



# A Robinson+Cole Legal Update

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## Catching Up on the 2021 Clean Water Act Releases

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The latest season of Clean Water Act (CWA) changes are now streaming from the courts and federal agencies. The Biden administration and lower courts have picked up where prior administrations and the U.S. Supreme Court left off, as we reported last year in [Binge-Watching the Clean Water Act Cases and Rules](#). Unless Congress somehow finds bipartisan support for legislative fixes, we expect contentious CWA rulemaking proceedings to resume and protracted CWA litigation to prosper. These actions constrain land developers, utilities and companies on projects or operations that impact wetlands or other water features. These decisions might also give environmental groups and agencies stronger grounds on which to base CWA claims targeting sewers, pipelines, tanks, and other systems that leak or seep wastes into groundwater.

### Maui's Functionally-Equivalent Point Source Discharges into Groundwater

In [July, a federal court in Hawaii found that the County of Maui has violated the CWA](#) by injecting its treated sewage into the ground without a CWA discharge permit, becoming the first court to apply the Supreme Court's 2020 interpretation of when CWA permitting requirements apply to pollutant sources flowing into the ground before reaching surface waters. In [September, the Biden administration took another step toward expanding the government's view of such CWA jurisdiction by formally rescinding a guidance memorandum](#) published by the Environmental Protection Agency (EPA) in the final days of the Trump administration. While the scope of the Supreme Court's "functional equivalent" standard will inevitably be shaped by future judicial and administrative rulings, these initial decisions suggest that the circumstances when CWA liability attaches to these indirect point source discharges could be growing.

In the 2020 [County of Maui v. Hawaii Wildlife Fund](#) decision, the Supreme Court found that CWA jurisdiction only attaches to a "point source" discharging pollutants to a CWA-regulated waterbody indirectly through groundwater and other subsurface media if the source is the "functional equivalent" of a direct point source discharge. Unless authorized by permits issued under the CWA § 402 National Pollutant Discharge Elimination System (NPDES) program, the CWA prohibits "point sources" directly discharging pollutants to regulated waters and, under Maui, the "functional equivalents" of such direct point source discharges.

The Act defines "point source" as "any discernible, confined and discrete conveyance." In addition to a wastewater treatment plant, such as the County of Maui's sewage reclamation and injection well system, this definition can include leaking tanks, sewers and pipelines as well as coal ash ponds, sludge settling lagoons, and even septic systems and leaching galleries commonly used to treat and discharge domestic

sewage. Therefore, environmental groups and agencies could potentially target a wide range of indirect point sources for CWA violation claims under the Court's Maui standard.

The Supreme Court identified seven considerations "that may prove relevant" in this "functional equivalent" 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, [and] (7) the degree to which the pollution ... has maintained its specific identity." Justice Breyer added: "Time and distance will be the most important factors in most cases, but not necessarily every case." The Court also commented that "the permitting requirement clearly applies" to pollutant discharges from a pipe ending "a few feet" from such waters, but that the requirement "likely [does] not apply" if the pipe is 50 miles away and the pollutants reach the regulated water "only many years later."

On January 14, 2021, the EPA issued its [Guidance Memorandum: Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program](#). In the non-binding, and now rescinded, document, the agency noted the "extremely low" number of NPDES permits issued for indirect point sources and predicted "that the issuance of such permits will continue to be a small percentage of the overall number of NPDES permits." The former guidance indicated that consideration of the Court's seven factors under the Maui functional equivalent analysis is only warranted for pollutant discharges found to come from "point sources" and found to actually reach such waters. The memorandum also identified the "design and performance of the system or facility" in question as an eighth factor that should also be considered in this analysis because those features "can affect or inform all seven factors identified in Maui," especially provisions that change the "composition and concentration" of pollutants reaching regulated waters. Over the strong objections of environmental advocates, the document suggested that septic system, settling pond, stormwater infrastructure, water reclamation, groundwater recharge, and other facilities with such "system components ... may be less likely" to require an NPDES permit.

