



## Federal Court Decision in Maui Remand Could Expand EPA's Wastewater Permitting Authority

Companies in a wide variety of industries, including agriculture, manufacturing, mining, power generation, and utilities, that manage wastewater effluent in surface impoundments, lagoons, land application, septic systems, underground injection, or similar methods will want to evaluate the [recent court decision in the County of Maui case](#) on remand from the Supreme Court and how it could significantly impact wastewater permitting in the future. The case is the first federal district court to work through the “functional equivalent” analysis for federal jurisdiction over groundwater set forth by the U.S. Supreme Court in its [April 2020 ruling](#) involving the very same parties and operative facts.

The *Hawaii Wildlife Fund v. County of Maui* groundwater discharge case seems to be starting a slow meander through the courts a second time, so far with much the same results as in the earlier proceedings. Indeed, the July 2021 district court decision on the parties' motions for summary judgment may be the first step in a journey back to the Supreme Court's docket. Although the County has filed a motion for reconsideration, the outcome of this district court case undoubtedly will be appealed. This case warrants tracking for both the ultimate conclusion of the *County of Maui* case and the demonstration of how the factors in the Supreme Court's “functional equivalent” test operate in practice. Both will help permittees gauge whether their current permitting suffices for their operations that employ any of the above techniques.

### Background – The Supreme Court's Functional Equivalent Standard

The first time around, the District Court for the District of Hawaii found in favor of petitioners who urged that the County of Maui's discharges violated the Clean Water

Act (CWA). The district court observed that “a considerable amount of effluent” from its underground injection of partially treated wastewater ended up in the ocean (a navigable water) and that “because the ‘path to the ocean is clearly ascertainable,’ the discharge from Maui’s wells into the nearby groundwater was ‘functionally one into navigable water.’” The Ninth Circuit agreed with the outcome on a different basis, reasoning that “a permit is required when ‘the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge in to the navigable water.’” Such a broad scope would, under certain circumstances, subject to federal CWA regulation not only deep injection wells and infiltrating septic systems, but also lagoons and other impoundments that have no discernable conveyances into groundwater.

The U.S. Supreme Court chimed in to vacate the Ninth Circuit’s overbroad approach and resolved a circuit split on whether the CWA could indeed regulate discharges via groundwater. Parsing the statutory context, the Court observed that “Congress was fully aware of the need to address groundwater pollution” and ultimately “left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.” Nevertheless, the Court determined that discharges via groundwater were subject to CWA permitting where those discharges are “the functional equivalent of a direct discharge from the point source into navigable waters.”

The Court noted that such equivalence “depends on how similar to (or different from) the particular discharge is to a direct discharge” and acknowledged that such an approach provides little guidance for scenarios in which pollutants travel a modest distance (more than a few feet and less than 50 miles) over a relatively short period of time before reaching a regulated surface water. The Court highlighted certain factors that would be relevant in determining on a case-by-case basis whether CWA regulation would be warranted – including travel time and distance, *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 pollutant (at that point) has maintained its specific identity. Notably, however, the factors were identified as illustrative rather than exhaustive examples, and the Court noted that

“courts can provide guidance through decisions in individual cases.”

## **Factors Analyzed by *Maui* Trial Court**

On remand, the district court largely ignored important nuances in the factors identified by the Supreme Court and reverted to its own reasoning. The district court focused on statements made by the County’s experts (acknowledging that 100 percent of the *wastewater* will ultimately discharge into the Pacific Ocean) and the volume of wastewater that admittedly mixes with ocean water at distinct seep areas. In so doing, the district court’s opinion misconstrues how the CWA works generally and the meaning of the specific factors identified by the Supreme Court in its consideration of this very scenario.

The district court’s base proposition is that the CWA should regulate a discharge to groundwater simply because some volume (even only 2 percent) of that wastewater mixed with a jurisdictional water (even if it is an *ocean*!) through a discernable feature over timeframes as long as, on average, 14 to 16 months. But the CWA by its terms does not regulate discharges so long as any volume of *water* attributable to a specific wastewater stream eventually reaches a jurisdictional water; it regulates the discharge of *pollutants* via direct discharge and groundwater discharges only if they are similar enough to a direct discharge to constitute a functional equivalent of a direct discharge.

Rather than carefully analyzing the relevant facts against the Supreme Court’s factors, the district court failed to consider significant nuances in the facts it expressly considered. For example, pollutants containing a sewage-derived nitrogen isotope are both significantly diluted by the groundwater that mixes with partially treated effluent and the polluting compounds change chemically in transit; the same nitrogen isotope is also contributed by irrigators using the County’s partially treated water; and most of the County’s wastewater reaches the Pacific Ocean via diffuse flow (similar to nonpoint discharges rather than point source discharges). Although the district court noted that the environmental impact of the discharge “might conceivably be a factor in an analysis of whether a discharge is the functional equivalent of a direct discharge,” it gave that issue no weight and failed to consider whether regulation of the County’s indirect discharge of a relatively trivial amount of water into a vast waterbody advances the CWA’s express

purposes (i.e., to restore and maintain the integrity of the Nation's waters) "without undermining the States' longstanding regulatory authority over land and groundwater." These unfortunate leaps in logic, failures to consider contrary evidence, and the failure to understand how these facts actually cut against CWA jurisdiction highlight the importance of permittees providing technical explanations in briefing at the summary judgment phase that walk through each factor of the Supreme Court's "functional equivalent" analysis in exacting detail.

## **What's Next?**

The County of Maui has recently filed a motion for reconsideration that raises several good technical, evidentiary, and legal arguments, but such motions are rarely granted. It is likely the County's next port of call will be with the Ninth Circuit, where past experience suggests it will face an uphill climb.

Although this decision is not binding on other courts and could be distinguished on its particular facts (i.e., underground injection in an area adjacent to an ocean), this case is one to watch. The district court's stilted reasoning would vastly expand the NPDES program to reach even activities that are already regulated under state groundwater protection and solid waste programs, including groundwater discharge permits, wastewater reuse and land application permits, as well as lagoons and impoundments whose proximity to a jurisdictional water presents a potential for contributing base flow to that receiving waterbody.

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