

Supreme Court Reverses EPA in Key CWA Groundwater Case

Alert

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Today the U.S. Supreme Court issued its long-awaited [opinion](#) in *County of Maui v. Hawaii Wildlife Fund*, regarding whether the discharge of pollutants via groundwater requires a Clean Water Act (CWA) permit. This holding invalidates the Environmental Protection Agency's (EPA) recent interpretive statement that *all* releases of pollutants to groundwater are excluded from the scope of the permitting program.

In a 6-3 opinion delivered by Justice Stephen Breyer, the Supreme Court relied on CWA language, structure and purpose in concluding that pollutants that leave a "point source" and reach groundwater via navigable waters "required a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." The court makes clear that time and distance will be the most important factors in most cases, but other relevant factors may include the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels, among others.

The court's opinion notes these factors are fact-intensive and should be judged on a sliding scale with the longer the time and distance from the source, the less likely a permit is needed. The court gave the example: "If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply." Ultimately, and in continuation of long-standing practice, the EPA remains tasked with providing administrative guidance consistent with the court's decision through its permit issuances and development of general rules.

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Justice Brett Kavanaugh issued a concurring opinion which noted that the majority followed Justice Antonin Scalia's *Rapanos v. United States* reasoning.

We will closely monitor the implications of the court's ruling as EPA implements its Navigable Waters Protection Rule and as states respond in administering their permitting programs.

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