

EPN “All Hands” Call, Friday, May 15, 2020

Last week’s all-hands call discussed two recent U.S. Supreme Court rulings on the Clean Water Act (CWA) and the Superfund Program, respectively. (Information on presenters is below.)

County of Maui v. Hawaii Wildlife Fund

Mark Ryan and Betsy Southerland led a conversation on the Supreme Court’s April 23, 2020, 6-3 decision rejecting EPA’s interpretation of the CWA.

In the case of Maui v. Hawaii Wildlife Fund, a discharge from a Publicly Owned Treatment Work (POTW) via groundwater made its way into the ocean impacting coral reefs. The POTW argued that it did not need to attain a National Pollutant Discharge Elimination System (NPDES) permit because of the non-jurisdictional nature of groundwater. The Court, which rejected this interpretation, stated that although groundwater is not considered “Waters of the United States” (WOTUS), it does serve as a conduit to WOTUS, therefore requiring an NPDES permit to discharge to the ocean. If the court had ruled differently, it would have given companies free rein to pollute surface water sources by discharging to hydrologically-connected groundwater without a permit.

The Supreme Court’s decision provided a new test for deciding whether discharges to groundwater are a functional equivalent of a direct discharge. The test is composed of seven considerations, with the most prominent being transit time and distance traveled. Although the implications of the case are still unfolding, this case is unlikely to spur an explosion of new hydro-connection cases because it does not reflect a significant departure from most prior court cases.

Atlantic Richfield Co. v. Christian

Robert Verchick and Bill Muno gave a presentation on the Supreme Court’s April 20, 2020, 7-2 decision, which clarified the limits on the ability of landowners located on Superfund sites to pursue state remedies against Superfund site owners.

This case hinged on the old Anaconda copper smelter in Butte, Montana, which operated from 1884 to 1980. The smelter contaminated the surrounding area with heavy metals and became an early Superfund Site in 1983. Atlantic Richfield Co. (ARCO) bought Anaconda in 1977. ARCO, as the potentially responsible party (PRP) of the site, paid \$470 million in remediation costs while working in tandem with EPA. Residents did not believe the remediation went far enough and sought state remedies. The landowners claimed that EPA’s 1996 Record of Decision (ROD) set a higher arsenic limit (250 ppm) than what they considered safe (8 ppm), allowing ARCO to remedy the site at unsafe levels.

The case, which made it to the Montana Supreme Court, awarded the residents additional money from ARCO to be used for subsequent remediation. ARCO challenged this ruling, arguing that under CERCLA, EPA’s 1996 determination precluded residents from seeking additional compensation. ARCO also claimed that the residents are PRPs and therefore must seek EPA approval under CERCLA before engaging in remedial action. The Supreme Court in its ruling held that the landowners were PRPs, and sent the case back to the Montana Supreme Court for further consideration.

Montana's law is more generous than that of many states in awarding restoration damages to landowners. For that reason, the practical effect of the holding will be limited. That said, this case is important in clarifying the rights of residents located on Superfund sites.

Presenters

Mark Ryan is a former EPA Regional Counsel, Region 10, where he specialized in the Clean Water Act (CWA), both enforcement and permitting; and former Special Assistant US Attorney, where he litigated CWA cases on behalf of the Department of Justice.

Betsy Southerland is a former Director of the Office of Science and Technology in EPA's Office of Water, where she worked on Superfund and water issues.

Robert Verchick is a former Deputy Associate Administrator for Policy at EPA, where he helped develop climate adaptation policy.

Bill Muno is a former Superfund Director, Region 5, where he managed the largest regional Superfund program in the US for the last 12 years of his career.