

Supreme Court Holds that Certain Discharges of Pollution that Pass Through Groundwater to Reach Surface Waters Require Permits Under the Clean Water Act

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On April 23, 2020, the Supreme Court in the case of *County of Maui v. Hawaii Wildlife Fund et al.*, answered an important question about the reach of the Clean Water Act: does the Act prohibit unpermitted point source discharges of pollutants that reach navigable water (i.e. surface water) only after first passing through groundwater. It has long been recognized that unpermitted discharges of pollutants to navigable water are subject to the Act's permitting program and that discharges to groundwater are not. But the question before the Court, whether discharges that pass through groundwater to reach surface water, had caused considerable disagreement among lower courts. In a 6-3 decision, with Justice Breyer writing for the majority, the Court held that a Clean Water Act permit is required for "indirect discharges" that pass through groundwater that are "the functional equivalent of a direct discharge."

The case arises out of a dispute over whether Maui County needed a National Pollutant Discharge Elimination System (NPDES) permit for its underground wastewater injection wells, due to the migration of pollution from those wells to the nearby Pacific Ocean. While there was no disputing that a direct discharge of sanitary waste from a pipe into the Pacific Ocean would be covered by the NPDES permitting program, the county and the Trump administration said the pollution's path through groundwater meant the pollution was outside the purview of the Act. This position departed from EPA's consistently held position of over 30 years that the Act covers discharges to groundwater bearing a direct hydrological to surface water.

The environmental groups that brought the case successfully convinced a majority of Justices that the County and the Trump Administration's position would create an enormous loophole in Clean Water Act permitting program. Justice Breyer questioned, "[i]f that is the correct interpretation of the statute, then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?"

Yet the tougher question, and the one not fully answered by the decision is not whether some groundwater discharges are covered by the Act, but which ones exactly. As Justice Breyer recognized "[v]irtually all water, polluted or not, eventually makes its way to navigable water" including groundwater but "Congress left general groundwater regulatory authority to the States." The Ninth Circuit in the decision under review held that a NPDES permit is required when pollutants are "fairly traceable" from a point source such that the discharge is "the functional equivalent" of a discharge directly into navigable waters. The majority found this test too broad, reasoning that the only limit it would place on EPA's authority would be the "power of modern science" to trace surface water discharges back to a point source.

The test adopted by the Court drops the "fairly traceable" framework and just asks whether an indirect discharge – i.e., a discharge that reaches navigable water after passing through or over an intervening medium such as groundwater – is the "functional equivalent" of a direct discharge. The Court recognized that this test will turn on a multitude of factors, chief among them the distance pollution must travel to reach a navigable water, and the time it takes to get there. The opinion suggests that a discharge into groundwater located 50 miles from the nearest

hydrologically connected surface water would likely be too far for the Acts' permitting requirements to apply. Other considerations will include the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels.

Writing in dissent Justice Alito warned that the Court's "nebulous" standard is potentially expansive enough to reach ordinary homeowners with underground septic tanks. Whether Justice Alito's concerns are valid, only time will tell. The Court's new standard is short on precision and will likely lead to a rash of litigation over the meaning of the Court's functional equivalency test, and perhaps an interpretive rule or guidance from EPA. Without further direction, members of the regulated community would be wise to proactively engage with state and federal regulators for case-specific guidance, particularly where activities – *e.g.*, construction, concentrated animal feeding operations, settlement ponds and landfills, septic systems, injection wells – in close proximity to navigable water are likely to pollute or otherwise interact with or influence groundwater.

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