In last year’s LUENR 2021 Update, we reported on the U.S. Supreme Court’s decision in County of Maui v. Hawai’i Wildlife Fund (County of Maui), 590 U.S. __; 140 S. Ct. 2778 (2020), in which the Court ruled for the first time that a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act (CWA) is required for discharges from a “point source” (e.g., a well, ditch, or other conveyance) into a navigable water or its tributaries via groundwater, if the discharge is the “functional equivalent” of a direct discharge. Developing case law has made clear that such a determination requires a fact-specific and expert-intensive inquiry, leaving a discharger with significant uncertainty as to whether an NPDES permit is required for indirect discharges.
This article summarizes some of the court rulings since the Supreme Court’s County of Maui decision, including two rulings issued this year. These may help to guide a discharger’s analysis of whether further legal and expert technical support may be needed to better ensure compliance with the CWA or to defend against CWA challenges brought by regulators or, more likely, environmental organizations playing the role of citizen enforcers.

County of Maui Resulted in Seven Factor Test

In County of Maui, the Supreme Court enunciated seven factors that “may prove relevant (depending upon the circumstances of a particular case)” in determining whether the discharge satisfies the “functional equivalent” test: “(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. Time and distance will be the most important factors in most cases, but not necessarily every case.” Id., 140 S. Ct. at 1476-77. The seven factors were not intended to be exclusive, and as subsequent cases have shown, additional factors also may be taken into account.

Post County of Maui Decisions

The first post-County of Maui decision, not surprisingly, was on remand in that case to the federal district court in Hawaii. See Haw. Wildlife Fund v. Cty. of Maui, 2021 U.S. Dist. LEXIS 131803 (D. Hawaii July 15, 2021). Applying the seven County of Maui factors, plus an additional factor as to the volume of the pollutants discharged, the district court concluded as a matter of law that the County had violated the CWA by failing to obtain an NPDES permit for discharges of treated wastewater into injection wells at its wastewater treatment facility. The court relied upon extensive expert testimony and a tracer dye study that identified seeps where a small percentage of the wastewater was discharging. It weighed heavily the fact that some discharges occurred in 84 days with an average transit time of 14-16 months; wells were one-half mile or less from the ocean and the minimum distance traveled was 0.3 to 1.5 miles to the sea; 100 percent of the wastewater ultimately discharges into the ocean; the discharges were still identifiable even if they contain lesser levels of pollutants than when originally discharged; and thousands of gallons of wastewater were discharged from the facility into the ocean each day. Less weight was given to the fact that much of the flow into the ocean from the groundwater was diffuse and could not be tracked to any specific discharge point; that the pollutants were diluted as they traveled so there was a change in the nature of the material discharged; that EPA guidance added a “system design and performance” factor (which the court found played no independent role); and that there was no identifiable impact on the ecosystem. The County’s Motion for Reconsideration of that ruling was denied. See Hawai‘i Wildlife Fund v. Cty. of Maui, 2021 U.S. Dist. LEXIS 202010 (D. Hawaii Oct. 20, 2021).

In Cottonwood Envtl. Law Ctr. v. Edwards, 2021 U.S. Dist. LEXIS 54922 (D. Mont. Mar. 23, 2021), plaintiffs were denied a preliminary injunction because, among
other things, the court concluded that it appeared unlikely they would be able to satisfy the “fact-intensive inquiry” required by the Supreme Court’s County of Maui “functional equivalent” test regarding discharges from a wastewater facility into a river via groundwater. It ruled that plaintiffs had not established the source of the pollutant at issue (nitrogen) notwithstanding samples that showed elevated nitrogen at both the discharge point and the river; and that the “samples fail to provide the kind of time, distance, and dilution data that the Court would require for its Maui inquiry.” Plaintiffs next sought a ruling on the merits that, as a matter of law, the sewer district was discharging without a permit in violation of the CWA, but still did not provide the fact-intensive support under County of Maui “functional equivalent” test. Rather than simply deny the motion, however, the court deferred its determination and required both plaintiffs and defendant to briefly answer (with citations to supporting evidence in the record) specific questions to address the seven County of Maui “functional equivalent” factors, an additional question as to the source of the alleged pollutant, and any two additional factors the respective parties wanted the court to consider before determining whether the alleged discharges violated the CWA as a matter of law. Cottonwood Envtl. Law Ctr. v. Big Sky Water & Sewer Dist., 2022 U.S. Dist. LEXIS 29774 (D. Mont. February 18, 2022).

Stay tuned.

In Black Warrior River-keeper, Inc. v. Drummond Co., 2022 U.S. Dist. LEXIS 6046 (N.D. Ala. January 12, 2022), the court granted plaintiff’s motion for summary judgment, finding that acid mine drainage (AMD) seeping from an abandoned underground mine site into groundwater that discharged into a nearby river violated the NPDES permitting requirements of the CWA and satisfied the County of Maui “functional equivalent” test. The court relied exclusively on plaintiff’s expert’s testimony that polluted groundwater flows 10 to 30 feet through a dam before “discharging at surface seeps” to the river; that the AMD seeps into the river in about 1.5 to 4.4 days, and as bed seepage, in about 4.4 to 14.6 days; that the groundwater becomes more polluted, not diluted, over the distance traveled; and that the pollutants maintained their identity as AMD. The court rejected defendant’s arguments that the data was insufficient and unreliable, given that defendant offered no expert testimony or specific evidentiary citations to refute it. The court also discounted the defense arguments that data showed “there is not a robust or very large groundwater flow system” at the site, and that there was de minimis ecological impact on the river from the alleged groundwater discharges. The court concluded that whether the polluted groundwater significantly contributes to ecological damage does not bear on the question of whether the CWA requires the discharger to have a permit to discharge the polluted groundwater in the first instance.

**More Discharge-to-Groundwater Litigation Expected**

In light of the Supreme Court’s expansion of the CWA NPDES permitting requirements in County of Maui to groundwater discharges satisfying the “functional equivalent” test, we can expect more citizen suit litigation like these against municipal wastewater treatment plants and industrial facilities where pollutants are injected or are otherwise discharged from a “point source” into groundwater, especially when the facility is near a waterbody.