Updates
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Supreme Court Rules Clean Water Act May Regulate Discharges Through Groundwater to Navigable Waters

Uncertainty has long reigned over the reach of the federal Clean Water Act, which applies to "navigable waters," defined by statute only as "waters of the United States." Over the last several decades of debate about federal authority over wetlands, one certainty has been that the definition of navigable waters does not include groundwater. But does the Act apply, for example, when an underground discharge mixes with groundwater and then ultimately reaches a river or a bay? The U.S. Supreme Court answered this question by ruling that the Act applies when such a discharge is found to be "the functional equivalent of a direct discharge" into navigable waters. By its own admission, the Court's open-ended standard leaves a host of unanswered questions that will need to be resolved by future court decisions and executive action. *County of Maui v. Hawaii Wildlife Fund* (No. 18-260, April 23, 2020). Absent further legislation by Congress to define the Act's key terms more precisely, the *Maui* decision likely will create more uncertainty, and lead to more litigation, over the boundaries of Clean Water Act jurisdiction.

Background

The Clean Water Act generally requires a National Pollutant Discharge Elimination System (NPDES) permit for the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12)(A). A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any … well … from which pollutants are or may be discharged." *Id.* § 1362(14).

In this case, the County of Maui disposed of treated effluent from its wastewater treatment plant by injecting it into four underground wells. The wells are located about one half mile from the Pacific Ocean, which is without question a regulated "navigable water." The State of Hawaii (which like most states has delegated authority from the U.S. Environmental Protection Agency to issue NPDES permits under the Act) agreed with the county that no permit was required, even though some of the injected effluent eventually reached the ocean.

Environmental groups sued, claiming Maui violated the Act by discharging pollutants to navigable waters from a point source without a NPDES permit. As we previously reported, the U.S. Court of Appeals for the Ninth Circuit ruled that a NPDES permit was required based on three factors: (1) the pollutants were discharged from a point source (i.e., the injection wells), (2) the pollutants were "fairly traceable" from a point source to a navigable water (i.e., the Pacific Ocean) such that the discharge was the "functional equivalent of a discharge into the navigable water," and (3) more than a *de minimis* level of pollutants reached navigable waters. *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

Shortly after the Ninth Circuit's decision in this case, a split developed among the federal circuit courts of appeal regarding the Act's scope as applied to discharges of pollution traveling through groundwater. The U.S. Court of Appeals for the Fourth Circuit held that a permit is required for discharges through groundwater to navigable waters only when there is a "direct hydrological connection" between the groundwater and the navigable surface water. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). The U.S. Court of Appeals for the Sixth Circuit adopted the narrower view that the Act simply does not regulate pollution that

travels through groundwater or any other indirect route to reach navigable waters. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018). Meanwhile, in April 2019, the EPA issued an "Interpretive Statement," which took the position that the Act excludes "all releases of pollutants from a point source to groundwater . . . regardless of a hydrologic connection between the groundwater and a jurisdictional surface water." 84 Fed. Reg. 16,810 (Apr. 23, 2019).

The Supreme Court's Ruling

In a 6-3 opinion written by Justice Stephen Breyer, the Supreme Court ruled that the Ninth Circuit erred by finding that the Act applies whenever a discharge to groundwater is "fairly traceable" to a downgradient surface water, concluding this interpretation is overly expansive. Rather, the Supreme Court ruled that the Act's permitting requirements cover only discharges through groundwater that are the "functional equivalent" of a direct surface discharge. According to the Court, this occurs "when the discharge reaches the same result through roughly similar means" as when a point source directly discharges pollutants into navigable waters.

Rather than establish a bright-line rule for defining a "functional equivalent" discharge, the Court provided a nonexclusive list of factors that may be relevant depending on the circumstances presented in each case, noting that the first two factors would often be the most important:

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

The Court acknowledged the difficulties with its open-ended approach in providing a clear definition of the specific circumstances under which a permit would be required. The Court thus left it to lower courts to "provide guidance through decisions in individual cases" and the EPA to "provide administrative guidance (within statutory boundaries)."

Justice Brett Kavanaugh wrote a brief separate concurrence to stress his view that the decision is consistent with Justice Antonin Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos*, a wetlands enforcement case, was the Court's most recent attempt to define what surface waters are subject to regulation under the Act. Five justices found that Mr. Rapanos had been wrongly convicted, but without agreeing why. Justice Scalia's four-justice plurality opined that the Act regulates only "relatively permanent, standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection" to such waters. Justice Anthony Kennedy provided the fifth vote to overturn the conviction, while stating that having a "significant nexus" to a navigable water is the proper test for regulating wetlands and other waters—a standard that many courts have since adopted in the decade-plus of litigation that ensued after the Supreme Court's ruling.

Recalling the fractured *Rapanos* case, Justice Samuel Alito's dissent in *Maui* bemoaned the uncertainty posed by the "functional equivalent" test, declaring that the majority "adopts a nebulous standard, enumerates a non-exhaustive list of potentially relevant factors, and washes its hands of the problem." Quoting Chief Justice John Roberts' concurrence in *Rapanos*—which similarly had lamented the lack of a clear standard for defining what constitutes a "navigable water" in the surface water context—Justice Alito cautioned: "We should not require regulated parties to 'feel their way on a case-by-case basis' where the costs of uncertainty are so great."

Justice Clarence Thomas, joined by Justice Neil Gorsuch, issued another dissenting opinion, which posited that there was no direct "addition" of pollutants to the ocean in the case, and hence no regulated "discharge."

Implications

In declining to articulate a clear-cut test for when a discharge through groundwater is subject to permitting under the Act, the *Maui* decision—like the Court's previous decision in *Rapanos*—is likely to generate considerable uncertainty, and thus more litigation, over the Act's reach. In dicta, the majority suggested that discharges through groundwater fifty miles and "many years" away from the nearest navigable water "likely" would not be subject to the Act, but this extreme example has not been ruled out. Additionally, while the decision urged the EPA to develop "administrative guidance" to implement and further define the Court's "functional equivalent" test, the decision is notable in its refusal to defer to the EPA's Interpretative Statement that specifically addressed releases of pollutants from a point source to groundwater that reach a jurisdictional surface water.

Moreover, by taking pains to cast the *Maui* ruling as flowing naturally from Justice Scalia's opinion in *Rapanos*, Justice Kavanaugh may well be importing into the groundwater arena the same uncertainty that has long plagued the wetlands regulatory arena. The 2006 *Rapanos* decision has generated years of uncertainty, litigation, and numerous rule-making proceedings, with a new final regulation adopted just two days prior to the *Maui* decision to define which kinds of surface water bodies are covered by the Act. *Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22250 (Apr. 21, 2020). The Court's open-ended standard in the *Maui* decision could similarly generate long-term uncertainty, and a spate of litigation, over what types of discharges through groundwater are covered by the Act.

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