

Supreme Court Holds That Clean Water Act May Require Permits For Some Indirect Discharges Of Pollutants Via Nonpoint Sources

Client Alert | April 23, 2020

Decided April 23, 2020

County of Maui v. Hawaii Wildlife Fund, No. 18-260

Today, the Supreme Court held 6-3 that the Clean Water Act requires a permit for the indirect discharge of pollutants from point sources to navigable waters via nonpoint sources, such as groundwater, if the discharge is the functional equivalent of a direct discharge.

Background:

The County of Maui disposes of treated wastewater by injecting it into groundwater through wells. Some of the wastewater eventually reaches the Pacific Ocean. Several environmental groups sued the County under the Clean Water Act, which prohibits the “discharge of any pollutant” into navigable waters without a permit. 33 U.S.C. §§ 1311(a), 1342. This permitting requirement applies only to pollutants discharged into navigable waters from a “point source”—that is, “any discernible, confined and discrete conveyance” such as a “pipe” or “container.” *Id.* § 1362(12), (14). The requirement does not apply to the discharge of pollutants from nonpoint sources such as groundwater. Although the County’s wastewater entered the Pacific Ocean from a nonpoint source (groundwater), the district court held that the County was required to obtain a permit because the wastewater originated in a point source (the well). The Ninth Circuit affirmed, holding that the indirect discharge of pollutants through a nonpoint source into navigable waters requires a permit if the pollutants are “fairly traceable” from the point source to navigable waters. After the Ninth Circuit’s decision, the EPA issued a new interpretive statement announcing its position that the Act does not require permits for any discharge via groundwater, although it might require permits for other indirect discharges. The United States defended that position and supported the County as an *amicus curiae*.

Issue:

Does the Clean Water Act require a permit for the discharge of pollutants that originate from a point source but are conveyed to navigable waters by a nonpoint source?

Court’s Holding:

Sometimes. If the discharge is functionally equivalent to a direct discharge from a point source into navigable waters, then the Clean Water Act requires a permit.

“Whether 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.”

Related People

[Lucas C. Townsend](#)

[Bradley J. Hamburger](#)

[Matthew S. Rozen](#)

[Max E. Schulman](#)

GIBSON DUNN

Justice Breyer, writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of Energy Transfer Partners, L.P. in support of petitioner County of Maui

What It Means:

- The Court purported to find its own “middle ground” between the positions of the parties. The Court rejected the Ninth Circuit’s “fairly traceable” test, the environmental groups’ test requiring a permit if a discharge from a point source “proximately caused” pollutants to enter navigable waters, the EPA’s groundwater-specific position, and the County’s bright-line rule that indirect discharges via nonpoint sources never require a permit.
- The Court did not apply its standard to the facts of the case, and it expressly left open the question of when an indirect discharge is “functionally equivalent” to a direct discharge. The Court explained that the lower courts can resolve this question in “individual cases” using “the traditional common-law method.”
- The Court directed judges to consider the Act’s “underlying statutory objectives,” and identified seven factors that may be relevant: (1) how long it takes the pollutants to reach navigable waters, (2) how far they travel, (3) what materials they flow through, (4) the extent to which they are diluted or chemically changed in transit, (5) the portion of the discharge that reaches navigable waters, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) whether the pollutants maintain their specific identity. The Court stated that the first two factors, time and distance, will be “the most important” in most but not all cases.
- The Court emphasized that “Congress thought that the problem of groundwater pollution, as distinct from navigable water pollution, would primarily be addressed by the States or perhaps by other federal statutes.” Statements like this may support a narrow interpretation of the Court’s new standard in cases involving groundwater.

The Court’s opinion is available [here](#).

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

Appellate and Constitutional Law Practice

Allyson N. Ho	Mark A. Perry	Miguel A. Estrada
+1 214.698.3233	+1 202.887.3667	+1 202.955.8257
aho@gibsondunn.com	mperry@gibsondunn.com	mestrada@gibsondunn.com

Related Practice: Environmental Litigation and Mass Tort

Daniel W. Nelson	Stacie B. Fletcher
+1 202.887.3687	+1 202.887.3627
dnelson@gibsondunn.com	sfletcher@gibsondunn.com

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

Related Capabilities

[Appellate and Constitutional Law](#)

GIBSON DUNN

[Environmental Litigation and Mass Tort](#)