



**Ashley Peck**

Partner  
801.799.5913  
Salt Lake City  
aapeck@hollandhart.com

# Justices Seek Balance In Clean Water Act Case Arguments

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## **Law360**

Last week's oral arguments before the U.S. Supreme Court in *County of Maui v. Hawaii Wildlife Fund* touched on big-picture impacts of potential federal regulation, as well as technical statutory interpretation, with the justices searching for a practical standard for controlling indirect discharges to navigable waters that would prevent evasion of surface water quality protections, but that would also avoid a significant expansion of federal permitting requirements.

It remains unclear from the oral arguments whether the court will be able to strike such a balance — or whether the search will come up short.

The Clean Water Act requires a permit for the “discharge of any pollutant,” defined as “any addition of any pollutant to navigable waters from any point source.” The parties in this case do not dispute that, under the terms of the CWA, the treated wastewater the County of Maui discharges into underground wells is a pollutant, the wells are point sources and the ocean is a navigable water. The parties disagree on the legal significance of the wastewater passing through groundwater, a nonpoint source, before it reaches CWA-regulated navigable waters — in this case, the Pacific Ocean.

Maui's position is that the CWA never requires a point source permit when pollution enters navigable waters through a nonpoint source, as opposed to when it enters navigable waters directly from a point source without an intermediary. Respondents *Hawaii Wildlife Fund* and other environmental groups argue that CWA jurisdiction is not limited to when pollutants are directly discharged from a point source to navigable waters, but also extends to discharges of pollutants to navigable water from groundwater that are fairly traceable to a point source. The Environmental Protection Agency, which initially supported the environmental groups in this case, changed its position in April, and now supports Maui.

Last week, the justices expressed skepticism for broad application of both parties' positions, implying that they may view both as too extreme. However, a plurality of justices indicated that the U.S. Court of Appeals for the Ninth Circuit's “fairly traceable” test was too broad.

## **Background**

The key question in *County of Maui* is whether the CWA requires a permit when pollutants originate from a point source, but are conveyed to a

navigable water by a nonpoint source, such as groundwater.

Maui operates a wastewater treatment plant that discharges treated wastewater to groundwater via four underground injection wells. Tracer dye studies conducted by the respondents in 2011 showed that pollutants from the injection wells traveled through groundwater and into the ocean, approximately three miles away.

Hawaii Wildlife Fund and other environmental groups sued Maui under the CWA's citizen suit provision for failing to obtain a point source permit despite being aware of a direct and traceable connection between pollutants discharged into the injection wells and those ultimately discharged to the ocean through the groundwater. The Ninth Circuit affirmed the decision of a Hawaii federal court, finding that Maui's discharge of pollutants from the wells into surrounding groundwater was subject to the CWA's permitting requirements.[1]

The Ninth Circuit reasoned that, although discharges that flow through groundwater do not travel immediately from the point source into navigable water, there was a direct and traceable connection that was enough to establish CWA jurisdiction.[2] The case could still potentially settle prior to the Supreme Court reaching a decision. The Maui County Council voted in September to settle the case,[3] but the mayor has refused to approve settlement, sparking a separate legal battle in Hawaii state court over who has the authority to settle a lawsuit on behalf of Maui.[4]

### **Where to Draw the Line?**

For much of the oral argument, the justices pressed both sides with hypotheticals testing the extremes of their positions, and it's unclear whether they were satisfied with the parties' responses to these lines of questions.

For Maui and the U.S. government attorneys, this meant answering questions regarding possible circumstances in which a business could pollute the nation's waters without needing a permit. Justice Stephen Breyer asked Elbert Lin, counsel for Maui, whether a pipe ending just short of a navigable water would be subject to CWA permitting requirements. Lin responded that the pipe would not require a point source permit, but emphasized that such a discharge would be regulated by other laws.

Justice Breyer was unsatisfied with this response, opining that “[w]hat we have is ... an absolute road map for people who want to avoid the 'point source' regulation.” Justice Elena Kagan agreed, remarking that nobody would go through the process of getting a permit if they knew they could just stop a pipe “five feet before the ocean.”

The conservative justices and Justice Breyer questioned Earth Justice attorney David Henkin, arguing on behalf of the environmental groups, as to why the traceability and proximate cause standards put forth by the respondents would not reach an equally problematic result of subjecting homeowners with septic tanks to federal enforcement under the CWA. Chief Justice John Roberts did not find either traceability or proximate

cause to be significant limiting principles. He characterized proximate cause as “notoriously manipulable” and noted that that traceability was only limited by the sophistication of the instruments used to measure it.

Both Justice Samuel Alito and Justice Neil Gorsuch seemed unconvinced that individual homeowners could not be swept into potential CWA permitting and enforcement if the pollution was traceable to their septic tanks. “Some clear line for the property owner, I think, is really important here,” Justice Brett Kavanaugh said. Justice Breyer was similarly leery of the traceability test, stating he was “worried about 500 million people or something suddenly discovering that they have to go apply for a permit for the EPA.”

