Supreme Court Creates New Standard for Clean Water Act Jurisdiction Over Discharges to Groundwater

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On April 23, 2020, the U.S. Supreme Court issued its much-anticipated ruling in *County of Maui v. Hawaii Wildlife Fund* addressing whether permits are required under the Clean Water Act (CWA) for a point source discharge of pollutants to groundwater that eventually reaches a surface water. By a vote of 6-3, the Court ruled that permits are required for such discharges when they are "functionally equivalent" to a direct discharge to surface waters, taking into account, on a case-by-case basis, all relevant factors, including:

- The time it takes the pollutants to reach surface waters;
- The distance traveled to reach surface waters;
- The nature of the medium through which the pollutants travel;
- The extent to which the pollutants are diluted or chemically changed before reaching surface waters;
- The amount of pollutants reaching surface waters;
- The manner or area by which the pollutants enter surface waters; and
- The degree to which the pollutants retain their identity when reaching surface waters.

In reaching its decision, the Court rejected: (1) the County's argument that only point source discharges directly to surface waters are required to have permits under the CWA (a standard supported by U.S. EPA), and (2) the Hawaii Wildlife Fund's broader argument that a permit is required if the pollutants are "fairly traceable" from the point source to the surface water (a standard articulated by the Ninth Circuit below).

On the one hand, the Court felt that the County's argument created too great an incentive for entities to circumvent the CWA's

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permitting obligation by, for example, cutting a pipe short of a surface water or directing pollutants into the ground. Primarily for that reason, the Court declined to afford deference to U.S. EPA's April 2019 interpretive statement that largely supported the County's view. On the other hand, the Court felt that the Wildlife Fund's contrary argument cast such a broad net that it would effectively nullify Congress' exclusion of groundwater from the statute's permitting program. In effect, the majority attempted to find common ground between the two extremes with a new "functionally equivalent" standard.

In the view of dissenting Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch, however, the majority's "functionally equivalent" standard fares no better than the "fairly traceable" standard that was rejected. In their judgment, the new standard is, at best, somewhat less broad, vague, and subjective, thus leaving the regulated community without clear guidance as to its permitting obligations, and subjecting it to substantial enforcement risks if the wrong decision is made.

Obviously, those who looked to *County of Maui* as the case that would resolve an issue that the U.S. EPA admits grappling with for decades did not achieve their objective. Absent an amendment to the CWA, it will now be left to the federal courts to interpret and apply the "functionally equivalent" standard and its list of factors. Only time will tell whether the new standard ends up being much different in application than the standard it just replaced.

For more information about the County of Maui decision or its potential impact, contact Steve Haughey, Steve Samuels, Tim Hagerty, or any member of the Frost Brown Todd's Environmental Practice Group.

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