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Client Alert: U.S. Supreme Court: Indirect Discharge Into Groundwater Covered Under Clean Water Act

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On April 23, 2020, the U.S. Supreme Court, in a 6-3 **decision**, held that a permit is required for either “a direct discharge of pollutants from a point source into federally regulated navigable waters, or when there is the functional equivalent of a direct discharge.” *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*, Case No. 18-260 (April 23, 2020). **The decision focused on whether the Clean Water Act (CWA) regulates groundwater and thus has implications for sites with contaminated groundwater and the use of CWA citizen suits.** The Court majority fashioned a 7 factor test to determine whether groundwater is regulated under the CWA. The case was on appeal from the 9th Circuit Court of Appeals.

At issue in the case was whether the County of Maui’s (Maui) unpermitted injection of wastewater into deep underground wells that then seeped into groundwater and, via groundwater transport, ultimately discharged into the Pacific Ocean, violated Section 301 of the CWA, which prohibits the discharge of any pollutant into the navigable waters of the United States. 33 U.S.C 1311(a). The Court, based on an analysis of three key terms expressly defined under the CWA – “pollutant”, “point source”, and “discharge of a pollutant”, rejected Maui’s means-of-delivery test under which a permit is required only if the point source itself (e.g. a pipe) delivers the pollutant to navigable waters. Justice Breyer, who authored the majority opinion, noted that if Maui’s interpretation were accepted, a pipe owner could “simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea.”

The Court also rejected the 9th Circuit’s analysis which held that a permit is required when the pollutants are “fairly traceable” from the point source to navigable waters. The Court held that the “fairly traceable” standard was too broad, citing the “power of modern science” to detect pollutants years after their release in minute quantities. Recognizing that the “functional equivalent” standard lacks specificity, the Court identified seven factors that may be relevant in determining whether the “functional equivalent of a direct discharge” has occurred: (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 that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution has maintained its specific identity. The Court further explained that “functional equivalent” decisions should not create serious risks of undermining state regulation of groundwater or of creating loopholes that undermine the CWA’s basic federal regulatory objectives.

The three dissenting justices (Gorsuch, Thomas and Alito), held that a permit is only required for direct discharges into navigable waters.