

Supreme Court Creates New “Functional Equivalent” Test for Groundwater Discharges



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Wading into a dispute about the Clean Water Act’s applicability to groundwater discharges, the Supreme Court handed environmentalists a somewhat surprising victory in *County of Maui v. Hawaii Wildlife Fund*. However, the lower courts, EPA, and the regulated community will have many opportunities to shape the significance of the decision.

Decision Summary: The majority reaches a compromise on the regulation of groundwater discharges.

The County of Maui’s wastewater treatment plant uses four massive wastewater injection wells to pump four million gallons a day of treated wastewater hundreds of feet underground. The wastewater mixes with groundwater, which then conveys pollutants to the Pacific Ocean. The Supreme Court was asked to determine whether this amounts to a “discharge” of pollutants to a “navigable water” that requires a National Pollutant Discharge Elimination System (“NPDES”) permit under Section 301 of the Clean Water Act. If the answer is “yes,” then the County would have to obtain a NPDES permit and would face civil penalties and attorneys’ fees for its prior unpermitted discharges.

Defying expectations for a definitive 5-4 decision along ideological lines, the Court instead charted a middle course. Justice Breyer’s opinion rejected both the Ninth Circuit’s test and the tests proposed by the parties. Under the Ninth Circuit’s “fairly traceable” test, the federal permitting regime would encroach on policy terrain Congress intended to leave to the states, namely the regulation of discharges to groundwater and the control of non-point-source pollution. But dismissing the formalist, rigid interpretation of the statute preferred by the County and Justice Alito’s dissenting opinion, the majority reasoned that Congress did not intend to allow a polluter to cut a pipe off mere feet from a water body, thereby avoiding a direct “discharge to” navigable water. The majority also discounted EPA’s belated attempt to intervene in *County of Maui* by issuing an “Interpretive Statement” that purported to foreclose CWA regulation of discharges to groundwater, despite prior agency statements to the contrary.

The majority held that the NPDES permitting requirement applies to direct discharges from a point source to navigable water, but also to discharges that are the “functional equivalent” of a direct discharge. Going forward, the lower courts should evaluate “functional equivalency” according to seven factors, the first two of which are the most significant:

- The length of time pollutants travel through groundwater;
- The distance they travel;
- The material through which the pollutants travel;
- Any dilution of or change to the pollutants as they travel;
- The ultimate amount of the pollutants entering the navigable water;
- The manner in which the pollutants enter the navigable water;
- The degree to which the pollutants maintain their distinct identity upon entering the navigable water.

Takeaways: The center holds, and so does the status quo.

Environmentalists certainly had reason to fear a worse outcome, but they have hardly won a sweeping victory. It is too soon to tell whether *County of Maui* will lead to a much broader NPDES permitting program that covers many discharges to groundwater. What is certain is that, as with any Supreme Court decision setting forth a multifactor test instead of laying down a bright line rule, *County of Maui* leaves much for the lower courts, EPA, the states, and individual litigants to resolve. The Courts of Appeals will weigh in soon, with *County of Maui* itself remanded to the Ninth Circuit to apply the new “functional equivalent” test. In addition, the Supreme Court vacated and remanded a Fourth Circuit decision raising the same issue, and yet another case in the First Circuit had been stayed pending the Supreme Court’s decision. In other cases, the district courts will be called on to resolve complex factual disputes between competing

hydrogeologic models, and they may face difficult questions about whether to impose civil penalties on businesses that have complied with state groundwater discharge permits but never sought or could not obtain NPDES permits. EPA also retains considerable discretion in how it responds to the ruling, including whether, as the majority opinion suggested, to issue a general permit that could cover common discharges to groundwater like home septic systems. Until EPA starts to issue permits for discharges to groundwater (if it ever does), the agency is unlikely to take enforcement action, but just as in *County of Maui*, environmentalists may file citizens' suits.

For the time being, complying with state groundwater discharge regulations—some of which impose significant costs on permittees while affording meaningful protection to groundwater—may be the best defense because environmental plaintiffs will see little to gain from a lawsuit. Some businesses with significant groundwater discharges may want to consult with hydrogeologists to evaluate potential groundwater connections to navigable waters. Property owners building new facilities or contemplating major renovations may want to invest in better wastewater treatment technology than they might otherwise.

Anderson & Kreiger's environmental attorneys will continue to monitor these developments. We remain available to assist clients with their environmental compliance, permitting, and litigation needs.