

The *Maui* Decision and Missouri's Permitting Implementation

Joel Reschly

Legal Counsel
General Counsel's Office
DNR

Heather Peters

Industrial Permits Unit Chief
Operating Permits Section
Water Protection Program
DNR

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County of Maui, Hawaii v. Hawaii Wildlife Fund, et al., 140 S.Ct. 1462 (2020)

- BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined.
- KAVANAUGH, J., filed a concurring opinion.
- THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined.
- ALITO, J., filed a dissenting opinion.

Statutory Background:

- The CWA “broadly states that (with certain exceptions) ‘the discharge of any pollutant by any person’ without an appropriate permit ‘shall be unlawful.’” 140 S.Ct. at 1469 (quoting 33 U.S.C. § 1311).
- The CWA defines “discharge of any pollutant” as: “any addition of any pollutant to navigable waters *from* any point source.” 33 U.S.C. § 1362(12) (emphasis added).

Factual Background:

- The County of Maui operates a wastewater reclamation facility on the island of Maui.
- The facility collects sewage from the surrounding area, partially treats it, and pumps the partially treated water through four injection wells approx. 200 feet deep.
- This effluent, amounting to about 4 MGD, then travels approximately ½ mile through groundwater to the ocean. No NPDES permit.

MAP AREA



Honua Kai Resort & Spa

Lahaina Wastewater
Reclamation Facility

HONOAPIILANI HWY

The Westin Kaanapali
Ocean Resort Villas

Kahekili Beach Park

Aston Maui Kaanapali Villas

Royal Lahaina Resort

- Injection wells
- Underwater springs
- Path of treated wastewater

1000 FEET

Source: Earthjustice, Google Satellite Imagery



Lower Courts:

- The Hawaii District Court granted summary judgment in plaintiffs' favor because the "path to the ocean is clearly ascertainable" and the discharge from the wells into groundwater was "functionally one into navigable water." 24 F.Supp.3d 980, 998 (D. Haw. 2014).
- The Ninth Circuit affirmed, but held that a permit is required when "the pollutants are *fairly traceable* from the point source to a navigable water." 886 F.3d 737, 749 (9th Cir. 2018).

Supreme Court:

- Granted certiorari to resolve a split in circuits:
 - *Compare* Ninth Circuit (“fairly traceable”)
 - *and* Fourth Circuit (“direct hydrological connection”) *Upstate Forever v. Kinder Morgan*, 887 F.3d 637, 651 (4th Cir. 2018)
 - *with* Sixth Circuit (discharges through groundwater are excluded from CWA permitting requirements) *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F.3d 925, 932–938 (6th Cir. 2018)

Supreme Court majority opinion:

- “The question presented here is whether the Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, here, groundwater.”
- “We conclude that the statutory provisions at issue require 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.”

Supreme Court majority opinion:

“The linguistic question here concerns the statutory word ‘**from.**’ Is pollution that reaches navigable waters only through groundwater pollution that is ‘**from**’ a point source, as the statute uses the word? **The word ‘from’ is broad in scope, but context often imposes limitations.** ‘Finland,’ for example, is often not the right kind of answer to the question, ‘Where have you come **from?**’ even if long ago you were born there.”

Supreme Court majority opinion:

- Maui interprets the permit requirement not to apply if there is any amount of groundwater between the end of the pipe and the edge of the navigable water.
- But if Maui's interpretation is correct, why wouldn't dischargers simply move their outfalls a few yards back to avoid permits?
- Congress could not have intended to create "such a large and obvious loophole" in the CWA. 140 S.Ct. at 1473.

Supreme Court majority opinion:

- Courts and EPA “have tried to find general language that will reflect a middle ground between these extremes.”
- “We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.*” 140 S.Ct. at 1476.

Supreme Court majority opinion:

- Relevant “functional equivalent” factors:
“(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.” 140 S.Ct. at 1476–77.

Justice Kavanaugh's concurring opinion:

- Wrote separately to emphasize three points:
 - The majority opinion is fully consistent with J. Scalia's 2006 plurality opinion in *Rapanos*.
 - The source of the vagueness is the statutory word "from," which the majority opinion attempts to translate into concrete guidance.
 - J. Thomas's dissent inaccurately critiques the majority for not stating which factors are most important; the majority clearly emphasizes the time and distance factors.

