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Lisa Soronen [1]

In County of Maui, Hawaii v. Hawaii Wildlife Fund [2] the Supreme Court held 6-3 that when there is a “functional equivalent of a direct discharge” from a point source to navigable waters an appropriate permit is required under the Clean Water Act.

The Clean Water Act forbids the “addition” of any pollutant “from a point source” to “navigable waters” without a National Pollutant Discharge Elimination System (NPDES) permit. In this case the County of Maui wastewater reclamation facility pumps treated wastewater (pollutants) from wells (point sources) which travels through groundwater to the ocean (a navigable water). Hawaii Wildlife Fund claimed Maui should have obtained an NPDES permit.

Maui argued that an NPDES permit is only required when a point source or series of point sources is “the means of delivering pollutants to navigable waters.” In this case groundwater lies “between the point source [the wells] and the navigable water [the ocean].” The State and Local Legal Center (SLLC) filed an amicus brief [3] supporting Maui’s position.

Hawaii Wildlife Fund agreed with the Ninth Circuit “that the permitting requirement applies so long as the pollutant is ‘fairly traceable’ to a point source even if it traveled long and far (through groundwater) before it reached navigable waters.”

The Supreme Court, in an opinion written by Justice Breyer, rejected both positions holding instead that a permit is required when there is a functional equivalent of a direct discharge. The Court concluded that the question in this case came down to the definition of “from” in the phrase “from a point source.”

The Ninth Circuit’s interpretation of “from” was too broad, the Court opined, because it would lead to “surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird’s feathers.” The Court also expressed “doubt that Congress intended to give EPA the authority to apply the word ‘from’ in a way that could interfere as seriously with States’ traditional regulatory authority—authority the Act preserves and promotes—as the Ninth Circuit’s ‘fairly traceable’ test would.”

The Court likewise rejected as too narrow Maui’s argument that if a pollutant travels from a point source through groundwater before reaching navigable water no NPDES permit is required. Justice Breyer offered an example of a point source pipe that spews pollution directly into coastal waters. He asked, under Maui’s interpretation, “why could not the pipe’s owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?”

According to the Court, the functional equivalent of a direct discharge test “best captures, in broad terms, those circumstances in which Congress intended to require a federal permit.”

The Court offered seven examples of factors courts could consider to determine if the functional
equivalent of a direct discharge has in fact occurred including: “(1) transit time, (2) distance traveled, (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 the Court, generally time and distance will be the most important factors.

The Supreme Court sent this case back to the lower court to apply its newly articulated test.


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