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# SCOTUS Hears Oral Arguments in Major Clean Water Act Case

The U.S. Supreme Court appeared divided following recent oral arguments on Wednesday, November 6, 2019 in a closely followed environmental case which will have major implications on the scope federal regulatory power under the Clean Water Act (CWA).

In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, the justices are considering whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. The outcome of *Maui* will have a significant impact on a wide-array of industries and private individuals by either subjecting millions of pollutant sources to the CWA's permitting requirements for the first time or enshrining what environmentalists consider a loophole in the CWA. Although several justices seem to reject the county's argument that the federal government should only regulate pollution direct from a point source, the justices appear divided as to the limits of such regulation.

**The Federal Government's Permitting Authority under the Clean Water Act**

The CWA is the federal government's main statutory tool for preventing pollution of navigable waters of the United States. The CWA requires federal permits for "any addition of any pollutant to navigable waters from any point source." The Act defines "point source" as "any discernible, confined and discrete conveyance," including but not limited to example sources like pipes, ditches, channels, and wells. A classic example illustrating when a federal permit is required is when one discharges wastewater from a pipe (the point source) directly into a navigable water. The CWA, however, exempts "non-point sources" from federal permitting requirements. Non-point sources include groundwater and runoff, which are diffuse and difficult to trace to a "discernible, confined and discrete" source. The regulation of non-point sources traditionally falls within state jurisdiction.

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**_Maui_ and the Permitting "Loophole" in the Clean Water Act.**

In *Maui*, several environmental groups brought a citizen suit alleging that the unpermitted discharge of pollutants into the Pacific Ocean by a certain wastewater treatment plant in Maui County via groundwater under the plant violated the CWA. This plant injects several million gallons of treated wastewater into underground wells (a point source) every day. This treated sewage then percolates into the groundwater (a non-point source) under the facility where it travels approximately a half-mile before discharging into the Pacific Ocean (a navigable water). The water issue in *Maui* boils down to whether this unpermitted discharge into a navigable water from a point source via a non-point source breaks the CWA's causal chain of liability such that the federal government has no regulatory authority to require a permit.

The federal district court in Hawaii granted summary judgment in the environmentalists' favor. The district court in large part based its ruling on the following undisputed facts: (1) the discharged treated sewage is a "pollutant," (2) the plant's wells are "point sources," and (3) the Pacific Ocean is a "navigable water." Based on these facts, the court held that the "groundwater conduit" between the wells and the ocean constituted a "confined and discrete conveyance" and, therefore, a point source under the CWA.

The Ninth Circuit affirmed the lower court's ruling. The court held that the county required a permit under the CWA because 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 "the pollutant levels reaching navigable water are more than *de minimis*." Thus, whether the "groundwater conduit" is a point source requiring a permit under the CWA is the central question before the Court.

**The Positions of the Parties (and Other Major Players) Heading into Oral Argument.**

The county's central argument is that a federal permit is not required when pollution reaches a navigable water by a non-point source rather than a point source. The county relies on a textualist interpretation of the phrase "from any point source" in the CWA's permitting language. According to the county, the word "from" denotes a means of transport and not a place of origin. In other words, the county argues a non-point source like a groundwater system downstream of a point source breaks the causal chain of conveyance such that the plant cannot be liable for an unpermitted discharge of pollution from a non-point source even if it originated from a point source. To hold otherwise, the county maintains, would create a precedent subjecting millions of new pollutant sources to federal regulation and liability exposure. The county often points to the example of a private individual who owns a faulty septic tank which leaks pollutants into the groundwater and travels to a navigable water. The county argues that such a precedent would result in widespread increased liability and hefty daily fines for property owners.

The county also argues that if Congress intended to require permits for non-point sources it would have added that language to the CWA. Instead, Congress exempted non-point sources from federal permitting requirements, so the Supreme Court should not graft language onto the statute which would effectively undermine congressional intent. To this end, the county argues groundwater is always a non-point source.

The United States has filed an *amicus* brief in support of the county's position that discharges from groundwater are exempted from federal permitting requirements. This brief follows the interpretative statement the EPA released in April 2019 rejecting the so-called "conduit" or "hydrologic connection" theory of CWA jurisdiction. For more information on this interpretative statement from the EPA, please see our previous alert here.

The environmental groups take a very different view of the phrase “from any point source,” arguing that this language is broad enough to encompass groundwater as a “proximate cause” of discharge of pollutants into navigable waters if the pollutants are “fairly traceable” to the point source. This is the language the Ninth Circuit used when it affirmed summary judgment in the environmentalists’ favor. A contrary holding, these groups argue, would result in a massive loophole in the CWA’s permitting system by which polluters could strategically place point sources (like pipes) in the groundwater system to evade permitting requirements and undermine the preventative goals of the CWA. Eleven different groups, including former U.S. EPA administrators and officials from multiple administrations, 13 states, a Native American tribe, scientists, and other clean water advocates have filed briefs in support of the respondents.

**The Justices Weigh into the Controversy with Tough Questions, Though With No Clear Consensus**

Justices from both sides of the ideological spectrum appeared to struggle with setting limits on the scope of federal permitting authority under the CWA during oral arguments on Wednesday. The Court’s liberal justices expressed concern that the county’s argument provided a blueprint for polluters to avoid the CWA’s permitting scheme by discharging water into the groundwater even if that groundwater is close to navigable waters. Justices Elena Kagan and Stephen Breyer called the county’s argument a “road map” for such behavior and opined that nobody would get a permit if they simply could “cut a pipe a few feet short” from a navigable water. Justice Sonia Sotomayor agreed, and also asked whether the county’s argument would trim the federal government’s primary tool for preventing pollution of navigable waters.

Chief Justice John Roberts asked counsel for the county if “any little bit” of groundwater, even “two inches,” between the facility and the ocean would make a permit unnecessary. The county took a hard line affirmative stance in reply, though qualified the response by saying that situation is unlikely, and there are state regulations of non-point sources in effect which might prevent polluters from circumventing federal permitting requirements.

Although several justices seemed troubled by the county’s argument, there appeared to be equal concern for delineating the limits of the environmentalists’ “fairly traceable” or “proximate cause” position. Justice Samuel Alito focused his questioning on finding a limiting principle between federal and state authority. Justice Alito asked if private homeowners with faulty septic tanks would suddenly become liable for fines—upwards to $50,000 per day—if these tanks leaked pollutants into the groundwater which ultimately discharged into a navigable water. Justice Breyer, who sympathized with Justices Kagan and Sotomayor on the “road map” concern, likewise sided with Justice Alito on this point, noting humorously that even his eighth grade self knew that “water runs downhill.”

To this end, Justice Breyer expressed concern for the “500 million people suddenly discovering that they have to go and apply for a permit from the EPA.” Justices Neil Gorsuch and Brett Kavanaugh also seemed suspicious of whether the environmentalists’ position would adequately safeguard businesses and private homeowners against fines for these more innocuous discharges. Justice Kavanaugh stated directly: “some clear line for the property owner is really important here.”

**Conclusion**

There is no certainty in predicting how the Court will rule in *Maui*, or whether the outcome will even be along ideological lines. It appears the justices generally rejected the county’s position that only pollution

discharged from point sources directly into navigable waters require federal permits. Conversely, justices from both sides of the spectrum expressed concern with the limits between federal and state authority. It is clear the justices are searching for some way to limit what is regulated, especially within the bounds of the CWA's statutory text. No matter how the Court rules, however, the decision will have a significant impact on the scope of the federal government's permitting authority and how businesses and private citizens must comply with the CWA.

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