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Client Alert

Environmental, Health and Safety

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Supreme Court and EPA to Address Broad Expansion of Clean Water Act Liability by Lower Courts

The scope of the Clean Water Act ("CWA") has vexed the courts and lead agencies for over a decade. In one of the most significant environmental cases this year, on February 19, 2019, the Supreme Court granted the petition for *certiorari* in *Hawai'i Wildlife Fund, et al., v. County of Maui* ("Maui"), where the Court will decide whether to affirm the Ninth Circuit's determination that CWA liability broadly extends to pollution that first moves through groundwater before reaching a federally regulated waterway. The issue has split circuit courts and threatens new CWA liabilities for a wide range of industrial, municipal and agricultural sources. Simultaneously, this action by the Supreme Court coincides with EPA's imminent announcement of its new interpretative rule addressing the scope of its CWA jurisdiction.

THE NINTH CIRCUIT'S DECISION

In *Maui*, the Ninth Circuit unanimously held that the county government is liable under the CWA for its use of an underground wastewater injection well that deposited treated effluent into a groundwater channel that flows into the Pacific Ocean, because it did not obtain the NPDES discharge permit that the CWA requires for "any addition of any pollutant to navigable waters from any point source."

THE SUPREME COURT ACTION

Maui is one of two cases where petitions for *certiorari* were filed seeking Supreme Court review of lower court decisions. By accepting review, the Supreme Court has agreed to consider a critical issue regarding the scope of CWA jurisdiction and whether it extends to pollution released from a point source that travels through groundwater before it ultimately migrates to navigable waters of the United States.

Notably, due to the clear separation between the groundwater and the surface water presented in the facts in *Maui,* that case presents the best

opportunity to clarify CWA jurisdiction. The U.S. Solicitor General's Office agreed and in response to the Supreme Court's invitation, filed a brief asking the Court to resolve the split of authority by granting review of the *Maui* case.

If the Supreme Court upholds the Ninth Circuit's ruling, liability under the CWA could expand to impose new mandates on dischargers based on hard to measure and difficult to mitigate groundwater connections with nearby surface waters, which do not fit neatly within the traditional CWA point source permitting process. The decision could radically change the way many industries, power plants, sewer systems, and others dispose of their wastewater. Violations of the CWA can expose the regulated parties to civil and criminal penalties.

EPA'S DRAFT RULE REGARDING ITS CWA JURISDICTION

Simultaneously, EPA is proceeding to finalize its draft rule to narrow its definition of "waters of the United States." The rule will replace the more expansive 2015 definition and, notably, proposes to expressly exclude groundwater, including groundwater drained through subsurface drainage systems and groundwater recharge basins, from the CWA's jurisdiction. The EPA's public comment period for the draft rule closes on April 15, 2019. If EPA can finalize the rule before a decision in this case is rendered, the case would raise additional issues of deference to an administrative agency's interpretation of its own statutes, this time with a new cast of Justices who may have different views on the subject. Assuming the EPA final rule retains the exception for groundwater, the probability of reversal and a narrower interpretation of CWA jurisdiction is significant, particularly in light of the Supreme Court's prior skepticism of expansive Ninth Circuit decisions.

Regulated parties with discharge to groundwater should consider whether the receiving groundwater body is isolated and confined, or whether it may be hydrologically connected to surface waters constituting waters of the United States. They should consider commenting upon and closely tracking the EPA's rulemaking and the Supreme Court's proceedings to obtain necessary guidance on their compliance obligations under the Clean Water Act.

King & Spalding has significant experience across the country in administrative and environmental matters, including the defense of citizen suits and enforcement actions under the CWA and other laws. We also have substantial experience developing comments for individual businesses and trade associations regarding proposed regulations. In 2019, *Law360* named our Environmental, Health and Safety Group as Practice Group of the Year for the fourth time. If you have questions about how the Supreme Court's ruling or EPA's impending action may affect you or your business, please contact any of our lawyers noted in the contact section on the first page.