

The Maui “Functional Equivalent” Point Source Test

April 30, 2020

On April 23, 2020, the United States Supreme Court issued its opinion in *County of Maui v. Hawaii Wildlife Fund*, 590 U. S. ____ (2020), holding that, when pollutants originate from a point source, but are conveyed to navigable waters by a nonpoint source (in this case groundwater), it is the **functional equivalent of a direct discharge from the point source into navigable waters** and, therefore, the Clean Water Act requires the discharger obtain a National Pollutant Discharge Elimination System (NPDES) permit.

Background

The County of Maui, Hawaii (Maui) operates a wastewater reclamation facility that collects sewage from the surrounding area, partially treats it, and then pumps the treated water into the ground through wells. The treated water then travels through groundwater to the Pacific Ocean. A number of environmental groups brought a citizens’ suit under the Clean Water Act (CWA), alleging that Maui was discharging a pollutant to navigable waters without the required NPDES permit.

The District Court held that the permit was required because the path to the Pacific was a clearly ascertainable discharge from Maui’s wells into groundwater and, therefore, was “functionally one into a navigable water” and granted summary judgment in favor of the environmental groups.

Maui appealed to the Ninth Circuit, which affirmed the lower court decision, but held that a permit is required when “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.” The appellate court did not, however, lay out how to determine when, if ever, the connection between a point source and a navigable water would be “too tenuous” to support requiring a permit.

The CWA

The CWA requires that for any person to lawfully “discharge any pollutant” from a “point source” to navigable waters, it must first obtain the applicable permit from the United States Environmental Protection Agency (EPA). The CWA defines those terms as follows:

Discharge of a pollutant (CWA § 502(12))

- (A) any addition of any pollutant to navigable waters from any point source,
- (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft

Pollutant (CWA § 502(6))

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water

Point source (CWA § 502(14))

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . .

The Opinion

The Court’s opinion was delivered by Justice Breyer and was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh. Justices Alito and Thomas issued dissenting opinions.

The Ninth Circuit Holding “Too Broad”

The Court felt the Ninth Circuit’s “fairly traceable” interpretation of “any point source” was too broad under the CWA. In so holding, the Court stated that, under the appellate court’s interpretation, EPA would be able to assert permitting authority over the release of pollutants that reach navigable waters many years after their release, authority Congress did not intend to provide EPA. Further, said the Court, “interpreting the word ‘from’ so broadly might require a permit in unexpected circumstances, such as, e.g., the 100-year migration of pollutants through 250 miles of groundwater to a river.” The Court also provided that the CWA’s structure indicates that, “as to groundwater pollution and nonpoint source pollution, Congress left substantial responsibility and autonomy to the States and did not give EPA authority that could seriously interfere with this state responsibility.” Finally, the Court pointed to “longstanding regulatory practice” that EPA has successfully applied the CWA’s permitting provision to pollution discharges from point sources that reached navigable waters through groundwater using a narrower interpretation than that of the Ninth Circuit.

Maui’s Interpretation “Too Narrow”

Maui argued that the CWA’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. In other words, the pollution must go directly from the point source, or a series of point sources, to the navigable water. If even a single non-point source intervenes, then a permit is not required. In other words, Maui was arguing for a bright-line test.

The Court, however, felt that such a narrow interpretation would risk serious interference with EPA’s ability to regulate point source discharges and that Congress did not intend to create such a “large and obvious loophole” in one of the Clean Water Act’s key regulatory innovations. “If that is the correct interpretation of the statute,” said the Court, “then why could not a pipe’s owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?”

The Maui “Functional Equivalent” Test

In the end, the Court held that a permit is required when there is a discharge from a point source directly into navigable waters, **or** when there is the *functional equivalent of a direct discharge*.

So, what is the *functional equivalent* of a direct discharge?

The Court opined that many factors may be relevant to determining whether a particular discharge is the functional equivalent of one directly into navigable waters, with time and distance being, in most cases, the most important factors, but that there were other “relevant factors.” While the Court recognized the difficulty with its approach, it felt there were too many potentially relevant factors applicable to factually different cases for it to be more specific. Among the determinative factors given by the Court as examples were:

- (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, and*
- (7) *the degree to which the pollution (at that point) has maintained its specific identity.*

According to the Court, transit time and distance traveled will, in most cases, be the most important factors, though not necessarily in every case.

Other guidance sources for determining “functional equivalence”

In the end, the Court suggested that guidance will be refined by way of lower court decisions, application of underlying statutory objectives, and EPA administrative guidance (“within statutory limits”) via methods such as grants of individual permits, promulgation of general permits, or the development of general rules.

So, where does this leave us?

The Court really seems to have “split the baby” here. In any event, there are certain to be many battles to be fought over the meaning of “functional equivalent.” Time and distance being, in the Court’s opinion, the most important factors, look for arguments centering on “how long is too long,” as far as time is concerned, and “how far is too far.” Stay tuned.

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