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Supreme Court's New "Functional Equivalent" Test Impacts Lower Court Decisions and Pending Petitions for Review, May Extend to Other Pollution Sources

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Supreme Court Issues Major Decision on Reach of Clean Water Act: *Maui* Decision Muddies the Waters of the NPDES Program

The United States Supreme Court has finally weighed in on whether discharging pollutants to groundwater constitutes a discharge to waters of the United States and triggers the need for a discharge permit under the federal Clean Water Act (CWA). This question and similar issues have been visited several times over the past few years by different circuit courts, resulting in disparate outcomes. In an opinion authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kagan, Ginsberg, Sotomayor, and Kavanaugh, who wrote a separate concurring opinion, the Court's answer is that a discharge permit is required when the discharge to groundwater is the functional equivalent of a direct discharge to navigable waters. To guide the United States Environmental Protection Agency (USEPA) and the state environmental agencies charged with making the determination, the Court identifies a non-exclusive list of seven criteria which may be considered in determining whether a discharge to groundwater is functionally equivalent to a discharge to navigable waters. Whether these criteria provide sufficient guidance or serve as an invitation for arbitrary and inconsistent application, as expressed in Justice Alito's dissent, remains to be seen.

On April 23, 2020, the Court issued its long-awaited opinion in the matter of [County of Maui v. Hawaii Wildlife Fund, et al.](#), concerning pollution discharges to groundwater under the CWA. The Court's decision significantly expands the point source program while reducing the scope of the nonpoint source program. In doing so, the Court also clarified the differing standards used by the Circuit Courts of Appeal in applying the CWA and answered the same or similar question posed by three other cases that had petitioned for or been granted certiorari review (*Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018)(groundwater that is "sufficiently connected" to navigable waters will allow citizen suit to enforce permit requirements under the CWA); *Tennessee Clean Valley Network v. Tennessee Valley Auth.*, 905 F.3d 436 (6th Cir. 2018)(discharges to groundwater excluded from permitting required under the CWA); and *Kentucky Waterways Alliance, et al v. Kentucky Util. Co.*, 905 F.3d 925 (6th Cir. 2018)(discharges to groundwater not made via "discrete conveyance" are excluded from the CWA)). The Court, in granting the petition for certiorari, focused on answering only the question regarding the conveyance of pollutants to navigable waters via groundwater and declined to decide whether the County had fair notice that a CWA permit was needed.

The underlying facts involve the County of Maui's Lahaina Wastewater Reclamation Facility, operational since the 1970s, which receives sewage and then discharges treated wastewater into underground injection wells (long pipes) that extend 200 feet or more below ground level. Some of this discharge enters an aquifer below the facility. Pollutants that originated at Maui's wastewater facility (a point source) ultimately ended up in the Pacific Ocean (a navigable water). In its 40 years in operation, the facility never had a National Pollution Discharge Elimination System (NPDES) permit for discharges from the wells, a fact known to both the USEPA and the Hawaii Department of Health (HDOH), as the wells were considered to be regulated under other state and federal environmental programs, including the CWA's nonpoint

source program. (A closer reading of the opinion below demonstrates that as of April 2014, the HDOH was still in the process of determining whether a NPDES permit was “applicable” to the well discharges, and the wells remained unpermitted under state and federal law. See *Hawaii Wildlife Fund v. County of Maui*, 866 F.3d 737, 752 (9th Cir. 2018)).

In 2012, the Hawaii Wildlife Fund filed a citizen suit claiming that the Lahaina facility was violating the CWA by discharging pollutants into the ocean without a NPDES permit. The County of Maui, supported by the Solicitor General as amicus curiae, argued it did not need a permit since the pollutants traveled through groundwater before reaching the ocean, and therefore the pollutants did not come “from” the Lahaina facility. Under the County of Maui’s interpretation, a permit was required only if a point source directly discharges the pollutant to navigable waters.

The Supreme Court scrutinized the line between point and nonpoint source pollution; specifically, whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. In the 6-3 decision, the Court ultimately held that the CWA requires a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters. Justices Alito and Thomas filed dissenting opinions, with Justice Gorsuch joining Justice Thomas’ dissent. Though the majority and dissenting opinions parse defined terms, grammar, and statutory construction, the majority concluded that the Ninth Circuit had gone too far in categorically concluding that all groundwater discharges were point source in nature, while rejecting interpretations of the CWA that would “open a loophole allowing easy evasion of the statutory provision’s basic purposes.”

The Court rejected the County of Maui’s argument that its discharges were not regulated by the CWA’s NPDES permitting requirement, concluding that it risks “serious interference with EPA’s ability to regulate point source discharges, and Congress would not have intended to create such a large and obvious loophole in one of the CWA’s key regulatory innovations.” The Court also rejected the Ninth Circuit Court of Appeals’ approach, that a permit is required whenever “pollutants are fairly traceable from the point source to a navigable water,” as such a test could allow USEPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release, and Congress did not intend to provide USEPA with such broad authority.

