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Some groundwater discharges need federal permits, U.S. Supreme Court says

Decision nixes EPA's interpretation of CWA

By: Eric T. Berkman May 21, 2020

A recent U.S. Supreme Court decision that the Clean Water Act regulates certain discharges of pollutants flowing through groundwater to the ocean or other navigable waters creates uncertainty and potential liability for business, industry and even homeowners, attorneys say.

Lawyers representing conservation interests, however, say the ruling provides much-needed protection for oceans, rivers and streams following a new polluter-friendly interpretation of the CWA by the Trump administration.

Under that interpretation, which the Environmental Protection Agency issued in 2019, discharges into groundwater — even when the point source sits just feet from federally protected navigable waters — do not require a federal permit.

By a 6-3 vote, the Supreme Court rejected the EPA's interpretation in a 51-page decision, *County of Maui, Hawaii, Petitioner v. Hawaii Wildlife Fund, et al.*

The petitioner county, relying on the EPA interpretation, unsuccessfully challenged a 9th U.S. Circuit Court of Appeals decision that effluents flowing from its sewage treatment facility through groundwater to the Pacific Ocean a half-mile away fell under CWA purview.

"We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters," Justice Stephen G. Breyer wrote for the majority.

In December, while *County of Maui* was pending, U.S. District Court Judge William G. Young in Boston dismissed a citizens suit brought by the Conservation Law Foundation alleging that a Cape Cod resort violated the CWA when its wastewater treatment facility discharged nitrogen from leach pits into groundwater that flowed into the nearby harbor.

In that case, *Conservation Law Foundation v. Longwood Venues & Destinations, Inc., et al.*, Young found the EPA interpretation was entitled to deference under the Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, which compels federal courts to defer to a federal agency's reasonable interpretation of an ambiguous statute.

But *County of Maui* could allow *Longwood Venues* and similar cases elsewhere to proceed. Meanwhile, attorneys who counsel entities potentially impacted by the decision say the "functional equivalent" test raises troublesome uncertainties, particularly in coastal states like Massachusetts and Rhode Island.

"Regardless of your position on the extent of the scope of the CWA, you have to be horribly disappointed in the decision," said Boston attorney Jeffrey R. Porter, defense counsel in *Longwood Venues*. "The Supreme Court was asked a 'yes' or 'no' question and answered it 'maybe,' by providing this functional equivalence test without providing anything close to a clear line whatsoever. … This means more years of litigation around the country attempting to figure out the scope of the CWA."

Porter also raised the specter of homeowners being subjected to costly citizens suits over discharges from their septic systems.

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> ***— Jeffrey R. Porter, Boston***

But David L. Henkin of Earthjustice in Honolulu, who represented the respondents in *County of Maui*, downplayed those concerns, pointing out that the recent EPA interpretation itself represented a radical shift from how the issues had been handled for years.

"There had been over three decades of application of the interpretation that the CWA covered some discharges via groundwater, and the court said this is not a situation where every time someone flushes their toilet they're going to need a permit," Henkin said.

Harder to counsel?

Attorneys for Maui County could not be reached for comment prior to deadline.

But Michael Donegan, an environmental lawyer in Providence, said the case makes it much harder to counsel his clients over permitting and compliance matters.

For example, when a client is constructing a facility or selling a business, Donegan said he needs to provide a legal opinion as to whether all approvals and permits necessary to operate as intended are in place.

That means if a client is fully compliant with a state permit for its discharges into groundwater, he now has to figure out whether such discharges constitute the "functional equivalent" of a direct discharge into navigable waters, necessitating a federal permit as well.

Donegan described the standard as vague and unpredictable.

"This just made it more challenging to provide an opinion with certainty regarding permitted facility discharges into groundwaters," he said. "This is particularly challenging the closer you get to a water like the ocean or a navigable water of the U.S."

Porter said the decision will have particularly big ramifications in Massachusetts, one of only three states that has not been delegated the authority to implement the National Pollutant Discharge Elimination System Program, which allows authorized states to issue discharge permits valid under both state and federal law.

"In 47 other states, what will happen post-*Maui* is that a state will decide whether or not a permit is needed and will issue one valid under both the CWA and whatever state program might be in place," Porter said. "But in Massachusetts, you can have a perfectly valid state permit like my client [in *Longwood Venues*] and still potentially be liable for not having a valid federal permit. … Maybe a silver lining of this case might be the Legislature deciding to put the DEP in the position of 47 of its counterparts."

Boston environmental lawyer Michael W. Parker described the functional equivalent test as a compromise between more extreme positions taken by environmental groups on one side and Maui County and the Trump administration on the other.

"The good news is that, for once, the CWA has a fairly workable test," he said. "I feel pretty confident small septic system owners won't get roped into CWA jurisdiction with the attendant $50,000-per-day fines. The court was very cognizant of that issue."

Ian D. Coghill, a Boston-based staff attorney with the Conservation Law Foundation, who represented the CLF as plaintiff in *Longwood Venues*, predicted an expansion of CWA application, especially in places such as Cape Cod, where there are a large number of injection wells causing significant water-quality problems.

"Ultimately, this is a trigger to take the issue seriously," he said. "It has not been directly addressed for a long time."

Flowing to the ocean

The petitioner county operates a facility on the island of Maui that collects sewage from surrounding areas, partially treats it, and pumps the treated water into wells hundreds of feet underground.

The effluent, approximately 4 million gallons a day, travels another half-mile through groundwater to the ocean.

In 2012, the respondents, a group of environmental groups, brought a citizens suit under the CWA alleging that the petitioner was discharging pollutant to navigable waters without a permit.

The U.S. District Court granted summary judgment to the respondents, characterizing the discharge as "functionally one into navigable water."

The petitioner appealed and the 9th Circuit affirmed. The Supreme Court subsequently granted cert to the petitioner.

The Supreme Court rejected the petitioner's argument that if at least one nonpoint source, like groundwater or unconfined rainwater runoff, lies between the point source of discharge and navigable waters, the CWA permit requirement does not apply.

That would allow a polluter spewing pollution directly into the ocean to avoid the permit requirement simply by moving the pipe back a few yards, Breyer said.

County of Maui, Hawaii, Petitioner v. Hawaii Wildlife Fund, et al.

THE ISSUE: Do some discharges of pollutants through groundwater to the ocean or other navigable waters require a federal permit under the Clean Water Act?

DECISION: Yes (U.S. Supreme Court)

LAWYERS: Elbert Lin and Michael R. Shebelskie, of Hunton, Andrews, Kurth, Richmond, Virginia (petitioner)

David L. Henkin of Earthjustice, Honolulu (respondents)

"We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act," Breyer continued.

At the same time, the court found that the 9th Circuit's holding that the permit requirement applies as long as the pollutant in question is "fairly traceable" to a point source, no matter how long and far it traveled, was too broad.

Instead, Breyer said, a permit is required for an indirect discharge that is the "functional equivalent" of a direct one.

"Both Maui and the Government object that [this] would vastly expand the scope of the statute, perhaps requiring permits for each of the 650,000 wells like petitioner's or for each of the over 20 million septic systems used in many Americans' homes," Breyer wrote. "But EPA has applied the permitting provision to some (but not to all) discharges through groundwater for over 30 years. In that time we have seen no evidence of unmanageable expansion."

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