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## County of Maui, Hawaii v. Hawaii Wildlife Fund

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***County of Maui, Hawaii v. Hawaii Wildlife Fund,***  
**140 S. Ct. 1462 (2020)**

**Rachel L. Wagner**

The Supreme Court of the United States was recently asked to decide whether the Clean Water Act requires a permit for the discharge of pollutants that originate from a point source but are conveyed to navigable waters by a nonpoint source. Vacating the Ninth Circuit’s “fairly traceable” test, the Court held the Clean Water Act requires a permit when there is a direct discharge of pollutants from a point source into navigable waters or when there is the “functional equivalent of a direct discharge.”

I. INTRODUCTION

In *County of Maui, Hawaii v. Hawaii Wildlife Fund*,<sup>1</sup> the County of Maui, Hawaii (“Maui”), raised the question of whether the Clean Water Act (“CWA”) requires a permit when pollutants originate from a point source—such as the underground injection wells from a sewage treatment plant at issue here—but only reach navigable waters after traveling by a nonpoint source—here, through groundwater.<sup>2</sup> The Supreme Court of the United States held that groundwater is subject to regulation under the CWA, but in a narrower class of cases than implicated by the United States Court of Appeals for the Ninth Circuit’s “fairly traceable” test.<sup>3</sup> Specifically, the Court held that a permit is required if the addition of the pollutant through groundwater is the “functional equivalent of a direct discharge” from the point source into navigable waters.<sup>4</sup>

The Court vacated and remanded the Ninth Circuit’s decision, but also abrogated two other circuit court decisions involving groundwater pollution: (1) *Upstate Forever v. Kinder Morgan Energy Partners LP*, 887 F.3d 637 (4th Cir. 2018), in which the United States Court of Appeals for the Fourth Circuit applied the CWA based on a “direct hydrological connection” between groundwater and navigable water; and (2) *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), in which the United States Court of Appeals for the Sixth Circuit held the CWA does not apply to indirect discharges.<sup>5</sup> In vacating these decisions, the Court created a new test for determining the kind of point source discharges conveyed to navigable waters that require a permit under the CWA.

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1. 140 S. Ct. 1462 (2020).  
2. *Id.* at 1468.  
3. *Id.*  
4. *Id.*  
5. *Id.* at 1469–70.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Maui operates a wastewater treatment facility near Lahaina on the Island of Maui, Hawaii.<sup>6</sup> The facility receives sewage from the area, partially treats it, then releases the effluent (or “wastewater”) through four on-site injection wells.<sup>7</sup> The wastewater travels hundreds of feet underground into the groundwater aquifer, then travels another half mile through groundwater to the Pacific Ocean.<sup>8</sup>

The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States, and prohibits the “addition” of a pollutant from a “point source” to “navigable waters” without a permit from the Environmental Protection Agency (“EPA”).<sup>9</sup> In 2012, numerous environmental groups (“Respondents”) sued Maui in the United States District Court for the District of Hawaii under the CWA’s citizen suit provision, alleging the CWA required a permit because Maui was “‘discharg[ing]’ a ‘pollutant’ to ‘navigable waters’”<sup>10</sup> Maui moved to dismiss the case, asserting the CWA did not cover the pollutants because they passed through groundwater—a nonpoint source—before entering navigable waters.<sup>11</sup> To reach its decision, the district court relied extensively on a tracer dye study conducted by the EPA and the Hawaii Department of Health and granted summary judgment for the Respondents.<sup>12</sup> The district court reasoned that because the “path to the ocean [was] clearly ascertainable,” the discharge from the injection wells into the groundwater was “functionally one into navigable water.”<sup>13</sup>

The Ninth Circuit affirmed the district court’s decision that Maui was required to obtain a permit from the EPA but applied a different legal test. The Ninth Circuit 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 a navigable water.”<sup>14</sup> The Ninth Circuit, however, did not address when a hydrogeologic connection between a point source and a navigable water is “too tenuous to support liability” under the CWA.<sup>15</sup>

Maui petitioned for certiorari.<sup>16</sup> Because the Supreme Court sought to resolve the conflict between the Ninth Circuit’s “fairly traceable” test, the Fourth Circuit’s “direct hydrological connection” test,

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6. *Id.* at 1469.

