Catch Transfer Water Regulatory Authority Analysis

The Program maintains its position that water used to offload raw materials from vessels for the purpose of processing is categorically seafood process water, and any operator of a point source that conveys the water must obtain an APDES permit before discharging the wastewater to WOTUS. Onshore seafood processors that discharge process wastewater from a pipe and then through a vessel, therefore, must obtain an APDES permit for that discharge, for at least two similar yet independent reasons. First, the process of loading fishing vessels with untreated seafood process water is the functional equivalent of discharging directly into the ocean. It is absurd to assert that the returned seafood process water will never be discharged to WOTUS even though the vessel operates solely in and on WOTUS. Second, an intermediary point source does not remove Clean Water Act (CWA) jurisdiction for discharges that originate in one point source and passes through an intermediary point source before being discharged directly into WOTUS.

<u>Discharging to a vessel is the functional equivalent of discharging directly to WOTUS</u>

In the Supreme Court of the United States (SCOTUS) decision *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the concept of a functional equivalent of a direct discharge to WOTUS was articulated:

> We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

Id. at 1476 (emphasis in original).

It is this concept of a functional equivalent of a direct discharge that prompted the Program to require sampling of the seafood process water prior to being discharged to vessels secured to the seafood processing facility. The data provided by the required monitoring will assist the Program in determining whether the nature of the pollutants poses a potential adverse impact to human health, aquatic life, or the environment. The Program intends to utilize the data collected during the term of the permit to assess the potential impacts, if any, and the legal authority to require sampling is supported by both regulation and the above SCOTUS ruling.

<u>All point sources are subject to CWA jurisdiction</u>

One key fact is that, eventually, all vessels that receive seafood process water from the onshore facilities discharge that water directly into the ocean. In other words, it is undisputed that a point source (the vessel) discharges the seafood process water directly to WOTUS. It is also undisputed that the vessels receive the seafood process water from a point source (a pipe) operated by the

onshore facility. That connection ultimately means the eventual discharge from the vessel to the ocean comes from the facility's pipe, and that the onshore facility is therefore subject to the CWA for that discharge.

The requestors argue, however, that their pipes discharge to a vessel, not a WOTUS, and so CWA jurisdiction does not attach to their pipes. But courts appear unanimous in rejecting that argument and concluding that, in a series of point sources leading to a direct discharge, all point sources in that series are subject to the CWA. The same *Maui* SCOTUS opinion quoted above provides a hypothetical that clearly illustrates this principle:

> Perhaps, as the two dissents suggest, the [CWA's definition of "discharge," which is "any addition" of a pollutant to navigable waters "from any point source"] could be narrowed to . . . refer only to the pollutant's immediate origin. But there is no linguistic basis here to so limit the statute in that way. Again, whether that is the correct reading turns on context. Justice THOMAS insists that in the case of a discharge through groundwater, the pollutants are added "from the groundwater." Indeed, but that does not mean they are not also "from the point source." When John comes to the hotel, John might have come from the train station, from Baltimore, from Europe, from any two of those three places, or from all three. A sign that asks all persons who arrive from Baltimore to speak to the desk clerk includes those who took a taxi from the train station. There is nothing unnatural about such a construction. As the plurality correctly noted in *Rapanos v. United States*, the statute here does not say "directly" from or "immediately" from. Indeed, the expansive language of the provision—*any* addition from *any* point source—strongly suggests its scope is not so limited.

County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1475 (2020) (emphases in original) (internal citations omitted) (alterations added).

The requestors here make the same argument about vessels that Justice Thomas made about groundwater in *Maui*: an intermediary between a point source and the WOTUS cuts off CWA jurisdiction. The *Maui* court rejected Justice Thomas' argument, and the Program does the same with the requestor's argument.

It is immaterial that, here, the intermediary between the onshore facility's point source and the WOTUS is (1) another point source that is (2) operated as a mode of transportation by a third-party, rather than groundwater. Taking each piece of the argument in turn, even the federal circuit court that held (and was eventually overturned by *Maui* for being too restrictive) intermediary groundwater cuts off CWA liability for an upstream point source agreed that an intermediary point source would *not* cut off CWA liability for upstream point sources:

> [W]hen Justice Scalia pointed out [in his *Rapanos* opinion] the absence of the word "directly" from [33 U.S.C.] 1362(12)(A), he did so to explain that pollutants which travel through multiple point sources before discharging into navigable waters *are still covered by the CWA*. . . . Justice Scalia's reference to "conveyances"—the CWA's definition of a point source—reveals his true concern. He sought to make clear that *intermediary point sources do not break the chain of CWA liability*.

Kentucky Waterways All. v. Kentucky Utilities Co., 905 F.3d 925, 936 (6th Cir. 2018), *abrogated by Cty. of Maui*, 140 S. Ct. 1462. (Emphasis added.)

The CWA carries strict liability, and so whether the intermediary point source is controlled by an independent third party is irrelevant to whether CWA jurisdiction applies to the onshore facility's point source.[1] What matters is that the wastewater passes through the requestor's initial point source (*i.e.* the wastewater is "from" the point source) before entering WOTUS from the intermediary point source. The terms of an APDES permit and the amount of penalties associated with an unpermitted discharge may be attuned to the amount of control the operator of the original point source has over the ultimate discharge, but the CWA jurisdiction and liability for the original point source are absolute.[2] That is, "[t]he fact that [a person] may discharge through conveyances owned by another party does not remove [the person's] actions from the scope of [the CWA]."[3]

As a result, the requestors are subject to the CWA for any discharge of seafood process water from vessels after the requestors convey that wastewater to those vessels.

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[1] *Cty. of Maui*, 140 S. Ct. at 1489 ("The Clean Water Act imposes a regime of strict liability backed by criminal penalties and steep civil fines. Thus, the consequences to landowners even for inadvertent violations can be crushing.") (internal quotation marks and citations omitted).

[2] *See*, *e.g.*, *Hawaii's Thousand Friends v. City & Cty. of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993) ("Courts throughout the country have held that NPDES compliance is a matter of strict liability, and a defendant's intent and good faith are irrelevant to the liability issue. . . . The fact that a violator is 'without fault' in committing violations of the Clean Water Act does not absolve the violator from penalties, although it may mitigate the amount of the penalties assessed.") (internal citations omitted).

[3] *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976); *see also San Francisco Baykeeper v. W. Bay Sanitary Dist.,* 791 F. Supp. 2d 719, 771 (N.D. Cal. 2011) ("[I]t is true that dischargers are not insulated from liability merely because they make illegal discharges via a system owned and operated by other entities."). Even under the most restrictive view of CWA jurisdiction, a permit is required whenever it is reasonably foreseeable that pollutants discharged from a point source to another point source will ultimately be discharged into WOTUS. *See id.*; *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005). As noted above, however, it is unreasonable to conclude that any seafood processor would believe that seafood process water conveyed to a vessel, which operates exclusively in or on WOTUS, would be discharged anywhere other than WOTUS.