

SCOTUS Requires Clean Water Act Permits for Some Groundwater Discharges, Pronounces 'Functional Equivalency' Test

By **Richard F. Ricci** and **Mark S. Heinzelmann**

On April 23, the Supreme Court of the United States issued a landmark decision interpreting the reach of the federal Clean Water Act (CWA). That case is *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, 590 U.S. ___ (2020). The Supreme Court's opinion can be viewed [here](#). The CWA requires regulated entities to obtain a permit for any discharge of pollutants from a point source to navigable waters of the United States. 33 U.S.C. 1311(a). For example, an industrial facility that discharges polluted wastewater from a drainage pipe (the point source) into the ocean (a navigable water) must obtain a permit under the CWA. But when the temporal and proximal links between a point source and navigable waters is more attenuated, the federal permit requirement becomes muddled.

This issue is highlighted most starkly when a point source discharges pollutants to groundwater and the pollutant-laden groundwater then migrates to reach navigable waters. When does a discharge from such a point source require a CWA permit, and when, if at all, should the traditional divide between federal authority over discharges to navigable waters and state authority over discharges to groundwater be bypassed? Over the years, the circuit courts have reached differing conclusions, creating confusion among regulated entities. Compare, e.g., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F. 3d 637 (4th Cir. 2018) (adopting a "direct hydrological connection" test), with *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F. 3d 925 (6th Cir. 2018) (holding that discharges through groundwater are excluded from the CWA's permitting requirements). The

U.S. Environmental Protection Agency (EPA) has compounded the confusion by adopting varying interpretations. In its most recent Interpretive Statement, the EPA opined that "a release of pollutants to groundwater is not subject to" the CWA's requirements, even if the discharge may eventually reach navigable waters. See 84 Fed. Reg. 16810 (2019).

In *County of Maui*, the Supreme Court attempted to resolve that confusion and answer the question of when a federal permit is required for a point source discharge to groundwater. There, the Hawaii Wildlife Fund (Wildlife Fund) filed a CWA suit alleging that the county of Maui, Hawaii (Maui) was required to obtain a CWA permit for discharges from its wastewater reclamation facility, which collects sewage from county residents, partially treats it, and then discharges it to groundwater. That groundwater then travels half a mile and ultimately discharges to the Pacific Ocean. The U.S. District Court for the District of Hawaii required Maui to maintain a CWA permit because the wastewater discharges to groundwater were "functionally one[s] into navigable water." See *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 998 (D. Haw. 2014). The Ninth Circuit affirmed, but using slightly different language. It held that a CWA permit was required because Maui's point source discharges were "fairly traceable" to navigable waters. 886 F. 3d 737, 749 (2018).

On review, the Supreme Court looked at the legislative history of the CWA and performed a close linguistic examination of the words "from" and "to," as used in the phrase "from a point source to navigable waters." *County of*

Maui, 509 U.S. ____ (slip op. at 4-15). A 6-to-3 majority rejected as too broad the Ninth Circuit's "fairly traceable" standard, because that standard could, hypothetically, require a CWA permit for "the 100-year migration of pollutants through 250 miles of groundwater to a river." *Id.* at 6. The majority felt that Congress did not intend the CWA's regulatory authority to reach so far, noting that "the structure of the statute indicates that, as to groundwater pollution . . . Congress intended to leave substantial autonomy to the States." *Ibid.* It also rejected the "extremes" proposed by the Wildlife Fund on the one hand (arguing for a true proximate cause standard) and Maui and the Solicitor General of the United States on the other (arguing that the CWA does not govern discharges to groundwater at all). Instead, the majority, taking an intermediate approach, held 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*." *Id.* at 15 (emphasis in original).

In reaching that conclusion, the majority recognized that it had established a test without concrete elements. To aid the lower courts and EPA in applying its new standard, the

majority stated that "[t]ime and distance are obviously important," and it set forth a variety of nonexclusive factors that might be relevant, including "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the 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." *Id.* at 15-16.

The real-world application of the Supreme Court's new standard will, of course, evolve over time. For now, regulated entities would be wise to examine any point source discharges from their facilities that reach groundwater and consider their temporal and proximal links (if any) to navigable waters. If it is apparent that there is a definable, close connection between the two, the entity should consider submitting an application for a CWA discharge permit, or at the very least seeking agency guidance.

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