

Alert | Environmental



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Supreme Court: Pollutants Reaching Navigable Waters Through Groundwater *May* Require Permit Under Clean Water Act

Rejecting the Trump administration’s novel 2019 interpretation that the Clean Water Act *never* requires permits for pollutant discharges to groundwater, the United States Supreme Court handed down, on April 23, its eagerly awaited decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*

The 6-3 majority held that Section 301 of the Clean Water Act requires an NPDES (National Pollutant Discharge Elimination System) permit for a point source discharge that reaches navigable waters after traveling through groundwater “if that discharge is the *functional equivalent* of a direct discharge” (emphasis added). The case is the last word (for now) in a highly publicized dispute about Maui’s underground injection of treated sewage waste water, a large part of which migrates a short distance via groundwater into the Pacific Ocean.

Maui joins *SWANCC* and *Rapanos* as milestones in the Supreme Court’s evolving jurisprudence regarding the scope of Clean Water Act jurisdiction. Like *Rapanos*, *Maui* may raise as many questions about Clean Water Act jurisdiction as it answers.

Meanwhile, EPA continues to wrestle with the fundamental question of which waters are subject to Clean Water Act jurisdiction. Indeed, the *Maui* decision comes just two days after the EPA and the Army Corps of Engineers published the **Navigable Waters Protection Rule** (NWPR), the federal government’s latest attempt to define jurisdictional waters, after repealing the earlier Obama-era **Waters of the U.S. Rule**, to

which various industry groups objected as overbroad. Unable to incorporate the latest Supreme Court thinking reflected in *Maui*, the NWPR may trigger a new wave of litigation.

The Context

Both lower courts in *Maui* – the District Court for the District of Hawaii and the Court of Appeals for the Ninth Circuit – held that the Maui discharge required an NPDES permit, but devised different tests for the permit requirement. See *Hawai'i Wildlife Fund v. County of Maui*, 24 F.Supp. 3d 980, 998 (D. Haw. 2014); 886 F.3d 737, 749 (9th Cir. 2018). The district court concluded that Maui's discharge into groundwater was “functionally” a discharge into nearby navigable waters. The Ninth Circuit used a broader test, holding that a permit is required when “pollutants are *fairly traceable* from the point source to a navigable water ...” (emphasis added).

In 2018, the same year as the Ninth Circuit decision in *Maui*, the **Fourth Circuit held** that an NPDES permit is required if there is a “direct hydrological connection” to navigable waters via groundwater, and the **Sixth Circuit held** that the Clean Water Act does not apply to any discharges through groundwater. Adding to the uncertainty, EPA issued an “**Interpretative Statement**” in 2019 which concluded – contradicting the Agency's own previous interpretations – that discharges via groundwater cannot be regulated under the Clean Water Act.

Maui's ‘Functional Equivalence’ Test

Environmental groups urged the Supreme Court to adopt a “proximate cause” test borrowed from tort law (promoted to the Court as a narrower alternative to the Ninth Circuit's “fairly traceable” test), while Maui (with support from the United States) argued that NPDES permits can never be required for pollutant discharges through groundwater. The Court rejected both positions as “too extreme,” and adopted a standard closer to the Hawaii District Court's “functionally” test, holding that the Clean Water Act “requires a permit where there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*” (emphasis in original).

In other words, a permit is required when the discharge accomplishes the “same result through roughly similar means.” “Functional equivalence” is a fact-based determination, and the Court acknowledged that many factors could be relevant to the determination in particular cases. The Court named seven (nonexclusive) factors, with special emphasis in most cases on time (the transit time through groundwater from the point source to navigable waters) and distance (the distance from the point source to navigable waters).

With the new “functional equivalence” test, the Court expressed its intention to establish a “middle ground” between the extremes advocated by the litigants. The Court also acknowledged that its test does not clearly explain how to deal with middle instances, although the middle instances are precisely the ones about which future disputes may arise. Writing for the majority, Justice Breyer embraced this uncertainty, observing:

[C]ourts can provide [functional equivalence] guidance through decisions in individual cases. The Circuits have tried to do so, often using general language somewhat similar to the language we have used. And the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes.

The Court also expects that EPA will provide guidance in numerous ways, including via individual permit decisions, general permits, and rule development. The *Maui* decision may lead to years of litigation over its meaning and implementation.

The *Rapanos* Effect

Other than a single reference, the majority did not cite or rely on Justice Scalia's plurality opinion in *Rapanos*, but that case looms visibly in the background of the Court's decision. Because the *Rapanos* plurality attempted to constrain jurisdictional waters to traditionally navigable waters and immediately adjacent wetlands, some argued that *Rapanos* must exclude regulation of discharges to groundwater, which generally is neither navigable nor a wetland.

In his dissent, Justice Thomas agreed with what he characterized as the majority's "implicit conclusion" that *Rapanos* does not control the outcome of *Maui*. Justice Kavanaugh took a different approach, joining the majority in *Maui* but adding a concurring opinion emphasizing the consistency of the majority's reasoning with the plurality opinion in *Rapanos*. And Justice Alito cited *Rapanos* in his dissenting opinion to illustrate how it could be read to require a permit in many cases of "indirect discharge" that the majority was concerned should be regulated, although not in the case of conveyance via groundwater.

***Chevron* Deference**

All nine justices agreed (at least tacitly) on one thing: EPA's interpretation is not entitled to *Chevron* deference. The majority dismissed the reasoning of EPA's Interpretative Statement as "oblique" and inconsistent with the Clean Water Act's structure, purposes, and text. Justice Thomas agreed (and suggested *Chevron* may be unconstitutional). Justice Alito did not address *Chevron* directly, but remarked that "EPA's position on the regulation of groundwater has been anything but consistent."

Impact of *Maui*

Litigants have been arguing over the scope of the Clean Water Act for decades, and *Maui* gives no reason to believe that those arguments will stop anytime soon. At the time of the Clean Water Act's passage in 1972, now-infamous images of the Cuyahoga River on fire were seared into the public consciousness, and it was relatively easy to see the need for a law to protect the nation's large waterways.

Less clear was the interconnection between those large waterways and myriad smaller bodies of surface and groundwater – and how much protection to afford those smaller resources. The EPA and the Army Corps have had the onus of making these determinations, without much guidance from the statutory text or legislative history.

With the Court explicitly questioning the propriety of affording *Chevron* deference to those agency determinations, it will be interesting to watch whether the *Maui* decision prompts a call for change to the statute itself.

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