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Legal Sidebar

Uncharted Waters: Navigating the Supreme Court's New Clean Water Act Permitting Test

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The U.S. Environmental Protection Agency (EPA) continues to grapple with how to implement the Supreme Court's April 2020 decision in *County of Maui v. Hawaii Wildlife Fund*. *Maui* introduced a new multi-factor test for determining whether the Clean Water Act (CWA) applies to pollutant discharges that migrate through groundwater to navigable surface waters. The *Maui* Court rejected EPA's 2019 interpretive guidance that categorically excluded point source pollutant discharges to groundwater from the CWA permitting program. In a 6-3 ruling, the Supreme Court held that the CWA requires a permit for a direct discharge or the "functional equivalent of a direct discharge" of pollutants from a point source into navigable waters.

EPA has not formally responded to *Maui* through the issuance of guidance or regulations. Absent such a response or legislative action, regulated entities, state agencies, and federal courts are tasked with clarifying and applying the Court's "functional equivalent" test. This Sidebar discusses the *Maui* decision and highlights its potential effects on current and future litigation over the scope of CWA jurisdiction over what qualifies as a "functional equivalent" of a direct discharge of pollutants into navigable waters.

The CWA's Permitting Requirements

The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), prohibits any "discharge" or "addition" "of any pollutant" "to navigable waters" "from any point source" without a permit. The CWA defines "pollutant" broadly to include toxins such as "sewage" and "radioactive waste," as well as more common elements such as "rock, sand, cellar dirt," and "heat." The act defines navigable waters as "waters of the United States" and a "point source" as "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, [or] tunnel."

The CWA allows certain discharges of point source pollutants if authorized by a CWA permit issued under the National Pollutant Discharge Elimination System (NPDES). CWA Section 402 requires *point source* dischargers to obtain NPDES permits, which set pollution limits—known as effluent limits—on the type and quantity of pollutants that dischargers can release into navigable waters.

The CWA does not require NPDES permits for *nonpoint source* discharges. Nonpoint source pollution is regulated through state programs under CWA Section 319 and other state and federal laws. If EPA

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approves a state's nonpoint source management program, the state may apply for grant money to support, among other things, nonpoint source and groundwater pollution control activities and demonstration projects. Under CWA Section 402(b), Congress allows EPA to authorize a state to administer its own NPDES permit program if the Agency determines that the state program meets certain statutory criteria. EPA has authorized nearly all states to implement all or part of the NPDES program. EPA retains oversight over delegated programs and NPDES authority for non-delegated states, territories, and tribes, as well as the program components for which a state is not authorized to implement.

Background on the *Maui* Litigation

CWA Section 505 grants "citizens" the right to bring civil actions against any person that allegedly violates effluent standards or limitations. Various citizen suits, including *County of Maui v. Hawaii Wildlife*, have sought to apply NPDES permitting requirements to point source pollutant discharges that migrate through groundwater to navigable waters.

In the *Maui* case, the County of Maui's (County's) Lahaina Wastewater Reclamation Facility discharged treated sewage into underground injection wells. EPA, the Hawai'i Department of Health, and others conducted a tracer dye study in which they injected a dye into the wells to see if and when the dye would appear in the ocean. The study concluded that 64% of the wells' treated sewage effluent migrated through groundwater to the Pacific Ocean. While conceding that the wells were point sources, the County argued that the point source must "convey the pollutants directly into the navigable water" to be regulated under the CWA. Because the wells discharged to the Pacific Ocean via groundwater, the County contended that it was not a point source discharger required to obtain an NPDES permit under Section 402 the CWA.

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) disagreed, affirming the district court's summary judgment that the County had violated the CWA by discharging pollutants without an NPDES permit. The Ninth Circuit concluded that the pollutants were "fairly traceable" from the point source (wells) to navigable waters such that the discharge through groundwater was the "functional equivalent of a discharge into navigable waters." In 2019, the Supreme Court granted review of the Ninth Circuit's decision to determine "whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater."