EPA's Implementation of the *Maui* Decision:

- On Jan. 21, 2021, EPA issued a memorandum to provide guidance to the regulated community and permitting authorities when applying the *Maui* decision, published at 86 Fed.Reg. 6321-01.
- Adds an 8th factor, which it says can affect or inform the other seven factors: the design and performance of the system or facility from which the pollutant is released.
- The new EPA administration has said it is re-visiting the guidance.

Maui II (on remand back to the trial court):

- On July 26, 2021, the Hawaii District Court entered final judgment for plaintiffs, concluding that an NPDES permit is required. *Hawai'i Wildlife Fund et al. v. County of Maui*, No. 12-00198 (D. Haw. July 26, 2021).
- “This court looks to the factors set forth by the Supreme Court in determining whether there has been the functional equivalent of a direct discharge, paying particular attention to the time and distance factors.” Slip Op. at 31.

Maui II's functional equivalence analysis:

- Time:
 - The dye study showed minimum transit time from the injection wells to the ocean was 84 days, and the average transit time was 14 to 16 months. Slip Op. at 31–32.
 - The Supreme Court “set its extreme at ‘many years,’ not at ‘many months,’ and not even at one year or two years.” Slip Op. at 34.
 - Concludes that this factors weighs in favor of requiring an NPDES permit. Slip Op. at 36.

Maui II's functional equivalence analysis:

- Distance:
 - Parties agreed the minimum distance the wastewater travels through groundwater to the ocean is 0.3 to 1.3 miles. Plaintiff's expert opined the maximum distance is 1.5 miles.
 - Court: the minimum distance "does not come close to the Supreme Court's reference to the 50-mile extreme." Slip Op. at 37.
 - This factor also weighs in favor of a permit. Slip Op. at 38.

Maui II's functional equivalence analysis:

- The nature of the material and the extent to which the pollutant is diluted as it travels:
 - These factors both weigh against requiring a permit, because the wastewater travels through porous volcanic rock and combines with saline, brackish, and fresh groundwater, significantly diluting the wastewater and resulting in partial nitrogen removal. Slip Op. at 39–41.

Maui II's functional equivalence analysis:

- The amount of pollutant that enters navigable waters relative to the amount discharged from the point source:
 - County does not dispute that 100% of the wastewater from its facility reaches the Pacific Ocean. Slip Op. at 2, 41.
 - This factor weighs in favor of requiring a permit. Slip Op. at 41.

Maui II's functional equivalence analysis:

- The manner by or area in which the pollutant enters navigable waters:
 - Some enters the ocean via seeps, but not all areas are discernable with precision. No extra weight given to this factor. Slip Op. at 41-42.
- The degree to which the pollution maintains its specific identity:
 - Diluted, but not devoid of pollutants. This factor weighs in favor of requiring a permit. Slip Op. at 43.

Maui II's functional equivalence analysis:

- System design and performance (EPA's factor):
 - Does not add anything to the analysis in this case. These considerations were considered in four other factors: specific identity, nature of material, dilution/chemical change, and the manner by or area in which the pollutant enters water. No dispute that the facility only partially treats the wastewater. No weight given to this factor. Slip Op. at 44-46.

Maui II's functional equivalence analysis:

- The volume of wastewater reaching navigable waters (new factor added by the court):
 - Supreme Court's factors are not exhaustive.
 - None capture the immensity of the volume.
 - >1 MGD per day discharged into each of the four injection wells, all going to the ocean.
 - Although the NPDES permit requirement does not refer to a minimum amount, this is still relevant and weighs in favor of permit.
Slip Op. at 46-48.

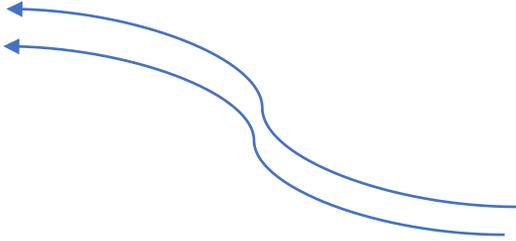
Maui II's functional equivalence analysis:

- The impact on ecosystem (new factor):
 - No genuine dispute that the discharge significantly affects the physical, chemical, and biological integrity of the ocean water. A study by one of plaintiffs' experts confirmed impacts to corals living nearby one of the seeps. Not relied on by the court in this case, but could be important in other cases. Slip Op. at 48–50.

