

# Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit? U.S. Supreme Court Decides Maui Case



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The United States Supreme Court (“SCourt”) issued an April 23rd decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.* See No. 18-260.

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.

A Clean Water Act NPDES permit must be required if five jurisdictional elements are met:

- A person
- adds a
- pollutant
- to navigable waters (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.

The Ninth Circuit Court of Appeals had ruled that discharges from a point source to groundwater can in certain circumstances be subject to Clean Water Act permitting requirements. See *Hawai’i Wildlife Fund v. County of Maui*, 886 F. 3d 737 (9th Cir., February 1, 2018).

The Hawaii Wildlife Fund and other organizations filed a Clean Water Act citizen suit against the County of Maui arguing that its discharge of pollutants from injection wells into the groundwater triggered Clean Water Act jurisdiction requiring acquisition of an NPDES permit. The basis for the argument was the

migration of the pollutants released into the groundwater to hydrologically connect to surface water/waters of the United States (“WOTUS”) (i.e., the Pacific Ocean).

The Ninth Circuit held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters (WOTUS). Several other federal Circuit Court of Appeals reached similar or varying conclusions involving groundwater fact patterns. The SCourt subsequently granted a Petition for Certiorari in the Ninth Circuit decision.

Both the Ninth Circuit decision and the SCourt’s granting of certiorari has attracted considerable attention from various stakeholders. Environmental organizations, different states, industry groups, agricultural groups, etc., have focused significant attention in the form of court filings and advocacy on the issue. In addition, the United States Environmental Protection Agency (“EPA”) weighed in arguing that the Clean Water Act is:

. . . best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the Clean Water Act, regardless of the hydrologic connection between the groundwater and jurisdictional surface water.

See April 12, 2019, EPA Interpretative Statement.

EPA stated it based this conclusion on the conflict of the federal court decisions and its comprehensive review of prior agency statements in the matter. It also referenced the “wholistic” analysis of the statute, text, structure, and legislative history of the Clean Water Act. Further, the United States Solicitor General filed a brief arguing that the NPDES permitting requirements do not apply where a pollutant is released from a point source to a groundwater – even if the pollutant ultimately migrates to navigable waters.

The SCourt in its April 23rd decision determined that the Clean Water Act is potentially applicable to pollution that migrates through groundwater. It concluded that NPDES permitting requirements are applicable if there is a direct discharge from a point source into navigable waters or when there is a functional equivalent of a direct discharge. However, it concluded that the Ninth Circuit’s “fairly traceable” test is broader than what the statutory language provides. Concern was expressed that the Ninth Circuit’s test could allow EPA the authority to require an NPDES permit over the release of pollutants that “reach navigable waters many years after their release.” It supported this conclusion by noting:

- Interpreting the term “from” in such a broad context might require an NPDES permit in “unexpected” circumstances, citing 100-year migration of pollutants through 250 miles of groundwater to a river
- Clean Water Act structure indicates that Congress left substantial responsibility and autonomy to the states in regards to groundwater and nonpoint source pollution
- Clean Water Act legislative history supports the conclusion that an NPDES permit does not extend to discharge of pollutants after significant periods of time
- EPA has applied the NPDES permitting provisions to groundwater scenarios using a narrower interpretation successfully

The SCourt rejects both Maui and the Solicitor General’s argument that an NPDES permit is not applicable if:

. . . a pollutant, having emerged from a “point source,” must travel through any amount of groundwater before reaching navigable waters.

This interpretation was stated to potentially risk serious interference with EPA’s ability to regulate point source discharges. The SCourt states that Congress would not have intended to create what it phrased as “a large and obvious loophole” in one of the Clean Water Act’s key regulatory innovations.

As a result, the SCourt states that:

. . . as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into the navigable waters. . . (the discharge is encompassed by the NPDES permitting requirements).

The SCourt vacates the judgment of the Ninth Circuit Court of Appeals because it applied a different standard and remands it for further proceedings consistent with the Opinion.

Note that Arkansas, as a delegated state, will presumably follow EPA's subsequent interpretation of this decision. However, also note that the Arkansas Water and Air Pollution Control Act utilizes the term "waters of the state." Waters of the state has a much broader reach. While it is not utilized for purposes of the NPDES permitting program, it, nevertheless, authorizes a number of regulatory activities that address potential impacts on groundwater (sometimes referred to as "no-discharge" programs).

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