LEGAL UPDATE

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UNITED STATES SUPREME COURT DECISION — DISCHARGE OF POLLUTANTS INTO NAVIGABLE WATERS

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

County of Maui v. Hawaii Wildlife Fund
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Facts and Procedural Background. The county of Maui, Hawaii, owns and operates a municipal wastewater treatment plant called the Lahaina Wastewater Reclamation Facility (LWRF). The LWRF receives and treats about 4 million gallons of sewage from approximately 40,000 customers and uses four injection wells to dispose of effluent (liquid waste or sewage) into a shallow aquifer beneath the facility on a daily basis. The injection occurs about one-half mile from shore.

When the LWRF underwent an environmental review in 1973, the county's consultant stated that effluent injected into the wells later enters the ocean off the shore. The county's reassessment in 1991 confirmed this finding. The county's expert estimated that when 2.8 million gallons of effluent are injected into the wells each day, about 3,456 gallons of effluent flow to the ocean per meter of coastline (approximately 800 meters) per day. Additionally, the county's expert found that "about one out of every seven gallons of groundwater entering the ocean near the LWRF is comprised of effluent from the wells."

The United States Environmental Protection Agency (EPA) and the county entered a consent decree in 2001 regarding the county's compliance with the federal Safe Drinking Water Act. The decree required the county to obtain a water quality certificate under section 401 of the federal Clean Water Act (CWA), but the decree did not mention whether the county was required to obtain a National Pollutant Discharge Elimination System (NPDES) permit.

In response to numerous studies suggesting that effluent from the LWRF reached coastal waters, the Hawaii Wildlife Fund and other environmental advocacy groups brought a citizens' CWA lawsuit against the county. The groups claimed that the county was discharging pollutants into a navigable water without the requisite NPDES permit. The District Court for the District of Hawaii (District Court) relied on a study conducted by the University of Hawaii, the Hawaii Department of Health, the EPA, and the United States Army Engineer Research and Development Center and determined that "a considerable amount of effluent" reached the ocean from the wells. The District Court also noted that the path the pollutants took to the ocean was "clearly ascertainable" so the discharge from the wells was "functionally one into navigable water." The District Court granted summary judgment in favor of the environmental groups and the county appealed. The Ninth Circuit Court of Appeals (Ninth Circuit) affirmed the District Court's decision but held that "a 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 county filed a petition for certiorari, which the United States Supreme Court (Court) granted due to inconsistencies among the circuit courts.

Issue. Whether the CWA "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source."

Holding. The Court, in a 6-3 decision, vacated the Ninth Circuit's judgment and remanded the case because the Ninth Circuit applied a different test to determine if the county needed to obtain an NPDES permit. The Court held that an NPDES permit is required if the addition of the pollutants to a navigable water via a nonpoint source "is the functional equivalent of a direct discharge from the point source."

Analysis. The Court relied primarily on the definitions in the CWA along with the Act's purpose to craft a test that is not so inclusive that nonpoint sources become subject to additional regulation, but not so exclusive that point sources could evade regulation. The CWA provides that except when permitted or otherwise allowed, "the discharge of any pollutant by any person shall be unlawful." The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Given that the county did not have an NPDES permit, the Court focused its factual question on the definition of "discharge of a pollutant" to determine whether an unlawful discharge occurred.

The Court noted that nearly all water, including groundwater, eventually reaches navigable water and therefore the Ninth Circuit's "fairly traceable" test may mistakenly give the EPA overbroad permitting authority. The Court also rejected the environmental groups' suggestion to adopt a "proximate cause" test, specifically that "a point source must 'proximately cause' the pollutants' eventual addition to navigable waters." The Court did not agree that the environmental groups' suggestion would be significantly narrower than the Ninth Circuit's "fairly traceable" test.

The Court provided four arguments against the Ninth Circuit's interpretation of the permitting requirement. First, the Court stated that interpreting "from" too literally could lead to permitting for situations attenuated by time or distance, including the transport of a pollutant to a navigable water via a bird's feather. Second, the Court noted that the CWA's structure, along with later legislation, strongly suggests that Congress intended the regulation of groundwater and other nonpoint sources to remain primarily with the states. Third, the Court looked to legislative history and noted that even though members of Congress were well aware of the connection between surface waters and groundwater, Congress rejected an amendment that would have extended permitting provisions to groundwater and instead created state programs for groundwater pollution management. Fourth, the Court stated that the Ninth Circuit's broad interpretation would contradict the EPA's long-standing practice of requiring permits of some point source discharges that reach navigable waters after traveling through groundwater, although the Court refused to defer to the EPA's interpretation that establishes a "direct hydrological connection" test.

The county and the Solicitor General, whom the Court invited to submit an *amicus curiae* brief to express the views of the federal government, argued that the permitting requirement does not apply if the pollutant travels through any nonpoint source between the initial discharge from a point source and reaching a navigable water. The Court rejected this argument because such a narrow interpretation would allow easy and obvious evasion of the law that Congress could not have intended to allow.

