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## Supreme Court Holds Some Groundwater Discharges Subject to Clean Water Act

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Supreme Court rules groundwater discharges can be regulated when they are the “functional equivalent of a direct discharge,” but application remains uncertain

On April 23, in *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court held that discharges to groundwater are subject to regulation under the Clean Water Act (“CWA”) if they are the “functional equivalent” of a direct discharge to navigable waters. This new test widens the scope of potential liability under the CWA, raises fundamental questions related to groundwater remediation and the regulation of underground discharges under other federal and state environmental statutes, and creates the potential for substantial uncertainty for regulated industries, including in the energy, chemical, and solid waste sectors.

At issue in *County of Maui* was a discharge to groundwater, permitted under the Underground Injection Control (“UIC”) program in Hawaii, that ultimately migrated to the Pacific Ocean. Filing a citizen suit under the CWA, environmental groups argued that the injection wells were “point sources” that required permitting under the CWA. On appeal, the Ninth Circuit held the County was liable under the CWA because it did not obtain a National Pollutant Discharge Elimination System (“NPDES”) permit, reasoning that the CWA applies to groundwater discharges when pollutants reaching navigable waters are “fairly traceable” to a point source—a test that could require NPDES permits for virtually any release of pollutants that eventually reach navigable waters.

In its 6-3 decision, the Supreme Court reviewed the CWA framework, focusing on the statutory purpose of providing federal regulation of identifiable sources of pollutants entering navigable waters. Agreeing with the County, the Court broke no new ground when it held that discharges directly from a point source were regulated by the CWA. Going beyond



this point, the Court held that a CWA permit is required “when there is a functional equivalent of a direct discharge” to a navigable waterway via groundwater.

Without ever precisely defining “functional equivalent,” the Court noted: “[m]any factors may be relevant to determining whether a particular discharge is the functional equivalent of one directly into navigable waters” and that “[c]ourts will provide additional guidance through decisions in individual cases.” Yet the Court did say that “[t]ime and distance will be the most important factors in most cases” and that “other relevant factors may include, e.g., the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels.” Thus, while the Court set a new standard, it left it to trial courts to determine the day-to-day meaning of the terms.

While narrower than the Ninth Circuit’s test, this decision creates the potential for significant uncertainty for a wide range of industries. As an initial matter, it remains unclear how the Court’s holding will affect applicability and enforcement of the Resource Conservation and Recovery Act (“RCRA”), which requires groundwater monitoring for hazardous waste corrective action but exempts from coverage point sources subject to CWA permits. Even more fundamentally, the Court’s holding provides few rules to determine when groundwater is regulated under the CWA and when groundwater is regulated under other state solid waste regulations, which historically have regulated groundwater. As part of a wide range of operations, industries must now consider a range of factors to inform whether operations or other activities may result in a “functional equivalent of a direct discharge” to a navigable water and apply for NPDES permits from local agencies that likely lack experience or authority to permit such sources. Guidance from regulatory agencies with jurisdiction over the range of potentially affected programs will be important in helping regulated parties navigate this new landscape.

Unfortunately, by pushing the issue to trial courts, the holding also has the potential to subject industries—especially industries with plants and facilities with known groundwater impacts located near “waters of the United States”—to increased scrutiny and the risk of CWA or RCRA citizen suits or enforcement actions. Given the potentially broad application of a “functional equivalent direct discharge,” and the Court’s reluctance to closely define what that term means, no doubt courts will arrive at inconsistent decisions.

King & Spalding has significant experience across the country in administrative and environmental matters, including the defense of citizen suits and enforcement actions under the CWA and other laws. If you have questions about how this ruling may affect you or your business, please contact any of our lawyers noted in the contact section.

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