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ENVIRONMENTAL LAW

# New Clean Water Act 'Functional Equivalent' for Indirect Discharge Permitting

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*Special to the Legal*

In April, the U.S. Supreme Court established a new standard under the Clean Water Act when it vacated and remanded a closely watched U.S. Court of Appeals for the Ninth Circuit decision that pertained to the federal government's authority to regulate the discharge of pollution from a point source through groundwater to navigable waters. See *County of Maui, Hawaii v. Hawaii Wildlife Fund,* No. 18-260, 590 U.S. ____ (Apr. 23, 2020). The central issue of the case was 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 such as groundwater. The court held that a permit issued under the Clean Water Act is required "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters." Because the "functional equivalent" standard is somewhat amorphous, the court introduced several factors (referred to hereafter as the Breyer Factors) to aid courts, the U.S. Environmental Protection Agency (EPA) and the regulated community in making permitting determinations.

The Clean Water Act (CWA) prohibits the "addition" of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the EPA or a delegated state agency. A "point source" is defined in the CWA as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." See 33 U.S.C. Section 1362(14). The statutory definition identifies pipes, ditches, channels, tunnels and wells as examples of potential point sources. Therefore, a discharge to a navigable water via a point source requires a CWA National Pollutant Discharge Elimination System (NPDES) permit.

The Supreme Court decision stems from a citizens' suit in which environmental groups sued the county of Maui, Hawaii, alleging that, in addition to its existing state and federal Safe Drinking Water Act permits, Maui's Lahaina Wastewater Reclamation Facility (LWRF) must obtain a CWA NPDES permit in order to discharge its treated wastewater into its West Maui injection wells, and that to discharge without such permit is in violation of the Clean Water Act. Maui's LWRF receives and treats approximately 4 million gallons of sewage per day, filtering and disinfecting the wastewater, which is then either sold to customers for irrigation or discharged into Maui's injection wells.

In the lower court, the plaintiffs alleged that the pollutants in the treated effluent discharged into the injection wells travel through the groundwater and enter the Pacific Ocean through submarine springs or seeps. A dye tracer study performed in 2013 by the EPA, the Hawaii Department of Health and others confirmed the hydrological connection between the injection wells and the ocean, finding that the tracer dye emerged in the ocean after 84 days. The plaintiffs alleged that water near the seeps has elevated levels of inorganic nitrogen and


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phosphorus, low salinity and pH, and elevated temperature. Maui argued that, when mixed with ocean water, these impacts rapidly diminish. The plaintiffs argued in the lower court and on appeals all the way up to the Supreme Court that the migration of pollutants from the injection wells to the ocean via groundwater constitutes a discharge of pollutants to navigable waters without an NPDES permit in contravention of the CWA. Maui argued that the injection well discharges are not to navigable waters, but rather are discharges to groundwater and therefore do not require an NPDES permit.

The citizens' suit first came before the U.S. District Court for the District of Hawaii, which held that the discharge to groundwater was "functionally one into navigable water" thereby requiring an NPDES permit. On appeal, the Ninth Circuit affirmed the district court's decision by noting that an NPDES permit is needed when the pollutants are "fairly traceable" from the point source.

While the litigation moved through the courts, the EPA released an interpretative statement on discharges to groundwater. The EPA concluded that releases of pollutants to groundwater are "categorically excluded" from the NPDES permitting program. The EPA's position was that because groundwater is regulated by the states and other federal statutes, further regulation of groundwater under the CWA was unnecessary.

The U.S. Supreme Court decided to grant the petition for certiorari in the *Maui* case based on the wide variety of standards in use by lower courts and by the EPA in its interpretative statement described above. Writing for the majority in the 6-3 decision, Justice Stephen Breyer rejected the EPA's categorical exclusion of discharges to groundwater from the NPDES program by noting that the exclusion opened a "large and obvious" loophole. The loophole envisioned by Breyer was one in which a pipeline's owner could "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." To settle the debate and provide a consistent standard, 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," and noted that a permit is appropriate when "the discharge reaches the same result [as a direct discharge] through roughly similar means."

## THE FUNCTIONAL EQUIVALENT STANDARD

The outer limits of the functional equivalent standard were described by the Supreme Court by way of several examples. If there is a discharge from a point source that ends up in navigable waters after traveling through groundwater, where it is mixed with other materials, for many years and many miles after it is first discharged, then it most likely should not be subject to the federal permitting program. Likewise, if a discharge from a point source occurs very near (but not directly into) a navigable water but ends up there a few days later via groundwater migration, then a federal permit is likely needed.

It is, of course, the middle ground that is the most ripe for debate and future litigation. To that end, the court provided seven factors for the EPA and the courts to consider (if and when relevant). The court wrote that time and distance would likely be the most important factors to consider but noted that other factors may become more important depending on the unique circumstances at hand.

## BREYER FACTORS

- Transit time.
- Distance traveled.
- The nature of the material through which the pollutant travels.
- The extent to which the pollutant is diluted or chemically changed as it travels.
- The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source.
- The manner by or area in which the pollutant enters the navigable waters.
- The degree to which the pollution (at that point) has maintained its specific identity.

There is ample room for disagreement in terms of what any of the Breyer Factors mean when viewed independently or applied to a specific case, let alone when several are considered in concert. The case was remanded to the Ninth Circuit for further proceedings consistent with the opinion, so it will be the lower court that will have to tackle application of the factors to this specific case.

Reactions to the Breyer Factors have thus far been mixed. On the one hand, the factors provide a nuanced approach to the issue that will enable the regulated community and the EPA to work collaboratively on permitting decisions. On the other hand, the functional equivalent standard is highly fact-specific and lacks a "bright line" by which permitting authorities and the regulated community can make close calls without a long debate. Finally, the fact-specific analysis could provide a mechanism for challenges by citizens' groups that are unhappy with the outcome of any particular decision, thereby increasing litigation over permitting decisions. •

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