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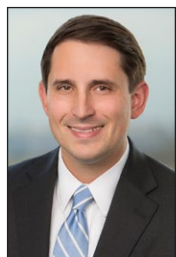
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Emerging Issues
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Legal Briefs is back! The *Journal* is excited to have Kyle Robisch as the new columnist. Kyle is an environmental, regulatory, and business attorney with Bradley Arant Boult Cummings LLP in Tampa. He assists clients with a wide range of legal issues, including infrastructure development, federal and state environmental permitting, and all manners of litigation (environmental and otherwise). He is especially experienced with the Clean Water Act and the National Environmental Policy Act, and recently chaired the American Bar Association's Water Resources Committee. Ideas for future column topics can be sent to Kyle at krobisch@bradley.com.



Kyle Robisch

“Middle Instances” of the Clean Water Act: Indirect Discharges Need NPDES Permits Too...Sometimes

For the past decade or so, the regulated community and federal courts alike grappled with the outer reaches of the Clean Water Act (CWA) point source permitting program. The core of the program—the National Pollutant Discharge Elimination System (NPDES)—is clear enough. Under the NPDES program, discharges from point sources to navigable waters (what qualifies as “navigable waters,” i.e., “waters of the United States” presents another thorny question) require a NPDES permit.

But what about more attenuated discharges? Say a Hawaiian municipal wastewater facility collects, partially treats, and discharges wastewater into underground injection wells, which, through groundwater connections, carry the effluent roughly 2,500 feet into the Pacific Ocean. Groundwater is generally beyond the NPDES program's reach; the Pacific Ocean is firmly within it. So, does the wastewater facility need a NPDES permit (because the groundwater conveys the effluent to a navigable water) or not (because the groundwater breaks the regulatory link)?

Before April, federal courts around the U.S. would've applied different legal analyses—and, by extension, reached different permitting conclusions—to this same factual question. Some said the CWA applied so long as groundwater discharges created a “direct hydrological connection” to navigable waters. Others required permits if the pollutants were “fairly traceable” from the point source to the navigable water. And others still held that discharges to groundwater *never* required NPDES permits. Practically speaking, this meant federal courts in California, Virginia, and Tennessee all applied *different* legal rules to the *same* theoretical discharge, with very real consequences for permittees. Just a few months ago, the U.S. Supreme Court resolved this “circuit split,” but, in many ways, the Court left the regulated community with more questions than answers.

The case of *County of Maui v. Hawaii Wildlife Fund* concerned the question just posed: Does the Hawaiian municipal wastewater facility require a NPDES permit to pump its partially treated effluent into groundwater that hydrologically reaches the Pacific Ocean? Sidestepping the specific question of whether *that* discharge required a NPDES permit, the Court answered with a resounding “maybe.” Though the Court sent the particular issue back to the lower courts

for further factual development, it did announce a new rule controlling whether *any* discharge triggers NPDES point source permitting requirements: The CWA requires NPDES permits “when there is a direct discharge from a point source into navigable waters or *when there is the functional equivalent of a direct discharge.*” What, then, is “the functional equivalent of a direct discharge?”

In a boon to lawyers everywhere, the Court eschewed a bright-line rule. Instead, it crafted a flexible, case-by-case analysis for permitting agencies, permittees, and courts to follow in these “middle instances.” Broadly speaking, the Court said federal permits are necessary if a point source “directly deposits pollutants” into navigable water or “reaches the same result through roughly similar means.” Fortunately, the Court did get more specific: “Time and distance are obviously important.” And, the Court flagged the following nonexhaustive factors:

- ◆ Transit time
- ◆ Distance traveled
- ◆ The nature of the material conveying the discharge
- ◆ The degree of any pollutant dilution or transformation
- ◆ The amount of pollutant ultimately reaching the navigable water relative to the amount initially discharged
- ◆ The manner by or area in which the pollutant enters the navigable waters
- ◆ The degree to which the pollutant, upon reaching navigable waters, retains its “specific identity”

That's a lot to chew on. It leaves us with few firm answers, but the Court did give us some useful guideposts. Most obviously, indirect discharges that reach navigable waters *faster* (in five minutes, rather than five years) and *more directly* (in 50 feet, rather than 50 miles) are likelier to require a NPDES permit. In the Court's eyes, this “time and distance” analysis “will be the most important factors in *most* cases.” Of course, that's little comfort for permittees facing the many “middle instance” discharges presenting closer calls. In those situations, permittees should work with their permitting authority (Florida Department of Environmental Protection for most NPDES and groundwater permits) and counsel to assess “functional equivalency.”

So, what does this mean for Florida and its water industry? In the short term, Florida municipalities, permittees, and project proponents will all be in “wait and see” mode. Over time, this “middle instance” murkiness should fade away as regulators issue guidance, and courts—including Florida federal and state courts—interpret *County of Maui's* guidance. Indeed, we're already tracking several post-*County of Maui* bellwether cases, but until then, permittees and project proponents should carefully consider whether indirect discharges—to groundwater, or otherwise—now require state *and* federal permit coverage. That is especially so in Florida, where most groundwater discharges already required state permits. And, Florida permittees and their regulators should also steel themselves for fresh challenges to existing “middle instance” discharges, which are sure to ensue.

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Bradley Arant Boult Cummings LLP

100 NORTH TAMPA STREET, SUITE 2200
TAMPA, FL 33602
813.559.5500

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