



County of Maui v. Hawaii Wildlife Fund et al.
US Supreme Court (Case No. 18-260)

National Association of Clean Water Agencies (NACWA)
Position & Amicus Brief Overview

On February 19, 2019, the US Supreme Court granted the petition for review submitted by Maui County Department of Environmental Management on the question of whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source - groundwater. If the court answers the question in the affirmative, it would result in an extraordinary expansion of sources subject to the requirements of the CWA National Pollutant Discharge Elimination System (NPDES) permit program. A negative decision would have a profound impact on the clean water sector, making this case the most significant CWA litigation to reach the court in decades.

A strong national public clean water sector voice in this litigation is critical. The issue is not whether releases of pollutants into groundwater with a connection to surface waters should be addressed; the issue is how they should be addressed. Put another way, it is not NACWA's position that releases of pollutants into groundwater should be allowed to contaminate natural resources. NACWA members are committed to the protection of public health and the environment regardless of specific statutory language. Even so, this does not mean the CWA NPDES program is the appropriate solution. Discharges to groundwater are regulated under other federal and state environmental statutes better suited to address such releases.

The potential impacts on NACWA members can be broadly categorized as expanded liability, regulatory uncertainty and permitting impracticability.

- Expanded liability
 - Has potential to trigger the regulation of an indeterminable array of diffuse and indistinct sources including public water distribution and sewer collection systems (or even individual leaks in such systems), retention ponds, municipal green infrastructure project, and water recycling projects.
 - Regulatory agencies might not target NACWA members' operations for permitting or enforcement, but any releases into groundwater would be subject to citizen suit enforcement. Just one CWA violation can result in a civil penalty of \$52,414 per day, in addition to injunctive relief and attorneys' fees awards.
 - By using the ill-suited NPDES permitting program and exposing point sources to additional liability, limited public resources may have to be diverted from projects and programs that do far more to improve water quality and protect human health.
- Regulatory Uncertainty
 - Determining whether an NPDES permit should be sought would require fact-intensive, site-specific, case-by-case determinations.

- For example, what is the minimum distance to navigable water, or the necessary time for pollutants to travel through groundwater, for a connection to be covered?
 - There is no guidance for making this decision.
 - This uncertainty would create disincentives for critical private and public infrastructure.
- Permitting Impracticability
 - The “end-of-pipe” NPDES permitting program is not the appropriate tool from a practicality standpoint.
 - Permitting authority must calculate effluent limits, determine the potential to exceed water quality standards, ensure consistency with antidegradation policies, allocate load and waste loads as part of TMDLs, assess the need for mixing zones, and determine appropriate monitoring, among other critical functions.
 - Where should the discharge be measured to determine compliance with effluent limitations? At the point of release into groundwater or where the pollutants eventually enter navigable waters? If monitoring is to occur where the pollutants eventually enter navigable waters, what is to be done if a consistent and discrete point of discharge is not known?

Background

The Maui County Department of Environmental Management produces tertiary-treated, disinfected recycled water that is sold for irrigation, with the excess disposed of into four Class V Underground Injection Control (UIC) wells located approximately half a mile from the Pacific Ocean. The wells are permitted by both the US Environmental Protection Agency (EPA) and the State of Hawaii Department of Health (HDOH) under UIC permits, issued pursuant to the Safe Drinking Water Act (SDWA) and its state equivalent. The wells are long pipes that carry recycled water approximately 200 feet underground into a shallow groundwater aquifer. The groundwater flows to and enters the ocean in a broad and diffuse manner along a two-mile stretch of coastline, as well as through freshwater seeps or springs that change location over time.

A 2013 tracer dye study confirmed that the recycled water from the County's UIC wells reached these ocean seeps. It took approximately 3 months for initial detection of the dye, with peak detection at 10 months, and total transit time estimated at 4 years. This and other studies found the recycled water also changes as it moves from the UIC wells to the ocean (decreases in dissolved oxygen, nitrate, and organic matter and increases in temperature and phosphorus levels). Once the groundwater enters the ocean, it mixes rapidly with ambient ocean water. Citizen groups sued claiming the County of Maui needed an NPDES permit for its wells, in addition to the UIC permits. Since planning for the treatment plant began in the 1970s, regulators knew recycled water from the wells would move through unconfined groundwater and eventually reach the ocean. The regulators never required CWA permits.

Ninth Circuit

The appeal to the Ninth Circuit arose from a district court decision, which held that the migration of pollutants from the UIC wells through groundwater – which acts as a “conduit” – into hydrologically connected navigable waters violates the CWA. NACWA filed an *amicus* brief in March 2016 urging reversal by the court.

