

Maui Supreme Court Case and Its Impact on Discharge Permitting

Nathan E. Vassar

WEAT Central Texas Section - May 21, 2020

Background of Lawsuit

- 1970s underground injection wells of County of Maui discharges
- 3-5 MGD discharge into wells under Lahaina WWTP
- Discharging into groundwater since 1970s



Background of Lawsuit -- Tracer Study

LAHAINA GROUNDWATER TRACER STUDY – LAHAINA, MAUI, HAWAII

Final Report

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Henrieta Dulaiova, Aly I. El-Kadi, Joseph Fackrell,
Jacque L. Kelly, Christine A. Waters and Jeff Sevadjian

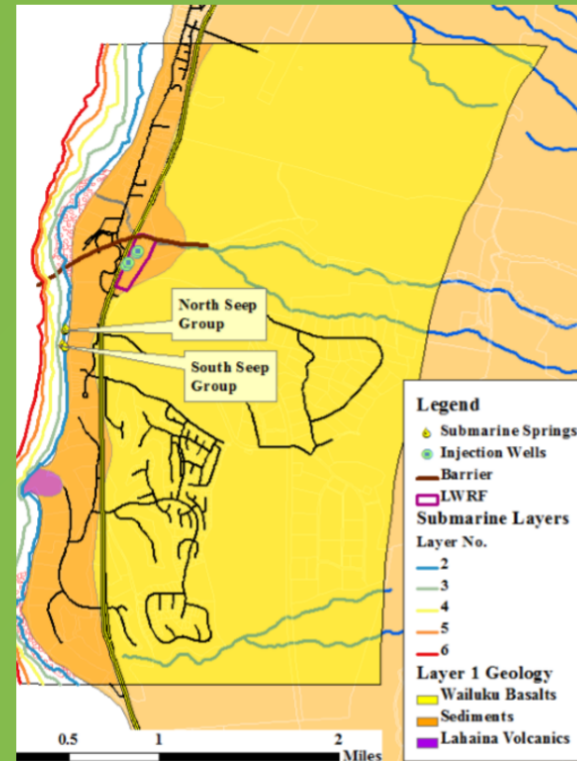
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PREPARED FOR

State of Hawaii Department of Health
U.S. Environmental Protection Agency
U.S. Army Engineer Research and Development Center

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What was at Stake before SCOTUS:

Is an NPDES Discharge Permit Required for discharges into groundwater (when such discharges eventually migrate into surface waters)?



Parties' Positions:

County of Maui, Hawaii (Discharger)	Hawaii Wildlife Fund (Plaintiff)
<ul style="list-style-type: none">-Discharge to groundwater breaks chain of point source discharge.-Separate SDWA UIC regulatory regime should cover discharge.-FIVE decades of injection discharge without required permitting.-Congress intended a limited NPDES authorization.	<ul style="list-style-type: none">-Dye testing shows migration.-Focused in on “fairly traceable” language (which 9th Circuit adopted in its opinion backing Hawaii Wildlife Fund)-Point Source can include indirect contributions, and scientific reality of hydrological connection supports an extended NPDES permit regime

Questions/Comments from Justices

- Repeated references along the lines of how to stop "*the polluters*" from "evading" regulation
- Skepticism over groundwater as exemption/detailed discussion of UIC program.
- J. Breyer's use of "functional equivalent" as a possible new test to expand reach of NPDES permit requirements.



Court Opinion: You both lose!

- The Supreme Court overruled the 9th Circuit's test -- "fairly traceable" too broad.
- The Supreme Court still determined a permit required because of the facts in this case.
- The Court created a "direct discharge or **functional equivalent**" of a direct discharge test
 - asks how similar an actual discharge is to that of a non-disputable direct discharge (see next page for factors).



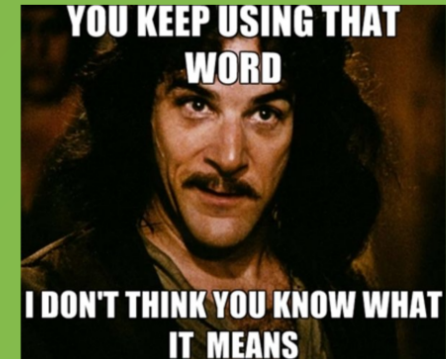
7 "Functional Equivalent" Factors

1. Time (most important, along with distance, in most cases);
2. Distance (most important, along with time, in most cases);
3. Nature of the material through which the pollutant travels;
4. Extent to which the pollutant is diluted or chemically changed as it travels;
5. Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
6. Manner by or area in which the pollutant enters the navigable waters; and
7. Degree to which the pollution (at that point) has maintained its specific identity.



Other Analysis from Court:

- The meaning of the word "**FROM**" -- a point source. Discussion of "From Baltimore" vs. "From Europe (in 1630s)"
- Maui's position was that the intervening groundwater between Maui's discharge and the Pacific Ocean meant no discharge permit because the "discharge" was "from" the groundwater, an intervening medium between Maui's infrastructure and the Pacific Ocean
- Breyer's Opinion noted the reality that a 9th Circuit standard could have the result of NPDES permitting on discharges that take years to reach navigable waters



What this means for Texas Dischargers?

- Little to no impact on 99.9% of TPDES holders (especially given broad state jurisdiction under "water in the state").
- Potential enforcement for deep well injections near jurisdictional rivers (oil & gas activities, for example; or municipal/industrial deep-well injection of brine from desalination)
- Current EPA Position vs. future positions (and Court's commentary on permit overreach)
- Do different facts lead to different results?



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