MUDDIED GROUNDWATER: NEW SUPREME COURT TEST ADDS CONFUSION AND UNCERTAINTY TO CLEAN WATER ACT PERMITTING JURISDICTION

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On April 23, 2020, the U.S. Supreme Court announced its much-awaited decision in *County of Maui v. Hawai'i Wildlife Fund* on whether the Clean Water Act (CWA) regulates the discharge of pollutants that pass through groundwater before reaching waters of the United States. The Court found that such discharges are subject to CWA permitting and enforcement if they are the "functional equivalent of a direct discharge."[1]

The Court conceded that its test is nebulous and will require intensive factual inquiry to determine if a discharge through groundwater is the functional equivalent of a direct discharge. The Court stated that agencies will need to develop guidelines and courts will have to use their discretion in applying the new standard. The only meaningful guide the Court offered is a non-exhaustive list of potentially relevant factors to consider, of which time and distance are likely most important, to determine when a pollutant discharged through groundwater to waters of the United States is subject to CWA permitting requirements.

The U.S. Environmental Protection Agency (EPA), state agencies with delegated CWA authority, and courts will all struggle to determine where the line is drawn between discharges from a point source that are subject to CWA permitting requirements, and those that fall outside the scope of federal authority. Meantime, the regulated community—including agriculture operations, public and private wastewater treatment facilities, utilities and energy companies, developers and other sectors—should prepare for a period of regulatory uncertainty regarding whether or not their operations or activities are subject to CWA permitting and enforcement.

COUNTY OF MAUI OVERVIEW AND KEY FINDINGS

The Court, in a 6-3 majority opinion authored by Justice Breyer, held that discharges of a pollutant from a point source through groundwater and ultimately to waters of the United States are regulated under the CWA "when there is a functional equivalent of a direct discharge."[2]

The case involves the County of Maui wastewater treatment plant's use of injection wells to discharge treated sewage by pumping it into groundwater, some of which reaches the Pacific Ocean. The core issue in the case was whether such discharges require a CWA National Pollutant Discharge Elimination System permit. The Court stopped short of finding that Maui County's discharges that flow through groundwater require a CWA permit. Rather, the Court remanded the case back to the Ninth Circuit for further consideration under its newly minted functional equivalent test.

In arriving at its functional equivalent test, the Court rejected "more absolute" interpretations from all the parties to the litigation. The Court found the parties' statements about reach and limit of CWA permitting jurisdiction to be

too extreme and “inconsistent with major congressional objectives” of the CWA.[3] While an absolute bright-line test would be “easier to administer,” the Court rejected these types of proposals.[4]

For example, environmental groups advocated for the broad test articulated by the Ninth Circuit below, where the CWA's “permitting requirement applies so long as the pollutant is 'fairly traceable' to a point source [as the proximate cause for the discharge] even if it traveled long and far (through groundwater) before it reached navigable waters.”[5] Conversely, the County of Maui and the United States, as amicus curiae, offered a bright line test under which point sources must be the means of delivering pollutants to waters of the United States; if any nonpoint sources, such as groundwater, lies between the point sources and waters of the United States, then the CWA's permitting requirements do not apply.

Recognizing that “courts and EPA have tried to find general language that will reflect a middle ground between these extremes,” the Court stated that the key “linguistic question here concerns the statutory word 'from'” as used in the CWA's definition of “discharge of pollutant” (i.e., “any addition of any pollutant to navigable waters from any point source”).[6] Moreover, the Court concluded that “from” is a contextual concept, and as such, the facts of each case will matter.

In an effort to collapse the potential range of circumstances where a CWA permit is required, the Court held that the CWA “requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.”[7] The Court concluded that its functional equivalent test is the best expression of congressional intent for when the CWA's permitting requirements apply: “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.”[8]

The sum total of the Court's guidance on applying its “functional equivalent” test is as follows:

- Application of the test must account for states' role in regulating groundwater. “As we have said (repeatedly), the word 'from' seeks a 'point source' origin, and context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. Whether 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.”[9]
- Time and distance are the most important factors. The Court posited only two hypotheticals, which fall at either end of the time and distances spectrum. On one hand, “[w]here a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies.” On the other hand, “[i]f the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.”[10]
- But, there are numerous potentially relevant factors depending on the facts of a particular case. “Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (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."[11]

COURTS AND EPA ARE LEFT TO FILL THE VOID CREATED BY THE FUNCTIONAL EQUIVALENT TEST

Unfortunately for the regulated community, there is no bright line test delineating regulated discharges through groundwater and discharges that falls outside the ambit of the CWA permitting regime. Justice Alito, authoring one of the opinion's two dissents questions "[j]ust what is the 'functional equivalent' of a 'direct discharge'"?[12] Justice Alito stated that majority "makes up a rule that provides no clear guidance and invites arbitrary and inconsistent application."[13]

Justice Alito may well be right. The functional equivalent test is necessarily factually intensive and will have to be handled on a case-by-case basis. Similar to the Court's last foray into CWA jurisdictional questions in *Rapanos v. United States* (where the Court announced its "significant nexus" and "relative permanence" tests),[14] the *County of Maui* decision will lead to unpredictability for the regulated community and potentially conflicting interpretations of the functional equivalent test. As the Court notes, guidance on this issue will likely come from additional, fact specific court decisions and/or potential future EPA actions (e.g., guidance and/or rulemaking or a general permitting scheme).

