

New SCOTUS test for NPDES permitting under the CWA: *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*

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On 23 April 2020 the Supreme Court, in a 6-3 opinion written by Justice Stephen Breyer, waded carefully into the very-muddied waters of Clean Water Act (CWA) jurisprudence when it issued a new test to determine when the statute requires point sources to secure a National Pollutant Discharge Elimination System (NPDES) permit. The Court, in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*, 2020 WL 1941966 (2020), held that a NPDES permit is required when "there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*" – in other words, "when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly the same means."¹

The dispute before the Court involved the County of Maui's Lahaina Wastewater Facility, which disposes of treated wastewater by injecting it into underground wells. Once injected, the water mixes with groundwater, disperses, and ultimately ends up in the Pacific Ocean. What is plain is that the CWA requires a NPDES permit for the discharge of pollutants into navigable waters. The key question the Court grappled with was whether the CWA similarly requires a NPDES permit for pollutants originating from a point source that are carried by groundwater into navigable waters.

The District Court for the District of Hawaii granted summary judgment to the plaintiff-environmentalist groups, finding that the release of pollutants from the facility's wells was "functionally one into navigable water."² The Ninth Circuit affirmed, holding that the correct test was whether the "pollutants are fairly traceable from the point source to a navigable water."³

In briefing before the Supreme Court, the government, the County of Maui, and the environmental groups offered varied interpretations of the CWA.⁴ The environmental groups

¹ *County of Maui*, 2020 WL 1941966 at *9.

² *Hawai'i Wildlife Fund, et al. v. County of Maui*, 24 F.3d 980, 998 (D. Hawaii 2014).

³ *Hawai'i Wildlife Fund, et al. v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018).

⁴ The government originally argued for a different interpretation before the Ninth Circuit during the Obama administration.

contended that the Ninth Circuit's test should be adopted, and suggested that the test could be narrowed by adding a proximate-cause requirement by which a permit would be required where the addition of pollutants is a foreseeable consequence of their release from a point source. On the other end of the spectrum, the Solicitor General argued that the EPA's recent Interpretive Statement was controlling.⁵ Pursuant to the Interpretive Statement, the EPA excludes *all* pollutant releases from groundwater – regardless of how the pollutant enters the groundwater – from NPDES permitting, leaving groundwater permitting entirely to the states. The County of Maui, similarly, read the statute to require permitting only when a point source discharges directly into navigable waters.

The Court rejected all these interpretations as too extreme in one way or another, focusing instead on both a textual interpretation of the word "from" and on congressional intent and legislative history. The latter is surprising for such a "textualist" Court on which the majority tend to rely on strict statutory interpretation. Ultimately, the Court chose to thread the needle, arriving at its own, new test for NPDES permitting.

The question that's left is what "functional equivalent" means, both literally and practically. Writing for the majority, Justice Breyer, joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh, set out specific guidelines, and provided factors to consider when making permitting decisions. The most important factors are the distance between the point source and the navigable water and the time it takes the pollutant to travel that distance. The farther away the point source is from the navigable water, temporally and physically, the less likely it is that the discharge will require a permit. Other elements to consider include the type of material through which the pollutant travels, the extent of dilution as the pollutant travels, the disparity between the amount of pollution that exits at the point source versus how much of it ultimately deposits into navigable waters, the manner or area in which the pollutant enters navigable waters, and the degree to which the pollutant has maintained its chemical identity throughout its journey.

Justice Kavanaugh concurred with the majority, joining the Court's opinion in full and writing separately to emphasize that the Court's interpretation is consistent with Justice Scalia's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), where the famous strict-constructionist justice stated that polluters could not evade a NPDES permit by discharging pollutants into intermittent sources before they reached navigable waters. Justices Thomas and Alito both separately dissented. Justice Thomas, joined by Justice Gorsuch, would have the permitting requirement apply only to situations where a point source directly discharges into navigable waters (consistent with the County of Maui's interpretation). And Justice Alito opined that the majority's rule does not provide clear guidance and "invites arbitrary and inconsistent application."⁶ Rather than finding a middle ground between Maui and the Hawaii Wildlife Fund, he would have picked Maui's interpretation.

The Court's new rule rejects clear boundaries and offers more guidance than bright lines. The phrases "functional equivalent" or "roughly the same means," provide a vast platform upon which to make arguments. The majority recognized that the test will require honing, and invited courts and the EPA to clarify "functional equivalent" through common law and administrative guidance.

⁵ 84 Fed. Reg. 16810, 16811.

⁶ *County of Maui*, 2020 WL 1941966 at *15 (Alito, dissenting).

Until future decisions refine this new rule, entities that indirectly deposit pollutants into navigable waters via groundwater should be on notice that not only might they face claims that they need to obtain a NPDES permit, but in doing so they'll need to make their best case for whether a permit is or is not required.

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