

## Elections Recap and Policy Updates

Thursday, November 5, 2020, Session 5 – Deantha Skibinski, AMA, Chair

### Implications of the Supreme Court's *Maui County* Decision for the Mining Industry

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The Supreme Court's decision in *County of Maui* disrupted long-settled understandings of the scope of the Clean Water Act and has created uncertainty for the mining industry and others. The Court's ruling not only expands the discharge pathways subject to NPDES permitting, but also suggests that federal permits might be required for surface discharges dozens of miles and decades away from a traditional navigable water.

Courts and stakeholders have famously struggled to define which surface waters are regulated under the Act. Although the statutory synonym for a "water of the United States" (WOTUS) is "navigable water," courts have long agreed that Congress intended to regulate more than waters that are navigable-in-fact. At the same time, it has long been understood that discharges to groundwater unconnected to surface waters were not subject to federal regulation. So, despite uncertainty about when discharges to wetlands or intermittent streams require a Clean Water Act permit, it has been understood that subsurface injections and discharges to groundwater generally did not.

In *Maui*, however, the Court held that the Clean Water Act regulates discharges into underground waters that impact surface waters "if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters." That ruling brought an unceremonious end to the modest regulatory certainty offered by the Trump administration's Navigable Waters Protection Rule.

Had the Court's opinion been limited to its unique facts, the looming fallout might not be so severe. In that case, the underground injections were a half mile away from the Pacific Ocean, which is indisputably a WOTUS, and there was no dispute that at least some of the discharge was reaching the ocean within a few months. However, the Court established a new "functional equivalence" test and the majority opinion, written by Justice Breyer, provided little guidance on its interpretation, suggesting that discharges to groundwater many miles from navigable waters might be subject to regulation.