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## U.S. Supreme Court Holds Clean Water Act Covers Groundwater in *Limited Circumstances*

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[Duncan Greene](#), [Rachael Lipinski](#), and [Sophia Amberson](#)

On April 23, 2020, the Supreme Court of the United States in [County of Maui v. Hawai'i Wildlife Fund](#) announced a new test to determine whether a discharge of a pollutant that travels through groundwater is subject to Clean Water Act ("CWA") National Pollution Discharge Elimination System ("NPDES") permitting requirements. The Court held that a NPDES permit is required not only when there is a direct discharge from a point source, but also when there is the "functional equivalent of a direct discharge." The Court vacated the Ninth Circuit's "fairly traceable" test and remanded the case back to the Ninth Circuit to determine whether the County wastewater facility's discharge of wastewater through injection wells that then migrated through groundwater into the ocean was a "functional equivalent of a direct discharge" into the ocean.

The question of whether a specific release of pollutants that travels through groundwater constitutes a "functional equivalent of a direct discharge" triggering CWA permitting requirements, undoubtedly, will be the subject to litigation and regulatory interpretation, all of which continue the cloud of uncertainty over the scope of permitting requirements under the CWA when the discharge is not directly to a jurisdictional surface water.

### BACKGROUND

The CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant" without a NPDES permit. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Notably, what constitutes "navigable waters" is subject to its own ongoing [legal controversy](#).

As [previously reported](#), *County of Maui* originated over the County's alleged discharges from a wastewater facility, which pumped treated waste into the groundwater through four injection wells. The groundwater, including the waste water, then flowed into the Pacific Ocean. Environmental organizations brought suit, asserting that such discharges were in violation of the CWA's prohibition on point source discharges to navigable waters without a NPDES permit. The Ninth Circuit held that a CWA permit is required when a pollutant from a point source is "fairly traceable" into navigable waters. The Ninth Circuit's decision aligned with the Fourth Circuit's decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, but conflicted with the Sixth Circuit's decision in *Kentucky Waterways Alliance v. Kentucky Utility Co.* The decision was appealed to the Supreme Court, which accepted review on the question of whether the "CWA requires a [NPDES] permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater."

In a 6-3 decision, the Supreme Court held that the Ninth Circuit's "fairly traceable" test was too broad. Specifically, the Court raised concerns that the "fairly traceable" standard would allow pollutants released into the groundwater, that reach a navigable water years later, to potentially fall within the EPA's permitting authority and potential encroachment on state responsibility.

The Supreme Court also summarily rejected the EPA's position—a position adopted during the pendency of the litigation—that a release of pollutants to groundwater is not subject to the CWA's NPDES permit requirement "even if the pollutants subsequently migrate to jurisdictional surface waters." The majority found the EPA's interpretation was unreasonable and declined to afford it any deference. Instead, the Court took a more central position, creating a new test to determine when discharges that travel through groundwater to navigable waters of the United States (jurisdictional surface waters) require a NPDES permit.

The opinion acknowledged that the "functional equivalent" test is murky but recognized that there are too many variables to consider depending on the circumstances of a particular case to establish a specific

bright-line test. As a result, the Court highlighted a non-exhaustive list of factors for determining – on a case-by-case basis – whether there was a discharge requiring a NPDES permit under the CWA. Those factors include: (1) time; (2) distance; (3) nature of the material through which the pollutant travels; (4) the extent to which the pollutant is diluted or chemical altered as it travels; (5) the amount of pollutant that enters the navigable waterway as compared to the amount of pollutant that leaves the point source; (6) the means by which the pollutant enters navigable waters; and (7) the degree to which the pollutant has maintained its specific identity when it enters the navigable water. The Court noted that “time” and “distance” will likely, but not always, be the most important factors in many cases. The Supreme Court found that a pipe ending a few feet from navigable waters and releasing pollutants that travel through groundwater would clearly require a NPDES permit, but pollutants that migrate over several years and 50 miles through groundwater to a river likely do not.

## PRACTICAL IMPLICATIONS

Ambiguity as to what exactly constitutes a “functional equivalent” discharge is likely to create considerable uncertainty for the regulated community regarding releases and seeps of pollutants into groundwater that are subject to CWA permitting requirements. While the examples provided by the Supreme Court certainly offer some general guideposts as to the functional equivalent standard, they reflect only two polar-opposite examples. EPA guidance and court interpretations in future litigation consequently will be avenues through which further definition will be provided on releases falling within these two guideposts.

The Supreme Court aimed to resolve the circuit splits among the Fourth, Sixth, and Ninth Circuits. In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, the Fourth Circuit adopted an interpretation similar to the Ninth Circuit’s interpretation in *County of Maui*. Conversely, the Sixth Circuit, in *Kentucky Waterways Alliance v. Kentucky Utility Co.*, disagreed with the Ninth Circuit’s interpretation in *County of Maui*, finding that groundwater is not a “point source” and that “for a point source to discharge into navigable waters, it must dump directly into those navigable waters.” *Upstate Forever* also was appealed to the Supreme Court, but the Court has not yet accepted review. It is likely the Court will grant review, vacate the Fourth Circuit’s decision, and remand it back for further consideration in light of the *County of Maui* opinion. How exactly the Courts of Appeals and District Courts apply the functional equivalent test remains to be seen. For now, the Ninth Circuit, and perhaps the Fourth Circuit, will have the first opportunities to interpret this new “functional equivalent” test.

## FOR MORE INFORMATION

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