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# SCOTUS Decision Provides Narrower Test for Discharges to Groundwater

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On April 23, 2020, the U.S. Supreme Court in a 6-3 decision held that the Clean Water Act (CWA) requires a permit for either a direct discharge from a point source into navigable waters, *or the functional equivalent of a direct discharge*.

The Supreme Court reached a middle ground by creating the new “functional equivalent” test, after rejecting the Ninth Circuit’s “fairly traceable” test advanced by environmental groups as too broad, and also rejecting the Environmental Protection Agency’s (EPA) and the County of Maui’s position that the CWA never applies to groundwater as creating a loophole for polluters. The decision reflects a measured approach by the Court that will provide some clarity for the regulated community as to a narrower category of discharges to groundwater that could be subject to jurisdiction under the Clean Water Act.

Ultimately, because the Ninth Circuit applied a different standard, the Court vacated its judgment and remanded the case for further proceedings consistent with its opinion.

## **Background**

The Supreme Court was tasked with determining 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.

The County of 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.

Environmental groups sued the County under the CWA’s citizen suit provision alleging they failed to obtain a point source permit despite a direct and traceable connection between pollutants discharged into the injection wells and those ultimately discharged to the ocean through the groundwater. Upholding the lower court’s determination, the Ninth Circuit held the CWA’s permitting requirements applied because there was a “direct and traceable connection” between the County’s discharge from a point source into surrounding groundwater and navigable waters.

## Functional Equivalent Test

The Court explained that its “functional equivalent” test reconciles the twin aims in the CWA's structure: the federal regulation of identifiable sources of pollutants entering navigable waters and the states' longstanding jurisdiction to regulate groundwater.

Recognizing the new test's imprecision, the Court identified the following factors to help guide decision-makers in determining when a discharge is “functionally equivalent” to a direct discharge:

- transit time
- distance traveled
- the nature of the material through which the pollutant travels
- the extent to which the pollutant is diluted or chemically changed as it travels
- the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source
- the manner by or area in which the pollutant enters the navigable waters
- the degree to which the pollution (at that point) has maintained its specific identity

The Court makes clear that **time and distance** in most cases will be the most important factors.

## Clarity at the Extremes

The Court provided the following example of how the functional equivalent test would apply:

- **CWA coverage:** A pipe ending a **few feet** from navigable waters and emitting pollutants that travel those few feet through groundwater
- **No CWA coverage:** A pipe ending **50 miles** from navigable waters and emitting pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later.

However, the Court gave little clear direction as to how the cases that fall in between these two extremes should be treated, deferring to EPA to issue regulations and lower courts to refine the test and provide examples through decisions in individual cases. The first such example will likely be the Ninth Circuit's decision on remand. All indications point to the Ninth Circuit finding that the CWA applies to the County's discharges. Indeed, the Ninth Circuit actually used the phrase “functional equivalent” to describe the discharges to ground water in its prior decision.

Although the Court's new test leaves considerable room for interpretation, it should not necessarily bring on a wave of new lawsuits. EPA has regulated certain discharges to groundwater for years, and significant changes to EPA's and state regulators' approaches regulating groundwater

discharges are unlikely to result from the decision given that it struck a reasonable balance between two extremes. However, it also will not eliminate the possibility of citizen suits for controversial projects, and we should expect environmental groups to test the limits of the new test in follow up cases.

It is also unlikely that we will see new rulemaking from EPA before the election. Updates to EPA's guidance on CWA permitting, on the other hand, are more probable.

If you have questions about the decision or about its application to your project or operation, please contact Ashley Peck or Alison Hunter.