

BURR ALERT

GOOD GRAVY: WHAT A MESS *County of Maui v. Hawaii Wildlife Fund*

By: William L. Penny

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“A recipe might instruct to ‘add the drippings from the meat to the gravy’; that instruction does not become incomprehensible or even peculiar, simply because the drippings will have first collected in a pan or on a cutting board.—*County of Maui v. Hawaii Wildlife Fund*, slip at 14.

Justice Breyer used the above folksy culinary analogy in [*County of Maui v. Hawaii Wildlife Fund*](#), decided April 23, 2020, to explain why a NPDES permit could be required for the discharge of wastewater to groundwater and then into navigable waters. Justice Alito in a strongly worded dissenting opinion accused the majority of departing from interpreting statutory text and creating its own legal rule with no clear guidance. The opinion focused on the term “discharge of pollutants” defined in the Clean Water Act as “any addition of any pollutant to navigable waters FROM any *point source*.” 33 USC § 1362(12) (emphasis supplied). The Court’s new definition of that term was that an NPDES permit is required under Section 301 of the Clean Water Act for the discharge of a pollutant from a point source into navigable waters OR after traveling through groundwater “when there is the *functional equivalent of a direct discharge from the point source into navigable waters*. The example used by Justice Breyer assumes metaphorically that the addition of drippings to the gravy is the functional equivalent of a discharge of a pollutant from a point source regardless of how it was transferred to the gravy. If things were only that simple.

Maui operated a sewage treatment plant and discharged the effluent into wells that intersected with groundwater and eventually discharged into the Pacific Ocean. The Hawaii U.S. District Court found that the path to the ocean was clearly ascertainable and was “functionally one into navigable water.” 24 F.Supp. 3d 980, 998 (Haw. 2014). The Ninth Circuit affirmed the District Court but added that where the pollutants were fairly traceable from the point source, the discharge is the functional equivalent of a discharge into navigable waters. 886 F.3d. 737,749 (2018). In reversing the Ninth Circuit the Court found that the “fairly traceable” test was much too broad, but left intact the concept of the “functional equivalent.”

The Court wrestled with how the new “functional equivalent” standard would be applied. According to the Court “time and distance” were the most important, using an example of a pipe that ends a few feet from navigable water and travels a few feet in groundwater to a navigable water. The opinion notes that a functional equivalent would not consist of a pipe that ends 50 miles from navigable waters that mixes with groundwater that may not discharge for years. The Court explained, in effect, that there was no bright-line test, but it identified some of the factors that may prove relevant depending upon specific cases:

- Transit Time
- Distance Traveled

- Nature of the material through which the pollutant travels
- The extent to which the pollutant is diluted or chemically changed as it travels
- The amount of pollutant entering the navigable waters relative to the amount of pollutant that leaves the point source.
- The manner by or area in which the pollutant enters navigable waters,
- The degree to which the pollution (at that point) has maintained its specific identity.

Justice Breyer, in essence, asks the reader to find comfort in future court decisions, which forecasts that this issue will be litigated frequently. The Court stated that judges could mitigate any hardship or injustice when they apply the statute's penalty provisions. "We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties, when, for example, a party could reasonably have thought a permit was not required." Slip at 18. That quote may need to be printed on a card and slipped in a defense counsel's wallet. In addition, the Court expects that EPA would be able to provide administrative guidance, and in conjunction with states, develop general permits or general rules. The Court stated that EPA had applied permitting requirements to some discharges through groundwater for over 30 years without creating an unmanageable expansion. EPA/Corps guidance has not been a model of clarity in the past, with all due respect.

It is worth noting that Maui had advocated a "means-of-delivery" test. That test was not about *where* the pollution originated but *how* it got there. If the pollutant must travel through groundwater to reach navigable waters, then it is the groundwater, not the pipe, which is the conveyance. The Solicitor General's position was that all releases of pollutants to groundwater are excluded from the permit program, even if pollutants are conveyed to jurisdictional surface waters by groundwater.

While it is generally understood that the *Rapanos* case did not exactly clear up the definition of "navigable waters," Justice Kavanaugh's concurring opinion explained that the Court's interpretation "adheres to the interpretation set forth in Justice Scalia's plurality opinion. . . ." Justice Scalia's plurality opinion in *Rapanos* stated in part that the permit requirements could not be evaded simply by discharging pollutants into non-jurisdictional waters upstream of jurisdictional waters. He further notes that Justice Scalia pointed out that the statute does not contain a "bright-line" test for when a pollutant is considered to come from a point source, and that the source of that vagueness is the fault or result of Congressional statutory text, not the Court.

The *Maui* decision will no doubt have wide ranging impact. The EPA/Corps "Navigable Waters Protection Rule: Definition of 'Waters of the United States'" ("WOTUS Rule") was published in the Federal Register April 21, 2020, just two days before the Opinion was released. [85 FR 77 \(April 21, 2020\)](#). Those rules will be effective June 22, 2020 absent a judicial stay or other amendment. The new WOTUS rules clarify that groundwater is not jurisdictional. The preamble to April 2020 WOTUS rule explains in great detail the government's position taken in the *Maui* case, which, of course, was not accepted by the Court. Both Maui and the Government argued to the Court that its interpretation would expand the scope of the statute perhaps requiring some 650,000 new permits and permits for over 20 million septic systems in use by American homeowners. Of course, it does not take much

imagination to envision many other examples which potentially would impact the newly regulated public. The Court may be revisiting this issue in a challenge to the WOTUS Rule, but good gravy what a mess.

To discuss this further, please contact:

[William L. Penny](mailto:bpenny@burr.com) at (615) 724-3213 or bpenny@burr.com

or the Burr & Forman attorney with whom you normally consult.

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