Supreme Court *Maui* Decision

In a 6-3 ruling, the Supreme Court vacated the Ninth Circuit decision, rejecting the "fairly traceable" permitting test as well as other tests proposed by litigants and the government to determine whether an indirect discharge to navigable waters requires a CWA permit. Justice Breyer delivered the opinion of Court, joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh. In his majority opinion, Justice Breyer relied on the CWA's statutory context and purpose of the statutory phrase "from any point source" to strike a middle ground between the Ninth Circuit's "fairly traceable" interpretation and the total exclusion of all discharges through groundwater proposed by the County, the federal government, and dissents from Justices Thomas and Alito.

The majority concluded that the various interpretations of the CWA's permitting applicability were inconsistent with Congress's intent to provide sufficient federal authority to regulate discharges of "identifiable sources" of pollutants into navigable waters while preserving the states' authority over groundwater discharges. The majority rejected the Ninth Circuit's and the environmental groups' "fairly traceable" standard, reasoning that such a broad interpretation would require a NPDES permit for highly diluted discharges that reach navigable waters many years after their release from the point source. At the same time, the majority refused to adopt the County's and the federal government's narrow interpretation categorically precluding CWA jurisdiction over discharges to groundwater. That interpretation, the

majority reasoned, would open a "massive loophole in the permitting regime" by allowing point sources to discharge pollutants into groundwater a short distance from navigable waters without a permit.

To bridge these "extreme" interpretations, the majority created a new test for determining, on a case-by-case basis, when a discharge requires a CWA permit and outlined various factors to consider in making such decisions. The majority held that the CWA requires a NPDES permit for a direct discharge of pollutants or the "functional equivalent" of a direct discharge from a point source of pollution into navigable waters. The majority explained 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." While rejecting the Ninth Circuit's "fairly traceable" standard, the majority appeared to echo the Ninth Circuit's view that such discharges must be "the functional equivalent" of a discharge directly into navigable waters.

The majority acknowledged that "a more absolute position . . . may be easier to administer" than the "functional equivalent" test but noted that "there are too many potentially relevant factors applicable to factually different cases . . . to use more specific language." The majority highlighted that the two "most important factors" in making a functional equivalent determination will likely be (1) the distance pollution must travel to reach navigable waters, and (2) pollutant transit time to navigable waters. However, the court noted that, depending on the circumstances, other factors may need to be considered, including the material the pollutant travels through, dilution or chemical changes to the pollutant as it travels, the amount of the pollutant entering the navigable waters, how and where the pollutant enters the navigable waters, and the degree to which the pollution has "maintained its specific identity" at the point it enters navigable waters.

For further guidance in administering the new test, the majority pointed to the courts and EPA. For example, the majority noted that the courts can "provide guidance through decisions in individual cases," and EPA can "provide administrative guidance (within statutory boundaries)," through permits or "general rules." To address concerns that such a test could greatly expand permitting requirements, the majority noted that EPA has been administering this permitting provision "for over 30 years . . . [and] we have seen no evidence of unmanageable expansion" and that various permitting techniques (e.g., issuing a CWA general permit for a category of dischargers) and the courts' discretion in applying the CWA's penalty provisions can be used to assuage such concerns. The Court remanded the case to the Ninth Circuit to determine whether the Lahaina Wastewater Reclamation Facility needs a NPDES permit under the new "functional equivalent" test.

Justice Kavanaugh joined the court's opinion "in full," emphasizing in his concurrence that the majority's interpretation adheres to Justice Scalia's plurality opinion in *Rapanos v. United States*, which noted that indirect discharges are not exempt from the CWA's permitting requirements. Justice Thomas dissented, joined by Justice Gorsuch, and Justice Alito issued his own dissent. Both dissents would require a permit only "when a point source discharges pollutants directly into navigable waters" and identified the "practical problems" in implementing the majority's "functional equivalent" test. Justice Alito also criticized the majority's test as "a rule that provides no clear guidance and invites arbitrary and inconsistent application."

