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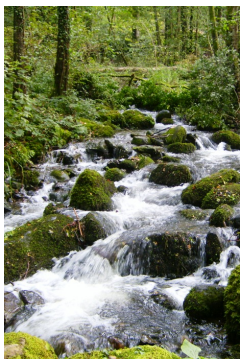

Settlement of *County of Maui* Prolongs Clean Water Act Uncertainty for Regulated Community

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On September 20, 2019, the Maui County Council voted 5-4 to settle a lawsuit—County of Maui v. Hawai'i Wildlife Fund—over the County's alleged violations of the Clean Water Act ("CWA"), which was set for review by the Supreme Court during the 2019 term. The central question to be resolved by the Supreme Court was whether a CWA permit is required when pollutants originate from a point source, but are conveyed to navigable waters by a nonpoint source, such as groundwater—a question over which the federal courts of appeals are split. Resolution of the case through settlement before the Supreme Court has the opportunity to weigh in will result in continued uncertainty for the regulated community regarding whether a CWA permit is required, and could result in the continued application of the Ninth Circuit's expansive reading of the scope of the CWA, which applies the CWA's permitting requirements to a broader array of discharges, as articulated in its decision in *County of Maui*.

Background

The CWA prohibits the "discharge of any pollutant," *33 U.S.C.* § 1311(a) without a National Pollutant Discharge Elimination System ("NPDES") permit. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

County of Maui originated over the County's alleged discharges from a wastewater plant, which pumped treated waste into the groundwater through four injection wells. The groundwater, including the waste water, then flowed into the Pacific Ocean. Environmental organizations brought suit, asserting that such discharges were in violation the CWA's prohibition on point source discharges to navigable waters without an NPDES permit.

The County conceded that the four injection wells that convey treated sewage to groundwater are "point sources" as defined under the CWA, but argued that the point source itself must convey the pollutants *directly* into a navigable water to require an NPDES permit, and because groundwater is not a navigable water regulated by the CWA, no NPDES permit was required.

The Ninth Circuit held that the County had violated the CWA because point source pollution includes pollutants that reach navigable waters by nonpoint sources so long as the pollutants can be "traced" in more than "de minimis" amounts to a point source. To support this position, the Ninth Circuit cited Justice Scalia's plurality opinion in *Rapanos v. United States*, which stated in dicta that the CWA does not forbid the "'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. 715, 743 (2006) (plurality opinion).

In February 2019, the Supreme Court accepted review of the Ninth Circuit's decision to resolve whether the "CWA requires a [NPDES] permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." The case was scheduled for oral argument on November 6, 2019.

The Settlement

On September 20, 2019, the Maui County Council voted in favor of a settlement that included the withdrawal of the County's appeal to the Supreme Court. Although this decision will likely remove the case from the Supreme Court's docket before the Supreme Court has the opportunity to weigh in, there is an unresolved question whether the County Council alone has the authority to require withdraw of the case or whether the Mayor of Maui County, who has publically opposed settlement, retains that authority. If the settlement moves forward without challenge, the County will drop the case and accept a previous settlement requiring the County to invest $2.5 million in wastewater reuse systems, pay a penalty, and apply for an NPDES permit.

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Practical Implications

Resolution of *County of Maui* through settlement before the Supreme Court has the opportunity to issue a decision continues the significant uncertainty for the regulated community, as there is a split among the federal courts of appeals as to whether the CWA regulates the discharge of pollutants that travel from a point source *through* nonpoint sources en route to navigable waters. In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), the Fourth Circuit adopted an interpretation similar to the Ninth Circuit's interpretation in *County of Maui.* Conversely, the Sixth Circuit disagreed with the Ninth Circuit's interpretation in *County of Maui,* finding that groundwater is not a "point source" and that "for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters." *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d. 925 (6th Cir. 2018).

Without a Supreme Court decision, this circuit split will go unresolved. A petition for certiorari was also filed in *Upstate Forever.* The Supreme Court neither granted nor denied certiorari in that case, and may take the case up in the future.

The U.S. Environmental Protection Agency ("EPA") weighed in on whether releases of pollutants to groundwater are subject to CWA permitting requirements through interpretative guidance issued in April 2019. In that guidance, EPA concluded that releases of pollutants to groundwater are categorically excluded from the CWA's permitting requirement. However, the EPA recognized that the Fourth and Ninth Circuit Courts' interpretations of how the CWA applies to discharges to groundwater are different than the agency's interpretation, and thus is not applying the guidance in those Circuits. Moreover, the guidance is likely to be given little weight by courts, as it was adopted without notice and opportunity for public comment. Until the Supreme Court has the opportunity to weigh in on this question, or EPA adopts its position through a formal rulemaking process, questions regarding the applicability of CWA permitting requirements to discharges of pollutants to groundwater will remain.

Moreover, agencies and courts within the Ninth and Fourth Circuits will likely continue to apply the more expansive reading of the scope of CWA articulated by the Fourth and Ninth Circuits, which may subject many segments of the regulated community—such as the agriculture industry; members of the energy industry, including natural gas, natural gas liquids, liquid natural gas, refined products, and crude oil pipelines, as well as electric utilities; and businesses engaged in construction activities—to additional permitting requirements.

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact Duncan Greene, Joseph Nelson, Brent Carson, Jenna Mandell-Rice, or any member of the firm's Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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