

## Supreme Court Clarifies Scope of Clean Water Act Permitting Requirements

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On April 23, 2019, the Supreme Court of the United States issued its highly anticipated decision in *County of Maui v. Hawaii Wildlife Fund*. The case involves a challenge to the County of Maui's discharge of treated wastewater into the ground via four wells, which effluent travels about half a mile through groundwater into the Pacific Ocean, without a Clean Water Act permit. Section 301 of the Clean Water Act forbids "any addition" of any pollutant from "any point source" to "navigable waters" without a permit. The District Court found that the discharge from the County's wells into groundwater was "functionally one into navigable water," 24 F. Supp. 3d 980, 998, and granted summary judgment to the environmental groups. The Ninth Circuit affirmed, holding that a permit is required when "pollutants are fairly traceable from the point source to a navigable water." 886 F. 3d 737, 749. The County appealed, with support from the Solicitor General, arguing that the Clean Water Act's permitting requirement does not apply if a pollutant, having emerged from a "point source," must travel through any amount of groundwater before reaching navigable waters. The Court granted *certiorari*, in light of a Circuit split on this issue.

The Court, in an opinion by Justice Breyer joined by Justices Roberts, Ginsburg, Sotomayor, Kagan, and Kavanaugh, held that a Clean Water Act 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. The Court found that the "fairly traceable" test proposed by the Ninth Circuit was broader than the statutory text allows and that the total exclusion of all discharges through groundwater as advocated by the County and the Solicitor General was too narrow. The Court recognized that many factors will be relevant to determining whether a discharge to a navigable water via groundwater is the functional equivalent to a direct discharge, including distance, travel time, dilution or chemical change of the pollutant during travel, and the amount of the pollutant entering the navigable water compared to the amount of the pollutant that leaves the point source.

Despite the highly fact-specific analysis that will be required under the Court's test, the Court found that the EPA has applied Section 301 to some discharges through groundwater for over 30 years, with no evidence of an unmanageable expansion in the Clean Water Act's scope. The Court noted that EPA could provide administrative guidance and that courts will provide additional guidance in individual cases. Because the Ninth Circuit did not apply the functional equivalence test announced by the Court, the Court vacated the Ninth Circuit's judgment and remanded the case for further proceedings consistent with its decision.

Going forward, municipalities and other entities discharging to a navigable water via groundwater should evaluate potential permitting requirements in light of the Court's decision. Guidance from EPA will likely be forthcoming. Watch for further updates on our blog.

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