

U.S. Supreme Court Splits the Difference on CWA Permitting for Groundwater Discharges

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On April 23, 2020, the U.S. Supreme Court issued a decision in *County of Maui, HI v. Hawaii Wildlife Fund* holding that the Clean Water Act (“CWA”) requires a permit when there is a direct discharge from a point source into groundwater only when that discharge is the “functional equivalent” of a direct discharge into navigable waters. The court declined to impose a bright-line rule for when that rule is satisfied, instead opting for a multi-factor test to be applied on a case-by-case basis. The court’s decision is expected to have a major impact on pending litigation involving similar discharges from coal ash ponds and underground pipelines, as well as recent guidance and rulemakings issued by the U.S. Environmental Protection Agency (“EPA”).

Background: The Clean Water Act and Indirect Discharges

The CWA prohibits discharges of pollutants from “point sources” to navigable waters without a National Pollutant Discharge Elimination System (“NPDES”) permit from the EPA or an authorized state. “Point sources” are defined as any “discernable, confined and discrete conveyance” from which pollutants are or may be discharged. For purposes of CWA compliance, traditional point sources are thought to include facilities such as industrial plants and municipal sewage treatment plants that discharge directly into navigable waters. However, “indirect” discharges, such as discharges to groundwater, have been the topic of increased discussion. Indirect discharges can result when pollutants originating from a point source are not directly discharged into navigable waters, but eventually reach navigable waters after migration or transport through soil or groundwater. Environmental groups have taken the position that even an unintentional discharge that later reaches navigable waters could be brought within the scope of the CWA and require an NPDES permit. Circuit courts have grappled with

this issue, including the U.S. Court of Appeals for the Ninth Circuit in this case, before the Supreme Court stepped in with its ruling.

District Court and Ninth Circuit Rulings in *County of Maui, HI v. Hawaii Wildlife Fund* and Related EPA Actions

In lower court decisions, the U.S. District Court for the District of Hawaii held that wastewater injections to wells owned and operated by the County of Maui that ultimately reached the ocean via hydrologically connected groundwater, were subject to CWA jurisdiction and required an NPDES permit regardless of how the pollutant got there. The Ninth Circuit affirmed, holding that a permit is required when pollutants in more than *de minimis* amounts are “fairly traceable from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”

In April 2019, in response to the Ninth Circuit’s decision, as well as a similar decision in the Fourth Circuit, EPA issued an Interpretative Statement on the application of CWA permitting requirements to groundwater. EPA concluded that releases of pollutants to groundwater were “categorically excluded” from the CWA’s permitting requirements because “Congress explicitly left regulation of discharges to groundwater to the states and to EPA.” In issuing the Interpretative Statement, EPA acknowledged that the guidance would not apply in the Fourth and Ninth Circuits and that, given that a petition for writ of certiorari had recently been granted in the *County of Maui* case, the agency might need to revisit the Interpretative Statement at a later date.

U.S. Supreme Court Decision

In a 6-3 opinion, the Supreme Court rejected both parties’ arguments in favor of a middle-ground approach, holding that the CWA 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.

The court rejected the Ninth Circuit’s “fairly traceable” standard, finding it overly broad and a clear infringement on Congress’ intent to leave regulation of groundwater to the states. The court also rejected the local and federal governments’ argument that discharges to groundwater should be totally excluded from the CWA, concluding that

such a bright-line rule could create a loophole pursuant to which regulated entities could intentionally circumvent permitting requirements.

In establishing the “functional equivalent” standard (defined to mean “the discharge reaches the same result through roughly similar means”), the court left the question of when a discharge to groundwater is “functionally equivalent” to a direct discharge to the lower courts, creating a multi-factor test to be used as guidance. The factors for consideration include (i) transit time and distance traveled (e.g., short distances would require a permit, longer distances likely would not); (ii) the nature of the material through which the pollutant travels; (iii) the extent to which the pollutant is diluted or chemically changed as it travels; (iv) the amount of pollutant that ultimately enters navigable waters (as compared to the amount initially discharged from the point source); (v) the manner by or area in which the pollutant enters the navigable waters; and (vi) the degree to which the pollutant has maintained its specific identity. The court noted that “time and distance will be the most important factors in most cases, but not necessarily every case.”

The court vacated and remanded the case to the Ninth Circuit to apply the functional equivalent standard.

Looking Ahead

The court noted that, in the absence of a bright-line rule, it will be up to lower courts to provide further guidance through decisions (applying the functional equivalent standard and multi-factor test) in individual cases, which will help to further refine the standard. Shortly after handing down the ruling in *County of Maui*, the court also remanded a similar case to the Fourth Circuit, *Kinder Morgan Energy Partners LP v. Upstate Forever*, for application of the new “functional equivalent” test. In addition, the decision is expected to come into play in continuing coal ash pond litigation.

The court further opined that EPA could also assist by providing administrative guidance within statutory boundaries through individual permit approvals, promulgation of general permits or development of general rules. Of note, the *County of Maui* decision came just days after EPA and the Army Corps of Engineers published a new water jurisdiction rule, the Navigable Waters Protection Rule (the “NWPR”). The NWPR is the second step in the Trump administration’s plan to repeal and replace the 2015 “Clean Water Rule” defining “waters of the U.S.” The new rule narrowly defines navigable waters and is expected to be subject to a number of litigation challenges.

The court's middle-ground approach and rejection of EPA's narrow reading of the CWA is expected to be used to bolster the challenges to the NWPR.

In the short term, determining which industry activities involving indirect discharges require permits may be less clear, but the middle ground struck by the court in *County of Maui* is not as likely to cause the upheaval that may have resulted if the court had completely sided with any particular party. It will be helpful to keep a close watch on the Ninth Circuit's and other courts' application of the new standard. Given the upcoming election season, it remains to be seen whether EPA will work to revise its Interpretative Statement, issue further guidance interpreting the decision or revisit recent rule-makings affected by the *County of Maui* decision.

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