The Department's Implementation of *Maui*:

- Permits already protected groundwater
- Potential Subsurface Discharges
 - Permittee Included with Application
 - Questions from Permit Writer
- Water Quality Standard
 - Groundwater Standards
 - Surface Water Standards
- State-only vs. state/NPDES permit

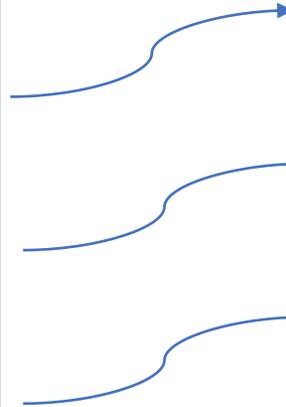
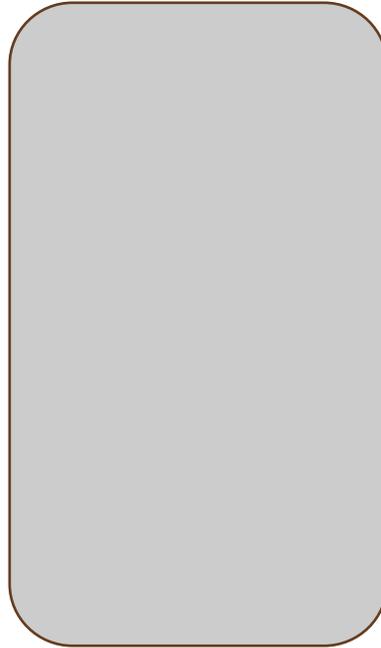
Implementation



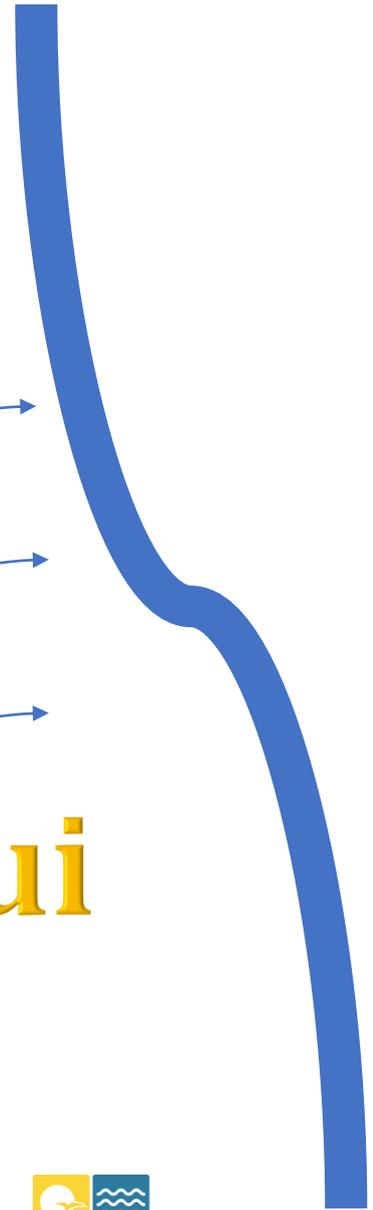
MRBCA

GW / DW

IRR



Maui



What's my limit?

- Aquatic Life
 - Cadmium
 - Chromium III (chronic)
 - Copper
 - Lead
 - Mercury / Methylmercury
 - Silver
 - Ammonia / Nutrients (excluding nitrate)
 - Oil & Grease
 - Ethylbenzene
 - Pesticides / Herbicides
- Fish Consumption
 - Thallium
 - 1,1 Dichloroethylene
 - Pesticides
 - Herbicides
 - Fungicide

What's my limit?

- Groundwater / Drinking Water Supply
 - Most pollutants
 - Antimony
 - Barium
 - Cobalt/Boron

- Irrigation
 - Boron
 - Cobalt

Missouri Risk-Based Correction Action (MRBCA) Applicability

✓ Groundwater

✗ Surface Water Discharges

✗ Subsurface to Surface Water Discharges

Questions?



Photo: mauiguide.com