Permits for Discharges of Pollutants to Groundwater

By **Kenneth J. Warren** | *The Legal Intelligencer*

The Clean Water Act requires persons discharging pollutants to navigable waters to obtain a permit. But where a discharge does not convey pollutants directly to navigable waters, but rather follows an indirect path through groundwater, is a discharge permit required? The answer is, sometimes.

In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020), the County of Maui operated a wastewater reclamation facility that pumped treated sewage through four wells hundreds of feet deep. The county was required to obtain a National Pollutant Discharge Elimination System (NPDES) permit only if it engaged in the "discharge of a pollutant," defined in the act to mean "any addition of any pollutant to navigable waters from any point source." A point source is a pipe, ditch, well or other "discernible, confined and concrete conveyance."

It was undisputed that the county's injection wells constituted a point source through which pollutants entered the groundwater. It was likewise clear that the pollutants moved through groundwater to a navigable water, the ocean. The debate centered on whether the pollutants were "from" the point source when they entered the ocean from the groundwater.

The U.S. Court of Appeals for the Ninth Circuit concluded that the pollutants were from the point source because the pollutants in the county's effluent entering the ocean were "fairly traceable" to the point source. The Ninth Circuit thus concluded that the county's facility required a NPDES permit. The county appealed, contending that the act requires an NPDES permit only if the pollutants are conveyed directly from a point source into a navigable water and not if they enter a navigable water through groundwater or other nonpoint source.

The U.S. Supreme Court rejected both the Ninth Circuit's "fairly traceable" test and the county's position. Turning first to the Ninth Circuit's holding, the court acknowledged that the word "from" could encompass indirect discharges such as pollution originating at a point source and migrating through groundwater to a navigable water. Yet the court concluded that such a broad interpretation would require a permit for discharges that might migrate for 100 years before reaching a point source 250 miles away. This result would conflict with Congress's intent not to intrude on the traditional role of the states in regulating groundwater and nonpoint sources. Noting that Congress rejected a proposed amendment that would have encompassed discharges to groundwater in the NPDES permitting regime, the court rejected the Ninth Circuit's test because it would upset the federal-state balance Congress specified.

The court was equally critical of the county's position, generally supported by the EPA, that no discharges through groundwater require an NPDES permit. This interpretation would create a loophole that might exclude ordinary point sources such as wastewater treatment facilities from NPDES requirements. As the court noted, under the county's interpretation, a discharger could terminate its pipe in the ground a few yards from the navigable water ultimately receiving the wastewater, and thereby avoid permitting requirements.

Seeking middle ground between these two extreme positions, the court held that the permitting requirement applies to both direct discharges and to indirect discharges that are the "functional equivalent" of direct discharges. According to the court, for purposes of determining how similar a particular indirect discharge is to a direct discharge, consideration should be given to factors such as pollutant transit time, distance traveled, nature of material through which the pollutant travels, amount of discharged pollutant reaching the navigable waters, manner by which the pollutant enters navigable waters and degree to which the pollutant maintains its

specific identify. The court left it to the district court to evaluate Maui's discharge based on these and any other relevant factors.

On July 15, the district court issued its opinion readily concluding that the county must obtain a permit. The district court found that the county injected 3-5 million gallons of wastewater per day into its wells. The sewage traveled no more than 1.5 miles through the groundwater before reaching the ocean. The average transit time was 14 to 16 months. The district court noted that both the distance traveled and the transit time within groundwater were much shorter than in the Supreme Court's hypothetical examples, and weighed heavily in favor of finding the indirect discharge to be the functional equivalent of a direct discharge.

Several additional factors bolstered this conclusion. All of the wastewater injected into the county's wells eventually reaches the ocean. The wastewater maintains its specific identity as polluted water from the wells throughout its transit to the ocean. And the absolute volume of wastewater at issue is large.

To be sure, competing factors weighed against finding Maui's discharge to be the functional equivalent of a direct discharge. The wastewater mixes with other waters as it flows through the ground, thereby somewhat altering the nature of the material. Similarly, attenuation mechanisms in the groundwater may reduce the concentration of pollutants. But the district court concluded that on balance these factors did not outweigh those favoring imposition of a permit requirement.

The facts in *Maui* presented a particularly strong case for finding functional equivalence. Groundwater flow paths were discernable, and the travel time and the distance from the well to the ocean were short. The county discharged large quantities of treated sewage that is ordinarily subject to NPDES requirements.

In less obvious circumstances, dischargers evaluating the need for a permit and regulators reviewing facility operations may be uncertain whether or not the indirect discharges at issue are the functional equivalent of direct discharges. The enforcement mechanisms of the act place these dischargers in a precarious position. If they discharge without a permit, federal or state authorities may seek civil or criminal penalties, and citizens may commence citizen suits. Although the government may exercise discretion to forego penalties where the outcome of the "functional equivalent" test could not be readily ascertained, this possibility is of small comfort to a discharger seeking to comply with the law and avoid citizen suits as well as government enforcement.

A judicial interpretation of the act requiring all indirect dischargers to obtain NPDES permits, or alternatively a ruling excluding all indirect discharges from NPDES requirements, would have established a bright line rule providing the certainty dischargers desire. But the court cannot be faulted for concluding that the "functional equivalent" standard best reconciles Congress's objectives to restore the physical, chemical and biological integrity of the nation's waters while preserving state authority over groundwater.

The need for a functional equivalent test arises from Congress' decision to subordinate sound science to other considerations. To restore and maintain water quality, all loadings of pollutants to waterbodies regardless of their source must be controlled. Because groundwater and surface water often form a single hydrologic system, this goal cannot be attained without control of pollutants in groundwater. Yet Congress chose to preserve traditional state control over groundwater resources. To accommodate this approach, Congress could have designed an institutional mechanism to coordinate federal and state programs, required minimum groundwater standards to be attained or made active state control of pollutants in groundwater a

condition of delegation of the NPDES program to the states. Because Congress declined to do so, the courts were left to strike the appropriate balance. The uncertainty of how the "functional equivalent" test will be applied is the price we pay.

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