

THE SUPREME COURT, THE EPA, AND THE QUESTION OF FEDERAL JURISDICTION OF THE CLEAN WATER ACT

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On April 23, 2020, the Supreme Court ruled in *County of Maui v. Hawaii Wildlife Fund* that a property owner is required to obtain a National Pollutant Discharge Elimination System (“NPDES”) Permit under the Clean Water Act (“CWA”) prior to a direct discharge, or the “functional equivalent” of a direct discharge, of a pollutant to navigable waters. In an almost eerie sense of timing, two days earlier, on April 21, 2020, the United States Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Army”) (collectively the “Agencies”) promulgated the Navigable Waters Protection Rule, redefining the “waters of the United States” (“WOTUS”) under the Clean Water Act (the “Navigable Water Rule”). The convergence of the Supreme Court decision in *County of Maui* and the Agencies’ promulgation of a new WOTUS rule is an inflection point in the evolution of federal jurisdiction over groundwater and ephemeral waters, otherwise regulated by the states. To comply with the Clean Water Act, property owners must interpret the Navigable Water Rule in light of the *County of Maui* opinion, and vice versa. -

The CWA forbids the addition of any pollutant *from* a “point source” to “navigable waters” without a NPDES permit. The Act defines a “point source” as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,” including any “container, pipe, ditch, channel, tunnel, conduit, . . . or well.” It defines “navigable waters” to mean “the waters of the United States, including the territorial seas.”

The Supreme Court establishes when there is federal jurisdiction over the conveyance of pollutants, while the Navigable Water Rule establishes to which “waters” the conveyance applies.

For the first half of the equation, the conveyance, Justice Breyer, writing for the 6-3 majority in *County of Maui*, articulated a number of factors to determine whether there is the “functional equivalent” of a discharge directly into navigable waters, including: (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. Time and distance will be the most important factors in most cases; for example, a pipe ending a few feet from navigable waters *is* the “functional equivalent” to a direct discharge, while the discharge from a pipe ending 50 miles from navigable waters *is not*.

Meanwhile, EPA and the Army had already begun to narrow the definition of WOTUS, limiting it to: territorial seas and waters that are susceptible to use in interstate or foreign commerce; tributaries that continuously flow all year round or during certain times of the year, but not merely in direct response to precipitation; lakes and ponds, and impoundments; and wetlands that are “meaningfully connected to” other jurisdictional waters. A tributary, lake, pond, or impoundment must contribute flow in a “typical year” directly to traditional navigable waters or indirectly to such waters through other jurisdictional waters (including other tributaries, lakes, ponds, impoundments or adjacent wetlands). EPA and the Army excluded from federal jurisdiction, groundwater, ephemeral streams and pools, previously

converted cropland, farm and stock watering ponds, artificial lakes, waste treatment systems, interstate waters, and adjacent wetlands that lack a physical or surface hydrological connection to a covered wetland.

Taking the Supreme Court's opinion together with the Navigable Water Rule, we can assume the Clean Water Act establishes federal jurisdiction over the discharge into territorial seas, interstate waters, tributaries that continuously flow without precipitation, natural lakes, ponds, impoundments, and wetlands that are connected to other jurisdictional waters, assuming that the discharge is the functional equivalent of a direct discharge based on the time and distance it must travel before it reaches one of the waters described above. The next step is more complicated. Can we assume that the Clean Water Act does *not* cover a discharge into groundwater, even if that discharge subsequently traveled through the groundwater to one of the navigable water, simply because the Navigable Water Rule excludes groundwater from the definition of WOTUS?

The *County of Maui* case may answer this question upon remand. The Supreme Court remanded the case to the Ninth Circuit to determine if the County of Maui's discharge of wastewater into underground injection wells constituted the "functional equivalent" of a direct discharge into the Pacific Ocean, based on the factors suggested by Justice Breyer. The Supreme Court rejected the Ninth Circuit's "fairly traceable" test, but it is likely that the Ninth Circuit will look at the tracer test to help it evaluate, at a minimum, the transit time and the distance traveled. A tracer test may also help the Ninth Circuit determine the amount of wastewater that entered the Pacific Ocean relative to the amount of the wastewater that left the injection wells, the manner by which the wastewater entered the Pacific Ocean, and the degree to which the wastewater maintained its specific identity once it reached the Pacific.

It is not a leap to predict that the Ninth Circuit will find that the injection of wastewater through wells into groundwater that is hydrologically connected to the ocean is the "functional equivalent" of a direct discharge. It is also not a leap to assume that the Ninth Circuit's future ruling will be appealed to the Supreme Court again in light of the Navigable Water Rule that excludes groundwater from the definition of WOTUS. It is also likely that one of the multiple challenges to the Navigable Water Rule, including the exclusion of groundwater from federal jurisdiction under the Clean Water Act, will reach the Supreme Court.

One way or the other, the apparent contradiction between the Supreme Court's "functional equivalent" test and the Navigable Water Rule's definition of WOTUS will need to be resolved.- Until it is, these two sources of federal jurisdiction will create uncertainty in an already complicated regulatory landscape that is the Clean Water Act.

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