Recognizing the difficulty in evaluating whether a discharge of pollutants to groundwater that eventually flows to navigable waters is the “functional equivalent of a direct discharge,” the Court provided several factors that may prove relevant, depending upon the circumstances of a particular case: 1) transit time; 2) distance traveled; 3) the nature of the materials through which the pollutant travels; 4) the extent to which the pollutant is chemically changed as it travels; 5) the amount of pollutant entering the navigable waters relative to the amount of pollutant that leaves the point source; 6) the manner by or area in which the pollutant enters the navigable waters; and 7) the degree to which the pollution (at that point) has maintained its specific identity. The Court suggested *time and distance* would, in most cases, be the most important factors.

The *Maui* decision represents a middle ground between the Ninth Circuit’s “fairly traceable” interpretation and the total exclusion of all discharges through groundwater. While reasoned, the decision nevertheless represents a departure from 40 years of Clean Water Act practice. It significantly increases the scope of point source regulation and reduces the role of state regulation via nonpoint source management programs.

The decision also leaves significant discretion to USEPA and authorized states to make “functional equivalent” determinations on a case-by-case basis. As such, the decision is likely to impact dischargers disparately, including for example, based on geographic location. In Florida, for instance, the presence of Karst limestone geology features like sinkholes, sandy soils, and a very shallow aquifer throughout the state means there are few areas within the state where groundwater is not close to navigable waters under a time and distance analysis. By way of example, in April 2003, the Miami-Dade County Department of Environmental Resource Management conducted a dye test that showed red dye injected into the shallow aquifer 100 meters from a wellhead took only *four hours* to migrate to its public water supply wellfields—surpassing 48 hour estimates. Florida’s numerous rivers, creeks, lakes and streams would all be considered navigable waters or waters of the US by even revised definitions, and unpermitted discharges to groundwater that

quickly reach those water bodies may be a target for enforcement. Conversely, in other areas where the geological substrate is less porous, and groundwater flows more slowly, the time and distance needed for groundwater to travel to navigable waters could mitigate against needing to obtain a permit for groundwater discharges.

After *Maui*, the determination of “functional equivalent” discharges will likely be made on a case-by-case basis for permit evaluation. Those who may be discharging to groundwater without a NPDES permit should internally evaluate whether their current discharges would meet this new standard.

UPDATE: As anticipated, the issuance of the *Maui* opinion and the Court’s new “functional equivalent” test has impacted existing lower court decisions and pending petitions for review, since the decision resolved the split among federal courts of appeals, noted above, regarding CWA regulation of discharges of pollutants originating at a point source and traveling to navigable waters via nonpoint sources.

On May 4, 2020, the Supreme Court vacated the Fourth Circuit’s April 2018 decision in *Kinder Morgan Energy Partners LP v. Upstate Forever*, and remanded the case for reconsideration in light of the *Maui* decision. The case involves a citizen suit, brought by environmental groups against Kinder Morgan, operator of the Plantation pipeline in South Carolina, alleging violations of CWA permitting requirements in connection with a 2014 pipeline rupture and gasoline spill that contaminated creeks and wetlands after traveling through groundwater. The Fourth Circuit adopted an interpretation of CWA permitting requirements similar to the Ninth Circuit’s interpretation in *Maui* and found that the CWA prohibits the discharge of pollutants from a point source through groundwater that has a direct hydrological connection to navigable waters of the U.S. Kinder Morgan appealed the decision to the Supreme Court in August 2018, arguing that the states – as opposed to the federal government – have the authority to regulate discharges through groundwater. In the wake of the Supreme Court’s ruling in *Maui*, the Fourth Circuit will now have to reconsider the *Kinder Morgan* case under the Court’s new “functional equivalent” test.

Cases involving other pollution sources, like power plants, may also be impacted by the *Maui* decision. Litigation related to coal ash sites, where contaminants can travel through groundwater to adjacent waterbodies, echoes arguments raised in the debate over CWA permitting requirements for indirect wastewater pollution. Environmental groups may soon request that an appeal related to the Dynegy coal-fired plant in Illinois, placed on hold by the Court of Appeals for the Seventh Circuit pending the Supreme Court’s decision in *Maui*, be remanded to the district court to allow CWA claims to proceed.

Although cases that have been fully resolved cannot be re-litigated, the *Maui* decision’s ripple effect may continue where pollution is ongoing and new claims can be filed. And in these new cases, courts will have to consider the factual circumstances and apply the “functional equivalent” test in reaching their decisions.

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