The [EPA's September 15, 2021 decision to rescind this memorandum](#) was made after considering input provided by an agency workgroup and stakeholders and concluding the January memorandum "was issued without proper deliberation" and included an eighth factor that was inconsistent with the CWA and Maui decision. The EPA is "evaluating appropriate next steps to follow rescission of the guidance." Given its other priorities and the time required to promulgate binding regulations, the agency might just develop a replacement memorandum or simply rely on judicial interpretations of the Maui "functional equivalent" standard.

On July 26, 2021, the U.S. District Court in Hawaii granted summary judgment to the Maui plaintiffs, finding that the County of Maui is violating the CWA by injecting treated wastewater into groundwater from a sewage reclamation plant located near the Pacific Ocean. The lower court's ruling in [Hawaii Wildlife Fund et al v. County of Maui, \\_\\_\\_ F. Supp. 3d \\_\\_\\_, 2021 WL 3160428, Docket No. 1:12-cv-00198-SOM-KJM \(D. Haw. Jul 26, 2021\)](#) was issued after the Supreme Court, on April 23, 2020, reversed and remanded a prior decision granting summary judgment to the environmental groups.

In granting plaintiffs summary judgment, the district court in [Hawaii Wildlife Fund](#) focused on evidence concerning the hydrogeologic fate of the injected wastewater as a whole, including the expert opinions generally agreeing that all of the well injections on the island eventually reach the ocean and more specific studies that were able to identify a very small fraction of this wastewater travelling beneath the surface less than 1.5 miles to specific seeps on the ocean floor, in as little as 84 days but, on average, over a period of 14 to 16 months. Although evidence showed that the wastewater could flow through a theoretical pipe leading directly from the wells to the seeps in 90 to 108 minutes, the court declined to rely on such a hypothetical example, cited its earlier characterizations of the injection well flows as "relatively rapid," and found that the time and distance factors identified in Maui weighed in favor of requiring a CWA permit. The court emphasized the absence of evidence indicating that the distance and transit time from the point source to the regulated waterbody approach the "50 mile" and "many year" levels noted by the Supreme Court as circumstances when the CWA "likely" does not apply.

The July ruling gave little consideration to the dispersal, dilution and chemical transformation of the treated sewage's pollutant chemicals while travelling through the ground and aquifer or the uncertainty as to where and when the vast majority of the injected wastewater reaches the ocean through diffuse flow. Noting the consensus that all of the wastewater injections eventually reach the ocean, the "millions of gallons" of treated sewage confirmed to reach the monitored seeps, and the absence of any suggestion that the treated wastewater "rids itself of all pollutants" or "becomes devoid of pollutants," the court found "the relative-amount-of-pollution-entering-the-water and the specific-identity factors weigh in favor of applying the NPDES permit requirements." The Court found that "the nature-of-material [through which the pollutant travels] and dilution/chemical-change factors favor not requiring a permit." The "manner-by-or-area-in-which-the-pollutant-enters-the-water factor" was found to be neutral, although this part of the ruling focused on the uncertain size of this ocean entry area without further consideration of the diffuse and subsurface manner in which the treated wastewater enters the ocean.

The Hawaii district court also commented on several other potential factors for consideration in an "functional equivalent" analysis. The court added "its own raw-volume-of-pollutant factor," finding that the immensity of the County's treated sewage injections, including "tens of thousands of gallons of wastewater [found to reach the monitored seeps] on a daily basis," weighs strongly in favor of requiring a permit. The discharge's impact on the ecosystem was noted as a hypothetical factor for other proceedings, but not in this summary judgment ruling, because "whether and to what extent the wastewater from the wells is affecting the nearby ecosystem" remained a disputed issue of fact. Through an amendment to its ruling, the court discussed the EPA's January 14, 2021 guidance recommending further consideration of system design and performance, but decided it would not adopt that factor here, stating those concerns were already included in its consideration of the Maui Court's seven factors and added nothing to the analysis in this case. Finally, the ruling noted that the plaintiffs argued for consideration of a "deliberate plan to pollute," but declined to add an "intent-based factor" to the analysis.

