Justices Leave Waters Muddy In County of Maui Sewage Case

By **Jeff Porter**

Jeff Porter

The U.S. Supreme Court's April 23 decision in County of Maui v. Hawaii Wildlife Fund proves that legislating is best done by Congress, not the courts. The high court's decision also tells us that the era of judicial deference to the U.S. Environmental Protection Agency that began in the mid-1980s seems to be coming to an end.

The Supreme Court was asked a yes or no question with huge ramifications for state authorities and millions of property owners: Does a discharge to groundwater require a permit under the Federal Clean Water Act? The court's answer to this yes or no question is a muddled maybe, concluding that the EPA's answer to the same question — an unequivocal no — was "neither persuasive, nor reasonable."

The County of Maui operates a wastewater treatment facility that treats approximately 4 million gallons of water each day. The treated effluent contains pollutants, albeit at concentrations compliant with the Federal Safe Drinking Water Act. That treated effluent is discharged to four wells, which are connected to groundwater several hundred feet underground. The groundwater, like most groundwater, flows to the ocean.

In 2012, several environmental groups brought a citizens' suit under the Federal Clean Water Act, alleging that the discharge of treated effluent to groundwater was an unpermitted, and therefore prohibited, discharge to a navigable water. The district court ruled against the County of Maui, concluding that the discharge to groundwater was "functionally one into navigable water."

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court based on its own new test, concluding that the applicable standard is whether "pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of the discharge into the navigable water."

Last week, Justice Stephen Breyer, joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan and Brett Kavanaugh, concluded that "the statutory context [of the Federal Clean Water Act] limits the reach of the statutory phrase 'from any point source' to a range of circumstances narrower than that which the Ninth Circuit's interpretation suggests." The court instead held that a federal permit is required when a discharge to groundwater is the "functional equivalent" of a discharge from a point source directly into a navigable water.

How are the millions of people responsible for discharges to groundwater — including the owners of every septic system in the United States — supposed to determine whether their particular discharge is the functional equivalent of a direct discharge? Well, according to the Supreme Court, "many factors may be relevant" with "time [for the discharged pollutants to get to a navigable water]" and "distance" being "the most important in most cases."

Other factors which "may prove relevant," according to the court, include:

- "[T]he nature of the material through which the pollutant travels";
- "[T]he extent to which the pollutant is diluted or chemically changed as it travels";
- "[T]he amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source";
- "[T]he manner by or area in which the pollutant enters the navigable waters"; and
- "[T]he degree to which the pollution (at that point) has maintained its specific identity."

One can't find these factors — or the line that can't be crossed with respect to any of them — in a federal regulation, because, as the court recognizes, the EPA doesn't agree that they are relevant factors (and, for that matter, they have never been collectively identified as factors in prior administrations).

Other than telling us that if a "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 don't apply," the Supreme Court offers us no guidance on functional equivalency. Instead, it looks forward to lower courts putting additional meat on its very brittle functional equivalent bone through decisions in future cases, months and years down the road.

In an apparent attempt to calm the millions who don't currently have a federal permit that the federal government has said they don't need, the court shares its expectation that: district judges will exercise their discretion mindful, as we are, of the complexities inherent in the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required.

But the court doesn't tell us how indirect dischargers are to pay the staggering legal fees to get to the end of these future cases, nor does it explain how we can have come to a place where the federal law is so complex that one can't know whether the law applies to them without litigation. Because of the burdens of litigation, what is more likely, of course, is many more citizens' suits under the Federal Clean Water Act settled without further guidance from the courts.

The court also suggests that the EPA and the states might lend a helping hand through future regulations and general permits. But, given the court's lack of deference to agency decision-making, one wonders why they would bother.

None of the justices said they would defer to the EPA's interpretation of the statute, the majority concluding that it is not reasonable, and Justice Clarence Thomas saying in his dissent that the "EPA's reading is not the best one" and deference to an agency is likely unconstitutional. This turn is likely to have significant ramifications down the road.

For over 30 years, our federal courts, including the Supreme Court, have struggled to determine the scope of the Clean Water Act. As Justice Samuel Alito said in dissent, "[i]f the

Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules than can be applied with a modicum of consistency."

In the meantime, Republican and Democratic presidential administrations promulgate regulations expanding and contracting the scope of the Clean Water Act. These efforts result in more litigation and more uncertainty. Perhaps the only way out of this mess is for Congress to answer the question once and for all.

This would likely involve environmental activists getting less Clean Water Act coverage than they want, and industry and municipalities settling for more coverage than they would prefer. In any event, one is left wondering how, after more than three decades, the best the three branches of the federal government can do for all of us is the prescription for further litigation provided by the Supreme Court in Maui.

Jeff Porter is a member and the chair of the environmental practice at Mintz Levin Cohn Ferris Glovsky and Popeo PC.