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Supreme Court Again Muddies Clean Water Act Standards

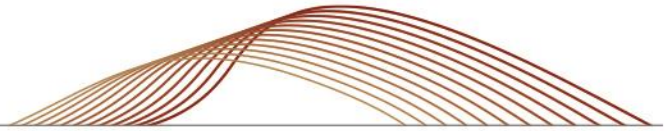
By Caroline Lee & Jill Yung

On Thursday, April, 23, 2020, the United States Supreme Court issued the term's most anticipated environmental decision of year, ruling that the Clean Water Act requires a permit for discharges of pollutants through groundwater if the discharge is "the functional equivalent of a direct discharge" into navigable waters. *See County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, 590 U.S. ___ (2020) (No. 18-260). The ruling, which the Court recognized does not provide a bright-line test, will require a significant number of facilities to reevaluate whether discharges that might come into contact with groundwater could reach navigable, jurisdictional surface waters, such as oceans, rivers, or streams, and thereby trigger permitting requirements.

The case concerned the County of Maui's wastewater reclamation facility, which collects and partially treats sewage before pumping the treated water through four wells hundreds of feet underground. The effluent then travels about a half mile through groundwater, to the ocean. Environmental groups sued under the Clean Water Act, alleging that the County's facility discharges pollutants to navigable, surface waters (i.e., "waters of the United States") without the required permit. But Maui, with the support of the U.S. Environmental Protection Agency ("EPA"), argued that the Clean Water Act requires a permit "only if a point source itself ultimately delivers the pollutant to navigable waters," which cannot occur where the pollutants are first transmitted through groundwater.

The District Court disagreed and sided with the environmental groups, finding that the discharge from the wells to groundwater was "functionally one into navigable waters." *Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 998 (D. Haw. 2014). The Ninth Circuit affirmed, but refined the holding to require a permit when "pollutants are fairly traceable from the point source to a navigable water." *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). This interpretation, if upheld, would have opened the door to Clean Water Act jurisdiction whenever a pollutant is traced from a point source to federal jurisdictional waters regardless of how, where, or when it is transmitted.

While the Supreme Court agreed a permit could be required for the discharges by the County, it found the Ninth Circuit's "focus on traceability" too broad because it "may well allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms." Instead, in the 6-3 decision, the Court narrowed the test to hold that a permit is required "when there is the *functional equivalent of a direct discharge*." The Court noted that "virtually all water, polluted or not, eventually makes its way to navigable water" and that rather than traceability, other factors should be considered.



The Court identified time and distance as the most important factors, but also found that additional considerations "may prove relevant" when determining if a discharge through groundwater is the "functional equivalent" of a direct discharge. The complete, non-exhaustive list of considerations identified by the Court included: "(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, (7) the degree to which the pollution (at that point) has maintained its specific identity." As for how to apply these factors, the Court left it to EPA and the lower courts to provide further guidance. Whether that tactic will be effective is questionable, at least under the current administration, given that just last year, in response to *Maui* and similar appellate court decisions, EPA issued an Interpretive Statement in which it concluded that the Clean Water Act excluded "all releases of pollutants from a point source to groundwater" regardless of whether there is a hydrological connection to the jurisdictional surface waters. 84 Fed. Reg. 78 (April 23, 2019). Implementing the Court's decision will require a complete reversal of this position.

The dissenting justices, led by Justice Alito, were greatly troubled by the outcome, lamenting that "[e]xcept in extreme cases, dischargers will be able to argue that the Court's multifactor test does not require a permit. Opponents will be able to make the opposite argument. Regulators will be able to justify whatever result they prefer in a particular case. And judges will be left at sea." The Court was not unaware of the limitations of this decision which, like *Rapanos v. United States*, 547 U.S. 715 (2006) (another Clean Water Act case), leaves the regulated community with a rather indeterminate "standard" to apply. As Justice Kavanaugh recognized in his concurrence, however, "[t]he source of the vagueness is Congress' statutory text, not the Court's opinion."

What is the takeaway? As with *Rapanos*, we will undoubtedly see years of regulatory back-and-forth, influenced by changes in administrations, and legal challenges with outcomes highly dependent on the specific facts. Significant swings in the scope of EPA's permitting authority should be infrequent, as the question of whether a permit is required should more often than not clearly fall on one side of the *County of Maui* divide, based in large part on the measurable criteria provided by the Court. The decision may also drive technical innovations, as the regulated community seeks to minimize and avoid contact with groundwater altogether. But there will always be borderline cases and thus, like the question of how to define "waters of the United States," these issues will be with us for a while to come.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings San Francisco lawyers:

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