In its amended summary judgment order, the court balanced the Maui factors set forth by the Supreme Court, as well as the added "raw volume" factor, and found that "the discharge from the County's injection wells into the groundwater and ultimately into the ocean is the functional equivalent of a direct discharge such that it triggers the NPDES permit requirement." The court also stated that it "would reach this same conclusion even if it did not consider any factor beyond the seven identified by the Supreme Court." Although the parties previously entered into a Settlement Agreement on remedies, the County's motion for reconsideration and potentially appellate review remain pending in this case.

### **Defining "Waters of the United States"**

When it wrote the CWA, Congress asserted jurisdiction over pollutant discharges into "navigable waters," but defined this critical term only as "waters of the United States" (WOTUS). Thus began the mystery surrounding which water and wetland features are protected under both the CWA § 404 "Dredge and Fill" and the CWA § 402 "NPDES" permit programs.

Under the Obama administration, the two federal agencies charged with implementing these CWA provisions, the EPA and the Army Corps of Engineers, tried to codify many years of WOTUS rulemaking and litigation in its 2015 regulation known as the "Clean Water Rule." This 2015 rulemaking cited the body of scientific literature analyzing the connections between tributaries, wetlands and downstream waters as grounds to incorporate the "significant nexus" test authored by Justice Kennedy in a concurring opinion of the Supreme Court's 2006 decision in [Rapanos v. United States](#). Justice Kennedy concluded that "wetlands possess the requisite nexus ... if the wetlands ... significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable waters.'" In contrast, when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" This test for determining when WOTUS should include certain wetland and intermittent or isolated waters contrasts sharply with Justice Scalia's plurality opinion, holding that WOTUS should extend only to those relatively permanent, standing or continuously flowing bodies of water forming ... in ordinary parlance streams, oceans, rivers, and lakes" and "only those wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right."

The defense and implementation of the Obama administration's "Clean Water Rule" was effectively trumped (so to speak) in 2019 when the next administration cast aside the 2015 rule, temporarily reinstating the agencies' pre-2015 regulatory definition. As part of its "repeal and replace" initiative, the Trump administration eventually adopted the 2020 Navigable Waters Protection Rule (NWPR). The government grounded its WOTUS definition on the Scalia opinion, favoring permanent waterbodies and excluding "ephemeral" waters that form only as a direct response to precipitation. A series of district court decisions allowed the NWPR to take effect on June 22, 2020, while litigation challenging both the 2019 repeal of the Clean Water Rule and its 2020 replacement continued.

To no one's surprise, the Biden administration published [Executive Order 13990](#) on January 25, 2021, declaring its science-based approach to rulemaking and revoking several directives issued by the Trump administration. The revoked orders included President Trump's Executive Order 13778 embracing the Scalia plurality opinion in *Rapanos* as the basis for defining WOTUS. On June 9, 2021, the new administration followed these marching orders by deploying its version of the "repeal and replace" strategy. The [agencies announced plans to propose two rounds of rulemaking](#), an initial rule that would withdraw the NWPR, again reinstating the agencies' pre-2015 WOTUS definition, and a second regulation that would adopt a new definition for this critical CWA term. In August and early September, the agencies held a [series of public meetings and opened a docket for submission of written comments](#) to inform their pending rule proposals. The agencies emphasized their plans to consider the CWA § 101(a) objective to "restore the chemical, physical, and biological integrity of the Nation's waters," the latest peer-reviewed and relevant science, practical WOTUS implementation approaches, and the experiences of a diverse range of stakeholders, including landowners, farmers, environmental groups, and disadvantaged communities with environmental justice concerns. The [agencies' WOTUS outreach program](#) therefore includes planned consultations with state and tribal authorities and ten regional roundtables to provide input from the "full spectrum of stakeholders" and to "highlight similarities and differences across geographic regions." To establish a "durable" WOTUS definition that can survive judicial scrutiny and not become the next target for repeal, the Biden administration appears to recognize the importance of factoring the CWA § 101(b) objective, preserving the States' primary regulatory role in the development and use of land and water resources. The agencies also seek input on "how climate change affects the chemical, physical, and biological integrity of the nation's waters," consistent with President Biden's broader directives in Executive Order 13990.

