

**Clean Water: 2021**

March 9, 2021, 12:30 p.m.—3:30 p.m.

*Via* Microsoft Teams

12:30—12:40 p.m. **Welcome and Introduction**

Terri Matthews, Esq., Director, Town+Gown:NYC

12:40—1:40 p.m. **Recent Cases of Interest**

Amanda Aspatore, Chief Legal Counsel, National Association of Clean Water Agencies

Michael Burger, Esq., Executive Director, Sabin Center, Columbia University and of counsel, Sher Edling

 Roberta Larson, of Counsel, Somach Simmons & Dunn

Hilary Meltzer, Esq., Chief, Environmental Law Division, New York City Law Department

1:40—2:10 p.m. **Post-Maui Survey of “More Stringent Than” States**

Amanda Aspatore, Chief Legal Counsel, National Association of Clean Water Agencies

Hilary Meltzer, Chief, Environmental Law Division, New York City Law Department

Brandeis Tilleman, Brooklyn Law School, Class of 2021

2:10—3:10 p.m. **Public Water and Wastewater Utilities —New York City Water Finance Authority Case Study**

Prescott Ulrey, General Counsel, New York City Department of

Management and Budget

 Sol Posada, P.E., Chief, Infrastructure Southeast Queens, New York City Department of Environmental Protection

 Olga Chernat, Executive Director, New York City Water Finance Authority

 Damian Busch, Director, Public Finance, Barclays

3:10—3:30 p.m. **Questions and Answers—General Discussion**

CLE credit for this event will be available for licensed New York State attorney for 3.0 transitional and non-transitional professional practice credits.

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* TAB 3-B—**Post-Maui Survey of “More Stringent Than” States**
	+ Brooklyn Law School and Fordham Law School Students Memo on *Maui* Decision and “More Stringent than” States (separate document)

*NOTE: This multi-state survey memorandum was prepared exclusively by Brooklyn Law School and Fordham Law School students for the New York City Law Department and the National Association of Clean Water Agencies (NACWA), as clients under Town+Gown:NYC's experiential learning component, and does not represent the positions of either the New York City Law Department or NACWA. See* [*https://www1.nyc.gov/site/ddc/about/town-gown.page*](https://www1.nyc.gov/site/ddc/about/town-gown.page) *and* [*https://www1.nyc.gov/site/ddc/about/town-gown-components.page#action*](https://www1.nyc.gov/site/ddc/about/town-gown-components.page#action)*.*

*Town+Gown:NYC is an open platform research program that uses* [*service (experiential) learning*](https://www1.nyc.gov/site/ddc/about/town-gown-components.page#action) *and* [*faculty-directed research*](https://www1.nyc.gov/site/ddc/about/town-gown-components.page#funded) *to facilitate partnerships between academics and practitioners on applied built environment research projects through the* [*collaborative inquiry model of systemic action research*](https://www1.nyc.gov/assets/ddc/downloads/town-and-gown/What%20Does%20Action%20Research%20Mean%20and%20How%20Does%20It%20Work.docx)*.  Town+Gown:NYC aims at increasing evidence-based analysis, information transfer, and understanding of the built environment, using, in many instances, New York City's built environment as a laboratory for practitioners working in the city's physical spaces, and academics in the built environment disciplines, with the ultimate objective of informing changes in practices and policies based on research results. Town+Gown:NYC develops 3-6 Symposium events each year, many of which are based on experiential learning project results. See* [*https://www1.nyc.gov/site/ddc/about/town-gown-archives.page#symposia*](https://www1.nyc.gov/site/ddc/about/town-gown-archives.page#symposia)*.*

*In this experiential learning project, Town+Gown:NYC worked with Brooklyn Law School's clinic program and the New York City Law Department worked with Fordham Law School's clinic program. These in-kind exchanges, where students provide their newly learned skills and practitioners provide real problems with real data and other information to produce knowledge, are a vital component of the Town+Gown:NYC program, providing benefits to both students and practitioners. This multi-state survey memorandum is the student's work product, which they can use as written materials when seeking employment. This Clean Water 2021 symposium event is the first symposium event using student work product as the basis of the event in near real time.*

* TAB 3-C—**Public Water and Wastewater Utilities —New York City Water Finance Authority Case Study**
	+ New York City Water Finance Authority Statute (separate document)
	+ New York City Water Finance Authority Official Statement (separate document)
	+ Presentation Documents (separate documents)

