

Supreme Court Extends National Pollutant Discharge Elimination System Permit Requirements to Indirect Pollutant Discharges

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On April 23, 2020, the Supreme Court issued a highly anticipated ruling in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, 2020 WL 1941966, which is expected to have significant future impacts on industrial facility operators and other dischargers of pollutants. The case involved a wastewater reclamation facility in the County of Maui that collects and treats sewage and pumps the treated water through underground wells. The treated water then migrates through groundwater into the Pacific Ocean.

In its decision, the Supreme Court held that groundwater infiltration and pollutant discharge is regulated under the Clean Water Act (“CWA”) and requires a National Pollutant Discharge Elimination System (“NPDES”) permit for indirect discharges if “the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters.” In applying the *functional equivalent* test, the Court identified a non-exhaustive seven factor list, including: “(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.”

The *functional equivalent* test is not a bright-line rule and the application is heavily fact dependent. The Court’s ruling effectively defers to state permitting authorities to apply the nebulous rule to permitting decisions and relies on additional guidance eventually becoming available when lower courts issue opinions in future cases challenging those decisions. This is likely to result in increased litigation on this topic.

The decision increases the range of facilities and operations that are considered CWA point sources and will require dischargers to consider whether discharges from their operations that migrate to groundwater have the potential to reach navigable surface waters (i.e., “Waters of the United States”), thereby triggering NPDES permitting obligations. The ruling is also likely to increase the number of citizen suits alleging unpermitted discharges under the CWA.

If you would like more information about how the Supreme Court’s new rule may impact you or your business, please contact us at Contact@HartmanKingLaw.com.

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