



Supreme Court Holds that NPDES Permit Can be Required for Discharges to Groundwater that Reach Surface Waters

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As we have reported in previous articles, controversy over whether the Clean Water Act (CWA) regulates discharges of pollutants that travel through groundwater into surface waters has led to significant litigation across the nation. This culminated in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, a case recently decided by the U.S. Supreme Court. The decision resolves a cadre of previous and varying holdings on this issue in the lower courts, but it also leaves many issues open.

The Court held in a 6-3 decision that a discharge of pollutants from a point source that travels through a groundwater pathway into regulated waters can indeed be regulated and required to be permitted pursuant to the CWA. The Court ruled that a permit is needed “if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.” In other words, “an addition [of pollutants] falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.”

The CWA prohibits the discharge of pollutants – that is, the addition of pollutants – to regulated waters (i.e., “navigable waters”) unless the discharge is subject to a permit or otherwise allowed pursuant to the CWA. Under the CWA’s National Pollutant Discharge Elimination System (NPDES) program, discharges of pollutants in wastewater and stormwater to “navigable waters” must be permitted unless otherwise exempt. Similarly, discharges of dredge or fill materials to “navigable waters” require a permit unless exempt. “Navigable waters” is defined in the statute as “waters of the United States,” a term that is defined in regulations of the EPA and U.S. Army Corps of Engineers. However, to be subject to permitting, such discharges to “navigable waters” (or “waters of the United States”) must occur from a “point source.” A “point source” is defined as “any discernible, confined and discrete conveyance,” such as a “pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft.” (Certain agricultural stormwater discharges and irrigation return flows are excluded, though.)

The discharge at issue in the case resulted from the County treating sewage at its wastewater reclamation facility and then pumping it into the ground through four wells. The effluent then traveled about a half mile through groundwater to the Pacific Ocean. The Hawaii Wildlife Fund argued that the discharge required a permit because the pollutants technically could be traced back through groundwater to an ultimate source and proximate cause of the pollutants (i.e., the “fairly traceable test”). The Court disagreed, noting that the fairly traceable test is overly inclusive of discharges that could be very remote in distance and time. It said it would be unreasonable to expect such remote discharges to

be contemplated within the CWA program purposes.

On the other hand, the Court felt it was too narrow to read the CWA to say, as the County and even EPA argued, that any discharge where pollutants travel through groundwater before entering regulated surface waters is not a regulated discharge subject to permitting. This argument (i.e., the “means-of-delivery test”) means that no permit is required if the point source itself is not the means of discharge of the pollutants directly into navigable waters. The Court said if this test were applied, it could lead to undermining the permit program protections clearly intended by the CWA. Furthermore, the Court rebuked EPA for its change in position regarding which test to apply in the case, and it said this negated any deference EPA’s interpretation may otherwise have been due.

The Court’s approach tacked between the positions taken by the parties in the case and many other parties in most lower court cases on this issue, and its assessment of these positions is telling about the middle ground the Court sought to occupy here. The Court held that a permit is required when there is a direct discharge from a point source *or when there is a functional equivalent of a direct discharge*.

The Court’s new standard announced in an opinion by Justice Breyer is very practical, though vigorous dissents by other justices complain that it ignores the plain language of the CWA in several respects. As the Court acknowledged, its “functional equivalency test” raises issues that can only be resolved with a fact-specific analysis by the lower courts. Context is key here for the Court. For example, it noted that “[w]hether pollutants that arrive at navigable waters after traveling through groundwater are ‘from’ a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.” A key question, then, will be whether the passage of pollutants through groundwater as an intermediate medium emulates a direct discharge to regulated waters. Still, this approach clarifies at least that not every situation involving groundwater as an intermediate medium for pollutants reaching surface waters should be considered a regulated discharge of pollutants under the CWA. Also, a clear inference from the Court’s holding is that groundwater itself is not a type of water regulated pursuant to the NPDES program. This is consistent with EPA’s just-announced redefinition of “waters of the United States” that expressly excludes groundwater.

EPA and states authorized by EPA to administer the NPDES program now need to consider how they will implement the Court’s decision, with states and regulated parties looking to EPA for guidance or a rulemaking. Given the urgency of the issue for most stakeholders, guidance seems like a better bet in the near term.

[County of Maui, Hawaii v. Hawaii Wildlife Fund, 2020 WL 1941966, No. 18–260 \(U.S. April 23, 2020\).](#)

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