On remand, the Ninth Circuit may have the first opportunity to apply the functional equivalent test to the County of Maui wastewater treatment plant injection well discharges. Additionally, the Court's decision has direct implications for an existing set of cases raising analogous CWA permitting issues to *County of Maui*, including discharges to groundwater from coal ash ponds, a stormwater retention pond, a resort's wastewater treatment facility, and an unlined mine tailings basin.[15]

Looking forward, environmental groups may view the Court's decision as a win (even though the Court declined to adopt the Ninth Circuit's broad "fairly traceable" test) and likely will continue to file CWA citizen suits against dischargers to push this issue further in cases involving groundwater, subsurface seepage, and or other "indirect" discharges.

To ameliorate the impacts associated with potential CWA enforcement suits, the Court noted that judges "can mitigate any hardship or injustice when they apply the statute's penalty provision . . . so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required."[16] The regulated community potentially subject to CWA citizen suits, including possible injunctive relief and attendant litigation costs, are unlikely to take much solace in this, however.

EPA is now on the clock—and likely in the best position—to offer the regulated community some quantum of certainty regarding the application of the functional equivalent test. At best, the "functional equivalent" test announced by the Court is similar to EPA's direct hydrologic connection approach that the agency has applied for decades, and the EPA should therefore be well equipped to offer reasonable sideboards to the Court's ambiguous new test.[17] But EPA's April 15, 2019 interpretive statement, issued in response to the *Maui County* case, disavowed this approach and the regulation of discharges via groundwater altogether. The Court's decision

summarily rejects EPA's interpretive statement, sending the agency back to the drawing board to recast its policy in a manner that gives meaning and, one hopes, clearer guideposts to the new functional equivalent test.

Another possible approach, and one that might offer the most certainty for select dischargers and industry sectors, is for EPA and states with delegated CWA permitting authority to develop general permits for categories of activities that are similar in nature. In any event, EPA's efforts here will also come on the heels of its recently published Navigable Waters Protection Rule to define WOTUS, which is destined for litigation in federal district courts throughout the country.[18] One thing is for sure: EPA will have its hands full with complex CWA regulatory and permitting issues for the remainder of 2020.

Meantime, the functional equivalent test offers little more than regulatory uncertainty. Members of the regulated community will have to evaluate their own operations and development plans and consider whether those activities have the potential to result in the functional equivalent of a direct discharge.

FOOTNOTES

[1] *Cty Maui, Haw. v. Haw. Wildlife Fund*, No. 18-260, slip op. at 2 (Apr. 23, 2020).

[2] *Id.*

[3] *Id*. at 18.

[4] *Id*. at 18.

[5] *Id*. at 4.

[6] *Id* at 6, 15; 33 U.S.C. § 1362(12).

[7] *Cty Maui, Haw.,* slip op. at 15.

[8] *Id.*

[9] *Id.* at 16.

[10] *Id*. at 15-16.

[11] *Id*. at 16.

[12] *Id*. at 2 (Alito, J. dissenting).

[13] *Id*. at 1 (Alito, J. dissenting).

[14] *See Rapanos v. U.S*., 547 U.S. 715 (2006).

[15] *Sierra Club v. Virginia Electric and Power Co*., 903 F.3d 403, 406 (4th Cir. 2018) (holding that pollutants leaching from coal ash ponds through groundwater into a nearby stream were not point source discharges and thus not in violation of the CWA); *Kentucky Waterways All. v. Kentucky Utilities Co*., 905 F.3d 925 (6th Cir. 2018) (same) *Tennessee Clean Water Network v. Tennessee Valley Auth*., 905 F.3d 436 (6th Cir. 2018) (same); *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994) (same as applied to stormwater retention pond for a warehouse); *Conservation Law Found. v. Longwood Venues & Destinations, Inc*., 422 F.Supp.3d 435 (D. Mass. Nov. 26, 2019) (holding that pollutants discharging from a resorts wastewater treatment to groundwater and then to the Ocean was not in violation and explicitly finding EPA's interpretive statement a

reasonable interpretation of the CWA); *Matter of NPDES/SDS*, No. A18-2094, 937 N.W.2d 770 (Minn. Ct. App. Dec. 9, 2019) (holding that the state regulatory agency's NPDES permit for an unlined tailings basin that did include limits for groundwater discharges did not violate the CWA because the CWA does not govern discharges of pollutants into groundwater regardless of hydrological connection).

[16] *Cty Maui, Haw*., slip op. at 18.

[17] *See, e.g., In re Bethlehem Steel Corp*., 2 E. A. D. 715, 718 (EAB 1989) (state that the CWA's permitting requirement applies only to injection wells "that inject into ground water with a physically and temporally direct hydrologic connection to surface water").

[18] 85 Fed. Reg. 22250 (Apr. 21, 2020). The Navigable Waters Protection Rule is effective on June 22, 2020. For a detailed analysis of the Rule, see our prior Alert: A. Tohan et al., Finally Finality? The Trump Administration's Answer to One of Environmental Law's Most Contested Questions: What Are "Waters of the United States"?, K&L GATES LLP (Feb. 20, 2020).

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