TAB 1

**Faculty Biographies**

**Amanda Aspatore**, Chief Legal Counsel at the National Association of Clean Water Agencies (NACWA) in Washington, D.C., represents public wastewater and stormwater agencies of all sizes nationwide on legal, regulatory, and policy matters to ensure they have the tools necessary to provide affordable and sustainable clean water for all. Prior to joining NACWA, Ms. Aspatore worked as the Associate General Counsel, Litigation & Environment at the Edison Electric Institute and the Vice President, Water Law & Policy at the National Mining Association. Ms. Aspatore also served as a law clerk in the Twelfth Judicial Circuit of Virginia and the U.S. Department of Transportation’s Office of Hearings. Ms. Aspatore has received certification from the U.S. Environmental Protection Agency’s Water Quality Standards Academy, and is a graduate of the William and Mary School of Law, where she served on the Environmental Law and Policy Review, and Washington and Lee University. Ms. Aspatore is admitted to practice in Virginia.

**Michael Burger** is the Executive Director of the Sabin Center for Climate Change Law, and a Senior Research Scholar at Columbia Law School. His research and advocacy focus on legal strategies to reduce greenhouse gas emissions and promote climate change adaptation through pollution control, resource management, land use planning and green finance.  Mr. Burger frequently collaborates with researchers across Columbia's Earth Institute, and with local and national environmental groups, government representatives, and international organizations. He is a widely published scholar, a frequent speaker at conferences and symposiums, and a regular source for media outlets. He is the editor of two recent books: Combating Climate Change with Section 115 of the Clean Air Act: Law and Policy Rationales (2020) and Climate Change, Public Health and the Law (2018).  He also is of counsel at the environmental law firm Sher Edling LLP.  Prior to joining the Sabin Center, Mr. Burger was an associate professor at Roger Williams University School of Law, an assistant professor in the Lawyering Program at New York University School of Law, and an environmental attorney for New York City’s Office of the Corporation Counsel. He is a graduate of Columbia Law School and of Brown University and holds a Master of Fine Arts degree from the Creative Writing program at NYU. Mr. Burger is admitted to practice in New York.

**Damian Busch** is a Director, Public Finance at Barclays, and is an adjunct lecturer at Columbia University School of International and Public Affairs, having advised on several completed Town+Gown experiential learning projects. He has a Masters in Financial Markets from Illinois Institute of Technology and a Finance degree from Loyola University Chicago.

**Olga Chernat**, Executive Director, NYC Water Finance Authority was appointed Executive Director of the New York City Municipal Water Finance Authority (NYW) in May 2017. Ms. Chernat is responsible for managing the Authority’s $31 billion debt, derivatives and investment portfolio. In addition, she and her team execute a $2 billion annual debt issuance program to finance the City’s water and sewer system.

Prior to returning to NYW, Ms. Chernat was Deputy Director of Finance at the New York State Metropolitan Transportation Authority. Ms. Chernat had previously served as Treasurer and Deputy Treasurer at NYW. She started her public finance career as an Assistant Vice President at Roosevelt & Cross, Inc., a municipal broker‐dealer. Ms. Chernat earned a B.B.A. degree in Finance and Investments from the City University of New York in 2002 and achieved a Chartered Financial Analyst (CFA) designation in 2008. She has received industry accolades including the Trailblazing Women in Public Finance award in 2019. Olga is a member of the Government Finance Officers Association (GFOA) Committee on Debt Management.

**Roberta L. Larson**, of Counsel at Somach Simmons & Dunn, returned to Somach Simmons & Dunn after serving nearly eight years with the California Association of Sanitation Agencies (CASA) as executive director. Ms. Larson's legal career has been underscored by an unwavering commitment to water quality advocacy and her practice emphasizes water quality law, recycled water permitting, environmental litigation, and regulatory advice. During her tenure as CASA’s chief executive (2012-2019), Ms. Larson was recognized for building and nurturing a high-functioning, cohesive team of staff and consultants, allowing for efficient and effective advocacy on behalf of California municipal wastewater agencies and she now serves as a special advisor to the organization, where she provides strategic advice and support on regulatory issues and special projects. Ms. Larson holds a JD from the University of the Pacific, McGeorge School of Law and is admitted to practice in California.

