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3 Takeaways From High Court Maui Groundwater Ruling

By **Juan Carlos Rodriguez**

Law360 (April 23, 2020, 9:52 PM EDT) -- The U.S. Supreme Court seems to have struck a sweet spot in deciding that Clean Water Act permits can sometimes be required for pollution that first hits groundwater, with environmental groups praising the justices for protecting the integrity of the law and industry attorneys saying the court arrived at a reasonable outcome.

The case had the potential to be a blockbuster if the justices had sided completely with either side, but a coalition of liberal and conservative justices found a middle path that didn't cause any of the parties to hit the panic button.

The justices rejected a "loophole" in Clean Water Act protection they said would have been created under argument from Maui County, Hawaii and the federal government. Yet the ruling isn't likely to spur a huge rush of litigation or regulation, although the U.S. Environmental Protection Agency could issue guidance interpreting the decision.

Environmental groups advocated for the justices to uphold the Ninth Circuit's broad interpretation of the act, while the government entities argued the law can't be used to require a permit if pollution traveled even a tiny distance through groundwater before reaching a navigable body of water that falls under the act.

Environmental groups said an outright victory for the EPA and Maui County would have allowed polluters to completely escape regulation by designing systems that used groundwater to their advantage.

The governments said if the Ninth Circuit's and the environmentalists' interpretation had carried the day, an untold number of currently unregulated sources like residential septic systems would have been required to traverse the expensive and time-consuming process to get a national pollutant discharge elimination system.

The case is rooted in an attempt to force Maui County to get a NPDES permit for some wastewater injection wells that drain into the Pacific Ocean via groundwater.

"The way the court came down on the question is appropriate and helpful for the regulated community," said Ashley Peck, a partner at Holland & Hart LLP. "The big takeaway is the narrowing of the fairly broad and ambiguous standard set forth by the Ninth Circuit to one that at least seems more workable in practice."

And Deborah Sivas, a professor at Stanford Law School and director of the school's Environmental Law Clinic, said the court clearly tried to "thread a needle" with its statutory interpretation and didn't go to far either way.

"All in all it's a reasonable opinion. It could have been a lot worse," she said.

Here are three key takeaways from the high court's ruling.

Justices Reject CWA 'Loophole'

Justice Stephen Breyer, writing for a 6-3 majority that included Chief Justice John Roberts, Justice Brett Kavanaugh and the other three more liberal justices, repeatedly said that the legal position endorsed by Maui and the U.S. Environmental Protection Agency would create a loophole that polluters could use to avoid NPDES permitting requirements by constructing a discharge system that ended a short distance from a navigable water and then traveled through a bit of groundwater.

And while the test they created leaves a significant amount of room for interpretation about exactly when a project will require a permit, attorneys said the gray area is manageable and won't even really change much from what it is now.

Mark Ryan, a principal at Ryan & Kuehler PLLC and former Clean Water Act attorney at the EPA, said lower courts have been struggling with this question for decades, and that they've generally come down around the same place the Supreme Court did, weighing how far pollution travels before it hits navigable waters and how long it takes to get there, among other things, in deciding whether permits are required.

"Everyone likes a bright line test because if you're a regulated entity you want to know, am I in or am I out? That's a fair question for business, or a farmer, or whoever to ask. But sometimes it's incredibly hard to come up with a definition that works in all circumstances," Ryan said. "And I don't see a major change in the status quo."

No Permitting Explosion

The decision, while a victory for environmentalists, isn't likely to lead to an explosion of new lawsuits or regulation, said David Chung, a partner at Crowell & Moring LLP.

"To the extent there are suggestions this somehow blows open a gigantic universe of permitting, I'm not sure that's going to happen," Chung said.

Just as courts had been, by and large, already using a similar test, the EPA and state regulators have been using their own standards, and there probably won't be much change in their approach except in limited circumstances, said Paulina Williams, a partner at Baker Botts LLP.

She said interested parties will be looking to the EPA or states for guidance, particularly if there are programs in place that formerly did not do a Clean Water Act analysis to make sure a permit wasn't required.

"It's possible that you need to look at those programs now and see if there's a Clean Water Act overlay for some particular subset of sites that are traditionally handled under an existing regulatory program," she said.

Possible EPA Action

Before the Supreme Court heard oral arguments in the Maui case, the EPA issued interpretive guidance asserting that there were no circumstances where a NPDES permit could be required for a source if a discharge touched groundwater. That was a reversal from the position the agency had held for years, and the high court skewered that change.

The justices noted that no party asked the court to give deference to the agency's interpretation. They said that even had someone done that, it would likely not have succeeded.

"As we have explained, to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes." the majority said. "Such an interpretation is neither persuasive nor reasonable."

Now the EPA is faced with a decision: Update its guidance on CWA and discharges to groundwater, craft a new rulemaking, or perhaps give the issue a break until after the upcoming election.

"I don't see there being enough time to crank out some sort of a notice and comment rulemaking," Chung said. "Would they try another interpretative statement that would be framed as guidance to EPA regions or NPDES permit writers on how to apply the functional equivalence test? That's something that could be within the realm of possibility. But I'm not sure they would take the time to really clarify that, given COVID priorities and/or whatever else is on their rulemaking agenda."

--Editing by Brian Baresch.