On February 1, 2018, a three-judge panel of the Ninth Circuit Court of Appeals issued a unanimous decision that reached the same result but did not adopt the lower court’s “conduit” theory. The Ninth Circuit disagreed with the district court’s holding that “liability under the [CWA] is triggered when pollutants reach navigable water, *regardless of how they get there*,” explaining instead that the original discharge must still be from a point source that then travels to navigable waters in some way. The court adopted a new “indirect discharge theory” to hold Maui County liable under the CWA because (1) the County discharged pollutants from a point source (i.e., underground injection wells); (2) the pollutants are fairly traceable from the point source to a navigable water, such that the discharge is the functional equivalent of a discharge into the navigable water; and (3) the pollutant levels reaching navigable water are more than *de minimis*.

The court rejected the direct hydrologic connection test articulated by EPA during the Obama administration in an *amicus* brief:

The EPA as *amicus curiae* proposes a liability rule requiring a “direct hydrological connection” between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA (“*direct*” and “*hydrological*”) that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a ‘fairly traceable’ connection, consistent with Article III standing principles.

The court’s focus on the text of the Act was surprising, given its own introduction of two new tests (fairly traceable and more than *de minimis* amount) are not supported by the plain text or structure of the CWA. The court also ignored the clear provisions of the Act regarding states’ authority over nonpoint source pollution, obliterating the cooperative federalism structure that Congress explicitly established.

The “direct hydrologic connection” test articulated by EPA, while still representing an expansion of the NPDES permit program, would have applied to a more limited scope of discharges, with the intent to capture wetlands and other closely connected waters. The “fairly traceable” test, by contrast, could apply where there is a much more tenuous connection. Indeed, the Ninth Circuit suggested that its application could be broad, leaving open the question of whether there is even a limit: “We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.”

The *de minimis* amount test similarly does not reflect the language of the CWA, and if anything, adds an additional layer of confusion. The CWA includes a strict requirement that *any* discharge of a pollutant, without qualification, from a point source to navigable waters must be subject to a permit. The court's addition of a volume requirement is therefore completely inapposite with the text of the statute. As a result, the decision both expands application of the CWA to a broad scope of discharges to groundwater, while simultaneously narrowing its application to only those discharges that are more than *de minimis*.

It is important to note that in the *Maui* case alone, three tests have been advanced to define the line between point and nonpoint sources: the district court's "conduit" theory, EPA's "direct hydrological connection," and the Ninth Circuit's "fairly traceable" and more than "*de minimis*" standard.

On August 27, 2018, Maui filed a petition for *writ of certiorari* with the US Supreme Court. NACWA filed a brief on September 28, along with a coalition representing the clean water sector, supporting Maui's petition. Maui filed a supplemental brief with the Supreme Court after the Sixth Circuit issued two decisions that deepen the conflict in authority—unequivocally rejecting the Ninth Circuit's (and the Fourth Circuit's) expansive view of point source pollution (see below).

Circuit Split

Sixth Circuit

On September 24, 2018, the Sixth Circuit Court of Appeals issued two decisions - *Kentucky Waterways Alliance v. Kentucky Utilities (KWA case)* and *Tennessee Clean Water Network v. Tennessee Valley Authority (TVA case)* - soundly rejecting the "fairly traceable" and "direct hydrologic connection" theories of liability.

The two cases both involve allegations by environmental groups concerning the seepage of pollutants from coal ash ponds through groundwater into hydrologically connected surface water, prompting the Sixth Circuit to conduct a joint oral argument before the same panel.

The *TVA* case involves a suit brought in April 2015 by two environmental advocacy organizations, alleging liability for contamination of groundwater with coal ash from the TVA's operation of its Gallatin Plant that eventually reaches the Cumberland River via groundwater. The lower court held that discharges to state-regulated groundwater require NPDES permits if the constituents end up in jurisdictional surface waters under the CWA. Following a trial, the court required the *elimination* of the source of pollutants by requiring that TVA fully excavate the site rather than complete a closure in place as permitted under the Resource Conservation and Recovery Act. TVA appealed the decision to the Sixth Circuit.

The *KWA* case involved a decision by the lower court dismissing the environmentalists' claims

arguing that discharges from a coal ash pond that eventually migrated to a nearby lake violated the CWA. The district court rejected the direct hydrologic connection theory. The court's reasoning was that adopting this theory would subject a variety of nonpoint source pollution to CWA regulation simply by going up the causal chain to find some initial point of discharge and would effectively read the point source requirement out of the CWA. The environmental plaintiffs, KWA, appealed the decision to the Sixth Circuit.

