



The Latest from the Supreme Court on **POINT SOURCE POLLUTION AND THE CLEAN WATER ACT**

by Simon Bailey

A wastewater facility on the island of Maui, Hawaii, collects sewage, treats it, and pumps the treated water through underground wells. The water then travels half a mile, through groundwater, into the Pacific Ocean. Must the facility possess an EPA permit to do this? In April, the Supreme Court of the United States answered this question with a rather drawn-out “maybe.”ⁱ

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For reasons that might not be obvious, this Supreme Court decision involving a facility that is located thousands of miles from Mississippi matters to our state’s forestry industry. This is because, in deciding the *Maui* case, the Supreme Court expanded the EPA permitting requirement for point source pollution—at least as that requirement has been understood and interpreted by the federal courts that oversee federal law in Mississippi.ⁱⁱ In the past, point source discharges

into groundwater were understood (or assumed) to be outside the EPA’s permitting regime. Discharges into groundwater have historically been regulated by state governments.ⁱⁱⁱ

Now, point source discharges into groundwater require an EPA permit in some instances, creating new potential federal liability for landowners, mills, and others involved in forestry.

To understand the significance of the *Maui* case requires some basic

familiarity with the Clean Water Act’s terms. The Act forbids the addition of a pollutant from a “point source” into “navigable waters” without a permit from the EPA.^{iv}

- The term “pollutant” is broadly defined; it includes, for example, “any solid waste,” any “garbage,” any “discarded equipment,” and any “agricultural waste.”^v Think: anything that does not belong in the water.

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- A point source is, essentially, any single, identifiable (and normally stationary) source of a pollutant—like a pipe, well, ditch, or container.^{vi}

You do not have to own a factory with a smokestack to be a point source. If your facility or your land is the source of anything that does not belong in the water, the law governing point source pollution could easily apply to you. While forestry generally involves non-point source pollution, participants in the forestry industry must still be aware of point source regulations.

- Navigable waters are “relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right”—meaning, essentially, the waters were or are navigable in fact—or “that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparable bound up with such relatively permanent waters.”^{vii} The term “navigable waters” is itself subject to very recent EPA rule-making and an even more-recent lawsuit that seeks to enjoin the EPA’s new rule. Suffice it to say that the term “navigable waters” is broad enough to encompass several waterways in our state.

Mississippi has historically understood its navigable waters to include “all rivers, creeks and bayous” that are at least 25 miles long and have “sufficient depth and width” for 30 days each year to float a steamboat carrying 200 bales of cotton.^{viii}

In the *Mauie* case, the Supreme Court analyzed whether the Clean Water Act “requires a permit when pollutants originate from a point source but are conveyed to navigable waters by . . . groundwater.”^{ix} Again, half a mile separated the wastewater facility (a point source) from the ocean (a navigable water), and groundwater lay in between.

After considering and rejecting arguments made by all parties and by several *amici curiae* (“friends of

the court”), the Supreme Court charted a middle course, holding that the Act requires “a permit if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters.”^x

The bottom line is that a polluter who acts in good faith and commits a minor offense cannot be sure that he/she will be immune from a penalty.

But rather than providing a bright-line definition of “functional equivalent” and applying that definition to the facts of the case, the Court announced a new flexible, multi-factor approach. A discharge into groundwater *may be* the functional equivalent of a discharge directly into navigable waters depending on a court’s assessment of how long it takes the particular discharge to reach navigable waters, the distance the discharged pollutant travels, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changes as it travels, the amount of pollutant that

reaches navigable waters, the manner by which the pollutant enters navigable waters, the degree to which the pollutant maintains its specific identity, and any other factor a court deems relevant.^{xi} Because the lower court had not applied this new, multi-factor standard, the Supreme Court vacated the lower court’s judgment and remanded the case for further proceedings.

In a parting shot, the Supreme Court acknowledged that its newly-announced standard vests the EPA and lower



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federal courts with immense power and discretion. This is because, rather than drawing a clear line in the sand, the standard invites a fact-intensive inquiry. Though “time and distance”—*i.e.*, how far your point source is from navigable waters and how long it takes for the pollutant to travel to those waters—are the “most important factors,” the Court declined to say just how far is too far, and just how slow is too slow, to incur liability. Those determinations will have to be made on a case-by-case basis over many years.

