

How Can We Chart a Course on Navigable Waters?

Alert

09.30.2021

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Since the U.S. Supreme Court decided the *County of Maui v. Hawaii Wildlife Fund* case in April 2020, the legal landscape of “navigable waters of the U.S.” has eroded quickly. With *Maui*, the Supreme Court created a test for determining whether discharges to groundwater that ultimately reach navigable waters require a National Pollutant Discharge Elimination System (NPDES) permit—i.e., whether the groundwater serves as a “functional equivalent” to a direct discharge. On remand to consider the facts of *Maui*, the district court found a permit was needed in a first-of-its-kind holding. This week, the Environmental Protection Agency (EPA) [officially rescinded](#) its *Maui* implementation guidance as the discharging county in *Maui* requested reconsideration of the permit decision and as courts and permitting agencies across the country sort through the Supreme Court’s “functional equivalent” test.

In parallel, the 2020 Navigable Waters Protection Rule has continued to meander its way through the litigation process. Earlier this month, an Arizona district court vacated the Navigable Waters Protection Rule, likely reverting the “waters of the United States” (WOTUS) standard back to the patchwork pre-2015 waters of the U.S. WOTUS framework. Each of these actions, as well as steps, are discussed below.

Groundwater

Supreme Court’s “functional equivalent” decision in *Maui*

In April 2020, the U.S. Supreme Court issued a landmark ruling - *County of Maui v. Hawaii Wildlife Fund*—in which it determined that the Clean Water Act (CWA) applies to discharges of pollutants traveling through groundwater on their way to the ocean. States have had long-standing regulatory authority over land and groundwater within their boundaries and thus groundwater itself was not considered “navigable water” of the U.S. subject to the CWA. Thus, National Pollutant Discharge Elimination System (NPDES) permits have not been required for pollutant discharges into underground wells.

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The *Maui* holding does not change the regulatory status of groundwater, but has established a new understanding for what constitutes a discharge from a point source, since groundwater can act as a conduit for the addition of pollutants to navigable waters. An NPDES permit is required “when there is a direct discharge from a point source into navigable waters *or when there is the functional equivalent of a direct discharge.*” The Supreme Court discussed many factors to determine when a particular discharge is the functional equivalent, most importantly (1) time and (2) distance, but also (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 that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution (at that point) has maintained its specific identify.

The Supreme Court remanded the case back to the district court for determination of whether an NPDES permit was required based on the particular facts of the case.

After the *Maui* decision, EPA issued a [guidance memorandum](#) titled “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the CWA Section 402 National Pollutant Discharge Elimination System Permit Program.” The memo described how to implement the Supreme Court’s factors and added an eight factor for consideration—system design and performance—as part of the “functional equivalent” analysis.

District Court hears underlying *Maui* case to determine if NPDES permit required for wastewater discharge to ocean through groundwater wells

The *Maui* case originally stemmed from environmental groups suing a wastewater reclamation facility that partially treated sewage and then pumped the treated water through underground wells before the effluent travelled through groundwater, eventually ending up in the ocean. Plaintiffs alleged the facility was discharging pollutants to navigable waters without a permit. Each day the facility pumped approximately four million gallons of treated wastewater into the ground through four wells. The effluent traveled about half a mile through groundwater to the Pacific Ocean and takes at least 84 days and potentially up to 16 months to seep into the ocean.

The District Court, in deciding to grant the environmental groups’ motion for summary judgment, determined that the circumstances required the County of Maui to obtain an NPDES permit. Based on extensive geologic studies and the unique circumstances of the island groundwater aquifer, the parties agreed that all discharged wastewater eventually finds its way to the ocean, and that certain components, like nitrogen, are likely reduced along the way. The county also introduced evidence that attenuation mechanisms, such as dispersion, mixing, dilution and chemical transformation likely occurred, reducing the nitrogen content over time and distance compared to a direct discharge. However, the district court rejected the defendant’s arguments that additional studies were needed to determine the source and environmental impact of pollutants found in groundwater seeps and that the parties must prepare the

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additional evidence for trial. Even if the concentration of pollutants changed over the course of conveyance to the navigable waters, the court determined it was still a discharge of pollutants that the existing studies demonstrated “relatively rapid flow of significant quantities of pollutant” from the source to the ocean. The court reasoned that “it is hard to see how trial would lead to a more precise figure [or] yield better data,” due to the undisputed fact that 100% of the water is in fact reaching the ocean within a period of less than two years.

