

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: Federal Court Addresses Maui Issue on Remand



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The United States District Court (District of Hawaii) (“Court”) addressed in a July 15th Order the question of whether a Maui County (“County”) wastewater discharge facility (“Facility”) should have obtained a Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit. See *Hawaii Wildlife Fund, et al. v. County of Maui*, Civil No. 12-00198 SOM/KJM.

The Court was tasked with considering the issue after a remand from the United States Supreme Court which described the appropriate criteria to make such a determination.

The Hawaii Wildlife Fund and other organizations filed a Clean Water Act citizen suit against the County 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 were hydrologically connected to surface water/waters of the United States (“WOTUS”) (i.e., the Pacific Ocean).

A Clean Water Act NPDES permit must be obtained 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.

Clean Water Act jurisdictional terms such as “point source,” “WOTUS,” etc., have been the subject of debate, regulatory activity, litigation, and confusion for many years. Consequently, whether, and to what extent, a discharge of pollutants into groundwater potentially triggers permitting is a significant issue.

The *Maui* issue was eventually addressed by the United States Supreme Court. It determined that the Clean Water Act is potentially applicable to pollution that migrates to groundwater. NPDES permitting requirements were held 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.

A key quote from the United States Supreme Court states:

. . . 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).

Justice Breyer in the Supreme Court's Majority Opinion enumerated factors for determining functional equivalence which included:

1. Transit time,
2. Distance traveled,
3. Nature of the material through which the pollutant travels,
4. Extent to which the pollutant is diluted or chemically changed as it travels,
5. 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

The Court in its July 15th Order upon remand addressed summary judgment motions on the issue by both the Plaintiff (Hawaii Wildlife Fund, et al.) and the County.

The Court described the central question as:

. . . whether the County is violating the Clean Water Act in having failed to obtain an NPDES permit while releasing pollutants, not by pouring them directly into the Pacific Ocean, but instead by introducing the pollutants into injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF") half a mile from the ocean.

The Court, after a detailed discussion of various information regarding the County Facility, wastewater discharge, dye tracer studies, and hydrologic regime applies the seven factors identified by Justice Breyer (along with the addition of two others) to determine whether there has been the functional equivalent of a discharge. In concluding that an NPDES permit is required, the Court discusses the factors:

1. Transit time (finding that at most wastewater reaches the ocean within 9 to 10 months [some within shorter or longer periods] and certainly short of the United State Supreme Court's disqualifying "many years"[favoring applicability of the permit])
2. Distance traveled (0.3 to 1.3 miles does not come close to the United States Supreme Court's reference to disqualifying the 50-mile extreme [favoring applicability of a permit])
3. Nature of the material through which the pollutant travels (Differentiates water flowing through a pipe because of material picked up through rock and other substances and favors a determination that a permit is not necessary)
4. Extent to which the pollutant is diluted or chemically changed as it travels (significant reduction as a combination with saline, brackish, and fresh groundwater along with interaction through rock results in pollution favoring inapplicability of a permit requirement)
5. Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source (100% of the wastewater is eventually discharged into the Pacific Ocean, therefore, weighing in favor of an NPDES permit requirement)
6. The manner by or area in which the pollutant enters the navigable waters (precise manner in which the wastewater enters the ocean is unclear and, therefore, is deemed to not add much to the other factors)

7. The degree to which the pollution maintains its specific identity (wastewater undergoes some changes but wastewater entering the ocean is not devoid of pollutants, weighing in favor of a permit)
8. The volume of wastewater reaching navigable waters (additional factor considered is volume of wastewater and deemed large enough to weigh in favor of requiring a permit) Impact on the ecosystem (deemed a factual issue and not weighed in the analysis)
9. Impact on the ecosystem (deemed a factual issue and not weighed in the analysis)

The Court concludes that the Plaintiffs' Motion for Summary Judgment should be granted based on the balancing of the previously referenced factors and that an NPDES permit must be obtained.

A copy of the Opinion can be downloaded [here](#).