Practitioner Insights: Maui Groundwater Case Shows Government Retreat Is Bad for Everyone

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With Administrator Scott Pruitt at its helm, cooperative federalism is the frequently recited principle underlying recent EPA enforcement efforts. As the Environmental Protection Agency's regulatory oversight in areas like the Clean Water Act is delegated to the states, the agency is relying more upon state and local authorities to enforce the laws.

There are shortcomings associated with this approach, which were raised in the recent U.S. Court of Appeals for the Ninth Circuit decision, *Hawaii Wildlife Fund v. County of Maui*. This decision creates uncertainty that unnecessarily exposes the regulated community to greater liability and costs.

At issue in *Hawaii Wildlife Fund* was whether a wastewater treatment plant can be liable under the Clean Water Act for discharging treated wastewater to groundwater. This was a fairly novel issue because the Clean Water Act prohibits discharges of pollutants to navigable waters from wells, pipes, ditches, or other artificial conveyances collectively known as "point sources." Groundwater is obviously not a navigable water, so the Clean Water Act doesn't cover pollutants discharged to hydrologically isolated groundwater. But the Ninth Circuit held that if a pollutant discharged from a well into groundwater is "fairly traceable" to a navigable water like the Pacific Ocean, then such an unpermitted discharge triggers Clean Water Act liability.

Whether the Clean Water Act covers groundwater discharges is the subject of an almost half-centurylong debate. Indeed, before it adopted the Clean Water Act in 1972, Congress considered a proposal known as the Aspin Amendment that would have added federal standards and control over groundwater pollution. Though it noted its appreciation for the artificial distinction between groundwater and surface water, Congress rejected this proposal because it lacked the "knowledge and technology" needed at the time to understand groundwater and how it differs state to state. Nearly 50 years later and the debate still unsettled, it's no surprise that the regulated community became agitated with the Ninth Circuit's apparent expansion of liability.

Lost among this discourse, however, is why the county of Maui was sued in the first place. Several years earlier, Maui sought guidance from the Hawaii Department of Health, the agency to

which the EPA delegated Clean Water Act permitting authority. The county specifically requested whether its wastewater injection wells required a Clean Water Act discharge permit, known as a National Pollutant Discharge Elimination System permit. In many instances, an NPDES permit is the primary defense to alleged Clean Water Act liability. Despite the county's request, the Department of Health took no action to clarify whether the county required an NPDES permit. Lacking any clear guidance, the county did not seek the permit, which the Ninth Circuit held was the wrong decision.

Setting aside its rationale in imposing liability for groundwater discharges, it's far from certain whether the Ninth Circuit reached an equitable decision, given concerns related to the effectiveness of cooperative federalism.

Federalism Tripped Up by Ambiguity

Cooperative federalism is the arrangement between states and the federal government that allows states to enact and administer their own regulatory programs within limits, including those imposed by federal statute or regulation. The Clean Water Act is an example of cooperative federalism whereby states, like the Hawaii Department of Health, are delegated authority to administer the program.

Given its ambiguity, however, the Clean Water Act could inhibit cooperative federalism. This undoubtedly contributed to the Department of Health's non-response to the county's inquiry. As the department failed to substantively respond, the county fell prey to a failure of cooperative federalism caused by ambiguous statutory authority.

Apparently in response to the Ninth Circuit's decision, the EPA released a request for comments Feb. 20 about whether it should modify its position on regulating discharges to groundwater under the Clean Water Act. Specifically, the request questions whether other laws and permit programs, like the Safe Drinking Water Act, adequately address liability for groundwater discharges. This request is concerning because it signals the EPA's intent to change its long-standing position that an NPDES permit is required when there's a direct hydrological connection between groundwater and surface water. On its face, such regulatory retreat may seem to benefit businesses and public agencies. In reality, it would not.

Ambivalence Breeds Uncertainty

Deregulation, when done imprudently, may risk creating uncertainty that the regulated community disdains. If the EPA reverses its guidance that NPDES permits are required for certain discharges to groundwater, examples of regulatory ambivalence like the Department of Health in *Hawaii Wildlife Fund* will become more prevalent. The department was presumably aware of the current EPA policy, which can be summarized as: While the Clean Water Act doesn't grant the department authority to regulate groundwater pollution, it may exercise authority when pollutants are discharged to groundwater with a direct hydrological connection to navigable or surface waters. Even with this known policy, the department still couldn't commit to determining whether the county required an NPDES permit. It chose instead to defer to a judicial determination pursuant to a citizen lawsuit. That's a clear failure in cooperative federalism.

