Water Update
July 2021
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Over a year ago, the U.S. Supreme Court ruled on a case that involved discharges in groundwater making its way to Waters of the United States (WOTUS). At that time, I predicted that the ruling could have significant implications for agriculture in the MACA region. While I hope I am wrong, there are indications that those implications for agriculture are just around the corner. Before sharing the latest news, I'll briefly review the issue. The original case involved a wastewater reclamation facility operated in Maui, Hawaii that collects sewage from the surrounding area, partially treats it, and then discharges the treated water into the ground through wells. It was discovered that the treated water travelled through groundwater to the Pacific Ocean. A citizen's lawsuit was filed alleging Maui was discharging pollutants to a WOTUS (the Pacific Ocean) without a federal Clean Water Act NPDES permit. In its ruling, the Court created what it called a 'functional equivalent' test. This test defines when an action is the 'functional equivalent' of a point source discharge. The Supreme Court declared that some of the key parameters of this functional equivalent test includes transit time of the pollutant, the distance the pollutant travels, the extent to which the pollutant is diluted or is chemically changed as it travels, as well as other parameters. As to how to apply this new test, the Supreme Court stated that "courts can provide guidance through decisions in individual cases." Well, with that statement, the Supreme Court laid out the welcome mat to more citizen lawsuits.

Given the blatant invitation by the Supreme Court, several lawsuits have been filed challenging decisions not to obtain discharge permits. One case is in Montana and involves holding ponds that are used to irrigate a golf course, which is adjacent to a river. There is an underdrain pipe system that carries groundwater into the river. The court here has ruled that there is insufficient evidence for determining the source of the nitrogen in the groundwater as well as lack of information related to time, distance traveled, and dilution of the water sampled. Cases have also been filed in Illinois, New York, and in other states. At this time, I am unaware of any cases that specifically involve agriculture, but a case could be filed at any point. There continues to be threats of lawsuits

involving agriculture nutrients and pesticides entering navigable waters through underground tiling in agricultural fields.

Since the Supreme Court ruling, the EPA released guidance on how to apply the Court's ruling. MACA was involved in the drafting of comments on this guidance through its participation in the Federal Water Quality Coalition (FWQC). We were generally pleased with the guidance issued by EPA. The guidance recognized that EPA's jurisdiction is limited to regulating the discharge of pollutants from a point source, not a non-point source such as agriculture. The guidance recognized the uncertainty by which fertilizers and pesticides applied to crop fields might reach groundwater, depending on factors such as soil conditions, rainfall patterns, and the various agronomic practices used. Bottomline, the guidance that was issued by EPA would help prevent the Supreme Court's ruling from being used by environmental groups to overregulate agriculture. The guidance was developed during the Trump Administration. Today, the Biden Administration is considering whether to revise this guidance. We are urging EPA to keep the current guidance and not revise it.

MACA will continue to monitor the lawsuits, monitor EPA actions, and continue to engage on this issue.

Each month Steve provides an update on a current water issue. Please share this information with the appropriate people in your company. ~ Bonnie McCarvel, MACA Executive Director.