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## THE SUPREME COURT SETS NEW STANDARD FOR CLEAN WATER ACT PERMITS

In a highly anticipated opinion the United States Supreme Court held that the Clean Water Act ("CWA" or "Act") applies to the release of pollutants that are eventually conveyed through groundwater into navigable waters.

The Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, held that a CWA permit is required where pollution is discharged from a point source either directly into navigable waters or "when there is a functional equivalent of a direct discharge."<sup>1</sup> The standard set forth in the Court's decision will impact the National Pollutant Discharge Elimination System ("NPDES") and the potential for future CWA enforcement actions.

The CWA is the main federal water pollution statute. It defines pollutants broadly.<sup>2</sup> The Act requires a permit for discharges through groundwater onto federal waters. It forbids the addition of any pollutant from a "point source" to navigable waters without an appropriate permit. Under the CWA, a point source is a discernible conveyance such as a well, pipeline, or other conduit.

In *County of Maui*, local environmental groups sued alleging that the County of Maui was discharging a "pollutant" into navigable waters without the required permit. Maui County's wastewater reclamation facility collects sewage from surrounding areas, partially treats it, and each day pumps about 4 million gallons of treated water into the ground through four wells. The effluent water then travels about half a mile through groundwater to the Pacific Ocean. The district court granted summary judgment to environmental groups. The Ninth Circuit Court of Appeals affirmed the lower court, espousing a broad rule that a permit is required when "pollutants are fairly traceable from the point source to a navigable water."

The 6-3 decision by the Court rejected the Ninth Circuit's test that would have allowed for exemptions for indirect pollution. The majority of Justices

created a new test, ruling that a permit must be obtained for indirect contamination that's the "functional equivalent" of a direct discharge into federal waterways.

The new standard espoused by the Court requires operators to obtain a CWA permit for discharges through groundwater, rejecting the government's argument that the CWA does not apply to such discharges. The Court identified seven factors that may be relevant when determining if the discharge would require a permit. The factors include: (1) transit time, (2) distance travelled, (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, (7) the degree to which the pollution (at that point) has maintained its specific identity. According to Justice Breyer who wrote the opinion, the two key factors in most determinations will almost always be the transit time and the distance the pollution must travel in order to reach a federal waterway. The Supreme Court concluded by remanding the case to the lower court to apply the new multi-factor standard.

The Supreme Court's decision will have a major impact on a variety of diverse stakeholders including government actors, as well as industries from oil and gas to agriculture. Going forward there could be a growth in litigation as lower courts and stakeholders apply the new "functional equivalent" test. Those operating utilities connected to groundwater, pipelines, fracking, energy facilities, development projects,

and green infrastructure projects may now be required to obtain CWA permits. Despite these new challenges, the Supreme Court was mindful in its holding regarding compliance and has urged lower courts to be cognizant of "any good faith effort to comply" with the CWA and "the economic impact of the penalty on the violator" when setting fines and punishments for violating the CWA. Nevertheless, it will likely take additional rulings before a clear policy of permitting for indirect discharges will be adopted.

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<sup>1</sup> 140 S. Ct. 1462 (2020)

<sup>2</sup> 33 U.S.C.A. § 1362(6); See *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1469 (2020)

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