While the 50-page opinion also considered the Supreme Court’s factors in the light most favorable to the defendant, and addresses but does not rely on two additional factors (impact on the ecosystem and raw volume of pollutant discharged), the district court primarily relied on the time and distance factors to find that these particular facts constitute the functional equivalent of a discharge under the Supreme Court’s standard, requiring an NPDES permit.

District Court Amends Order to Consider “System Design and Performance”

Just two weeks after its initial order, the district court amended and superseded the order to add consideration of “system design and performance” based on January 2021 EPA guidance to the regulated community and permitting authorities. In amended order, the court discussed EPA’s January 2021 guidance without endorsing its treatment as a factor relevant to the issue presented in the case, as EPA urged the courts to consider it an additional factor. Ultimately, the court determined the guidance “does not add anything to the analysis,” since the court already considered design and performance of the water reclamation facility pursuant to the seven Supreme Court factors.

The *County of Maui* is seeking reconsideration of the ruling.

EPA Withdraws January 2021 *Maui* Guidance

On September 15, 2021, EPA issued a [memo](#) rescinding its January 14, 2021 “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the CWA Section 402 National Pollutant Discharge Elimination System Permit Program” guidance. EPA indicated the rescission was driven by two issues: (1) the eighth factor identified in the guidance—“the design and performance of the system or facility from which the pollutant is released” that the district court judge rejected in *Maui*—is not consistent with the CWA; and (2) the guidance was issued without proper deliberation within EPA or its federal partners. The rescission was published in the Federal Register earlier this week.

What Now?

Following the withdrawal of the guidance, the Supreme Court’s *Maui* decision itself will “provide guiding principles” regarding when a discharge to groundwater requires a permit, and may play out case-by-case until EPA issues new guidance or a rule clarifying its interpretation of how the functional equivalent test should apply. Similar cases seeking certiorari of the U.S. Supreme Court on the issue of whether pollutants

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discharged to groundwater that eventually reach navigable waters require NPDES permits were remanded after the April 2020 *Maui* decision and remain pending in their respective circuits.

Further, the withdrawal of EPA guidance leaves the landscape uncertain for how state agencies, who primarily carry out the NPDES permitting program within their borders, will make permitting decisions consistent with the new “functional equivalent” test. Permittees with pending state court legal challenges to their state agency’s permitting decisions have had their permitting decisions remanded back to the agency for consideration in light of the *Maui* test. Permittees will need to develop a thorough understanding of developing interpretations within their state, especially as their permits come up for renewal and permit conditions related to groundwater are implemented.

Permittees should expect state permitting agencies to add NPDES permit conditions related to groundwater discharges if they can be considered the “functional equivalent” of a discharge from a point source to navigable waters using the *Maui* factors.

Navigable Waters

At the same time, the interpretation of what are “navigable waters”—those into which discharge of pollutants is regulated pursuant to the CWA— is perhaps more fluid than ever. The CWA defines “navigable waters” as “waters of the United States, including the territorial seas;” however, the statute does not further define WOTUS. This lack of clarity leaves room for constitutional and statutory arguments as to the full extent of the CWA’s reach, and whether any particular waterway is “navigable.” The U.S. Supreme Court addressed this debate in a series of cases culminating in the *Rapanos v. United States* plurality decision in 2006. Justice Antonin Scalia, writing for four justices, limited “waters of the United States” to permanent waterways and only those wetlands with a surface connection to another waterway. Three dissenting justices rejected Scalia’s approach as being contrary to CWA’s text and purpose. A separate concurring opinion was issued by Justice Kennedy, which suggested the question of navigability is answered by whether a waterway has a “significant nexus” with a traditionally navigable water body. Lower courts have since used Kennedy’s “significant nexus” test from the concurrence as controlling guidance from the *Rapanos* plurality.