The county advocated for a means-of-delivery test that relied on the definitions of "discharge of a pollutant" and "point source." By breaking down the elements of those definitions, the county coupled the words "from" and "conveyance," and argued that how a pollutant reaches a navigable water matters more than where the pollutant came from. Under this logic, if groundwater is the conveyance that transports a pollutant to a navigable water then there is no discharge subject to a permit because groundwater is not a point source. The Court rejected this argument, stating that the CWA couples the words "to" and "from," which indicates a destination (navigable water) and an origin (point source), not a means of delivery.

The Solicitor General argued in favor of the EPA's interpretive statement that the agency issued after the Ninth Circuit released its opinion. The interpretive statement stated that the EPA's position was to exclude all releases of pollutants into groundwater from NPDES permitting requirements. The Court

stated that such an interpretation was contrary to the text of the law because the definition of "point source" includes wells as an example and wells ordinarily discharge into groundwater. The Court stated that if the states are meant to exclusively regulate groundwater, then the need to include wells under federal regulation of point sources is questionable.

The Court also dismissed the idea that the word "from" in the NPDES permitting requirement should be interpreted to mean "immediately from" without any intervening nonpoint sources. The Court found "no linguistic basis" for such an interpretation and cited examples from everyday language to demonstrate that such a restrictive interpretation would allow evasion of the requirements of the CWA.

The Court settled on a multi-factor "functional equivalent" test. Specifically, the Court stated that an NPDES permit is required if a point source directly discharges into navigable waters "or when the discharge reaches the same result through roughly similar means." In addition to a nonexhaustive list of factors that could apply in a particular situation, the Court stated that time and distance will be the most important factors in the majority of cases to determine whether a permit is required. The Court emphasized the EPA's role in providing administrative guidance and noted that a court can mitigate any hardship or injustice that arises from the EPA's interpretation when that court applies the CWA's penalty provision.

Concurrence. Justice Kavanaugh concurred with the majority opinion in full but wrote separately to emphasize three points. Relying on Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Kavanaugh stated that the CWA prohibits an unpermitted addition to navigable waters from a point source, but the Act does not state that the addition has to come directly from the point source. In response to potential criticism that the Court's opinion does not provide a bright-line test, Justice Kavanaugh stated that Congress left the CWA vague and the Court is attempting to "translate the vague statutory text into more concrete guidance." In response to the argument that the Court failed to commit to the most important factors for determining when a pollutant entering a navigable water comes from a point source, Justice Kavanaugh noted that the Court did emphasize the importance of time and distance and stated that the Court properly provided guidance for the permitting requirement rather than proclaim a bright-line rule.

Dissents. Justice Thomas wrote a dissenting opinion to which Justice Gorsuch joined. Justice Thomas argued that the majority opinion should have interpreted the word "addition" in context with the words "to" and "from." After providing dictionary definitions for the word "addition," Justice Thomas argued that the CWA implies that a permit is required only for a direct discharge of a pollutant to navigable waters from a point source. In response to the majority's argument relating to legislative intent, Justice Thomas cited *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015), to argue that the Court is required to follow the text of a statute even if doing so undercuts the statute's objective.

Justice Alito wrote a separate dissenting opinion in which he argued that the majority's opinion will lead to confusion among interested parties, the EPA, and lower courts because the Court provided a nonexhaustive list of factors without guidance as to how those factors would apply. Justice Alito stated that there are only two possible ways of interpreting the permitting requirement. The first is that a permit is required for the original source of the pollutant. The second is that a permit is required for a direct discharge. Justice Alito argued that any other middle-ground interpretation does not provide proper guidance for a potential permittee to know at what point a discharge is no longer subject to federal regulation. Justice Alito rejected the "originally from" interpretation because that interpretation could put owners of injections wells, septic systems, and related conveyances to groundwater who are currently subject to state regulation at risk of federal regulation that Congress explicitly avoided. For those reasons, Justice Alito found that the only proper interpretation of the permitting requirement is that a permit is required for a direct discharge into navigable waters.

Impact on Iowa. The EPA has delegated NPDES permitting authority to Iowa. The Department of Natural Resources (DNR) requires a facility to acquire an NPDES permit when the facility discharges a pollutant from any point source into waters of the United States or waters of Iowa. The Court's ruling requires a facility to obtain an NPDES permit if the discharge of pollutants from a point source is the

functional equivalent of a direct discharge into navigable waters even if the pollutants are secondarily conveyed to navigable waters via a nonpoint source. Using the factors that the Court provided, it is possible that the DNR could require a facility to obtain an NPDES permit for the discharge of a pollutant from a point source that does not discharge directly into a water of the United States or a water of the state, but reaches such water after traveling through a nonpoint source conveyance.

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