County of Maui v. Hawaii Wildlife Fund—Groundwater discharges of pollutants into navigable waters require EPA permits only if the functional equivalent of a direct point source discharge

The County of Maui operates a wastewater reclamation plant that pumps partially treated sewage hundreds of feet underground through four wells. The sewage then travels approximately one-half mile as part of groundwater that discharges into the Pacific Ocean. The treated sewage constitutes a "pollutant" as defined in the Clean Water Act. 33 U.S.C. § 1362(6). Not viewing the plant's activity as a "discharge of pollutant," as also defined in the CWA (*id.* § 1362(12)), the County had not secured a National Pollutant Discharge Elimination System permit from the Environmental Protection Agency. Several environmental organizations sued, claiming that the wells served as point sources within the "discharge of pollutant" definition. Both the district court and the Ninth Circuit held in their favor. *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 380 (D. Haw. 2014), *aff'd*, 886 F.3d 737 (9th Cir. 2018). The court of appeals reached its conclusion "because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*." After granting certiorari, the Supreme Court vacated the Ninth Circuit's judgment and remanded for further proceedings consistent with its opinion. *County of Maui v. Hawaii Wildlife Fund*, ___ S. Ct. ___, 2020 WL 1941955 (Apr. 23, 2020).

The six-Justice majority opinion (per Breyer, J.) held that the CWA's applicability turned on "the statutory word 'from.' Is pollution that reaches navigable waters only through groundwater pollution that is 'from' a point source, as the statute uses the word? The word 'from' is broad in scope, but context often imposes limitations." Here, the majority "agree[d] that statutory context limits the reach of the statutory phrase 'from any point source' to a range of circumstances narrower than that which the Ninth Circuit's interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater described by Maui and the Solicitor General."

The Court next dissected and rejected the parties' and the amicus United States' understanding of "from." The environmental groups "basically adopt[ed] the Ninth Circuit's view" although "add[ing] that the release from the point source must be 'a proximate cause of the addition of pollutants to navigable waters.'" The majority did "not see how [the proximate cause element] significantly narrows the statute beyond the words 'fairly traceable' themselves." Rather, it held "that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit's narrow focus on traceability would allow" because, inter alia, "to interpret the word 'from' in this literal way would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river." The County's and the United States' position "that the statute's permitting requirement does not apply if a pollutant, having emerged from a 'point source,' must travel through any amount of groundwater before reaching navigable waters" was "too narrow, for it would risk serious interference with EPA's ability to regulate ordinary point source discharges." The County's "means-of-delivery test" requiring a permit "only if a point source itself ultimately delivers the pollutant to navigable waters" imposed an "esoteric definition of 'from'" that "does not remotely fit in this context. The statute couples the word 'from' with the word 'to'—strong evidence that Congress was referring to a destination ('navigable waters') and an origin ('any point

source')." The United States placed heavy reliance on EPA's understanding of the NPDES permitting requirement, as expressed in the agency's Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16810 (Apr. 23, 2019), "that 'the best, if not the only, reading' of the statutory provisions is that 'all releases of pollutants to groundwater' are excluded from the scope of the permitting program, 'even where pollutants are conveyed to jurisdictional surface waters via groundwater.'" Following this interpretation, the majority stated, "would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable."

The majority then set forth its conclusion as to the proper scope of "from":

> We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

It posed as the determinative question "[w]hether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge." The majority recognized "[t]he difficulty with this approach" because "it does not, on its own, clearly explain how to deal with middle instances." But the possibility of "many potentially relevant factors applicable to factually different cases" made it impractical "for this Court now to use more specific language." The majority nevertheless identified

> just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (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.

It anticipated that "courts can provide guidance through decisions in individual cases" and that "the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes."

Justice Kavanaugh joined in the majority opinion but concurred separately to stress his view that the "the Court's interpretation of the Clean Water Act regarding pollution 'from' point sources adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U. S. 715 (2006)" and that the lack of a bright-line test derives from "Congress' statutory text, not the Court's opinion. The Court's opinion seeks to translate the vague statutory text into more concrete guidance." The concurrence observed further that "[a]lthough the statutory text does not supply a bright-line test, the Court's emphasis on time and distance will help guide application of the statutory standard going forward."

Justice Thomas, joined by Justice Gorsuch, dissented. He argued that "[t]he best reading of the statute is that a 'discharge' is the release of pollutants directly from a point source to navigable

waters. The application of this interpretation to the undisputed facts of this case makes a remand unnecessary"—i.e, "[a]ll parties agree that the wastewater enters groundwater from the wells and does not directly enter navigable waters."

Justice Alito dissented separately. In his view, "[t]here are two possible interpretations of [when a pollutant is 'add[ed]' to navigable waters 'from' a 'point source.'] The first is that pollutants are added to navigable waters from a point source whenever they originally came from the point source. The second is that pollutants are added to navigable waters only if they were discharged from a point source directly into navigable waters." His dissent chose the second interpretation:

> Instead of concocting our own rule, I would interpret the words of the statute, and in my view, the better of the two possible interpretations is that a permit is required when a pollutant is discharged directly from a point source to navigable waters. This interpretation is consistent with the statutory language and better fits the overall scheme of the Clean Water Act. And properly understood, it does not have the sort of extreme consequences that the Court finds unacceptable.

In lieu of following that path, "[t]he Court adopts a nebulous standard, enumerates a non-exhaustive list of potentially relevant factors, and washes its hands of the problem. We should not require regulated parties to 'feel their way on a case-by-case basis' where the costs of uncertainty are so great."

Decision link: https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf