The Basics of the Clean Water Act:

County of Maui v. Hawai'i Wildlife Fund

Prof. Sara Colangelo
Director, Georgetown Environmental Law & Policy Program

Background

- Factual history
  - Lahaina wastewater reclamation plant collects sewage, partially treats it, and injects that mixture into four wells hundreds of feet underground
  - Effluent travels half-a-mile, then emerges from submarine fissures
  - Plant conveyed excess nutrients and pathogens to a popular coral reef snorkeling spot, Kahekili Beach

Kahekili Beach Park

Background

- Legal dispute
  - Whether the pollutants' journey through groundwater before reaching the ocean exempted the County's plant from federal permitting requirements under the Clean Water Act
  - Rare situation where everyone agreed the wells qualified as "point sources," and that the pollution from the wells reached "navigable waters"
  - But could the County do *indirectly* what they could not do *directly* under the Act; that is, discharge pollutants into the ocean without a permit

Lower court cases

- The District Court of Hawaii agreed with environmental citizen groups, finding that the discharge was **"functionally one into navigable water" because the pollutants' path to the ocean was "clearly ascertainable."** *Hawai'i Wildlife Fund v. Cty. of Maui,* 24 F. Supp. 3d 980, 998, 1000 (D. Haw. 2014)
- Role of hydrological evidence

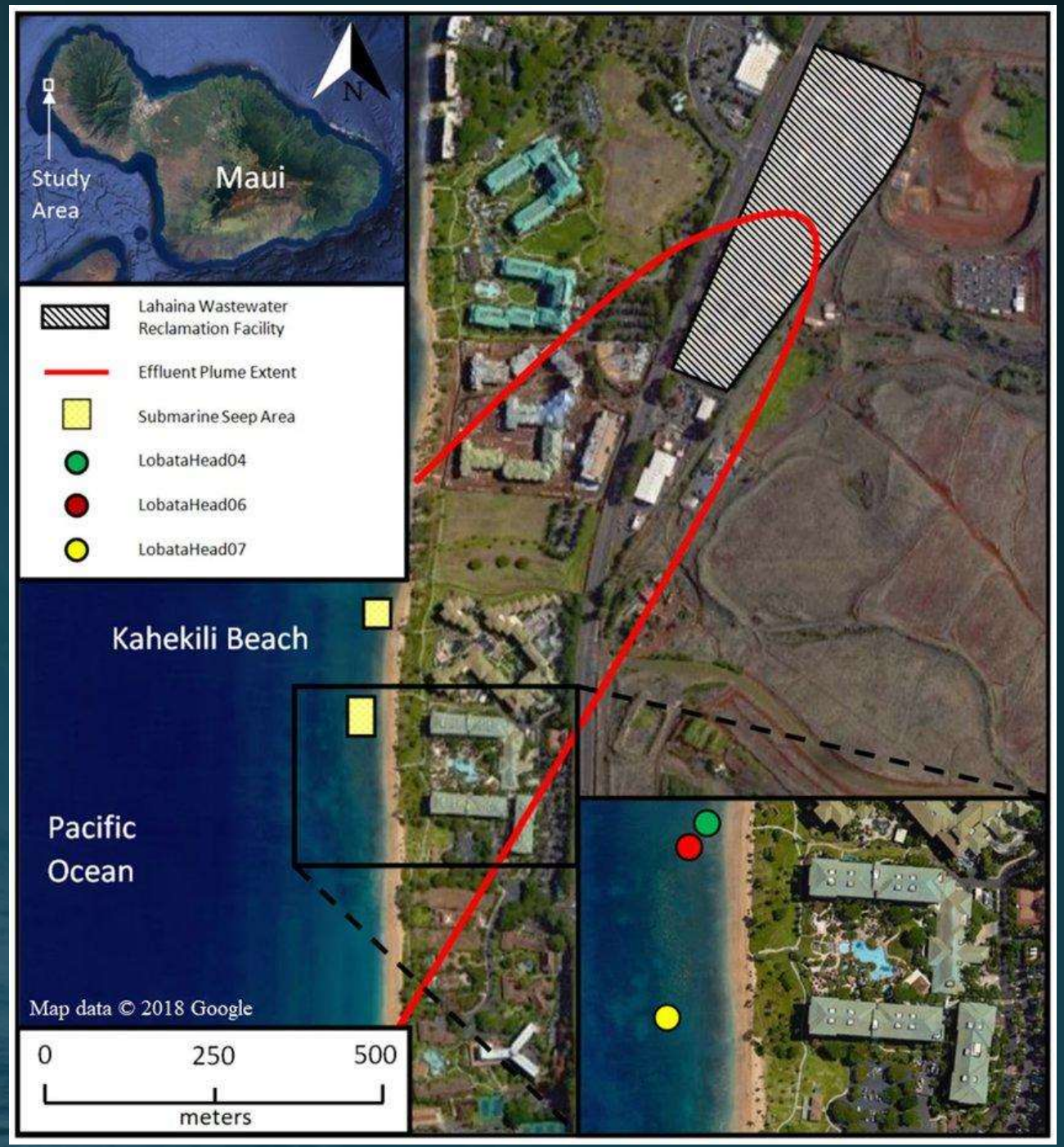
MARLEY RUTKOWSKI

Coral damage resulting from wastewater effluent discharges offshore of Kahekili Beach Park Aug. 19, 2019.