For good reason, the Supreme Court urged lower courts to be mindful of their immense power under this new flexible standard when handing out Clean Water Act penalties—to consider a polluter’s “good faith efforts” to comply with the law, the “seriousness of the violation,” and the “economic impact of the penalty on the violator.”^{xii}

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This admonition from the Court reflects a nice sentiment, but how well it is heeded will depend on future trial court judges and juries, on intermediate appellate court judges, and on the EPA’s future leadership. These decision-makers will be bound by the Supreme Court’s central holding—the “functional equivalent” test—but will be free to take or leave the Supreme Court’s mere admonitions. The bottom line is that a polluter who acts in good faith and commits a minor offense cannot be sure that he/she will be immune from a penalty.

The only sure thing is that the *Maui* case means more federal involvement in

point source discharges into groundwater (at least more than we are accustomed to in Mississippi) and more litigation in the future, whether in the form of EPA enforcement actions or private enforcement actions.

Only time will tell what lines judges and juries draw through that type of litigation. Consider a sawmill located miles from a river. That mill must be aware of its organic and inorganic waste and how that waste might progress through groundwater to ultimately reach the river. While the mill may be accustomed to oversight from the Mississippi Department of Environmental Quality, it must now assess whether its discharges into groundwater are the functional equivalent of a direct discharge into navigable waters based on factors it may not know without investing significant time and money into discovering. If its discharges are the functional equivalent of a direct discharge, then it must seek an EPA permit and/or risk that assessment being made for it in a federal lawsuit that could drag on for several years at an enormous expense.

Or consider, simply, a landowner with a septic tank on his property. The Supreme Court’s opinion potentially opens the landowner to the same kind of risk, subject to the EPA’s discretion in just how far it chooses to push the boundaries of this new rule.^{xiii}

The illustrations could go on and on, but the point is simply this: the *Maui* case opens a door to a new federal liability. How far the case opens that door is impossible to say; knowing that will take further development in the case law, as judges and juries grapple with the Supreme Court’s new standard. ♦

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ⁱ *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1469, 1478 (2020).

ⁱⁱ See *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (referring to point sources as “the means by which pollutants are ultimately deposited into a navigable body of water”); see also *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001); *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

The law governing point source pollution into groundwater was interpreted and applied differently in other parts of the country, which is one reason the Supreme Court decided to hear the *Maui* case. See *County of Maui*, 140 S. Ct. at 1469-70.

ⁱⁱⁱ See generally 11 Code Miss. R. Pt. 7.

^{iv} 33 U.S.C. §§ 1311, 1362.

^v *Id.* § 1362.

^{vi} *Id.*; see also NOAA, Pollution Tutorial, [https://oceanservice.noaa.gov/education/tutorial_pollution/03pointsource.html#:~:text=The%20U.S.%20Environment%20Protection%20Agency%20\(EPA\)%20defines%20point%20source%20pollution,common%20types%20of%20point%20sources](https://oceanservice.noaa.gov/education/tutorial_pollution/03pointsource.html#:~:text=The%20U.S.%20Environment%20Protection%20Agency%20(EPA)%20defines%20point%20source%20pollution,common%20types%20of%20point%20sources). (last visited July 8, 2020).

^{vii} The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020). The definition given in the text above is, admittedly, a shorthand. The full definition is available on page 22340 in Volume 85 of the Federal Register.

^{viii} Miss. Code § 51-1-1.

^{ix} *County of Maui*, 140 S. Ct. at 1468.

^x *Id.* (emphasis added)

^{xi} *Id.* at 1476.

^{xii} *Id.* at 1477.

^{xiii} *Id.*; see also *United States v. Lucas*, 516 F.3d 316, 332 (5th Cir. 2008) (“[B]y the language of the Act the septic systems at issue in this case are point sources that discharged pollutants into waters of the United States and required NPDES permits.”).