



Early Tea Leaves For Interpreting The Supreme Court's Maui Decision?

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On April 23, 2020, the Supreme Court ruled in [Maui v. Hawai'i Wildlife Fund](#) that pollutants that are discharged from a point source into groundwater, and end up reaching downgradient navigable waters, may be treated as the "functional equivalent" of a direct discharge into that water of the U.S. The Court held that Clean Water Act authorized National Pollutant Discharge Elimination System (NPDES) permits are mandated for certain point source discharges through groundwater to surface water and left it to the lower courts to assess whether that "functional equivalent" test is met in specific cases. My colleagues have reported on the ["functional equivalent" set out in Maui](#).

But the Maui case was not the only case pending before the Supreme Court that involved the migration of pollutants through groundwater into surface waters. Petitions for certiorari had been filed in two other cases, asking the Supreme Court to consider whether NPDES permitting also should apply to other specific fact patterns from pollutant discharges resulting in Tennessee ([StarLink Logistics, Inc. v. ACC, LLC, et al](#)) and South Carolina ([Kinder Morgan Energy, et al. v. Upstate Forever, et al](#)). The disposition of those petitions may provide some early hints on application of the "functional equivalent test."

In the Tennessee case, StarLink LLC claimed that ACC illegally "discharges pollutants from point sources" without an NPDES permit. ACC operated a

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landfill in Tennessee that had been remediated pursuant to Tennessee law. The landfill remediation effort had been overseen by Tennessee regulators and at no time had they ever mandated an NPDES permit, relying upon other regulatory authorities to clean up the landfill and otherwise protect the environment. In that case, pollutants migrated underground from the closed landfill through the adjacent aquifer, ultimately emerging down gradient in the surface water. One of the key issues was whether the migration of contaminants through groundwater for an extensive distance before reaching surface water is a regulated discharge.

Last year, the Supreme Court granted certiorari to the Ninth Circuit in *Maui*, and StarLink asserted that its petition even more clearly than *Maui* provided a scenario mandating Clean Water Act permitting. Two days after *Maui* was decided, StarLink filed a supplemental brief, further arguing that the facts of its case clearly fit the Court's "functional equivalent" test.

But the facts of that case differed significantly from those in *Maui*. For one, while StarLink had argued that the landfill was a "point source" discharging pollutants into groundwater, in fact ACC argued that the pollutants left over from the landfill remediation were not "point source" discharges but were the type of diffuse discharges traditionally considered "non-point source" pollutants subject to state – not federal – authority. Further, StarLink had unsuccessfully appealed a state action all the way through the Tennessee Supreme Court. Tennessee regulators never demanded an NPDES permit, nor did any Tennessee court take issue with the lack of NPDES permitting, to control diffuse migration of pollutants into groundwater.

The U.S. Supreme Court denied the petition on May 4. While no clear message can be drawn from summary action by the Supreme Court, one might infer that these facts did not meet the Court's new "functional equivalent" test; and that no NPDES permit was required.

However, the Supreme Court obviously saw enough similarities between the *Maui* and *Kinder Morgan* cases to grant Kinder Morgan's petition for certiorari, vacating and remanding that case to the Fourth Circuit in light of the "functional equivalent" test in *Maui*. That case relates to a pipeline gasoline spill that traveled through groundwater and then contaminated creeks and wetlands in South Carolina. The U.S. District Court in South Carolina had dismissed a lawsuit by several environmental groups regarding pollution resulting from the pipeline spill because the pipeline was immediately repaired (and therefore lacked an ongoing violation for citizens suits under the Clean Water Act) and because it lacked subject matter jurisdiction over movement of pollutants through groundwater hydrologically connected to navigable waters. The Fourth Circuit remanded that case, indicating that the district court "should entertain" that discharges that end up in navigable waters may be traceable to a point source (the pipeline), even if they travel through hydrologically connected groundwater.

Similar to *Maui*, the Fourth Circuit analyzed the meaning of the term "from" in the statutory scheme regulating pollutant discharge from point sources into navigable waters. It concluded that "a point source is the starting point or cause of a discharge under the CWA, but that starting point need not only convey the discharge directly to navigable waters." In doing so, the Fourth Circuit was apparently concerned about the same type of factual situation the Supreme Court struggled with in its *Maui* ruling, in which a discharge would end its pipe near a navigable water and avoid permitting by letting pollutants flow through a short distance of groundwater.

We cannot predict the outcome in the *Kinder Morgan* case. We believe part of the difference in how the Supreme Court decided the cert petitions in that case and *StarLink* may rest on whether the pollutants originate from a “point source.” While there will be much more litigation regarding the definition of “point source,” a pipeline rupture could be seen as more similar to a point source than if one were to consider diffuse seepage from a remediated landfill. Beyond that, we will all be watching courts begin interpreting the *Maui* decision. Do the final pollutants have to be the “functional equivalent” to what is discharged when some pollution reaches the navigable water? Might certain discharges that historically have been considered “non-point” sources, but involve a “pipe” (leaking sewers, septic systems, or others) be reevaluated in light of *Maui*? I guess we’ll see!

The authors of this post, Jeffrey Longsworth and Fredric Andes, represented ACC LLC in opposing StarLink’s petition for certiorari before the U.S. Supreme Court in StarLink Logistics, Inc. v. ACC, LLC, et al.