

US Supreme Court Issues New Rules on NPDES Permitting Requirements

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On April 23, 2020, the Supreme Court of the United States (SCOTUS) ruled that a National Pollutant Discharge Elimination System (NPDES) permit is required “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 underlined part is new.

The case, *County of Maui v. Hawaii Wildlife Fund*, unfolded like this. Maui, like countless places across the US, has a sewage treatment plant. Its sewage treatment plant has an NPDES permit that controls discharges on the surface to the nearby stream, Honokowai Stream. Maui, however, also injected around 4 million gallons per day of waste generated at the plant into underground injection wells that reach hundreds of feet underground. This injected waste did not directly discharge into the nearby stream or directly into the Pacific Ocean.

Rather, the injected waste blended with groundwater in an aquifer, before making its way roughly ½ mile to the Pacific Ocean. There was no question in the case about the connection between the injected waste and the groundwater seep into the ocean. Instead, SCOTUS grappled with whether the Clean Water Act “requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source,” in this specific case, “groundwater.”

Ultimately, SCOTUS determined that Maui needed a NPDES permit for the underground injection, fashioning a new requirement to obtain an NPDES permit when there is the “functional equivalent” of a direct discharge to waters of the U.S. It did not, however, define “functional equivalent,” but did offer a non-exhaustive list of factors to consider in deciding the issue. SCOTUS wrote,

Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case):

- (1) transit time,
- (2) distance traveled,

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- (3) the nature of the material through which the pollutant travels,
- (4) the extent to which the pollutant is diluted or chemically changed as it travels,
- (5) the 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.

Time and distance will be the most important factors in most cases, but not necessarily every case.

If you need assistance applying this new Supreme Court case to your business, contact us here. We have decades of experience dealing with Clean Water Act issues.

Attorneys

Nicholas S. Johnson

Practice Areas

Environmental