**Terri Matthews** is Director of Town+Gown:NYC. A graduate of Boston College, Boston College Law School and New York University Wagner Graduate School for Public Service, Ms. Matthews has worked in both the public and private sectors. In addition to her public finance law experience at several national bond firms, Ms. Matthews' governmental experience at New York City spans both the legislative and executive branches. Her areas of focus have included public budgeting, public finance, performance measurement, public procurement and built environment public policy. She is admitted to practice in Massachusetts and New York.

**Hilary Meltzer**, Chief, Environmental Law Division at the New York City Law Department, is a graduate of Yale Law School and joined the Environmental Law Division in 1992. Prior to becoming Environmental Law Division Chief in 2019, Ms. Meltzer's work focused largely on the City's water supply system, working closely with the City's Department of Environmental Protection, which operates the City's water supply, on a wide array of watershed protection programs and on issues relating to the operation of the drinking water system. Ms. Meltzer is also co-chair of the Legal Affairs Committee of the National Association of Clean Water Agencies, and co-teach a clinic, Representing the City, at NYU Law School. Ms. Meltzer is admitted to practice in New York.

**Sol Posada**, P.E., Chief at the Infrastructure Southeast Queens division at the New York City Department of Environmental Protection, is a New York State licensed Professional Engineer and holds a Bachelor of Engineering from The City college of New York.  She has 20 years of experience in the environmental engineering field – water and wastewater treatment, and has been with the DEP for 6 years and currently oversees the Southeast Queens program.

**Brandeis Tilleman**, a 2021 graduate of Brooklyn Law School, has a B.A. in economics and a Masters of Public Policy from the University of Calgary. In addition to working on the *Maui* memo, as an intern under BLS's public service grant, Mr. Tilleman has also worked as an intern at Martinez & Ritorto, P.C., and the New York City Law Department.

**Prescott D. Ulrey**, General Counsel at the New York City Office of Management and Budget, also serves as Secretary of the New York City Municipal Water Finance Authority.  He holds a BA from the University of California at Berkeley, an MA from the Fletcher School at Tufts University, and a JD from Columbia Law School.  He is also an Adjunct Professor of Public Finance and Corporate Finance at New York Law School.  Mr. Ulrey is admitted to practice in New York.

Tab 2

**Educational Objectives**

**Brooklyn Law School will grant [3] CLE credits for each day to attorneys admitted to practice in New York.**

This is the first Town+Gown:NYC Symposium event that focuses entirely on a particular legal issue, although it is not the first time that Town+Gown:NYC has focused on the link between public finance and capital projects, which in this case is highlighted by additional pressure on water and sewer utilities' capital programs resulting the *Maui* decision's making the hydrological connection between inland water and surrounding water a legal connection.

**Recent Cases of Interest** will cover a survey of 2020 Cases of Interest to the Clean Water Community, which has been an annual feature of NACWA's annual conference and include a general discussion of trends in various areas.

**Post-Maui Survey of “More Stringent Than” States** will cover the results of a legal analysis of "more stringent than" states in the context of the *Maui* decision that was conducted by Brooklyn Law School and Fordham Law School students for NACWA and the New York City Law Department within the Town+Gown program. This analysis looked at when and to what extent these "more stringent than states" cover discharges to groundwater and/or from point sources reaching WOTUS via groundwater under the respective states’ NPDES programs and also applied the *Maui* decision, for each "more stringent" than state, to several scenarios, including for (1) municipal wastewater management, when sewer systems may pose risks of backup into basements and/or leaks into the ground and (2) municipal stormwater management, when green infrastructure (GI) installations, such as bioswales, may pose risk of diverting stormwater, which carries pollutants, into the ground rather than into sewers, which treat wastewater before release into surface waters (the operational scenarios).

**Public Water and Wastewater Utilities —New York City Water Authority Case Study** will outline the relation of project finance and project delivery in a heavily-regulated environment and within finance capacity constraints, which are directly related to each other but are often treated separately as if unrelated. In all built environment systems, especially publicly-funded systems, finance issues—the capital budget and debt financings for construction and the expense budget for post-construction operations and maintenance—have a direct impact on system performance. Public built environment (PBE) systems at the local government level reflect the police powers of local governments, as expanded over time to include economically related areas, and mandates from the state and federal levels of government. In the case study presentation of New York City, the PBE for the city's water and sewer systems includes operation by the New York City Department of Environmental Protection and financing by the New York City Water Authority, a state-created off-budget utility. To the extent that *Maui* results in new capital needs to address the operational scenarios, it operates as an "unfunded" mandate on top of a multitude of "unfunded" mandates PBE water and wastewater systems operate, and this case study presentation forms the foundation to think about the potential impact of *Maui* on PBE water and wastewater systems' related construction and finance programs' capital program efficiency, including state of good repair; risk management profile; and, finance capacity.

