Insights: Alerts

United States Supreme Court Announces Functional Equivalent Test to Require Permits for Discharges to Groundwater (County of Maui v. Hawaii Wildlife Fund)

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The United States Supreme Court has expanded the authority of the United States Environmental Protection Agency (EPA) to regulate discharges to groundwater. The Court announced a new legal test for when discharges directly to groundwater may require a Clean Water Act discharge permit. The announced standard is the "functional equivalent" test that looks at whether the discharge to groundwater is the functional equivalent of a direct discharge from a point source into a navigable water.

The underlying case addressed whether a Clean Water Act National Pollutant Discharge System (NPDES) permit is required for the County of Maui's discharge of treated sewage into underground injection control wells. In Maui, treated sewage meets groundwater at a depth of 200 feet and mixes with groundwater as it flows approximately one-half mile to the ocean. Both the district court and the Ninth Circuit Court of Appeals held that a permit was required. The Ninth Circuit reasoned that an NPDES permit is required when "the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water."

The Ninth Circuit "fairly traceable" test differed from holdings and tests adopted in other Circuits. For example, the Fourth Circuit requires a direct hydrogeological connection whereas the Sixth Circuit holds that no permits are ever required for direct discharges to groundwater. As an attempt to resolve the confusion, on April 15, 2019, the EPA sided with the Sixth Circuit by issuing an Interpretive Statement that concluded that "the best, if not the only, reading" of the statutory provisions is that "all releases of pollutants to groundwater" are excluded from the scope of the permitting program, "even where pollutants are conveyed to jurisdictional surface waters via groundwater."

The Court has charted its own course, rejecting the tests adopted by the Ninth, Fourth, and Sixth Circuits and rejecting EPA's latest interpretation. The Court adopted a "functional equivalent" test, observing that this "functional equivalent" analysis will not be easy and identified a number of factors for the lower courts to consider when determining whether a discharge to groundwater is the functional equivalent to a direct discharge to navigable waters: (1) transit time; (2) distance traveled; (3) 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 water relative to the amount of pollutant that leaves the point source; (6) the manner by or area in which the pollutant enters the navigable water; and (7) the degree to which the pollution (at that point) has maintained its specific identify. The Court noted that time and distance will be the most important factors.

The Court's decision invites EPA to provide administrative guidance on this ruling through decisions on individual and general discharge permits, or the development of rules and guidance documents. The Court also indicated that they expect judges to exercise its discretion when assessing penalties for a failure to obtain a discharge permit while the new test is being applied.

The Court itself acknowledges its “functional equivalent” test presents challenges. The regulated community should expect inconsistent applications while EPA regions, the delegated states, and the courts apply the test. Regulated entities should move with caution if discharging wastewater into an underground well or into a groundwater conduit that could lead to a navigable water.

To read the decision, please click here.

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