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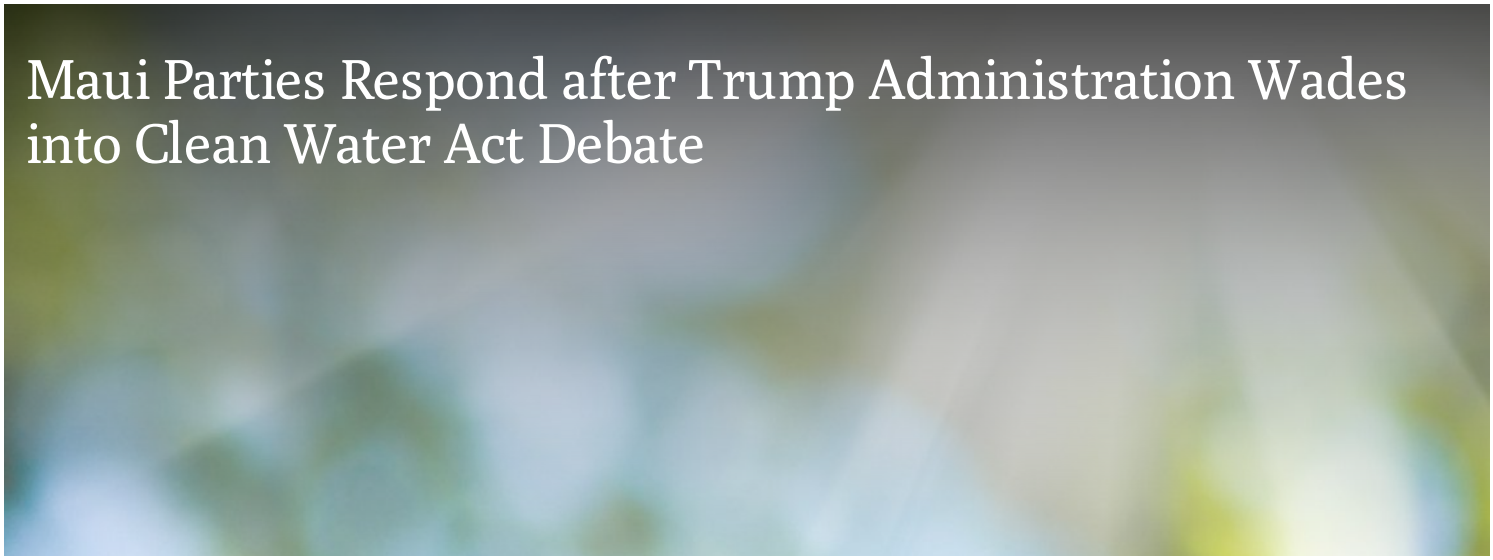
BLOG

Maui Parties Respond after Trump Administration Wades into Clean Water Act Debate



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The growing debate following two parallel decisions over the Clean Water Act's (CWA) applicability to groundwater discharges continued with further briefing as to whether the Supreme Court should grant pending petitions for review in those cases. In 2018, decisions by the Fourth and Ninth Circuits broadened the traditional reach of the CWA by finding discharges of pollutants traveling through groundwater which reach jurisdictional waters of the United States were regulated by the CWA. An amicus filing by the Trump Administration in early January contended the Supreme Court should hear the issue, but declined to voice its own opinion on the scope of the CWA over discharges through groundwater. Recently, Earthjustice, the plaintiff in the Ninth Circuit case, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), responded and informed the Supreme Court that it would be premature to review the matter while it remains under consideration by the United States Environmental Protection Agency (USEPA) and other federal circuit courts. Defendant Maui County asked the Court to review its entire argument, without limitation to only the groundwater question.

We previously commented on the Ninth Circuit's opinion because of its far-reaching implications for regulated entities under the CWA permitting regime known as the National Pollutant Discharge Elimination System (NPDES). NPDES permits under the CWA are issued to "point source" dischargers of pollutants to waters of the U.S., which are outfalls with a "discernible, confined, and discrete conveyance." Courts have traditionally interpreted the CWA not to extend federal jurisdiction over point source discharges to groundwater, as regulatory oversight of groundwater is left to state or tribal entities. Under the Ninth Circuit view, however, dischargers can be required to obtain a permit where groundwater acts merely as an indirect conduit for pollutants that can migrate to traditionally navigable waters. That Court held that permitting and liability under the CWA attaches where the pollutants are "fairly traceable" from the point source to a navigable water.

The Fourth Circuit in *Kinder Morgan Energy Partners LP v. Upstate Forever*, 887 F.3d 637 (4th Cir. 2018), reached a similar conclusion where an underground gasoline pipeline ruptured, contaminating nearby rivers, creeks, and wetlands after migrating through soil and groundwater. The Fourth Circuit adopted the "hydrological connection" approach, stating that "direct hydrological connection between groundwater and navigable waters" brought the discharges within the purview of the CWA. That case was also petitioned for a writ of certiorari to the Supreme Court.

Converse to the Fourth and Ninth Circuits, sister cases in the Sixth Circuit endorsed the opposite view. In *Kentucky Waterways All. v. Kentucky Utilities Co.,* 905 F.3d 925, 927 (6th Cir. 2018), and *Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), the Court determined coal residuals discharged through leaks in unlined waste ponds were not subject to regulation under the CWA, instead refusing to characterize the groundwater seeps point sources subject to the CWA. In a similar context, the relevant Seventh Circuit precedent was followed in *Prairie Rivers Network v. Dynegy Midwest Generation, LLC,* No. 18-CV-2148, 2018 WL 6042805 (C.D. Ill. Nov. 14, 2018), where the District Court dismissed the federal lawsuit of environmental groups for discharges from coal ash ponds to an adjacent river. Adhering to the Seventh Circuit decision in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963 (7th Cir 1994), the Court reasoned that such discharges would not be governed by the CWA, "even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as 'navigable waters' of the United States."

A briefing from the Trump Administration was prompted by the Supreme Court's request that the Solicitor General express its position on the petitions for review from the Fourth and Ninth Circuits. Relying on the split among the Fourth, Ninth and Sixth Circuits, the Trump Administration argued in support of certiorari, noting that the groundwater question "has the potential to affect federal, state, and tribal regulatory efforts in innumerable circumstances nationwide" and presents significant implications for regulated parties that may face serious civil penalties or criminal punishment for violations. Maui County in its response brief advised that the groundwater and notice issues were intertwined and cautioned against the federal government's approach of only hearing the groundwater issue, which "could result in the Ninth Circuit's finding of liability remaining in place for past releases." Earthjustice asked that the Court "allow the issue to percolate further," noting Supreme Court review would be premature in anticipation of expected regulatory action by USEPA, and a pending en banc petition in the Sixth Circuit. The en banc petition has since been denied by the Sixth Circuit.

Divergent results among the federal circuits, in conjunction with a federal government endorsement, is strong justification for the high court to consider accepting at least one of the petitions. And, as noted by the parties in those decisions, the groundwater question has significant implications for a variety of industries, including waste disposal, oil, and energy production. Even if the Supreme Court agrees to take the reins on the issue, there is unlikely to be a bright line drawn in the sand—past Supreme Court decisions considering jurisdictional issues under the CWA have not necessarily provided the clarity that regulators and permittees would prefer. Continue to follow the blog for more updates on this issue as it progresses.
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