TAB 3-A

**2020 Cases of Interest to the Clean Water Community**

Sent Separately

TAB 3-A

A Regulatory Morass: Hydrological Connection and the Supreme Court’s decision in [*County of Maui v. Hawai'i Wildlife Fund*](https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf)[[1]](#footnote-1)

Hilary Meltzer, Chief

Environmental Law Division

New York City Law Department

In April 2020, the U.S. Supreme Court decided the question of whether the National Pollutant Discharge Elimination System (“NPDES”) permit program under the federal Clean Water Act[[2]](#footnote-2) applies when treated wastewater is injected into underground injection control, or UIC, wells[[3]](#footnote-3) and eventually reaches the ocean. By a 6-3 majority, the Supreme Court held that a NPDES permit is required “when there is a direct discharge from a point source into navigable waters *or when there is the functional equivalent of a direct discharge.*”

The plain language of the Clean Water Act makes clear that a direct discharge from a point source into navigable waters requires a NPDES permit. In this article, I will look at what the last part of that sentence – “when there is the functional equivalent of a direct discharge” – means, focusing on the potential implications for municipal water infrastructure.[[4]](#footnote-4) While the specific facts in the *Maui* case are extremely unusual, the decision may apply to a broad array of infrastructure that could give rise to liability for the indirect discharge of “pollutants” – which are defined extremely broadly in the Clean Water Act – to surface waters.

Before turning to a discussion of municipal infrastructure that may be implicated by *Maui*, I want to clarify the relationship between the *Maui* decision and the heavily-debated (and litigated) issue of what qualifies as a “water of the U.S.” or “WOTUS” under the Clean Water Act. As explained in the accompanying article by Carolyn McIntosh, the Navigable Waters Protection Rule was finalized earlier this year, and defines which waters, including wetlands, are WOTUS, meaning that they are subject to Clean Water Act jurisdiction.

In contrast, the *Maui* case is about whether a discharge from a point source that reaches a WOTUS (that is, a water feature that meets the applicable regulatory criteria) *only indirectly* nonetheless requires a CWA NPDES permit. The Supreme Court’s answer in *Maui* is yes, if there’s a “functional equivalent” to a direct discharge. The majority opinion establishes factors to be considered in determining what constitutes functional equivalence, identifying the first two (italicized) factors as “most important factors in most cases”:

* *Transit time*
* *Distance traveled*
* Nature of the material traveled through
* Extent of changes/dilution of pollutant
* Proportion of pollutant entering navigable waters
* How and where pollutant enters navigable waters
* Degree to which pollutant at that point has maintained “its specific identify”

The decision, written by Justice Breyer and joined by Chief Justice Roberts, the late Justice Ginsburg, and Justices Sotomayor, Kagan, and Kavanaugh, created this new standard based not on specific language in the Clean Water Act itself but rather on “the underlying statutory objectives.” They were particularly concerned about not “creating loopholes that undermine the statute’s basic federal regulatory objectives.” Specifically, the majority worried that without regulating “functional equivalents” to direct discharges, a discharge of pollutants could evade regulation if there was as little as an inch of groundwater between the point source and the receiving surface water.

While the Supreme Court established these factors as the general framework for evaluating whether discharges that only indirectly reach navigable waters require NPDES permits, the Court did not actually apply this test to the facts in *Maui*, instead remanding the matter to the lower courts to do so. That litigation is scheduled for trial in the U.S. District Court in Hawaii next year. Unless the parties are able to reach a settlement, the district court will consider how the factors listed above apply to the Kahului Wastewater Reclamation Facility, which discharges treated wastewater to underground wells about half a mile from the ocean. Dye and other tracers from these wells have been detected in the ocean, traveling in the tens of feet per day – it takes 14-16 months for effluent injected into the wells to reach the ocean.

Application to Municipal Infrastructure

While the *Maui* litigation plays out, municipal utilities should consider their own infrastructure that may raise analogous issues – discharges to groundwater that eventually, indirectly, reach navigable waters. Such discharges could come from a wide range of infrastructure, and could be either accidental or intentional.

