SUPREME COURT RULES A CLEAN WATER ACT PERMIT CAN BE REQUIRED FOR GROUNDWATER DISCHARGES BY MAUI COUNTY INTO NAVIGABLE WATERS FEATURED

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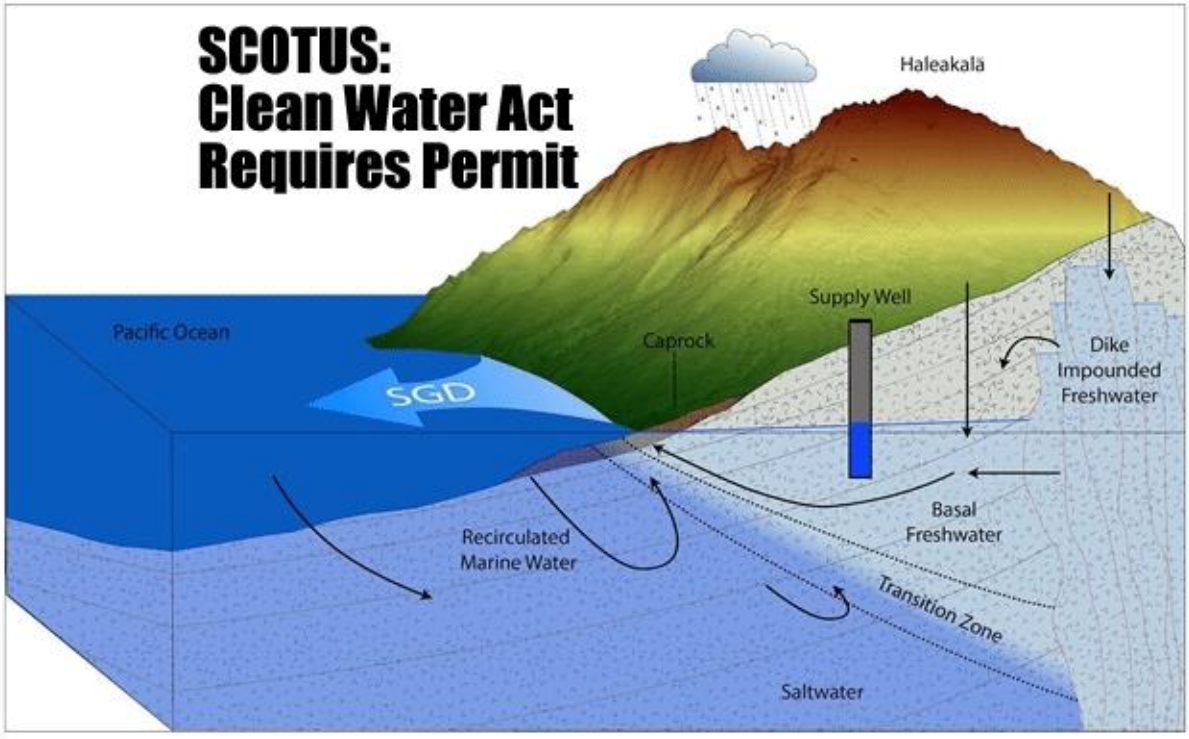

Schematic of submarine groundwater discharge. Bishop, et al. (2015)

On April 23, 2020, the United States Supreme Court issued its decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*, No. 18-260, 590 U.S. __ (April 23, 2020), ruling that the federal Clean Water Act (CWA) may require a permit when a point source discharges pollutants to navigable waters through groundwater. This decision has been eagerly awaited by industry, government, and the bar.

Justice Breyer authored the majority opinion for the 6-3 decision, ruling that a permit issued under the CWA is required if the addition of the pollutants through groundwater is "the functional equivalent" of a direct discharge into navigable waters. This is a new concept in CWA jurisprudence.

The CWA prohibits the addition of pollutants from any "point source" to "navigable waters," without an appropriate permit from the Environmental Protection Agency (EPA). §§ 301(a), 502(12), 86 Stat. 844, 886. Pollutants described in the Act range from the obvious—solid waste, sewage, chemical wastes—to the less intuitive—cellar dirt, and agricultural waste.

Any pollutant discharged through a point source (a discernable, confined, and discrete conveyance, such as a pipe), into waters of the United States, can be subject to a permit under the Clean Water Act. This

ruling expands the understanding of that jurisdiction. This has been the National Pollutant Discharge Elimination Permit Program (NPDES) program since 1972.

This case stemmed from a challenge to the County of Maui's wastewater reclamation facility, which collects, partially treats, and then injects about 4 million gallons of wastewater into the ground per day. The wastewater mixes with the groundwater, and then travels about a half-mile before ultimately discharging into the Pacific Ocean.

The Hawaii Wildlife Fund and other environmentalists brought a Citizen Suit under the CWA, alleging that the County was illegally discharging a pollutant into navigable waters without first obtaining an NPDES Permit.

The most compelling evidence in support of the Hawaii Wildlife Fund's argument came as a result of the wastewater's path being tracked using a "Tracer Dye Study," where tracer dye was injected into the wells, and then submarine springs on the coast were monitored to see if any dye appeared there. It did.

Both the District Court and the Ninth Circuit agreed with the respondents, stating that the CWA requires a NPDES permit when "pollutants are fairly traceable from the point source to navigable water," which they concluded these pollutants were. 24 F. Supp. 3d 980, 998; 886 F. 3d 737, 749.