If the EPA changes its long-standing policy that NPDES permits are required for certain groundwater discharges, then regulators like the Department of Health would be even more ambivalent in requiring an NPDES permit for groundwater discharges. This doesn't help businesses and public agencies because private litigants may nonetheless bring citizen lawsuits under the Clean Water Act to enforce unpermitted discharges. Regardless of the EPA's position on permitting groundwater discharges, the fact is present case law permits citizen lawsuits to hold dischargers liable for such discharges in certain circumstances.

Without an NPDES permit shield, many dischargers will be exposed to liability.

Moreover, the EPA's proposed reliance on other statutory schemes like the Safe Drinking Water Act for withdrawing its guidance on groundwater discharges is equally disconcerting. Adopted two years after the Clean Water Act, the Safe Drinking Water Act includes within its purview the regulation of injection well discharges to groundwater. Entities could therefore obtain an underground injection control permit—issued pursuant to the Safe Drinking Water Act—to discharge to groundwater. If a discharger complies with its underground injection control permit, it is considered compliant with the permitting requirements of other environmental statutes like the Resource Conservation and Recovery Act.

Unlike NPDES permits, however, underground injection control permits do not shield dischargers from Clean Water Act liability because the Clean Water Act and Safe Drinking Water Act address different environmental issues. The former intends to improve the biological integrity of aquatic environments, whereas the latter intends to improve human health and the aesthetic quality of drinking water. Safe Drinking Water Act compliance therefore does not guarantee Clean Water Act compliance, a conclusion several courts have reached when faced with this issue.

Clarity Needed From EPA...

Instead of revising prior statements solely aimed at reducing the Clean Water Act's reach, the EPA should instead clarify its long-standing statements on groundwater in order to provide dischargers—like wastewater treatment plants—with greater certainty as to what the present law requires. Instead of suggesting that the Clean Water Act does not cover groundwater discharges, the regulated community would benefit from unambiguous directives regarding when state and local agencies shall issue permits for pollutants discharged to certain groundwater that is actually hydrologically connected to surface water.

Given the substantial increase in Clean Water Act citizen lawsuits filed in the past two years, such a clear statement could avoid situations like the one in which Maui found itself. In the wake of cases like *Hawaii Wildlife Fund*, case law more strongly supports the filing of a citizen lawsuit when there's actual evidence of a discharge of pollutants into groundwater that's in fact hydrologically connected with surface water. While the burden of obtaining actual evidence of a hydrological connection remains high, such evidence is becoming more readily available as our knowledge and technology regarding groundwater improves.

Modifying prior statements interpreting the Clean Water Act therefore will not stop the growing prevalence of citizen lawsuits and are not likely to affect the legal precedent upon which the citizen lawsuits rely. At best, modifying past agency statements ensures only that the EPA is less likely to involve itself in cases in support of the private enforcer—as it did in *Hawaii Wildlife Fund*, and as may happen again should the U.S. Supreme Court take up the case. Absent these limited circumstances, the regulated community gains little from the EPA's anticipated retreat.

...Or Congress

For now, either the Supreme Court or Congress is best-suited to clarify whether the Clean Water Act imposes liability for any groundwater discharges. If the Supreme Court doesn't grant Maui's anticipated petition for review, then Congress is left as the last hope for clarity.

But before we acquiesce to the cynicism of likely congressional inaction, remember that Congress in 1972 chose not to impose standards and controls over groundwater pollution because at the time it didn't have the knowledge and technology it considered necessary to understand groundwater. In the nearly half-

century since that debate began, knowledge and technology concerning groundwater has improved substantially. Incorporating this much improved understanding into revised legislative authority may create the certainty that the regulated community demands and deserves.

Operators of wastewater and groundwater recharge operations like the County of Maui are beholden to ever changing judicial standards and equivocating regulators. The uncertainty bred from this is as harmful to the environment as it is to businesses. With a clearer understanding of what laws govern their discharges, the regulated community would be less likely subject to a citizen lawsuit and unregulated discharges of pollutants would be less prevalent.

While congressional action may or may not occur, there are few other alternatives when the regulated community remains subject to growing uncertainties that are exacerbated by evolving case law and the partisan shifts of changing administrations. For now, groundwater dischargers are caught in the absurd situation of either applying for an unnecessary and costly permit, or risking a Clean Water Act citizen lawsuit for what may be an unpermitted discharge. Absent needed clarity, the regulated community shall remain prey to an ambiguous statute that inhibits rather than promotes cooperative federalism. In the face of this ambiguity, dischargers making good faith efforts to prognosticate what's required shouldn't be punished with civil penalties for the choice they ultimately make.

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