7. *Id.*

8. *Id.*

9. *Id.* at 1468.

10. *Id.*

11. *Id.* at 1469 (citing *Hawai’i Wildlife Fund v. Cty. Of Maui*, 24 F.Supp.3d 980, 998 (D. Haw. 2014)).

12. *Id.*

13. *Id.* at 1469 (quoting *Hawai’i Wildlife Fund v. Cty. of Maui*, 24 F.Supp.3d 980, 998 (D. Haw. 2014)).

14. *Id.* (quoting *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018)).

15. *Id.* at 1469.

16. *Id.*

and the Sixth Circuit's broad conclusion that discharges through groundwater are categorically excluded from the CWA's permitting requirements, it granted Maui's petition.<sup>17</sup>

### III. ANALYSIS

This case hinged on the scope of the statutory word “from.” In a 6–3 decision, the majority first addressed whether pollution that reaches navigable waters through groundwater is “from” a point source as defined by the CWA.<sup>18</sup> The Court found the Respondents' and Ninth Circuit's “fairly traceable” test overinclusive, and Maui's “means of delivery” test and categorical exclusion of groundwater from the CWA's permitting requirement by the Solicitor General as *amicus curiae* underinclusive.<sup>19</sup> Instead, the Court concluded the CWA requires a permit when a point source of pollution adds pollutants to navigable water through groundwater, if the addition of pollutants is “the functional equivalent of a direct discharge” from the source into navigable waters.<sup>20</sup>

#### A. *The Ninth Circuit's “Fairly Traceable” Test Is Overinclusive*

Looking to the context, structure, and history of the CWA, the Court rejected the Ninth Circuit's test—that a permit is required so long as the pollutant is “fairly traceable” to a point source regardless of the distance it traveled before reaching navigable waters.<sup>21</sup>

The Court stressed the importance of advancing congressional intent and turned first to context to interpret the CWA's statutory objectives. To interpret “from” in the context of the phrase “from any point source” would require a permit in absurd circumstances, such as “for pollutants carried to navigable waters on a bird's feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river.”<sup>22</sup> Thus, the Court did not think this literal interpretation of the word “from” conformed with Congress's intent when it established the CWA.<sup>23</sup>

The Court also looked to the structure of the CWA to point out that the statute expressly grants some authority to the EPA to regulate point source pollutants, but is silent about nonpoint source regulation.<sup>24</sup> Consequently, because the EPA's role in managing groundwater pollution is limited to collecting from and sharing information with the states, the Court did not think Congress intended the EPA to interfere with the states'

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17. *Id.*

18. *Id.* at 1470.

19. *Id.*

20. *Id.* at 1477.

21. *Id.* at 1470.

22. *Id.* at 1471.

23. *Id.*

24. *Id.* at 1471.

authority to regulate groundwater and nonpoint source pollution.<sup>25</sup> Further, the legislative history of the CWA indicated that Congress rejected prior requests for general EPA permitting authority over groundwater.<sup>26</sup>

Finally, the historical practices of the EPA's permitting requirement—a much narrower and administratively workable “direct hydrological connection” test—supports the Court's view that Congress did not intend for the EPA to have broad regulatory authority like the Ninth Circuit's test would enable.<sup>27</sup> Therefore, the Court concluded the Ninth Circuit's “fairly traceable” test was overinclusive and did not think the EPA should be able to assert its permitting authority over the release of pollutants that reach “navigable waters, possibly many years after their release and in highly diluted forms.”<sup>28</sup>

### *B. Maui's “Means-Of-Delivery” Test Is Underinclusive*

Rejecting Maui's “means-of-delivery” test, the Court dismissed Maui's assertion that a permit is only required if a point source ultimately delivers the pollutant directly into navigable waters.<sup>29</sup> Again, the Court based its decision on its analysis of the context of the CWA and congressional intent.<sup>30</sup>

Maui, with the support of the Solicitor General, argued the language of the CWA only requires a permit for a “discharge,” which in this context is defined as “‘any addition’ of a pollutant to navigable waters ‘from any point source.’”<sup>31</sup> Maui asserted that the meaning of “from any point source” did not concern from *where* the pollution initiated, but only the manner in which it got there.<sup>32</sup> If a pollutant moves through groundwater to navigable waters, Maui argued, then it is the groundwater that is the conveyance, not the point source.<sup>33</sup>