JENNIFER SMITH

Healthier, undamaged area of the reef offshore of Kahekili Beach Park away from the wastewater discharges.

via https://earthjustice.org/features/supreme-court-maui-clean-water-case



Kahekili Beach Park and Lahaina Wastewater Reclamation Facility – Groundwater dye tracer study

via Hawaii Public Radio

Lower court cases, con't

- The Ninth Circuit affirmed, but devised a novel test, holding that **permits are required when pollutants are "fairly traceable" from a point source to navigable waters.** *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018)
- Under President Obama, EPA sided with the environmentalists and advanced the Agency's decades-long position that CWA permitting requirements apply to groundwater discharges with a **"direct hydrological connection" to surface waters**
- Circuit split
  - NPDES permit required for discharges to groundwater with a "direct hydrological connection" to a point source. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018)
  - NPDES permit never required for discharges to groundwater. *Kentucky Waterways All. v. Kentucky Util. Co.*, 905 F.3d 925, 933 (6th Cir. 2018)

Supreme Court Ruling (April 23rd, 2020)

- Court ruled 6-3 that **an NPDES permit is required if the addition of pollutants through groundwater is the "functional equivalent" of a direct release into navigable waters from a point source.** Justice Breyer, joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh
- In crafting the "functional equivalent" test, the Court rejected the positions of both Petitioner and Respondent as too extreme

- Ninth Circuit test overbroad
  - Federalism concerns
  - **"The structure of the [CWA] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States."**

Supreme Court Ruling, con't

- County's "means of delivery" test too narrow
- The Trump administration filed a brief in support of Maui County, adopting a new position that discharges to groundwater are excluded from NPDES permitting, per an EPA 2019 "Interpretative Statement"
- Court dismissed that position as a road map for evasion of the Act, violating its protectionist purpose:

- **"We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the [CWA]"**
- **A discharger could "simply move the pipe back. . . a few yards, so that the pollution must travel through at least some groundwater before reaching the sea."**

Supreme Court Ruling, con't

- Crafting the "functional equivalent test"
- Linguistic analysis paired with consideration of statutory purpose and structure
- Focusing on the preposition "from" and its object "to" in the statutory text, Justice Breyer cogitated: Was the discharge to the surface water "from" the point source, the ground water, or both?
- Explored everyday usage scenarios, from travelers to meat drippings in a pan
- **"Whether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge."**

Facilitating Implementation of the "Functional Equivalent" Test

- Bounds of "functional equivalence"
  - "**Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater. . . the permitting requirement clearly applies.**" At the other end of the spectrum, Justice Breyer advised that **if the pipe "ends 50 miles from navigable waters" and "emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply."**

- Non-exhaustive list of factors to consider:
  - (1) transit time; (2) distance traveled; (3) nature of the material through which pollutants travel; (4) extent to which pollutants are diluted or chemically altered through the travel; (5) amount of pollutant entering the navigable waters relative to leaving the point source; (6) manner by or area in which the pollutant enters navigable waters; and (7) degree to which pollution maintains its identify during transit

Concurrence and Dissents

- Justice Kavanaugh's concurrence invoked Justice Scalia both in overt reference to his opinion in *Rapanos*, and in a fervent commitment to textualism regardless of its outcome
- Justices Thomas and Gorsuch dissented, arguing the majority's reading was not supported by the statutory text
- Justice Alito dissented separately to emphasize the ruling created a vague standard, "**invit[ing] arbitrary and inconsistent application**"

- Because the Ninth Circuit applied a broader legal standard, **the Court vacated that judgment and remanded the case for analysis under the "functional equivalent" test**

Supreme Court Ruling, con't

- Opinion rooted in statutory purpose
  - Justice Breyer repeatedly invoked the purposes animating the CWA in the same breath as its language and structure. This is a rarity in modern opinions!
- Exemplified current administration's view (shared by some on the Court) that *Chevron* deference is outmoded
  - The Solicitor General never asked for *Chevron* deference, and argued simply that the Court should follow EPA's Interpretive Statement
- None on the Court deferred to EPA view. But EPA's long-standing administrative practice still influenced the majority, likely assuaging federalism concerns. The Court remarked that when EPA followed the "direct hydrologic connection" test, there was no "**unmanageable expansion of the program.**"

County of Maui Potential Impacts

- Will *County of Maui* will significantly expand the universe of permitees under the Act? To what extent will "functional equivalence" actually differ from EPA's prior interpretation based on "hydrologic connection"?

- For now - Justice Breyer's prescriptions for implementation:
  - invites EPA to provide specificity through guidance and regulations
  - suggests EPA and states could develop general permits for common situations
  - notes "functional equivalence" will become more precise as district courts apply it
  - encourages judges to exercise their discretion when setting penalties under the Act, **"mindful" of "when. . . a party could reasonably have thought that a permit was not required."**

- Can surmise there is neither appetite nor, perhaps, time for the Trump Administration to promulgate such technical regulations
- Likely to be little devotion of resources to government enforcement against indirect dischargers by this EPA
- May see citizen groups pursue claims under "functional equivalence" for certain agricultural, mining, or other industrial dischargers
- States with delegated NPDES program authority may outline how the factors should be balanced as they issue permits
- BNSF railroad implementation examples to come!

Concluding observations

- Critics lament the majority's standard as creating insufferable uncertainty and an invitation to litigate

- Ultimately, *County of Maui* maintains crucial protection for our waters
  - Court faithful to the Act while respecting states' roles
  - Timing – same week as Trump administration's separate regulation limiting federal jurisdiction of the CWA and excluding groundwater in its entirety -- more on "WOTUS Rule" to come
  - May provide additional/stronger grounds for challenging The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (April 21, 2020). *E.g., Chesapeake Bay Foundation, Inc. et al. v. Wheeler et al.*, 1:20-cv-01063 D. Maryland (April 27, 2020).

THANK YOU!

Sara Colangelo

Sac54@law.georgetown.edu