Van Ness Feldman LLP

County of Maui and the Functional Equivalent Test

San Francisco, Maui, and NPDES Updates from the Public and Private Sector

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County of Maui v. Hawaii Wildlife Fund, 590 U.S. 165

- In 2020, the U.S. Supreme Court decided *County of Maui v. Hawaii Wildlife Fund*—a Clean Water Act ("CWA") case that addressed whether a permit is required for pollutant discharges to groundwater that eventually reach a water of the U.S. ("WOTUS").
- The Court established a test to determine when a discharge could be considered a "functional equivalent" of a direct discharge to a WOTUS, requiring a permit.
- In other words, the Court held that the CWA prohibits an unpermitted discharge of pollution "into navigable waters, *or when the discharge reaches the same result through roughly similar means*."

Setting the Stage

- The CWA prohibits **discharging pollutants** from **a point source** into **navigable waters** without a **permit**.
- The CWA defines a **pollutant** broadly.
- A **point source** means "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," such as a well, ditch, or pipe.
- **Navigable waters** are defined as WOTUS.
- A National Pollutant Discharge Elimination System ("NPDES") **permit** allows such discharges. The permit generally contains limits on what can be discharged, monitoring and reporting requirements, and other provisions to ensure the discharge does not harm water quality or people's health.

Case Facts

- Case involved the County of Maui's Lahaina Wastewater Reclamation Facility, which pumped partially treated (reclaimed) wastewater into injection wells.
- Specifically, the Facility filtered and disinfected approximately four million gallons of sewage each day.
- The Facility then released that reclaimed water into four injection wells that terminated in a groundwater aquifer.
- The case arose when a group of nonprofit environmental organizations sued the County alleging that the reclaimed water eventually ended up in the coastal waters around Maui in the Pacific Ocean.
- The reclaimed water contained heightened levels of nutrients.

Holding

- The Supreme Court rejected the Ninth Circuit's "fairly traceable" standard.
- Instead, the Court established a test for determining when a discharge to groundwater is "functionally equivalent" to a direct discharge into a WOTUS and thus requires a permit.
- The Court did not define "functional equivalent" but provided a non-exhaustive list of seven factors that might be relevant to the analysis.
    1. Transit time
    2. Distance traveled
    3. The nature of the material through which the pollutant travels
    4. The extent to which the pollutant is diluted or chemically changed as it travels
    5. The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source
    6. The manner by or area in which the pollutant enters the navigable waters
    7. The degree to which the pollution (at that point) has maintained its specific identity

County of Maui Applied

- The Supreme Court remanded to the Federal District Court in Hawaii.
- The District Court applied the seven factors, plus an additional factor on the volume of the discharged pollutants.
- The District Court held that the County violated the CWA by failing to obtain a NPDES permit for discharges of treated wastewater into injection wells.

County of Maui Guidance

- In November 2023, the U.S. Environmental Protection Agency ("EPA") issued Draft Guidance on the *County of Maui* decision, including how to apply the new "functional equivalent" test.
- The Guidance reiterates the *County of Maui* Court's seven non-exhaustive factors.
- The Guidance also reiterates the Court's bookend examples
  - "a discharge ending 50 miles from a navigable water with a groundwater transit time of many years" vs. a discharges that travels only a few feet.
- EPA places the onus on dischargers to determine whether they need a NPDES permit.
- Note, the EPA has not finalized this Guidance.

Sackett Nexus

- In May 2023, the U.S. Supreme Court ruled on another CWA case in *Sackett v. Environmental Protection Agency*.
- The Court issued a sweeping ruling that limited the scope of federal regulation over wetlands and other waters by adopting a narrow interpretation of federally-regulated WOTUS.
- The Court held that "adjacent" wetlands are subject to the CWA only when they are "as a practical matter indistinguishable from [WOTUS]," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins" and there is "no clear demarcation between 'waters' and wetlands."
- The EPA and the U.S. Army Corps of Engineers have since issued a conforming rule aligning the regulatory definition of WOTUS with the *Sackett* decision.