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SCOTUS: Groundwater and the Clean Water Act

On April 23, 2020, the Supreme Court of the United States (SCOTUS) issued an opinion in *County of Maui v. Hawaii Wildlife Fund*. SCOTUS found that, when pollutants originate from a point source, but travel some distance from the point source to the navigable water (such as through groundwater), it is the ***functional equivalent of a direct discharge from the point source into navigable waters***. Therefore, the Clean Water Act (CWA) requires the discharger to obtain a National Pollutant Discharge Elimination System (NPDES) permit, and the continued discharge without a NPDES permit would be a violation of the CWA.

Background

The County of Maui (Maui) operates a wastewater reclamation facility that pumps partially treated water into the ground through injection wells. Pollutants in the injected water then travel with groundwater to the Pacific Ocean. Maui was sued by several environmental groups. After decisions in favor of these environmental groups at the local District Court and the 9th Circuit Court of Appeals, Maui petitioned SCOTUS for review.

The Opinion

9th Circuit "Too Broad"

SCOTUS determined the 9th Circuit Holding of "*fairly traceable*" standard was "*too broad*". SCOTUS also indicated that, "*as to groundwater pollution and nonpoint source pollution, Congress left substantial responsibility and autonomy to the States and did not give EPA authority that could seriously interfere with this state responsibility.*" Finally, SCOTUS pointed to "*longstanding regulatory practice*" that USEPA has successfully applied the CWA to pollution discharges from point sources that reached navigable waters through groundwater using a narrower interpretation than the 9th Circuit.

Maui's Interpretation "Too Narrow"

Maui argued that the CWA does not apply if a pollutant, having emerged from a "*point source*," must travel through any amount of groundwater before reaching navigable waters. In other words, the pollution must go directly from the point source to the navigable water. In other words, Maui was arguing for a bright-line test. However, SCOTUS decided that the narrow interpretation advocated by Maui (joined by wastewater treatment plant associations, industry, and landowner groups) would risk serious

interference with USEPA's regulation of point source discharges. SCOTUS felt that Congress did not intend to create such a "*large and obvious loophole*" in the CWA. If the narrow interpretation "*is the correct interpretation of the statute*," said SCOTUS, "*then why could not a 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?*"

The "Functional Equivalent" Test

In the end, SCOTUS held that a permit is required when there is a discharge from a point source directly into navigable waters, or when there is the ***functional equivalent of a direct discharge***. SCOTUS opined that many factors may be relevant to determine whether a discharge is the functional equivalent of one directly into navigable waters, with time and distance being the most important factors in most cases. SCOTUS recognized the difficulty with its approach. However, it felt there were too many site-specific relevant factors to factually different cases for it to be more specific. The following are some determinative factors given by SCOTUS as examples:

(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, and
(7) the degree to which the pollution (at that point) has maintained its specific identity.

Looking Forward

SCOTUS may have split the baby in its opinion: Vacating a broad application of the CWA to any discharge to groundwater that can be "*fairly traceable*" to navigable waters, but opining that the CWA would apply when there is the "*functional equivalent of a direct discharge*" (via groundwater). The functional equivalent test will require site-specific evaluation of the pollutant discharge to groundwater from a point source, the transport of the pollutants via groundwater to navigable waters, and the discharge of the polluted groundwater to navigable waters. Lower courts will need to weigh this scientific analysis of site-specific factors to decide "*how long is too long and how far is too far*." Thus, the science presented by expert hydrologists will be critical in such cases.

Aquilogic is currently supporting environmental groups in numerous matters where these groups are looking to prevent the discharge of pollutants to navigable water using the provisions of the CWA. These matters involve coal ash waste, coal mining wastes, petroleum pipeline spills, and other point sources. Success in these cases will now rest heavily on the "*functional equivalent test*" and the scientific analysis that helps the court apply the test. For more information, please contact us at: BD@aquilogic.com.