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THE SUPREME COURT CREATES "FUNCTIONAL EQUIVALENT" TEST IN CLEAN WATER ACT CASE

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Last Thursday, the Supreme Court tried to balance the federal regulation of point-source pollution with states' regulation of nonpoint-source pollution under the Clean Water Act ("CWA") in **County of Maui v. Hawaii Wildlife Fund**. The Supreme Court's majority opinion left as many questions as answers, however, as it created a new "functional equivalent" standard, but failed to define what constitutes the "functional equivalent" of a "direct discharge." In short, a property owner will be required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit when there is a direct discharge of a pollutant to navigable waters of the U.S or the "functional equivalent" of a direct discharge. The Ninth Circuit opinion was vacated and the case remanded to the Ninth Circuit to determine if the County of Maui's discharge of wastewater via injection wells through groundwater and eventually to the Pacific Ocean is the "functional equivalent" of a direct discharge. It is not a huge leap to assume that the Ninth Circuit, on remand, will find that it is.

The CWA forbids the "addition" of any pollutant from a "point source" to "navigable waters" without a NPDES permit. The majority focused on interpreting the words "from" and "to" in context, to find something narrower than the Ninth Circuit's "fairly traceable" test (a pollutant discharge that is "fairly traceable" to a point source requires a permit), but broader than the Environmental Protection Agency's ("EPA's") "means of delivery" test (a pollutant discharge that travels through groundwater does not require a permit). This middle ground is the new "functional equivalent" test.

Justice Breyer, writing for the 6-3 majority, articulated a number of factors relevant to determining whether a particular discharge 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. Justice Breyer provided little other guidance to guide lower courts and EPA in applying these factors, other than to compare a pipe ending a few feet from navigable waters to a pipe ending 50 miles from navigable waters. He did not rule out the possibility that NPDES permits may be required for individual homeowner wells and septic systems, or any of the other scenarios creating uncertainty and fear among real property owners and the regulated community across all industries.

Breyer expressed confidence in EPA's ability to apply the "functional equivalent" factors to the facts in specific cases stating that EPA has implemented the permitting provision of the CWA to discharges through groundwater for over 30 years, "with no evidence of in-administrability or an unmanageable expansion in the statute's scope." This fails to acknowledge the inconsistent application of CWA jurisdiction to ephemeral streams, ditches, settling ponds, agriculture properties, and groundwater across the U.S. depending on jurisdiction. The reason the County of Maui came to the Court in the first place was to resolve the conflicting circuit courts' interpretations of the CWA's jurisdiction over groundwater for the past 24 years after the **Rapanos v. United States**, 547 U. S. 715 (2006). The decision in County of Maui does not clear up the confusion. Instead, harkening back to Rapanos, the Court punted the question to

EPA, state regulators, and lower courts to make decisions on a case-by-case fact-specific basis.

Going forward, real property owners will need to determine if there is a discharge of a pollutant on or from their property based on the new “functional equivalent” multifactor test, which still could include discharges to groundwater. Property owners who fail to reach the same conclusion as the regulator could suffer penalties of $54,833 in fines per day (or more than $20 million per year). The availability of citizen suits exacerbates the risk to property owners. Permits are expensive and time consuming, and could impair or delay beneficial land use. In other words, the Supreme Court did not do any favors to property owners in this case.

The California Clean Water Act lawyers at Bick Law LLP will closely monitor the lower courts who are called upon to apply the County of Maui multifactor test and decide what “functional equivalent” means.