The Supreme Court narrowed the lower courts' rulings, citing that statutory context of the CWA as limiting the reach of the phrase "from any point source" to a narrower range of circumstances than "fairly traceable" suggests. Instead, the Court used the phrase "functional equivalent of a direct discharge" to pinpoint when a discharge to groundwater needs an NPDES Permit.

The Court emphasized that to make the determination of whether discharge to groundwater is the "functional equivalent" of a direct discharge into navigable waters, "time and distance will be the most important factors." Other factors include the nature of the material through which the pollutants travel, and the extent to which the pollutant is diluted when it reaches navigable waters.

The Court explained that the Ninth Circuit's "fairly traceable" language could allow the EPA to assert permitting authority over the release of pollutants into groundwater that reach navigable waters years and years after their release. This would open a panoply of long-term liability, timing, and tracing issues, and could functionally contradict the EPA's new Navigable Water's Protection Rule: Definition of "Waters of the United States," which goes into effect on June 22, 2020. 85 Fed. Register 77, at 22250.

The CWA defines "navigable waters" as "waters of the United States," so any change in scope of the definition in turn changes the scope of the CWA itself. The EPA's new rule explicitly excludes "groundwater" from the definition of "Waters of the United States." While the Supreme Court's holding in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.* doesn't make the discharge of pollutants into groundwater a per se violation of the CWA, it does require those who pollute groundwater to obtain a NPDES Permit, if that pollution ultimately reaches navigable waters in a clear and attributable way.

The County of Maui and the Solicitor General argued that the CWA does not apply if the pollutant, discharged from a point source, has to travel through any amount of groundwater before reaching navigable waters. The Court rejected this interpretation as too narrow, saying "it would risk serious

interference with EPA's ability to regulate ordinary point source discharges," and hypothesizing that to avoid jurisdiction, one could simply ensure all discharging points stop short of navigable waters.

The Court concluded that it did "not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act."

The Court did not rule, however, on whether the specific facts of the case resulted in the "functional equivalent" of a discharge to navigable waters—that matter was remanded for the lower federal court to decide. This means that while the Court concluded that a discharge of pollutants to groundwater may invoke CWA jurisdiction and require a permit, there is currently a lack of clarity on what a "functional equivalent" means as applied, in reality.

The holding in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.* is a wakeup call to groundwater dischargers nationwide. While the discharge of pollutants into groundwater alone does not necessarily require an NPEDES Permit under the Clean Water Act, the decisional law now recognizes that it may. This has real, practical implications.

Those discharging pollutants into groundwater must now account for the reality that pollutants in groundwater can and do easily traverse sight-unseen into navigable waters, thus granting regulatory jurisdiction over the discharge to the EPA under the CWA. Due to the subjective term "functional equivalent" in the Court's decision, the applicability of this new case is not black and white.

Regulated entities should keep an eye out for the remand decision in this *Maui* case applying the new standard to the facts. Meanwhile, they should realistically assess the need for obtaining an NPDES Permit for what they discharge—especially if there is known groundwater contamination flowing toward a body of water.

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OLYMPIA A. BOWKER, Esq. is an Associate at McGregor & Legere, P.C. in Boston. She helps clients with a broad range of environmental, land use, zoning, and regulatory matters in both administrative and legal forums.

Ms. Bowker's work includes performing in-depth research on both the procedural and substantive aspects of legal issues; drafting memoranda for clients to communicate legal matters; drafting public records requests to state agencies; working with consultants and other entities to ensure consistent and professional presentation of materials in administrative and legal filings; preparing clients for administrative proceedings; keeping clients up to date with the latest developments in their cases; tracking and organizing thousands of electronic documents and press for high-profile cases; and communicating with press and state agency representatives.

Ms. Bowker has extensively researched and contributed to presentations and treatises on topics such as: affordable housing, air pollution, Article 97, climate change, coastal zones, environmental justice, hazardous waste, Home Rule, organic waste, parklands, the public trust, regulatory review, regulatory takings, site remediation, underground storage tanks, storm water, waterways, wildlife and endangered species, zoning,

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Ms. Bowker has written for a variety of legal and environmental publications, including the Journal of Environmental Law and Litigation, the Vermont Journal of Environmental Law, Municipal Law Quarterly, the Real Estate Bar Association (REBA) newsletter, and the American Bar Association Student Lawyer Magazine. Ms. Bowker has written specifically on cutting edge municipal reform bills; the application of federal statutory language to state conservation regulations; the public trust doctrine and dam removal; microbead legislation in Vermont; and the delineation between legislative and non-legislative rules under the federal Administrative Procedures Act.

In addition to work at McGregor & Legere, Ms. Bowker also serves on an advisory council for the Appalachian Trail Conservancy, where she keeps tabs on interstate and intrastate energy projects and environmental legislation in all fourteen states where the trail corridor passes.

Ms. Bowker graduated from the University of Vermont, and went on to receive both her Juris Doctor and Masters of Environmental Law and Policy from Vermont Law School. In her time at Vermont Law School, she served on the editorial board of the Vermont Journal of Environmental Law, and completed specialized coursework to obtain certificates in Land Use Law and Water Resources Law.

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