Searching “for something not quite as broad as traceability,” Justice Breyer suggested a test of whether migration of pollutants is the “functional equivalent of a direct discharge.” He noted that this test would “leave lots of room for the EPA to write regulations” that would define functional equivalent. Henkin appeared to embrace the “functional equivalent” test, but did little to help flesh out its parameters. While Justice Roberts also sought a middle ground approach, he was skeptical that a “functional equivalent” test was any more specific and discernable than the traceability test.

Overall, the justices' comments suggested they may be more inclined to side with the environmental groups in the County of Maui case, but only if they could articulate a limiting principle for application of CWA permitting that ensured predictability, and would not subject ordinary landowners to onerous permitting requirements.

### **“From” Text to Elaborate Hypotheticals**

Maui's argument focuses on the meaning of “from” in the statutory phrase “from any point source.” Maui argued that this phrase indicates that the point source must be what actually delivers the pollutant to navigable waters. In response to a question from Justice Kagan regarding Maui's attempts to explain that “from” in the context of the CWA does not connote “causation,” Lin provided the following analogy:

If you said, for example, Your Honor, this arrived from Miami, Miami is a place of origin, and so, yes, “from” is indicating the source, the place where that started. But, if you said this arrived today from a truck, I posit, Your Honor, I submit that truck is being used as a conveyance there. It's not necessarily the point of origin.

Deputy Solicitor General Malcolm Stewart, arguing for the federal government, also posited an extended analogy in support of Maui's position. “If at my home I pour whiskey from a bottle into a flask and then I bring the flask to a party at a different location and I pour whiskey into the punch bowl there,” he said, “nobody would say that I had added whiskey to the punch from the bottle.”

Counsel for Hawaii Wildlife Fund countered with his own metaphor supporting a broader interpretation of “from,” stating, “When you buy

groceries, you say they came from the store, not from your car, even though that's the last place they were before they entered your house.”

Justice Kavanaugh appeared to step into former Justice Antonin Scalia's textualist role, asking several questions concerning statutory construction. He appeared to concede that both parties had strong arguments as to their interpretations of the meaning of “from” in the CWA, and asked Lin to point to the statutory interpretation canons supporting his position.

However, when Lin argued that the plain meaning of the statutory language “addition to navigable water from any point source” was delivery to the navigable water, not a mile away from the navigable water, Justice Kavanaugh interjected that his argument resembled the one Justice Scalia rejected in a 2006 case, *Rapanos v. United States*. In a plurality opinion in that case, Justice Scalia noted that the CWA prohibited the addition of pollutants “to” a navigable water, not “directly to.”<sup>[5]</sup>

Justice Alito noted that “‘from’ could be read very broadly to mean that a discharge requires a permit if the pollutant emerges at some point from a point source and by some means, no matter how remote, some quantity of the pollutant eventually makes its way into the waters of the United States.”

### **Where Is the Court Headed?**

It is hard to predict, based on the oral arguments, where the court will come down on this case. Justices Sonia Sotomayor, Ruth Bader Ginsburg and Kagan seem potentially inclined to embrace the traceability test and uphold the Ninth Circuit's ruling. Justice Kagan pointedly asked Lin how the statute does not apply when a discharge is “from a point source, which is the well, and it's to navigable waters, which is the ocean, and it's an addition, it's a discharge from a point source”?

But the remaining justices seemed to largely reject the “traceability” test as too broad. Breyer, in particular, while also concerned with potential evasion of CWA permitting requirements, shared Justice Alito's concern that application of the traceability test could lead to ordinary homeowners being subject to the statute's permitting requirements.

However, the conservative justices also seemed to not completely embrace Maui's bright-line test that any amount of groundwater between a point source and navigable water breaks the CWA's chain of jurisdiction.

It may be likely that, given all the uncertainty, the court issues a very narrow opinion limiting the outcome only to the facts of the County of Maui case. It is also possible, although less likely, that the court attempts to craft a more precise standard along the lines of Justice Breyer's “functional equivalent” test. Or it could defer the definition of such a test to the EPA, leaving further uncertainty on regulation of nonpoint source discharges that affect surface water.

Depending on how the court comes down, the outcome has potentially far-reaching implications — not just for the ordinary homeowners discussed in

the oral arguments, but for a broad range of industrial facilities such as oil, gas and mining operations.

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*Ashley Peck is a partner and Alison Hunter is an associate at Holland & Hart LLP.*

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[1] *Hawaii Wildlife Fund v. County of Maui*, Hawaii, 886 F.3d 737 (9th Cir. 2018), cert. granted (No. 18-260).

[2] *Id.* at 747.

[3] <https://www.law360.com/articles/1211809/maui-mayor-won-t-drop-high-court-groundwater-suit>.

[4] Complaint for Declaratory and Injunctive Relief, *McKelvey v. Victorino*, 2CCV-19-0001012 (Haw. 2nd Cir. Oct. 28, 2019), <https://mauitime.com/wp-content/uploads/2019/10/McKelvey-v-Victorino-Complaint.pdf>.

[5] *Rapanos v. United States*, 547 U.S. 715, 743 (2006).

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