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9th Circ. CWA Decision Could Pose New Compliance Risks

By **Bernadette Rappold** (February 27, 2018, 11:42 AM EST)


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Environmentalists have scored a victory under the Clean Water Act that may cause a widespread re-evaluation of permitting status and engender a wave of citizen suits. The victory comes as debate continues among litigants, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers over the fate of the agencies' 2015 rule defining jurisdictional waters under the CWA.

On Feb. 1, the Ninth Circuit, in Hawaii Wildlife Fund v. County of Maui,[1] upheld a lower court's grant of summary judgment in favor of environmental groups challenging the county of Maui's decades-old practice of injecting partially treated wastewater from its wastewater treatment plant into wells. The wells leaked, and the wastewater subsequently migrated through groundwater to the ocean.

The CWA prohibits discharges of pollutants "to navigable waters from any point source," and further defines "navigable waters" as "the waters of the United States, including the territorial seas."[2] In County of Maui, there was no dispute that the wastewater facility's wells are "point sources" under the act (the act explicitly includes wells in the definition of "point source"), that the Pacific Ocean is a navigable water, or that pollutants from the facility migrate through the subsurface to the ocean. The central question was whether the act covers discharges from point sources through groundwater to navigable waters.

The Ninth Circuit answered that question affirmatively, rejecting the County of Maui's argument that the act prohibits only discharges where pollutants "travel via a 'confined and discrete conveyance'" to jurisdictional waters.[3] The court of appeals also rejected the EPA's argument, filed in an amicus curiae brief, that the act forbids discharges only where there is a "direct hydrological connection" between a point source and a water of the United States.

Instead, the court held the county liable for discharges into jurisdictional waters where the discharges were "fairly traceable" to point sources. A previous EPA tracer dye study had confirmed that 64 percent of the wastewater wound up in the ocean less than three months after injection into the wells. Indeed, the county itself had admitted in the district court proceedings that the volume of wastewater discharged to the ocean was "roughly the equivalent of installing a permanently running garden hose at every meter along the 800 meters of coastline."[4] On those facts, the discharge to the ocean was "fairly traceable" to the county's point sources.

In reaching its decision, the Ninth Circuit cited to the plurality opinion in Rapanos v. United States, where Justice Antonin Scalia opined that the act forbids not the "'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'"[5] The Ninth Circuit thus joins the Second Circuit (which considered an analogous situation in which liquid manure was discharged from tankers and migrated across fields into navigable waters[6]) in holding that indirect discharges of pollutants are sufficient for liability to attach under the act.

The court's decision comes just as the EPA and the Army Corps are attempting to rescind and to replace the 2015 Obama-era "Waters of the United States rule," defining the waters subject to the EPA's and the Army Corps' jurisdiction. Certain industries have decried the rule as sweeping too many waters into the act's purview. The president issued an executive order last February[7] that called on the two agencies to propose a new rule "in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States ..."[8]

Conservatives and others have long preferred the late justice's plurality opinion in Rapanos over Justice Anthony Kennedy's "significant nexus" test. After all, they believed, Justice Scalia's more restrictive view of jurisdictional waters under the act would serve as a bulwark against what he described as "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act."[9]

Thus, the Ninth Circuit's reliance on Justice Scalia's opinion here is not without irony. County of Maui has effectively turned a test, originally articulated to describe and to limit the waters subject to the act, into a kind of causation analysis — an analysis that brings groundwater squarely within the federal government's purview.

The implications of County of Maui are significant. If, through testing or modeling, the government or a citizen plaintiff can show that a pollutant in navigable waters originated from a point source, then the owner or operator of that point source may be liable for the discharge.

For now, the decision is controlling only in the Ninth Circuit. The County of Maui has not yet announced whether it will seek rehearing en banc or a writ of certiorari from the U.S. Supreme Court. And neither the EPA nor the Army Corps has announced any change in policy or procedure in light of the decision as they press forward with plans to further delay implementation of the Waters of the U.S. rule and to propose a more limiting replacement rule in 2019.

In the meantime, companies that discharge pollutants to air, land or groundwater may want to reanalyze their compliance risks and pollution liability insurance policies in light of County of Maui.

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[1] Hawaii Wildlife Fund v. County of Maui, D.C. No. 1:12-cv-00198 SOM-BMK (Ninth Cir. Feb. 1, 2018).

[2] 33 U.S.C. §§ 1362(7) & (12).

[3] County of Maui, slip op. at 16.

[4] Id. at 6.

[5] 547 U.S. 715, 743 (2006) (emphasis in original).

[6] Concerned Area Residents for Environment v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994).

[7] See Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed.Reg. 12497 (March 3, 2017)

[8] 547 U.S. 715 (2006)

[9] Id. at 722.