

# The Supreme Court's *Maui* Decision – What Does It Mean for Future Groundwater Permitting?

Legal Issues Arising from *County of Maui v. Hawaii Wildlife Fund*



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## Background: *Hawaii Wildlife Fund v. County of Maui*

- Clean Water Act citizens' suit against the County of Maui, which operates a wastewater reclamation facility on the island of Maui, Hawaii
- The facility collects sewage from the surrounding area, partially treats it, and pumps the treated water through wells hundreds of feet underground
- This effluent travels approximately a half mile through groundwater to the Pacific Ocean
- Several environmental groups (“ENGOS”) sued, alleging that the County was discharging a pollutant to navigable waters without a National Pollutant Discharge Elimination System (“NPDES”) permit, in violation of Section 402 of the CWA (33 U.S.C. § 1342)
- Facility has been operating since 1986 under underground injection well permits

# Background: The Conduit Theory

- Section 402 of the CWA requires a permit for discharges from a point source to navigable waters
- Groundwater is not a “navigable water” and generally is not regulated under the CWA – instead, that was left to states
- But in *Maui*, ENGOs argued that discharge to surface water *through* groundwater requires a CWA permit
  - In other words, where the groundwater acts as a “conduit,” a section 402 permit is required
  - This legal theory became known as the conduit theory
  - Key part of ENGOs’ wider campaign regarding the scope of the CWA
- The federal district court upheld the conduit theory, and the Ninth Circuit affirmed – finding that the CWA’s NPDES permit provision applies to discharges through groundwater where “*the pollutants are fairly traceable from the point source to a navigable water*”

# Background: Circuit Split

- The Fourth Circuit upheld the conduit theory
  - *Upstate Forever v. Kinder Morgan Energy Partners*
  - Used the “direct hydrological connection” test
- The Sixth Circuit rejected the conduit theory and held that the CWA never applies to discharges to surface water through groundwater
  - *Kentucky Waterways Alliance v. Kentucky Utility Company; Tenn. Clean Water Network v. Tenn. Valley Authority*
  - Discharges through groundwater are excluded from the CWA’s permitting requirements
- To resolve this circuit split, the Supreme Court granted the petition for certiorari in *Maui*

## Background: EPA's Position

- Prior to 2016, EPA took the position that discharges from a point source that move through groundwater with a “direct hydrological connection” to navigable waters is subject to the CWA’s permitting requirements
- After the Ninth Circuit decision in *Maui*, EPA requested public comment on subjecting discharges through groundwater to CWA permitting
  - EPA received over 50,000 public comments
- On April 23, 2019, EPA published a detailed “Interpretative Statement” on this issue
  - Explained that the CWA excludes all discharges to groundwater from the scope of the NPDES permitting program, even where pollutants are conveyed to surface waters via groundwater
  - Acknowledged that this interpretation differs from the prior informal EPA interpretation

# Arguments Before the Supreme Court

- ENGOs: CWA permitting requirements apply if the “the pollutants are fairly traceable from the point source to a navigable water”
  - Asked Court to uphold the Ninth Circuit’s decision
- County of Maui: no permit required if the pollutant traveled through any amount of groundwater before reaching navigable waters
- Solicitor General filed a amicus brief for the United States in support of the County of Maui
  - Solicitor General argued that the correct interpretation was reflected in the EPA’s recent Interpretative Statement
  - All releases of pollutants to groundwater are excluded from the scope of the permitting program, “even where pollutants are conveyed to jurisdictional surface waters via groundwater”

# The Supreme Court's Decision

- The majority's opinion (written by Justice Breyer) upheld conduit theory but opted to create its own standard
  - The Ninth Circuit standard was too broad – it could require a permit in circumstances such as the "100-year migration of pollutants through 250 miles of groundwater to a river"
  - The County of Maui/Trump administration standard was too narrow – it would create a "large and obvious loophole" in the CWA
- The court held that a permit is required when ***“when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge”***

# The Supreme Court's Decision

- The majority acknowledged that the standard is not a bright-line test and does not explain how to deal with middle circumstances
- Noted that the following factors could be relevant in determining what constitutes a “functional equivalent of a direct discharge”:
  - Transit time;
  - Distance traveled;
  - The nature of the material through which the pollutant travels;
  - The extent to which the pollutant is diluted or chemically changed as it travels;
  - The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
  - The manner by or area in which the pollutant enters the navigable waters; and
  - The degree to which the pollution (at that point) has maintained its specific identity.
- Time and distance are likely to be most important in most—but not all—cases



# Dissents

- Critical of the majority's standard
  - Lack of guidance in applying the test
  - Lack of clarity as to what might constitute a “functional equivalent”
  - Uncertain and piecemeal approach to permitting
- Justice Alito: a CWA permit would only be required when the course of a discharge is a “conveyance” that is discernible and “confined”
- Justice Thomas (joined by Justice Gorsuch): the CWA only applies when there is a direct discharge into navigable waters

# What's Next?

- The majority acknowledged that its standard will be determined on a case-by-case basis by the lower courts and EPA
  - Likely that EPA will eventually provide guidance or a rule explaining how the factors should apply but probably not soon
- The Court provided two examples of applying its test
  - A pipe that ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater
  - A pipe that ends 50 miles from navigable waters and pollutants end up in navigable waters many years later

# What's Next?

- Likely to be the subject of litigation and regulatory uncertainty going forward
  - Similar to another Supreme Court CWA decision that set forth a vague standard (*Rapanos v. United States*)
- There are several cases pending in district and state courts that will apply the Court's new standard or may be resolved through settlement agreements
  - For example, a case brought by ENGOs against a Cape Cod beach club recently settled in light of the Court's decision in *Maui*
- Facilities may consider proactively seeking a jurisdictional determination from the state or EPA to avoid risk of litigation
- Unclear how dramatically things will change in the immediate future
  - EPA previously had used the “direct hydrological connection” test
  - Many states that implement the NPDES program already have groundwater regulations in place

# Q & A session will occur at the end of the webinar.



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