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The U.S. Supreme Court Broadens EPA's Regulatory Authority to Include Groundwater Discharges

Authors: Charles R. Schaller

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On April 23, 2020, the United States Supreme Court clarified and expanded when a person is obligated to obtain a discharge permit under the federal Clean Water Act (Act). The Court put to rest the dispute in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.* where the County of Maui collects partially treated wastewater and pumps it into the ground. That effluent then travels through groundwater almost one-half mile to the Pacific Ocean. The County asserted no discharge permit was required because the discharge was not from a point source to navigable water. As discussed in more detail below, the Court concluded that the Act requires a permit when there is a point-sources discharge or when there is a functional equivalent of a direct discharge to navigable water.

As a way of background, and at least up until the Court's recent decision, the Act assigns oversight authority emanating from point sources to the Federal government with oversight authority over pollution emanating from non-point sources to the states. The 1972 legislative history on this separation and distinction of authority is clear. The Federal government regulates discharges of pollutants from point sources to navigable waters under Section 402 of the Act. The states are mandated under Section 208 and 309 of the Act to adopt measures to address non-point sources pollution. In *Concerned Citizens for Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994), the Second Circuit discussed and confirmed the distinct and separate authority of the state and federal governments regulating point sources pollution when it reviewed alleged pollution from manure spreading operations on a dairy farm. Despite arguments that the manure spreading and concentrated animal feeding operation (CAFO) activity were non-point source discharges and exempt as an "agricultural activity", the Court concluded a Section 402 National Pollutant Discharge Elimination System (NPDES) permit was required.

The Act precludes the addition of any pollutant from any point sources to navigable water without a permit. Pollutant is broadly defined under Section 502(6), and point source is defined as "any discernable, confined and discrete conveyance... from which pollutants are or may be discharged" including, but not limited to pipes, ditches, channels and wells. See Section 502 (14). Various federal appellate courts have reviewed and tried to harmonize the legislative intent through statutory interpretation resulting in a mixed message that ripened the *Maui* case for the Supreme Court's review and consideration.

The Court, in expanding EPA's regulatory authority to require a discharge permit, noted the Act's purpose is to "restore and maintain...the integrity of the Nation's waters." To accomplish this purpose, the Act makes it illegal to discharge a pollutant to navigable waters. Thus, the question before the Court was whether a pollutant that leaves a point source and then travels through groundwater before reaching navigable waters requires an NPDES discharge permit under Section 402 of the Act.

Noting that the Ninth Circuit's conclusion that a permit is required if it is "fairly traceable" was too broad, the Court crafted a standard still allowing state control over groundwater yet broadening EPA's role. The Court, however, made clear EPA's role over groundwater and non-point sources is limited to studying the issues, sharing information and issuing monetary grants.

The Court also rejected *Mau*'s position and proposed a test that any addition of a pollutant that travels through groundwater and reaches navigable waters does not require a permit under the Act. The Court, apparently trying to strike a balance, found that the Act "requires a permit when there is a direct discharge from a point source into navigable waters or when there is a functional equivalent of a direct discharge." In determining what is the "functional equivalent" the Court's new test identified the following factors for consideration: time, distance, nature of material through which the pollutant travels, the extent to which the pollutant is diluted or changed as it travels, the amount of pollutant entering navigable waters, the manner by which the pollutant enters navigable waters and the degree to which the pollutant has maintained its specific identity. As noted by the Court, time and distance will be the most important factors in most cases.

With the Court's new standard attempting to further Congressional intent in restoring and maintaining the nation's waters, the regulated community will now have to fully examine its current or proposed discharges of pollutants into navigable waters. Engineers, health and safety personnel and industry officials will have to determine if the discharge meets the test established by the Court requiring a permit. The old bright line is gone. EPA now has tools in its toolbox to regulate certain groundwater discharges. This new authority may further expose the regulated industry to EPA enforcement actions or citizen suit challenges that did not previously exist. And given this ruling, it will not be long before EPA, and the states for that matter, promulgate and adopt new regulations. All of this requires careful examination and consideration by the regulated community when proposing new projects or repositioning existing assets.

For additional information or if you would like to discuss this or other environmental matters, please contact [Charles R. Schaller](#) or other members of [Baker Donelson's Environmental Team](#).