The Sixth Circuit rejected the theory that an NPDES permit is required where pollutants are discharged through groundwater that conveys them to navigable waters, explaining that in that instance “[the pollutants] are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance.” As the court explained, groundwater itself cannot be a point source because of its diffuse nature, and as a result “[t]he CWA has no say over that conduct.”

The court went on to emphasize Congress' clear intent to reserve power over discharges to groundwater to the states, focusing on the Act's specific purpose to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources.” Petitions for rehearing *en banc* were denied. On April 15, a petition for certiorari was filed for review of the TVA case.

Fourth Circuit

In April 2018, a divided panel of the Fourth Circuit reversed a district court's dismissal of the CWA citizen suit in *Upstate Forever v. Kinder Morgan*. This case is based on a leak from a petroleum pipeline into groundwater. Plaintiffs alleged that petroleum migrates subsurface into various creeks and wetlands and thus constitutes an ongoing discharge of pollutants without an NPDES permit, in violation of the CWA.

Deferring to EPA statements from 1991 and 2001, the majority found that CWA liability may be triggered based upon release of pollutants to groundwater that has a “direct hydrologic connection” to surface water. Although the majority did not define the term “direct,” it found that the allegations in the complaint were sufficient to state a claim under the CWA: “an alleged discharge of pollutants ... reaching navigable waters located 1000 feet or less from the point source by means of ground water ... falls within the scope of the CWA.”

In so holding, the majority found that a point source need not *convey* the pollutants to navigable waters to trigger NPDES permitting requirements: “to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters.” Rather, a discharge to groundwater may trigger liability so long as the groundwater is “sufficiently connected” to navigable waters.

In August 2018, Kinder Morgan filed a *cert* petition with the Supreme Court. In the federal government's brief filed at the request of the Supreme Court in early January, the Department of Justice recommended that the Court grant cert in *Maui v. Hawaii Wildlife Fund*, which it

deemed as the best vehicle for resolving the question presented. In *Kinder Morgan*, the Fourth Circuit addressed the merits of the indirect discharge theory only after concluding that the plaintiffs had properly alleged “an ongoing violation” sufficient to confer jurisdiction over a CWA citizen suit.

Groundwater Regulation

Nonpoint source pollution is subject to control under state nonpoint source management programs. All 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. In addition, CWA provisions on total maximum daily loads (TMDLs), grants, planning, and nonpoint source management programs under CWA Section 319 can be effectively used to address nonpoint source pollution. The SDWA (and/or state equivalent) is most commonly used to regulate water reuse projects.

Many other federal laws are responsible for helping to protect groundwater.

- Resource Conservation and Recovery Act (RCRA) - regulates the storage, transportation, treatment, and disposal of solid and hazardous wastes to prevent contaminants from leaching into groundwater and requires remedial action for releases.
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund) - authorizes the government to clean up contamination caused by chemical spills or hazardous waste that do or could pose threats to the environment and imposes liability on parties responsible for releases.
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) - authorizes EPA to control the availability of pesticides that have the ability to leach into groundwater.
- Toxic Substances Control Act (TSCA) - authorizes EPA to control the manufacture, use, storage, distribution, or disposal of toxic chemicals that have the potential to leach into groundwater.

Many of the cases attempting to expand NPDES liability to groundwater come up in the context of coal ash. The ponds and landfills used to store coal ash are frequently unlined, allowing toxins to leach into groundwater. In August 2018, the U.S. Court of Appeals for the DC Circuit vacated major parts of the Obama-era 2015 coal combustion residuals rule under RCRA holding that EPA did not go far enough to regulate sites that lack a composite liner to prevent groundwater leaks. The court suggested that EPA require that the ponds be lined citing government data showing that “a significant portion” of the 500- plus ponds covered under the rule “are likely to contaminate groundwater.” EPA is currently going through rulemaking to revise the rule, which will undoubtedly be litigated. Congress clearly intended RCRA to be a mechanism to address this type of pollution.

If EPA and state regulators administer and enforce these other laws and regulations appropriately, it is not necessary to stretch the CWA NPDES program beyond what Congress

intended. While the factual circumstances in certain cases may suggest a need to strengthen the regulation of discharges to groundwater, the CWA NPDES permitting program does not contemplate, and cannot logically accommodate, the regulation of such sources.

Implications on NACWA Members

The potential impacts on NACWA members can be broadly categorized as expanded liability/regulatory uncertainty and permitting impracticability.

