Supreme Court Will Wade Into Clean Water Dispute

A case over a Hawaii wastewater treatment plant could redefine the scope of the federal law that regulates pollution in lakes, rivers, streams and oceans.

BY: Daniel C. Vock | February 19, 2019

SPEED READ:

- The U.S. Supreme Court will hear a case that could redefine the scope of the federal Clean Water Act, which regulates pollution in lakes, rivers and other navigable waters.
- The case concerns a dispute over wastewater in Maui County, Hawaii, which argues that a lower court ruling would add significant new burdens to state and local governments.
- A group of 18 mostly conservative states, as well as the National League of Cities, the National Association of Counties and the National Association of Clean Water Agencies, filed briefs urging the high court to review the case.

The U.S. Supreme Court agreed on Tuesday to review a Hawaii case about clean water regulations, which is good news for the 18 states and many local governments that want the lower court’s ruling in that case overturned.

The dispute is over the scope of the federal Clean Water Act (CWA), a landmark environmental law that has vexed judges, regulators and environmentalists since Congress passed it in 1972.

The federal law imposes tight restrictions on pollution that enters lakes, rivers, streams, oceans and other navigable waters, which the federal government unquestionably has the right to regulate. It says, for example, that no one can dump pollution from a “point source,” such as a pipe, into navigable waters without a permit.

Problems arise when officials try to draw the boundaries of what the federal government can and cannot regulate. Wetlands, drainage ditches and mostly dry streambeds all feed navigable waters but are not themselves navigable, so there is disagreement over whether the Clean Water Act applies to them.

The Hawaii case that the high court accepted Tuesday is another example. The case centers on a wastewater treatment plant in western Maui, which disposes of 3 to 5 million gallons of treated wastewater every day by injecting it into underground wells. A 2013 study determined that much of that water ends up in springs beneath the Pacific Ocean half a mile away.

Lower courts determined that Maui County, which operates the wastewater plant, violated the Clean Water Act because it did not have a permit for point-source pollution. A three-judge panel of the 9th Circuit U.S. Court of Appeals determined that the injection wells were a “point source” of pollution that led directly to the pollution of the Pacific Ocean, even if the water had to seep through the ground to do so. The fact that the pollution is “fairly traceable” back to the wells means it qualifies as a point source of pollution, the judges explained. That set it apart from non-point sources, like road runoff, that can’t be traced back to a single location.

“At bottom, this case is about preventing the county from doing indirectly that which it cannot do directly,” the judges wrote in their February 2018 decision. “The county could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without [a] permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA’s prohibitions.”
Other States, Associations Urged Court to Take Up Case

A slew of states and local governments took Maui's side when the county appealed to the U.S. Supreme Court.

"The situation in Maui is not unique," wrote several groups of local governments and water agencies in one friend-of-the-court brief. "Wastewater treatment operators, water supplier purveyors, flood control districts and stormwater management agencies have all made investments in infrastructure based on the reasonable belief that the [point source permitting] program would not apply to activities involving discharges to groundwater. The 9th Circuit's decision in the Maui case upended that regulatory structure."

The National League of Cities, the National Association of Counties and the National Association of Clean Water Agencies were among the groups that signed onto that brief. They argued that Congress limited the scope of the Clean Water Act so that states would retain their authority to regulate groundwater.

"All 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. Because the release of pollutants into groundwater is already prohibited and/or regulated in every state, there is no practical reason to extend the [point-source permitting] program beyond what Congress intended."

If the 9th Circuit's decision stands, they argued, it would add new burdens to local governments, especially those that handle wastewater.

Sewage treatment systems can require hundreds of miles of pipe to move polluted water. By the 9th Circuit’s logic, every time any of those pipes leaked, they could be regulated as point-source pollution under the Clean Water Act, which could become a major source of frustration because the law allows private citizens to sue polluters, they said in their brief.

Green infrastructure, which water utilities and local governments use to slow down and capture storm water before it enters rivers or lakes, could also require point-source permits under that scenario. Even leaks of drinking water could trigger more scrutiny, they warned, because drinking water is treated with chemicals, such as chlorine, that could be considered a pollutant if released into the ground.

Separately, a group of 18 mostly conservative states (and the governors of two others) filed a similar brief urging the high court to review the 9th Circuit’s decision. The practical effect of the ruling, they warned, "is to extend the reach of the CWA not only to virtually all of the nation's waters, but to any land capable of absorbing water as well."

The state officials told the justices that expanding the scope of the Clean Water Act would actually increase the workload of state regulators because 46 states have assumed responsibility for issuing the point-source pollution permits.

"As it stands, state environmental protection agencies already spend nearly 1.6 million hours and nearly $70 million each year processing [point-source pollution] permits. Those numbers are likely to increase by several orders of magnitude if this court allows the 9th Circuit's 'fairly traceable' test to stand," the state officials wrote.

Taking over the task would be difficult, too, they added.

"It is one thing to measure outflow from a pipe into navigable waters to ensure discharge levels are compliant with [a point-source] permit; it is quite another to track the volume of pollutants that reach navigable waters after seeping into the ground and joining the subsurface network of groundwater flows," they wrote.

“All told, the 9th Circuit's standard threatens to drown state environmental protection agencies in a myriad of new and technologically challenging [point-source] permit requirements from a novel source of federal liability, and leech away scarce resources from other programs better equipped to address groundwater pollution," they argued.
The environmental groups that originally brought the lawsuit against Maui had urged the Supreme Court not to take up the case because, they said, the appeals court was simply applying settled law.

“There is no basis for [the] alarmist claim the 9th Circuit’s decision sweeps millions of new sources into the [point-source regulation] program. Nothing has changed from the decades-old practice of considering the specific facts of each case to determine if a point source discharge via groundwater is the functional equivalent of a discharge into the navigable water,” they argued.

But other appeals courts interpreted the law differently, which meant that the federal point-source pollution rules would be different for different parts of the country. The Supreme Court often steps in to settle disagreements among lower courts.

The high court will likely hear the case in its next term, which begins in October. The case is County of Maui, Hawaii v. Hawai'i Wildlife Fund.

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