

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: SCOTUSblog Post Discusses U.S. Supreme Court Argument



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

11/08/2019

Georgetown University Law Professor Lisa Heinzerling discusses the recent oral argument in *County of Maui, Hawaii v. Hawaii Wildlife Fund* in a November 7th SCOTUSblog post.

The United States Supreme Court had previously granted a Petition for Writ of Certiorari in the Ninth Circuit decision *Hawai'i Wildlife Fund v. County of Maui*.

The case involves whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination System ("NPDES") permitting requirements.

The Ninth Circuit Court of Appeals decision in the *Maui* case held that discharges from a point source into groundwater can in certain circumstances be subject to the Clean Water Act. Courts had arguably, with limited exceptions, never interpreted groundwater to be a water of the United States under the Clean Water Act.

Environmental groups argued in the *Maui* case that jurisdiction was triggered by the migration of pollutants from municipal wastewater injection wells released into the groundwater hydrologically connected to surface water (i.e., the Pacific Ocean). The Ninth Circuit Court of Appeals held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters.

The United States indicates in its brief that it has a strong interest:

... in ensuring that the respective roles of the federal government and the States in regulating the release of pollutants are appropriately balanced under the Act.

The United States in its brief argued in part that the NPDES permitting requirement does not apply where a pollutant is released from a point source to groundwater – even if the pollutant ultimately migrates to navigable waters.

Professor Heinzerling titles her post:

Argument analysis: Context trumps text as justices debate reach of Clean Water Act

A Clean Water ACT NPDES permit is required if five jurisdictional elements are met:

- A person
- adds a

- pollutant
- to navigable water (waters of the United States)
- from a point source.

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

The scope of the term “waters of the United States” from a Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact that it is also relevant to non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, whether, and to what extent a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

Professor Heinzerling states by way of introduction in regard to the oral argument that:

. . . The textual crux of the case is the word “from”: Does “from” mean that a pollutant must be directly delivered to a navigable water by a point source or that a pollutant must merely originate at a point source?

She delineates the importance of the meaning of “from” by noting that the County of Maui will win if it must be directly delivered to a navigable water because the treated sewage discharges first into underground wells before reaching the Pacific Ocean. However, it is further noted that the environmental groups will win if it simply has to originate from a point source because there is agreement that such wells are point sources under the statute.

In describing the November 6th U.S. Supreme Court oral argument, she states:

. . . the justices appeared to find little purchase in the bare word “from.” Justice Brett Kavanaugh was most explicit on this point. He suggested that both sides have good arguments about the meaning of “from,” and asked counsel for both parties how to break the tie. “What then,” he asked, “should we look at to help us decide how to interpret it?”

Professor Heinzerling states that “Not long ago,” the Court would have broken the tie by deferring to the agency’s interpretation. However, she points out that the United States Environmental Protection Agency issued an interpretive statement excluding discharges of groundwater. The Deputy Solicitor is stated to have asked the court to adopt the federal agency’s interpretive statement. However, he is stated to have foregone asking the court to defer to it.

Other Justices’ comments noted included the following discussion:

Roberts dismissed traceability as a “technological issue,” dependent on the sophistication of tracing instruments and not “a significant limitation” on the permitting requirement. He panned the groups’ other limitation on permitting – proximate cause – as “notoriously manipulable.” He wondered aloud what Breyer’s alternative test of functional equivalence meant. Gorsuch observed that “water runs downhill, and gravity tends to work its wonders with water,” so that it is foreseeable that pollution from a septic tank will “wind up in the waters of the United States.” Breyer piled on, saying “virtually every little drop of rain that falls finds its way to the sea” and that scientists are “geniuses” who “can trace all kinds of things.” He conceded that this was an overstatement – “but not by too much.” Kavanaugh added “a massive increase in the permitting program,” the availability of citizen suits and “transforming the federal/state balance” to the list of contextual factors that might help illuminate the question posed by the text of the statute.

A link to the post can be found [here](#).