Implementing the "Functional Equivalent" Test

In the aftermath of *Maui*, EPA, states, regulated entities, and the courts are faced with interpreting, implementing, and enforcing the "functional equivalent" test for indirect point source discharges. EPA is reviewing options on implementing the new test, including conducting a rulemaking or revising previous guidance. At a congressional oversight hearing in May 2020, the EPA Administrator testified that the test may be "difficult" to implement and is trying to determine if the agency needs to reissue guidance. In the

Maui decision, the Supreme Court did not defer to and ultimately rejected EPA's 2019 interpretive guidance that categorically excluded indirect discharges from the CWA permitting program.

Without guidance from EPA, regulated entities and states with delegated authority to issue NPDES permits will use the "functional equivalent" test to determine whether a point source needs a permit for an indirect discharge. For example, under the new test, some commentators believe that previously unpermitted point sources such as underground injection wells, septic systems, and waste ponds may need NPDES permits to comply with the CWA. Because EPA has delegated NPDES permitting authority to nearly all states, point sources will likely seek guidance from their state permitting agency regarding compliance with the *Maui* decision.

Meanwhile, the litigants in *Maui* and other ongoing CWA indirect discharge cases are applying the functional equivalent test to their specific circumstances, which may establish precedent for future cases and permitting decisions. The Ninth Circuit remanded the *Maui* case to the federal district court in Hawaii, which previously held that the County's discharge was subject to NPDES permitting requirements. Now, the district court will have to decide whether the discharge from the County's wastewater treatment facility needs a NPDES permit under "the functional equivalent" test. In an effort to supplement the record, the County has asked the district court for more discovery to address the various factors outlined by the Supreme Court.

Other federal appellate courts may soon apply the new "functional equivalent" test to indirect pollutant discharges in different contexts. In light of *Maui*, the Supreme Court vacated and remanded the U.S. Court of Appeals for the Fourth Circuit's decision in *Upstate Forever v. Kinder Morgan* that had held that the gasoline discharges from a ruptured pipeline into groundwater violated the CWA because there was a "direct hydrologic connection" between the polluted groundwater and navigable waters. In addition, the U.S. Court of Appeals for the Seventh Circuit may apply the "functional equivalent" test in *Prairie Rivers Network v. Dynegy Midwest Generation*, which involves a district court decision dismissing the plaintiff's allegations that a retired coal power plant violated the CWA when pollutants from coal ash storage ponds leaked into groundwater and reached navigable waters. These cases may rely on new technical data that consider *Maui*'s "functional equivalent" factors and may need to address how to apply permitting requirements for a potential pipeline break or other unforeseeable discharges.

Many stakeholders agree that the "functional equivalent" test will likely increase litigation and may result in a patchwork of conflicting judicial decisions that fail to provide consistent guidance to the states or regulated entities. Other stakeholders fear that new test will lead to years of litigation over the meaning of a "functional equivalent" discharge similar to the prolonged litigation and uncertainty that resulted from the Supreme Court's 2006 case, *Rapanos v. United States*. In *Rapanos*, the justices split 4-4-1 on the proper test for determining which surface waters qualify as "waters of the United States" subject to the CWA. Fourteen years after *Rapanos*, EPA and stakeholders continue to litigate and debate the scope of the CWA's jurisdiction over "waters of the United States."

Considerations for Congress

Congress could consider legislative options to clarify the scope of CWA jurisdiction over indirect pollutant discharges or direct EPA to report to Congress on related actions or interpretations as it has done in the past. For example, in March 2018, the House and Senate Appropriations Committees' explanatory statement for the Consolidated Appropriations Act of 2018 "encourage[d] the [EPA] to consider whether it is appropriate to promulgate a rule to clarify that releases of pollutants through groundwater are not subject to regulation as point sources under the CWA." The Committees directed EPA to brief the Committees about its findings and any plans for future rulemaking. In April 2019, EPA issued its guidance providing its interpretation

that point source pollutant discharges to groundwater were not subject to the CWA. However, a year later, the Supreme Court rejected EPA's interpretation in *Maui*.

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