Following *Rapanos*, the EPA and U.S. Army Corps of Engineers’ (Army Corps) promulgated the “Clean Water Rule” in 2015 to incorporate Kennedy’s “significant nexus” language their rules. However, in 2019, those same agencies repealed the Clean Water Rule with the “Definition of the ‘Waters of the United States’” (WOTUS) rule in 2019. In 2020, the EPA and Army Corps established the [Navigable Waters Protection Rule: Definition of “Waters of the United States” \(NWPR\)](#). The NWPR had a more limited view of whether a waterway was a WOTUS and thus navigable. The NWPR was challenged in district courts and courts of appeal across the country.

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Federal Court Grants Federal Agency Remand Case and Vacates Navigable Waters Protection Rule

A recent federal court decision out of Arizona, *Pascua Yaqui Tribe v. U.S. Env'tl Prot. Agency*, marks another chapter in the near-two-decade debate on the scope of the CWA and the definition of “navigable waters.”

The Pascua Yaqui Tribe, and other Indian Nations, sued the EPA and Army Corps in the summer of 2020 after the NWPR’s passage challenging the agencies’ repeal of the Clean Water Rule and creation of the NWPR. The Plaintiffs alleged that the agencies exceeded the CWA’s authority and disregarded the advice of its own scientists. The EPA and Army Corps responded that they are once again seeking to redefine WOTUS and would no longer defend the NWPR.

On August 30, 2021, the District Court of Arizona granted the EPA and Army Corps’ request for remand while the agencies redefine WOTUS, and vacated the NWPR. The Pascua Yaqui Tribe’s challenge to the repeal of the Clean Water Rule remains pending before the Arizona Court, meaning that the 2015 repeal is still effective. With the NWPR vacated, the EPA and Army Corps’ understanding of WOTUS has effectively returned to its pre-2015 state nationwide.

What’s a Navigable Water Now?

Since the *Pascua Yaqui Tribe* holding, multiple other district courts have joined the District of Arizona in remanding the rule. EPA has now released guidance indicating it will interpret WOTUS consistent with the pre-2015 regulatory regime until further notice. Pre-2015 WOTUS is a smattering of policies developed in the 1980s and 1990s, coupled with a series of court rulings culminating with *Rapanos* in 2008.

EPA’s [website](#) identifies the pre-2015 definition of WOTUS at 40 CFR 230.3(s) as the operative definition. It defines “waters of the United States” as:

- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide
- All interstate waters including interstate wetlands
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - Which are or could be used by interstate or foreign travelers for recreational or other purposes
 - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce
 - Which are used or could be used for industrial purposes by industries in interstate commerce
- All impoundments of waters otherwise defined as waters of the United States under this definition

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- Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- The territorial sea
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States

What's Next?

In June, EPA announced it is undertaking a rulemaking to again revise the definition of WOTUS. Since its announcement, EPA opened a docket soliciting comments. The docket closed September 3, and EPA has expressed its desire to move forward with a series of new rulemakings soon, though top EPA officials have acknowledged "huge" challenges in crafting a "durable" definition of WOTUS.

EPA and the Army Corps have indicated the "durable" definition of WOTUS will reflect experiences and input from all communities. We anticipate that the revised WOTUS definition will be far more expansive than the recently vacated NWPR; however, it's unclear how far it will go. In the meantime, EPA and the Army Corps have halted implementation of the NWPR, using the pre-2015 regulatory regime to evaluate new projects until its revised definition takes effects. Pending projects will need to coordinate closely with agencies on a case-by-case basis. Whether this shift prompts Congress to enact clarifying legislation also remains to be seen.

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