On a parallel track, the government has also moved to remand the NWPR back to the agencies for further revisions in response to several challenges brought against the 2020 WOTUS rule by state attorneys general, tribal authorities and environmental groups. On its website, the EPA has posted [copies of these pleadings as well as agency data](#) collected for the first year of NWPR implementation, suggesting a "decrease in jurisdiction [that] has been more dramatic than the deregulatory effects the agencies had identified in the NWPR preamble or supporting documents." According to the EPA, fewer dredge and fill permit applications were filed and far fewer were required under CWA jurisdictional determinations, especially in arid states.

So far, federal courts in South Carolina, Massachusetts, New York and California have granted the government's remand motions, but only one Arizona decision granted the challengers' related requests that the 2020 NWPR also be vacated. Remand was granted at the government's request without vacating the NWPR in *South Carolina Coastal Conservation League v. Regan*, Docket No. 2:20-cv-01687-BHH (D. S.C. Jul. 14, 2021), *Conservation Law Foundation v. U.S. EPA*, Docket No. 1:20-cv-10820 (D. Mass. Sep. 1, 2021), *William Murray & Jane Omura v. Regan* (N.D.N.Y. Sep. 7, 2021), and *State of California v. Regan*, Docket No. 3:20-cv-03005-RS (N.D. Cal. Sep. 16, 2021).

However, in [Pasqua Yaqui Tribe v. U.S. EPA](#),      F. Supp. 3d     , 2021 WL 3855977 (D. Ariz. Aug. 30, 2021), the U.S. District Court granted the remand with "vacatur." Citing the agencies' implementation data and concerns with the NWPR, including its categorical exclusion of ephemeral waters and failure to consider their effect on traditional navigable waters, the Arizona court found that remand should be granted to cure "fundamental, substantive flaws" in the NWPR. The district court followed 9<sup>th</sup> Circuit case law calling for vacatur when the rule's concerns "are not mere procedural errors or problems that could be remedied through further explanation" and when vacating the rule does not risk serious environmental harm. The court also allowed further briefing on the plaintiffs' challenges to the 2019 repeal of the 2015 Clean Water Rule, leaving open the possibility of the 2015 definition being reinstated.

For the time being, the pre-2015 WOTUS definition applies in Arizona, and potentially other districts, to the extent the district court's vacatur may have nationwide effect. The court's order in Pasqua Yaqui Tribe included no such injunction, bringing into question whether it vacates the NWPR outside the state. Motions to remand, with or without vacatur, are still pending in challenges to the NWPR proceeding in other district courts.

While still arguing for remand of the NWPR without vacatur in other cases, the government seems comfortable with the Arizona district court decision, as shown by the [EPA website posting pre-2015 WOTUS terms and implementation guidance](#) stating: "In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime until further notice." Following this September 3, 2021 announcement, the [Army Corps of Engineers](#) has applied the pre-2015 WOTUS rule when issuing formal jurisdictional determinations (JDs), while allowing its prior JDs to remain in effect.

The [agencies are promising to propose a more "durable" WOTUS definition](#) that addresses the concerns raised with both the 2020 NWPR and the 2015 Clean Water Rule. Certainly, the Trump and Obama administrations staked positions on either sides of the WOTUS gap created by Congress when it adopted the CWA without a satisfactory definition of its most essential term. Whether the Biden administration can bridge this gap or simply feed the insatiable appetite of CWA litigants remains the unsolved mystery that brings us back to this drama time and again.

For more information contact our author listed above.

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