well case, the Ninth Circuit ruled that a CWA permit is required whenever the pollutant reaching a navigable water is "fairly traceable" to a point source. In a leaking pipeline case, the Fourth Circuit found CWA liability when there is a "direct hydrological connection" between the point source-contaminated groundwater and the impacted waterbody. In contrast, the Sixth Circuit adopted a much narrower standard in cases involving power plants' coal ash ponds, barring CWA jurisdiction whenever pollutants have entered into groundwater that is not CWA-regulated. In general, courts adopting broad standards focus on the statute's purpose of preventing pollution in navigable waters, while those using a narrow interpretation emphasize the CWA provisions preserving the states' traditional role regulating groundwater pollution and related land uses.

In ***Maui***, the Supreme Court tried to find a middle ground. The Court held that the CWA not only requires a permit when there is a direct discharge into navigable waters, but also "when there is the *functional equivalent of a direct discharge*." Justice Breyer found that the "statute's words ['from any point source'] reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater."

While conceding that others' more absolute positions would be easier to administer, the Court decided "there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language." Justice Breyer noted "some of the factors that may prove relevant: (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 … has maintained its specific identity." Justice Breyer added: "Time and distance will be the most important factors in most cases, but not necessarily every case."

The federal circuit and district courts will now apply the "functional equivalent" standard in several pending cases that involve coal ash pollutants leaching from power plant settling ponds, sewage flowing out of injection wells, cesspools and septic systems, and other pollutants released into the ground by pipes, tanks, impoundments, and other point sources. The flexibility afforded by the Court's decision will inevitably prompt more environmental groups and some agencies to test the limits of this standard. Those upcoming CWA cases are most likely to target manufacturers and businesses in locations where the time and distance between a point source release and an impacted waterbody are perceived as short or where a pollutant's strength remains significant after travelling through groundwater and reaching a navigable water.

Navigable Waters Protection Rule: Trump Administration's New WOTUS Definition

The second Clean Water Act drama to release new episodes this year concerns the scope of CWA-regulated "navigable waters," defined as "waters of the United States" or WOTUS. Businesses affected by the WOTUS definition tend to be landowners, developers, businesses extracting or harvesting natural resources, and others with operations that require CWA § 404 permits if those operations will disturb wetlands or other small, isolated or intermittent waterbodies.

Most recently, the federal government published a final WOTUS rule on April 21, 2020, under the Trump Administration's Repeal and Replace initiative. This new regulation seeks to replace a 2015 rule that the Obama Administration adopted in an effort to codify many years of WOTUS rulemaking and litigation.

On the surface, the clash between the 2015 and 2020 rules features opposing political parties. But the roots of the WOTUS battles are much deeper and reflect interpretations evolving since Congress adopted the statute without a clear WOTUS definition. The Obama Administration's 2015 rule adopted the "significant nexus" test, described in Justice Kennedy's solo opinion in the Court's 2006 *Rapanos v. United States* decision. Under that approach, protected waters include not only "traditional navigable waters," but other wetlands and water features that "significantly affect the chemical, physical and biological integrity" of such waters. As we expected, the Trump Administration's replacement rule tends to follow Justice Scalia's

plurality opinion in ***Rapanos***, stating that WOTUS status extends only to "relatively permanent, standing or continuously flowing bodies of water." The 2020 WOTUS rule therefore limits CWA-regulated waters to territorial seas and traditional navigable waters (TNW), perennial and intermittent tributaries contributing surface flow to TNW in a typical year, impoundments of such jurisdictional waters, and adjacent wetlands physically touching jurisdictional waters.

Appeals of the 2020 WOTUS rule have already been filed in at least three U.S. district courts. Litigation over the issuance and revision of the 2015 WOTUS rule also continues. Rest assured, there will be no shortage of air-time for the competing rules, defining regulated waters to include dramatically different land features and areas.

The stakes are high whenever and however agencies and environmental groups attempt to impose CWA jurisdiction. The changing WOTUS definition is likely to affect a more limited set of manufacturers and organizations than the "functional equivalent" test adopted for point source discharges reaching navigable waters through groundwater. Businesses should also keep in mind that many States regulate wetland disturbances and discharges into non-navigable waters, independent of the CWA and its WOTUS definition.

For more information concerning this topic, please contact any member of the Environmental, Energy + Telecommunications Group listed below:

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