International Municipal Lawyers Association
2020 Annual Conference
September 21 – October 16, 2020
Virtual

Environmental Law Section Meeting:

County of Maui v. Hawaii Wildlife Fund: What Does it Say and How Does it Apply

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1. INTRODUCTION

County of Maui v. Hawaii Wildlife Fund, 140 S.Ct. 1462 (2020)

The County of Maui owns and operates a wastewater treatment plant that injects excess treated water to groundwater through four underground injection control wells. The wells are permitted under the Safe Drinking Water Act's Underground Injection Control Program.

In June 2013, the EPA and Hawaii Dept. of Health and others conducted a tracer dye study. The study placed a tracer dye into 3 wells and monitored the submarine seeps off the coast to see if and when the dye would appear in the ocean. The study concluded that a hydrogeologic connection exists between the wells and coastal waters of West Maui. Eighty-four days after injection the dye showed up 0.5 miles southwest of the treatment plant.

The County was sued by environmental organization for alleged violations of the Clean Water Act. The Clean Water Act prohibits the "addition" of any pollutant from a "point source" to "navigable waters" without a permit. (33 U.S.C. § 1311(a).) Although the injection wells were permitted under the Safe Drinking Water Act, the wells did not have a permit under the Clean Water Act. The County argued that the Clean Water Act did not require a permit for the wells, in part, because the wells discharged to groundwater, which is not a "navigable water."

The district court determined that the wells required a permit under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES"). (33 U.S.C. § 1342.) The district court articulated the "conduit theory" after noting that there was no support for this theory in the Act, stating that "liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of how they get there."

The Ninth Circuit held that the Act's permitting provisions require "only a 'fairly traceable' connection between a point source and a navigable, consistent with Article III standing principles, to trigger the NPDES permitting requirements. The Ninth Circuit also concluded that the County's "actions fall squarely within the 'plain language of the statute,' [and] conclude[d] the County had 'fair notice' its actions violated the CWA."

2. "FUNCTIONAL EQUIVALENT OF A DIRECT DISCHARGE"

The U.S. Supreme Court considered the question of how the Act applies to a pollutant that reaches navigable waters only after it leaves a "point source" and then travels through groundwater before reaching navigable waters. It held that the Act requires a permit "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 Court recognized that the "functional equivalent" standard does not clearly explain how to determine when a discharge through groundwater is the functional equivalent to a direct discharge. To provide guidance, the Court articulated seven potentially relevant factors:

- Transit time
- Distance traveled
- Nature of the material through which the pollutant travels
- Extent to which the pollutant is diluted or chemically changed as it travels
- Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source
- Manner by or area in which the pollutant enters the navigable waters
- Degree to which the pollutant (at that point) has maintained its specific identity

3. APPLYING THE "FUNCTIONAL EQUIVALENT" FACTORS

A. The Court's Examples

The Court identifies a few "extreme" situations where it would either be "surprising" and "bizarre" to require an NPDES permit or a "serious loophole" to exclude the discharge from the permitting requirement. These examples are summarized as follows:

Should Not Require an NPDES Permit

- "pollutants carried to navigable waters on a bird's feathers"
- "100-year migration of pollutants through 250 miles of groundwater to a river"
- "'between 60 and 420 years' for pollutants to travel 'one to four miles' through groundwater"
- "50 miles from navigable waters and … pollutants … travel with groundwater, mix with much other material, and end up in navigable waters only many years later"

Should Require an NPDES Permit

- "pollution must travel through … a few yards / at least some groundwater before reaching the sea"
- "adding water to the bath from the well" using "a bucket to complete the task" (???)
- "a pipe that drains onto the beach next to navigable waters"

B. Real Life Examples

Cities undertake various activities that may introduce pollutants to groundwater, such as:

- Groundwater augmentation / aquifer storage and recovery
- Leaks from wastewater collection systems
- Wastewater treatment and discharge
- Leaks from water supply lines
- Low impact development projects
- Retention, detention, and infiltration ponds
- Surface water impoundments

The Court recognizes that the factors and examples provided in the decision do not give clear answers as to whether these and other projects will require an NPDES permit. Time and distance are expected to be the most important factors in most cases, but not necessarily every case. Where there is uncertainty, "courts can provide guidance through decisions in individual cases." In making these determinations, court decisions "should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives." Finally, EPA "can provide administrative guidance" by issuing permits and promulgating general rules.

4. CONCLUSION

In striking a middle ground between the district court and the Ninth Circuit, the Supreme Court created a standard that is not easily applied. Understanding that balance will require the courts to sort it out. Until then, we face an uncertain regulatory environment about whether our clients' discharges are the "functional equivalent of a direct discharge."