

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN WATER ACT

County of Maui v. Hawaii Wildlife Fund: *Regulating Point Source Discharges Through Groundwater*

Under the Clean Water Act, point source discharges to navigable waters of the United States require a special permit from the Environmental Protection Agency (EPA).¹ These National Pollution Discharge Elimination System (NPDES) permits provide the EPA a means to regulate the discharge of pollutants from point sources,² which are defined under the Clean Water Act as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,” such as pipes, channels, or wells.³ In April 2020, the United States Supreme Court decided that even point source discharges that travel *through groundwater* before reaching navigable waters may be regulable under the NPDES permitting system, thereby closing up a potential polluter loophole.⁴ This loophole would have *not* required an NPDES permit for discharges carried through a pipe that ended, for example, a few feet before reaching navigable waters.⁵ Now, under the Supreme Court’s holding in *County of Maui v. Hawaii Wildlife Fund*, such discharges are regulable under the NPDES permitting system, as are any discharges through groundwater that are the “*functional equivalent of a direct discharge*.”⁶

The dispute giving rise to this Supreme Court suit involved the County of Maui’s wastewater reclamation facility, which collects sewage from the surrounding area and partially treats it.⁷ The facility was pumping approximately four million gallons of this partially treated water into the ground via injection wells each day.⁸ The effluent then traveled through

1. 33 U.S.C. § 1311(a) (2020); 1342(a)(1) (2020).

2. *Id.*

3. 33 U.S.C. § 1362(14) (2020).

4. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020).

5. *Id.*

6. *Id.* (emphasis in original).

7. *Id.* at 1469.

8. *Id.*

groundwater about half a mile into the Pacific Ocean⁹ and led to elevated levels of a nitrogen isotope in algae growing in nearshore waters south of the treatment plant.¹⁰ In response, environmental groups brought a Clean Water Act citizens' suit against the County of Maui for discharging a pollutant to navigable waters, albeit through groundwater, without the requisite NPDES permit.¹¹ The Hawai'i District Court held the County of Maui liable for violating the Clean Water Act,¹² a decision affirmed by the Ninth Circuit Court of Appeals.¹³ The Supreme Court granted certiorari to determine whether the Clean Water Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source"¹⁴ in light of the different standards adopted by various Courts of Appeals to determine this issue.¹⁵

Though the Supreme Court's holding that the Clean Water Act requires an NPDES 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*" closed up a potential polluter loophole, it by no means established a bright-line rule. Instead, the Court set forth a list of seven factors to be considered when determining what constitutes a "functional equivalent" of a direct discharge: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the

9. *Id.* Tracer dye studies conducted by the EPA, the Hawaii Department of Health, and researchers at the University of Hawaii established a hydrological connection between the partially treated wastewater and the coastal waters, finding that sixty-four percent of the effluent injected into the wells discharged into the ocean. *Haw. Wildlife Fund v. Cnty. of Maui* (Haw. Wildlife II), 881 F.3d 754, 759 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462.

10. *Haw. Wildlife Fund v. Cnty. of Maui* (Haw. Wildlife I), 24 F. Supp. 3d 980, 984 (D. Haw. 2014).

11. *Cnty. of Maui*, 140 S. Ct. at 1469.

12. *Haw. Wildlife I*, 24 F. Supp. 3d at 1005 ("This court holds only that, given the undisputed evidence in the record showing that pollutants rapidly flow from the aquifer into the ocean and cause significant change to the ocean water near the submarine seeps, the County is liable under both the *Healdsburg* framework articulated by the parties and the indirect discharge (or "conduit") framework.").

13. *Haw. Wildlife II*, 881 F.3d at 765 ("We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*.").

14. *Cnty. of Maui*, 140 S. Ct. at 1468.

15. *Id.* at 1469-70 (While the Ninth Circuit relied on the "fairly traceable standard," *Haw. Wildlife II*, 881 F.3d at 749, the Fourth Circuit relied on a "direct hydrological connection standard," *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), and the Sixth Circuit held that discharges through groundwater are excluded from NPDES permitting requirements, *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F.3d 925, 932-38 (6th Cir. 2018)).

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.”¹⁶ While the Court stated that time and distance will *usually* be the most important of these factors, it noted that this will “not necessarily [be true in] every case.”¹⁷ Further, the Court explained that if a discharging pipe ends fifty miles from navigable waters and discharges effluent into groundwater, and the effluent mixes with “much other material, and end[s] up in navigable waters only many years later, the permitting requirements *likely* do not apply.”¹⁸

For the time being, however, federal enforcement against such indirect discharges remains unlikely. The EPA issued an interpretive statement asserting that discharges into groundwater are categorically excluded from NPDES permitting requirements while petition for certiorari was pending in this case, and thereby expressed its disinclination to expend resources to limit such discharges.¹⁹ However, some states implement the NPDES program based on delegated authority from the EPA, and those states may be more likely to exercise their authority to require NPDES permits for point source discharges through groundwater.²⁰ Further, federal enforcement could look quite different in 2021 as Biden’s political appointments are confirmed.

Julie Schwartzwald Meaders*

16. *Id.* at 1476-77.

17. *Id.* at 1477.

18. *Id.* at 1476 (emphasis added).

19. *Id.* at 1470 (citing 84 Fed. Reg. 16810 (2019)).

20. 33 U.S.C. § 1342(b).

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