The Court, however, looked to the ordinary meaning of the CWA's statutory language to ascertain congressional intent. The Court expressed serious concern that Maui's interpretation would create an unintended loophole in the EPA's permitting requirement.<sup>34</sup> Accordingly, the Court determined that because the statute pairs the word “from” with the word “to,” Congress intended “navigable water” as a destination, and “any point source” as an origin.<sup>35</sup>

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25. *Id.*  
26. *Id.* at 1472.  
27. *Id.* at 1472–73.  
28. *Id.*  
29. *Id.* at 1473.  
30. *Id.*  
31. *Id.* at 1473–74.  
32. *Id.* at 1473.  
33. *Id.*  
34. *Id.* at 1474.  
35. *Id.*

The Court next turned to the argument proposed by the Solicitor General—that the proper interpretation of the CWA is reflected in the EPA’s recently published Interpretive Statement, categorically excluding all releases of pollutants to groundwater from the permitting requirement.<sup>36</sup> The Court pointed out that neither party, nor the Solicitor General, asked for what the Court has referred to as *Chevron* deference to the EPA’s Interpretive Statement.<sup>37</sup> Moreover, the Court did not find the EPA’s Interpretive Statement persuasive or reasonable in light of the essential purpose of the statute.<sup>38</sup> The Court rejected this interpretation of the CWA because it would “open a loophole,” thus enabling circumvention of the essential purpose of the statute.<sup>39</sup>

Finally, the Court addressed the two dissenting opinions, and rejected the dissents’ suggestions that the language of the statute could be narrowed by reading it to refer only to the pollutant’s immediate origin.<sup>40</sup> Through an extensive linguistic analysis of the statute, the Court explained that the correct reading of the statute turns on context.<sup>41</sup> Comparing the present case to *Rapanos v. United States*,<sup>42</sup> “the statute here does not say ‘directly’ from or ‘immediately’ from.”<sup>43</sup> The Court pointed out that in *Rapanos*, Justice Scalia reasoned that the CWA does not “forbid the ‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’”<sup>44</sup> Therefore, as the Court held in *Rapanos* and restated in *County of Maui*, pollutants discharged from a point source and conveyed through an indirect means into navigable waters are not exempt from the CWA’s permitting requirement.<sup>45</sup>

### C. The Court’s “Functional Equivalence” Test

Ultimately, the Court concluded that “in light of the [CWA’s] language, structure, and purposes,” a permit is required when there is a “direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.”<sup>46</sup> The Court emphasized several factors that may be relevant to determining whether a particular discharge is the functional equivalent of one directly into navigable water, with time and distance being the most important factors in most cases.<sup>47</sup> The relevant factors may include: (1) transit time; (2) distance traveled;

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36. *Id.*

37. *Id.*

38. *Id.* at 1474–75.

39. *Id.* at 1474.

40. *Id.* at 1475 (citing Thomas, J., dissenting).

41. *Id.* (majority opinion).

42. 547 U.S. 715 (2006).

43. *County of Maui, Hawaii*, 140 S. Ct. at 1475.

44. *Id.* at 1477.

45. *Id.* at 1478.

46. *Id.* at 1476 (emphasis in original).

47. *Id.*

(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; and (7) the degree to which the pollution (at that point) has maintained its specific identity.<sup>48</sup> According to the Court, this test reflects the “complexities inherent to the context of indirect discharges through groundwater” and allows district judges to use their discretion on a case by case basis.<sup>49</sup>

#### IV. CONCLUSION

*County of Maui, Hawaii v. Hawaii Wildlife Fund* settled the divide between federal circuit courts as to whether the CWA applies to pollutants discharged into groundwater that subsequently migrate into navigable surface water bodies. However, the “functional equivalence” standard *County of Maui* imposes requires significant factual analysis, which will likely require clarification in future decisions. Because of this lingering ambiguity, exactly how far the protections afforded by the CWA will reach remains uncertain.

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48. *Id.* at 1476–77.

49. *Id.* at 1477.