



## Pollutant Discharges to Groundwater May Fall Within the Clean Water Act

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From a debate over the word “from,” the United States Supreme Court recently held in *County of Maui v. Hawaii Wildlife Fund* that the Clean Water Act’s permitting requirements apply to pollutant discharges that enter groundwater and eventually make their way to a Water of the United States under certain circumstances.

The case involved a wastewater reclamation facility operated by the County of Maui that did not have a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA). The wastewater facility collects sewage and partially treats it. The treated water, amounting to about four million gallons a day, is then pumped through four disposal wells into the groundwater, and less than a mile later, the groundwater—including the partially treated wastewater—is discharged into the Pacific Ocean.

But the Federal Clean Water Act prohibits the discharge of pollutants from a point source, like the wastewater facility, to navigable waters without a NPDES permit. Prior to this case, NPDES permits were only required for pollutant discharges directly into Waters of the United States (often referred to as a point source discharge), not indirect discharges like the Maui facility, where pollutants traveled from the wells through the groundwater (a non-point source) and ultimately into the Waters of the United States. Whether indirect discharges following Clean Water Act definitions to determine if indirect discharges were regulated by the Clean Water Act (33 USC §1362):

- **“pollutant”** means dredged spoil, solid waste, incinerator residue, **sewage**, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

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- **“point source”** means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, **well**, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
- **“navigable waters”** means the waters of the United States, including the territorial seas.
- **“discharge of a pollutant”** and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

The case boiled down to a disagreement over the meaning of the word “from” in the definition of the term “discharge of a pollutant.” Before reaching the U.S. Supreme Court, the District Court evaluated research and studies on discharge and held that the discharge from the wells into nearby groundwater was “functionally” a discharge into navigable water and therefore a violation of the Clean Water Act. The environmental groups won and the County of Maui appealed.

In the Ninth Circuit, the court affirmed the lower court holding but clarified that a permit is required when “the pollutants are fairly traceable from the point source to navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.” The court did not clarify how traceable the point source must be to navigable waters. The U.S. Supreme Court granted certiorari to determine which standard to apply.

The environmental groups supported the Ninth Circuit’s standard and preferred an interpretation of “from” that meant “fairly traceable.” In addition, they argued that the release from the point source was a “proximate cause” of the addition of pollutants to navigable waters. The County of Maui preferred a more stringent rule: unless the point source directly delivered the pollutants to navigable waters, then a permit is not required. *Maui* clarified this meant that if groundwater was between the point source and the navigable waters, then a permit was not required.

The U.S. Supreme Court did not adopt either approach advocated by the parties, but instead outlined a standard that falls somewhere in between. The Court held that “the statute requires a permit when there is a direct discharge from a point source into navigable waters **or when there is the functional equivalent of a direct discharge.**” The Court also outlined factors that might be relevant, but not dispositive, for future cases when deciding if there has been the functional equivalent of a direct discharge.

These factors include “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, [and] the degree to which the pollution (at that point) has maintained its specific identity.” **The Court emphasized that time and distance may be the most important in most cases.** For example, the standard is meant to prevent a facility from discharging pollutants a foot from navigable waters in an effort to qualify as a non-point source discharge and avoid



permitting requirements.

Moving forward, this case may have implications for agricultural businesses and farming operations. Operations that do not discharge pollutants directly into navigable waters may be required to obtain NPDES permits under the functional equivalent test, if pollutants found in navigable waters can be traced back to the operation and are determined to be the functional equivalent of a direct discharge.

The extent to which NPDES permits may be required for non-point source discharges by agricultural operations, such as discharged pollutants that enter groundwater, will in large part rest on how Michigan agencies and courts apply the functional equivalent test in the near future.

For more information or questions about this U.S. Supreme Court case, the Clean Water Act, or NPDES permits in general, please contact:

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