For instance, drinking water distribution pipes may leak, leading to a discharge of pollutants – chlorine, fluoride, or other chemicals used to treat the water – to groundwater; these chemicals could eventually find their way to surface waters.[[5]](#footnote-5) Potentially even more concerning than accidental leaks are water recycling and groundwater recharge systems where pollutants may reach surface waters. Some such discharges may be excluded from the NPDES program under the federal Water Transfers Rule (which excludes from the NPDES programs activities that convey or connect waters of the U.S. without intervening industrial, municipal, or commercial use),[[6]](#footnote-6) but that will depend on the specific facts and circumstances.

Wastewater infrastructure may pose even greater risks. Even before the Supreme Court decided the *Maui* case, building owners in Connecticut sued the Greater New Haven Water Pollution Control Authority, claiming that sewer back-ups might cause untreated wastewater to leak from basements into groundwater and then to surface waters. This legal theory – were it to prevail – could lead to an unworkable overlay of permitting obligations at random points in a publicly owned treatment works, on top of the existing regulatory framework for the system as a whole. While that lawsuit settled, *Maui* could provide a framework for analogous litigation. And there are several lawsuits – some pending, at least one recently settled – involving Clean Water Act claims based on discharges from septic systems that reach surface waters.

Similar concerns arise in the context of stormwater infrastructure. The very purpose of green infrastructure is to prevent pollutants in stormwater from entering surface waters directly, often by diverting the stormwater into the ground. If the pollutants in infiltrated stormwater can be traced to surface waters, however, the green infrastructure – which may be installed as mitigation pursuant to a stormwater NPDES permit – may itself require its own NPDES permit.

What’s Next?

As noted, the Supreme Court established the “functional equivalent” standard in the *Maui* decision, but that standard has yet to be applied by the courts to the infrastructure at issue in that case and, over the coming years, presumably in many other cases.[[7]](#footnote-7) Courts will evaluate, on a case-by-case basis, both the question of functional equivalency, based on the *Maui* factors, and also whether the discharges at issue cause or contribute to exceedances of applicable water quality standards. Given the uncertainty of these outcomes, the prospect of years of litigation is somewhat unnerving for municipal utilities.

A regulatory, or even legislative, solution would seem more attractive. Recognizing the uncertainty of future litigation, the Supreme Court explicitly invited EPA to “provide administrative guidance (within statutory boundaries) through, for example, grants of individual permits, promulgation of general permits, or the development of general rules.” And indeed on January 21, 2021, EPA published as final a short guidance memorandum, “[Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program](https://www.epa.gov/sites/production/files/2021-01/documents/final_ow_maui_guidance_document_-_signed_1.14.21.pdf).” The last couple of pages of that guidance provide some preliminary analysis of the *Maui* decision, including the welcome affirmation that municipal water management, including stormwater controls, green infrastructure, water reuse and recycling, and groundwater recharge activities, which “in fact abate discharges of pollutants,” “may be less likely” to require NPDES permits.

Consistent with the *Maui* decision, the current guidance is directly contrary to EPA’s April 2019 “[interpretive statement](https://www.epa.gov/sites/production/files/2019-04/documents/interpretive_statement_application_of_cwa_npdes_memo_-_signed.pdf?mc_cid=23686de8d6&mc_eid=0ae6873cf6)” which concluded that discharges to groundwater do not require a NPDES permit, regardless of whether the pollutants reached jurisdictional waters. Given the timing, and also the brevity of the 2021 guidance memo, it seems likely that the Biden administration will issue further guidance, and perhaps rescind this document.

Ultimately, if there is a “functional equivalent” to a discharge of pollutants to a jurisdictional water, it must meet the applicable water quality standards for that surface water, except where the Clean Water Act establishes a different standard, as it does for municipal separate storm sewer systems (MS4s – for which the standard is reducing pollutants to the “maximum extent practicable”) and combined sewer overflows, which are governed by the 1994 CSO Control Policy. While the statute could be amended to allow for an analogous approach, relying on best management practices for discharges from municipal infrastructure to groundwater where pollutants may reach waters of the U.S., Congress acting on such an amendment would seem unlikely in the foreseeable future.

Unless and until that happens, the *Maui* decision has the potential to lead to a regulatory morass, resulting in new compliance obligations based on the happenstance of where water management infrastructure may, even inadvertently, allow pollutants to enter groundwater, and how that groundwater influences surface waters, rather than on a coherent regulatory framework for the infrastructure itself. The challenge for EPA in developing permits, rules, or guidance will be to reconcile the *Maui* standard, which is triggered by individual discharge points within a system, with a programmatic regulatory approach to an entire infrastructure system.

