



COUNSEL TO GREAT COMPANIES

Eric Fjelstad

Partner, Perkins Coie LLP

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County of Maui decision Implications for the Mining Industry

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Overview-discharges associated with Mining

- Point Source Discharges to Surface Waters – requires an APDES/NPDES permit
- Stormwater – requires APDES/NPDES permit
- Groundwater – “State only” regulation
- Discharges of “fill” – Corps Section 404 permit

Discharges to Groundwater

- **Historical Treatment by Courts**
 - Key question: is an NPDES permit required?
 - Some Courts said “yes” if clear connection between discharge and pollution in surface water
 - Most courts refused to extend CWA regulation to discharges into or through groundwater

WOTUS Regulation

WOTUS regulation defines jurisdictionally limits of CWA.

- Not binding on courts but highly relevant
- Every administration has excluded groundwater in its WOTUS regulations.
- Impractical to regulate discharges into GW.

County of Maui decision

Key Facts

- POTW located a half mile from Pacific Ocean
- Discharges 4 MGD partially treated sewage into groundwater via injection
- Discharge indisputably reached ocean
- Timeframe – within a few months
- Visible impact on coral reefs

County of Maui decision (cont.)

Majority holding

- Justice Breyer opinion joined by Ginsburg, Sotomayor, Kagan, Roberts, and Kavanaugh
- CWA extends to regulation of discharges into GW that impact surface waters if the discharge is “functional equivalent” of a direct discharge.

County of Maui decision (Cont.)

- What is “functional equivalence” – key factors:
 - Transit time and distance traveled;
 - Nature of materials through which pollution moves
 - Extent of dilution of change in chemical composition as pollution moves

County of Maui decision (cont.)

Key Factors (cont.):

- The manner by which pollution enters surface waters
- The degree to which pollution has maintained its identity at point of discharge

Time and distance will be the most important factors

County of Maui decision – Key Observations

- Not a radical change in practice of CWA permitting
- Decision does not support regulation of groundwater itself.
 - Think of groundwater like a pipe

County of Maui decision - Implications

- Slippery Slope – could lead to direct regulation of groundwater
- Sets stage for more expansive WOTUS rulemaking
- Citizen's Suits/Permitting challenges

County of Maui decision – Implications (cont.)

Mines

- Unlined waste rock piles
- Unlined tailings impoundments
- Pits
- Failures of seepage collection systems

County of Maui decision – Implications (cont.)

Third Parties/NGOs

- EISs for new projects
 - Failure to consider a key issue?
- Permitting for new sources
 - Is mine lacking an NPDES/APDES permit?
- Citizen Suit Enforcement

County of Maui decision – Solutions?

- **Rulemaking?**
 - Address the Court's factors. Tighten up circumstances when CWA regulation in play.
- **Congressional action (unlikely)**
- **Piecemeal action by the courts (most likely)**

County of Maui decision - recommendations

- Avoid discharges to groundwater (liners are key where feasible)
- Sentinel wells/capture groundwater
- Have good data on surface waters
- Understand groundwater flows

County of Maui decision – Crystal Ball/Feds

- Any change in administration unlikely to change EPA view on groundwater;
- A Biden Administration probably more supportive of citizen enforcement
- EPA can cut off citizen's suits – unlikely to do so

County of Maui decision - Summary

- Not a game changer. Yet.
- Regulation of groundwater itself *would* be a game changer.
- Court decisions over next decade will determine significance of the precedent.