

# Supreme Court Rules Clean Water Act Protections Can Extend to Groundwater; Creates Conflict with New 2020 WOTUS Rule

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On April 23, 2020, the United States Supreme Court ruled that the addition of pollutants to groundwater which travels a half mile to enter navigable waters is the functional equivalent of a direct discharge, and subject to the protections and requirements of the Clean Water Act ("CWA"). The decision in *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. (2020), represents a sea change in CWA interpretation, and may spell the end of the Navigable Waters Protection Rule issued by EPA and the Army Corps of Engineers only two days earlier. That rule (colloquially known as the 2020 WOTUS Rule) specifically excluded groundwater from the protections of the CWA under a new definition of "Waters of the United States."

Maui County began as a challenge to a wastewater reclamation facility's practice of pumping partially treated wastewater into wells, where it joined with groundwater and travelled roughly half a mile to the Pacific Ocean (a "navigable water"). Studies determined that a considerable portion of the 4 million gallons per day discharged by the County of Maui ended up in the ocean. Environmental groups brought suit, stating that the County's practice constituted an addition of a pollutant from a point source to a navigable water without a permit in contravention of the CWA.

The District Court ruled in 2014 that the "path to the ocean is clearly ascertainable" and that the County's discharge to the wells was "functionally one into navigable water." The Ninth Circuit Court of Appeals upheld the District Court's decision, but utilized a different, and arguably broader standard, finding that "the pollutants are *fairly traceable* from the point source [wells] to the navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." The Ninth Circuit did not rule on what would constitute too tenuous a connection between a point source and navigable water to support liability under the CWA, leaving open the

possibility that pollutant discharges miles removed from navigable waters and detected years after the fact could constitute a violation of the Act.

The Supreme Court decision walked a line between the broad “fairly traceable” standard of the Ninth Circuit, urged by the environmental respondents, and the bright line test argued by the County that the point source (essentially the discharge pipe) must be the “means of delivering pollutants to navigable waters” for CWA liability to attach. The court determined that the Ninth Circuit approach could allow regulators to assert permitting requirements over sources of pollutants as remote as a compost heap many years after their release, given the modern scientific tools available to trace and identify sources of contaminants. The court determined Congress did not intend so broad a reach, nor to limit States’ authority to deal with pollution that has traditionally been treated as “nonpoint source discharges” but which may well be captured by the “fairly traceable” standard. The court also acknowledged the disparate standards used by other Courts of Appeal in recent decisions, citing the “direct hydrological connection” standard of *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* 887 F.3d 637 (CA4 2018), and the complete rejection of CWA application to discharged through groundwater found in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (CA6 2018). While the ultimate decision in Maui County forged a standard bearing some similarity to that of *Kinder Morgan*, it rejected the extremes of the Sixth Circuit decision, as well as those of both the Petitioners and Respondents in the instant case.

In determining that the CWA requires a permit when there is a *functional equivalent of a direct discharge* from a point source to navigable waters, the Supreme Court acknowledged that application of the statute will be highly fact dependent, with time and distance being critical issues in most cases. The court noted numerous additional factors which may be utilized to determine the need for a permit in any given case, including the amount of pollution emerging into navigable waters, the nature of the material through which the pollutant travels, and the degree to which the pollution has maintained its specific identify. The 6-3 decision by Justice Breyer remanded the matter back to the Ninth Circuit to apply the new standard. Justices Thomas, Gorsuch, and Alito dissented.

The conflict Maui County creates with the nascent 2020 WOTUS Rule is likely to complicate what was already predicted to be a highly litigated rulemaking. The 2020 Rule was the third redefinition of “Waters of the United States” since 2015, and was intended to clarify the murky and controversial term.

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