TAB 3-B

*Maui* Memo Sent Separately

TAB 3-C

Materials on New York City Water Finance Authority

Links below and Documents Sent Separately

 NYC Water Finance Authority Act

<https://www1.nyc.gov/assets/nyw/downloads/pdf/nyw_title_2a_1045.pdf>

[https://www1.nyc.gov/site/nyw/governance/title-2-a-1045-new-york-state-public-authorties-law.page](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww1.nyc.gov%2Fsite%2Fnyw%2Fgovernance%2Ftitle-2-a-1045-new-york-state-public-authorties-law.page&data=04%7C01%7CMatthewTe%40ddc.nyc.gov%7C459db57d94d5476ab69208d8bf0ef57c%7C32f56fc75f814e22a95b15da66513bef%7C0%7C0%7C637469418253562280%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=DBYmoqweVifNi9QHv455Z%2BCh%2FFurC0OQrBD1cacafJE%3D&reserved=0)

NYC Water Finance Authority Official Statement

[https://www1.nyc.gov/assets/nyw/downloads/pdf/bond-statements/nyw-2021bb.pdf](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww1.nyc.gov%2Fassets%2Fnyw%2Fdownloads%2Fpdf%2Fbond-statements%2Fnyw-2021bb.pdf&data=04%7C01%7CMatthewTe%40ddc.nyc.gov%7Cf794275f3ea74a74968208d8bf129df7%7C32f56fc75f814e22a95b15da66513bef%7C0%7C0%7C637469433974635939%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=2%2BNBzCm6AHnb7jFzK7y9wDH%2F7NvaA8tEvOOx3Bx%2F64I%3D&reserved=0)

New York City's Preliminary 10-Year Capital Strategy

[https://www1.nyc.gov/assets/omb/downloads/pdf/ptyp1-21.pdf](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww1.nyc.gov%2Fassets%2Fomb%2Fdownloads%2Fpdf%2Fptyp1-21.pdf&data=04%7C01%7CMatthewTe%40ddc.nyc.gov%7Cf794275f3ea74a74968208d8bf129df7%7C32f56fc75f814e22a95b15da66513bef%7C0%7C0%7C637469433974635939%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=0ngrfq5M9m1nCf47KWMZpkIT%2FvfIf6g6OrB1GKimYDk%3D&reserved=0)

 Note: The section for NYC DEP starts on p.33.

1. This article is based on my presentation on a June 18, 2020 webinar of the American Water Works Association (“AWWA”), “WOTUS and Maui – Parallel Developments Impact the Clean Water Act and Source Water Protection.” I have submitted a similar version to AWWA for publication in the AWWA Journal. [↑](#footnote-ref-1)
2. One of the core elements of the Clean Water Act is that except with a NPDES permit, the “discharge of any pollutant by any person” is prohibited. “Discharge of a pollutant” is defined under the statute as “any addition of any pollutant to navigable waters from any point source.” [↑](#footnote-ref-2)
3. UIC wells are permitted under the Safe Drinking Water Act rather than the Clean Water Act. [↑](#footnote-ref-3)
4. The decision also has significant implications for industrial facilities, including leaking oil pipelines and unlined ponds that have historically been used for disposal of mining wastes. Such facilities have been the focus of most of the litigation concerning discharges of pollutants that reach surface waters only indirectly. [↑](#footnote-ref-4)
5. In California, drinking water systems, including unplanned leaks, are already eligible for coverage under a [statewide general NPDES permit](https://www.waterboards.ca.gov/water_issues/programs/npdes/docs/drinkingwater/final_statewide_wqo2014_0194_dwq.pdf), but public water systems in most states generally do not have Clean Water Act permits for such discharges. [↑](#footnote-ref-5)
6. 40 CFR § 122.3(i). The exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred. [↑](#footnote-ref-6)
7. The U.S. District Court for the District of Hawaii will apply the standard to the underground injection wells operated by the County of Maui in the first instance, unless the parties settle. A second case that had been teed up for the Supreme Court, *Kinder Morgan Energy Partners, LP v. Upstate Forever* involving the continuing migration of oil from a pipeline in South Carolina that has now been repaired, settled in October 2020. [↑](#footnote-ref-7)