Expanded Liability/Regulatory Uncertainty

A negative decision from the Supreme Court in the *Maui* case has the potential to trigger the regulation of an indeterminable array of diffuse and indistinct sources. These sources could include public water distribution and sewer collection systems (or even individual leaks in such systems), retention ponds, municipal green infrastructure project, and water recycling projects. A case that made its way to the Second Circuit but settled before decision illustrates the direct impact an adverse ruling in *Maui* could have on NACWA members: in *26 Crown Associates*, plaintiffs alleged that basement backups from the New Haven collection system resulted in sewage leaking into groundwater which then reaches the Long Island Sound, half a mile away.

Determining whether an NPDES permit should be sought under the Ninth Circuit's indirect discharge theory will require fact-intensive, site-specific, case-by-case determinations. There is no guidance for making this decision. No clues exist, for example, on the minimum distance to navigable water, or the necessary time for pollutants to travel through groundwater, for a connection to be covered. This uncertainty would create disincentives for critical private and public infrastructure. For example, groundwater recharge systems are used to convey stormwater or recycled wastewater (which contain "pollutants") into shallow subsurface aquifers to augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls, among other benefits. This infrastructure can include spreading basins, natural treatment systems, and injection wells, among others. Another example is green infrastructure, which is used to retain, percolate and infiltrate stormwater into the ground to minimize discharges of municipal stormwater and combined sewer overflows. Green infrastructure provides multiple benefits to the public, including improving water quality. If the indirect discharge theory stands, it will create uncertainty on whether NPDES permit requirements apply and will likely impede the application of this beneficial infrastructure.

Regulatory agencies might not target NACWA members' operations for permitting or enforcement, but any releases into groundwater would be subject to citizen suit enforcement. Just one CWA violation can result in a civil penalty of \$52,414 per day, in addition to injunctive relief and attorneys' fees awards.

The 60-day notice-of-intent-to-sue letters – required by the CWA citizen suit provision - that have been received by utilities and other entities suggest the Ninth Circuit's indirect discharge

theory is already exposing local governments and public clean water utilities throughout the country to citizen suit enforcement for alleged regulatory noncompliance.

Permitting Impracticability

The “end-of-pipe” NPDES permitting program is not the appropriate tool from a practicality standpoint. The permitting authority must calculate effluent limits, determine the potential to exceed water quality standards, ensure consistency with antidegradation policies, allocate load and waste loads as part of TMDLs, assess the need for mixing zones, and determine appropriate monitoring, among other critical functions.

Under the Ninth Circuit’s rationale for indirect discharges, where should the discharge be measured to determine compliance with effluent limitations? At the point of release into groundwater or where the pollutants eventually enter navigable waters? In *Maui*, the pollutant levels vary significantly after effluent leaves the wells and interacts with the groundwater. If monitoring is to occur where the pollutants eventually enter navigable waters, what is to be done if a consistent and discrete point of discharge is not known?

The analysis required to issue a permit will be costly and resource intensive not only for the regulated community, but also for the regulators. Permit backlogs - already an issue in many states - could be exacerbated. Delayed permits could slow or prevent beneficial projects. The permitting process itself will impose additional permit application fees, compliance costs, and other financial and logistical impacts. EPA estimates that the public already spends over 19 million labor hours and over \$946 million in annual costs related to applying for NPDES permits and complying with just the monitoring, recordkeeping and reporting requirements.

As described above, this may add a duplicative and conflicting overlay of regulations on top of other federal and state programs that are designed to address these circumstances. By using the ill-suited NPDES permitting program, limited public resources may have to be diverted from projects and programs that do far more to improve water quality and protect human health.

NACWA’s Position

NACWA’s position is that the Ninth Circuit’s decision has the potential to radically expand point source permitting beyond the scope of what Congress intended. The Supreme Court and several appeals courts have read the CWA to draw a bright line between point and nonpoint source pollution based on a single critical requirement: whether pollutants are delivered to navigable waters by means of one or more point sources. The Ninth Circuit decision expands point source pollution to circumstances where pollutants reach navigable waters by means other than a point source, such as groundwater, so long as the pollutants can be “traced” to a discrete source. Only the former reading is consistent with the text, structure, and history of the CWA. The bright-line test approach provides much-needed certainty to NPDES permitting. The Ninth Circuit’s traceability rule does the opposite, leaving regulated entities and regulators to feel their way on a case-by-case basis.

The County of Maui's brief will make, and NACWA's brief will support, these legal arguments. However, the true value of NACWA's brief will not be the black-letter legal analysis, but rather an explanation and quantification of the potential unintended consequences on the clean water sector. NACWA's brief will highlight the clean water sector's role in providing services and maintaining public infrastructure that are essential to protecting public health and the environment; and how an expansion of the NPDES program will hinder rather than facilitate these efforts. The brief will make the case for the need for regulatory certainty to allow for the effective and sustainable planning and investment of finite public resources.