

County of Maui v. Hawaii Wildlife Fund et al. US Supreme Court (Case No. 18-260)

Circuit Split Summary

On February 19, 2019, the US Supreme Court granted the petition for review submitted by Maui County Department of Environmental Management on the question of whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source - groundwater. The case is currently in the briefing stage. On May 9, 2019, the County of Maui filed its [brief](#) with the Supreme Court. On May 16, 2019, NACWA – along with Association members the City and County of San Francisco, New York City, and the Denver Metro Wastewater Reclamation District - filed a [brief](#) in support of Maui.

The Supreme Court has the opportunity to resolve the following circuit split with its ruling in this case.

Ninth Circuit

The appeal to the Ninth Circuit arose from a district court decision, which held that the migration of pollutants from the UIC wells through groundwater – which acts as a “conduit” – into hydrologically connected navigable waters violates the CWA.

On February 1, 2018, a three-judge panel of the Ninth Circuit Court of Appeals issued a unanimous decision that reached the same result but did not adopt the lower court’s “conduit” theory. The Ninth Circuit disagreed with the district court’s holding that “liability under the [CWA] is triggered when pollutants reach navigable water, *regardless of how they get there*,” explaining instead that the original discharge must still be from a point source that then travels to navigable waters in some way. The court adopted a new “indirect discharge theory” to hold Maui County liable under the CWA because (1) the County discharged pollutants from a point source (i.e., underground injection wells); (2) the pollutants are fairly traceable from the point source to a navigable water, such that the discharge is the functional equivalent of a discharge into the navigable water; and (3) the pollutant levels reaching navigable water are more than *de minimis*.

The court rejected the direct hydrologic connection test articulated by EPA during the Obama administration in an *amicus* brief:

The EPA as *amicus curiae* proposes a liability rule requiring a “direct hydrological connection” between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA (“*direct*” and “*hydrological*”) that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a ‘fairly traceable’ connection, consistent with Article III standing principles.

The court's focus on the text of the Act was surprising, given its own introduction of two new tests (fairly traceable and more than *de minimis* amount) are not supported by the plain text or structure of the CWA. The court also ignored the clear provisions of the Act regarding states' authority over nonpoint source pollution, obliterating the cooperative federalism structure that Congress explicitly established.

The "direct hydrologic connection" test articulated by EPA, while still representing an expansion of the NPDES permit program, would have applied to a more limited scope of discharges, with the intent to capture wetlands and other closely connected waters. The "fairly traceable" test, by contrast, could apply where there is a much more tenuous connection. Indeed, the Ninth Circuit suggested that its application could be broad, leaving open the question of whether there is even a limit: "We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."

The *de minimis* amount test similarly does not reflect the language of the CWA, and if anything, adds an additional layer of confusion. The CWA includes a strict requirement that *any* discharge of a pollutant, without qualification, from a point source to navigable waters must be subject to a permit. The court's addition of a volume requirement is therefore completely inapposite with the text of the statute. As a result, the decision both expands application of the CWA to a broad scope of discharges to groundwater, while simultaneously narrowing its application to only those discharges that are more than *de minimis*.

In the *Maui* case alone, three tests have been advanced to define the line between point and nonpoint sources: the district court's "conduit" theory, EPA's "direct hydrological connection," and the Ninth Circuit's "fairly traceable" and more than "*de minimis*" standard.

Sixth Circuit

On September 24, 2018, the Sixth Circuit Court of Appeals issued two decisions - *Kentucky Waterways Alliance v. Kentucky Utilities* (KWA case) and *Tennessee Clean Water Network v. Tennessee Valley Authority* (TVA case) - soundly rejecting the "fairly traceable" and "direct hydrologic connection" theories of liability.

The two cases both involve allegations by environmental groups concerning the seepage of pollutants from coal ash ponds through groundwater into hydrologically connected surface water, prompting the Sixth Circuit to conduct a joint oral argument before the same panel.

The TVA case involves a suit brought in April 2015 by two environmental advocacy organizations, alleging liability for contamination of groundwater with coal ash from the TVA's operation of its Gallatin Plant that eventually reaches the Cumberland River via groundwater. The lower court held that discharges to state-regulated groundwater require NPDES permits if the constituents end up in jurisdictional surface waters under the CWA. Following a trial, the court required the *elimination* of the source of pollutants by requiring that TVA fully excavate the site rather than complete a closure in place as permitted under the Resource Conservation

and Recovery Act. TVA appealed the decision to the Sixth Circuit.

The *KWA* case involved a decision by the lower court dismissing the environmentalists' claims arguing that discharges from a coal ash pond that eventually migrated to a nearby lake violated the CWA. The district court rejected the direct hydrologic connection theory. The court's reasoning was that adopting this theory would subject a variety of nonpoint source pollution to CWA regulation simply by going up the causal chain to find some initial point of discharge and would effectively read the point source requirement out of the CWA. The environmental plaintiffs, *KWA*, appealed the decision to the Sixth Circuit.

The Sixth Circuit rejected the theory that an NPDES permit is required where pollutants are discharged through groundwater that conveys them to navigable waters, explaining that in that instance "[the pollutants] are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance." As the court explained, groundwater itself cannot be a point source because of its diffuse nature, and as a result "[t]he CWA has no say over that conduct."

The court went on to emphasize Congress' clear intent to reserve power over discharges to groundwater to the states, focusing on the Act's specific purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources." Petitions for rehearing *en banc* were denied. On April 15, 2019, a petition was filed with the Supreme Court for review of the TVA case.

Fourth Circuit

In April 2018, a divided panel of the Fourth Circuit reversed a district court's dismissal of the CWA citizen suit in *Upstate Forever v. Kinder Morgan*. This case involves a leak from a petroleum pipeline into groundwater. Plaintiffs alleged that petroleum migrates subsurface into various creeks and wetlands and thus constitutes an ongoing discharge of pollutants without an NPDES permit, in violation of the CWA.

Deferring to EPA statements from 1991 and 2001, the majority found that CWA liability may be triggered based upon release of pollutants to groundwater that has a "direct hydrologic connection" to surface water. Although the majority did not define the term "direct," it found that the allegations in the complaint were sufficient to state a claim under the CWA: "an alleged discharge of pollutants ... reaching navigable waters located 1000 feet or less from the point source by means of ground water ... falls within the scope of the CWA."

In so holding, the majority found that a point source need not *convey* the pollutants to navigable waters to trigger NPDES permitting requirements: "to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters." Rather, a discharge to groundwater may trigger liability so long as the groundwater is "sufficiently connected" to navigable waters.

In August 2018, *Kinder Morgan* filed a *cert* petition with the Supreme Court, which remains

pending. In the federal government's brief filed at the request of the Supreme Court in early January, the Department of Justice recommended that the Court grant *cert* in *Maui v. Hawaii Wildlife Fund*, which it deemed as the best vehicle for resolving the question presented. In *Kinder Morgan*, the Fourth Circuit addressed the merits of the indirect discharge theory only after concluding that the plaintiffs had properly alleged "an ongoing violation" sufficient to confer jurisdiction over a CWA citizen suit.