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Lisa Heinzerling *Guest*
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Argument preview: Justices to consider reach of Clean Water Act's permitting requirement

The central regulatory construct of the Clean Water Act is the requirement of a permit for the addition to the nation's waters of any pollutant that comes "from any point source." Congress' high hopes for the cleansing power of the act's permitting system are reflected in the name Congress chose for it – the "national pollutant discharge elimination system" – and the attendant statutory goal that "the discharge of pollutants into the navigable waters be eliminated by 1985." Yet in requiring permits only for point sources of water pollution, Congress excluded nonpoint sources from the permit system's reach. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, which will be argued next Wednesday, asks whether the act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater."

Both sides warn of the dire consequences that will ensue if the Supreme Court rules against them. The County of Maui asserts that a ruling that its discharges require a permit may subject millions of pollutant sources to the Clean Water Act's permitting requirement for the first time. The respondents counter that a contrary ruling will open a large loophole by allowing polluters to dump unlimited amounts of pollutants into navigable waters through the simple expedient of locating their outfall pipes a few feet upland or inland of navigable waters. Twenty-nine amici, including the United States, offer their perspectives.

The case involves pollutant discharges from a wastewater treatment plant in Hawaii. The County of Maui owns and runs a facility that treats sewage from local homes and businesses and daily injects several million gallons of the treated sewage into underground wells designed for this purpose. From the wells, the treated sewage runs into the groundwater under the facility. The wastewater then travels through the groundwater to the Pacific Ocean a half-mile away. In the wells' decades of operation, the County of Maui has never had a Clean Water Act permit for its discharges, although it has always known that pollutants from its wells reach the ocean.

Several Hawaii-based environmental groups alleged in a citizen suit that the county's unpermitted discharges of pollutants violated the Clean Water Act. The U.S District Court for the District of Hawaii granted summary judgment in their favor, holding that the county's wells are point sources that "indirectly discharge[] a pollutant into the ocean through a groundwater conduit." The district court also found that the groundwater involved here is a "confined and discrete conveyance," and thus a point source under the act, because of the high proportion of the county's wastewater reaching the ocean. The court concluded that the county's wastewater "is significantly affecting" the water in the ocean where the discharges occur.

The U.S. Court of Appeals for the 9th Circuit affirmed, holding that the county requires a permit for its pollutant discharges because the "pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water" and "the pollutant levels reaching navigable water are more than *de minimis*." The court assumed without deciding that the groundwater under the county's facility is neither a point source nor a navigable water within the meaning of the Clean Water Act.

The act's permitting requirement is triggered by the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source." The act defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to" named sources such as pipes, ditches, channels and, of particular relevance to this case, wells. Exempt from the act's permitting requirement are nonpoint sources, such as runoff, which are not traceable to a discrete source and are difficult to regulate because they are diffuse.

The parties do not dispute that the treated sewage the county discharges into underground wells is a "pollutant," the wells are "point sources" and the ocean is a "navigable water." Further, no one denies that if the county discharged wastewater from a pipe leading directly into the ocean, the discharge would require a permit. The parties' disagreement centers on the legal relevance of the passage of the wastewater through the groundwater between the county's wells and the ocean.

For the county, the passage of its wastewater through groundwater is the legally central fact of this case. The county argues that a point source permit is never required when pollution is delivered to navigable waters by a nonpoint source. The quiet premise of the county's position is that the groundwater here – and everywhere – is a nonpoint source. Effectively, therefore, the county's "question presented" actually raises two separate legal questions: 1) whether the Clean Water Act requires a permit when pollutants are conveyed to navigable waters by a nonpoint source, and 2) whether groundwater is, always and everywhere, a nonpoint source.

Regarding the first question, the key statutory phrase for the county is "from any point source." The county argues that the only permissible interpretation of the word "from" is that it identifies a point source "not as a place of origin but as a means of transport" – or, in other words, a "means-of-delivery" test for identifying point sources. Under this test, even if pollution originates from a point source, it will not require a per it is directly delivered to a covered water only by a nonpoint source of pollution. Based on the word "any," the county concedes that a point sou

must obtain a permit even if its discharges reach the navigable waters through multiple point sources. Thus, the county says, only a "nonpoint source downstream of the point source breaks the causal chain of liability."

The county relies heavily on Congress' decision to exempt nonpoint sources from the permitting requirement, asserting that requiring a permit when pollution runs through a nonpoint source on its way to a covered water would "eviscerate" the point source requirement and undermine Congress' intent of leaving nonpoint-source regulation to the states. The county also claims that an affirmance of the 9th Circuit's ruling would subject a great many pollutant sources to the Clean Water Act's permitting requirement for the first time and recalibrate the balance between federal and state responsibilities under the act. It urges the Supreme Court to require a clear statement from Congress before embracing such an interpretation.

On the second issue embedded in the question presented – whether groundwater is a nonpoint source – the county states, without mentioning the district court's contrary findings, that groundwater is not "confined" or "discrete." The county also asserts that groundwater is "incapable" of discharging pollutants, because the pollutants "do not leave the groundwater and enter navigable waters on their own." The county argues, in other words, that groundwater can never be a point source of water pollution.

The United States has joined the case as an amicus on the county's side and will participate in oral argument. In the 9th Circuit, as in prior regulatory decisions, the government stated that a permit is required when there is a "direct hydrological connection" between a point source and navigable waters. While the county's petition for certiorari was pending, the government switched sides, and issued an "interpretive statement" concluding that discharges into groundwater are categorically excluded from the Clean Water Act's permitting requirement. The government does not ask the Supreme Court to defer to this interpretation, but does urge the court to adopt it.

The environmental groups argue that the phrase "from any point source" means that a point source must be a factual and proximate cause of the addition of pollutants to navigable waters. This condition is met, they say, when the pollutions are "fairly traceable to the point source" and their "addition to navigable waters is the foreseeable, natural consequence of their release from that source." The environmental groups assert that the express inclusion of wells in the act's definition of point sources shows that the permit requirement covers "subterranean movement of pollutants from wells to navigable waters." They charge that the county's approach rewrites the act by inserting the word "directly" into the statute, and thus ignores Justice Antonin Scalia's observation, for a plurality of the court in *Rapanos v. United States*, that "The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" Similarly, the environmental groups charge that the government's interpretation effectively adds the phrase "except through groundwater" to the statutory definition of a discharge requiring a permit.

The groups urge the court not to decide whether "*de minimis*" discharges require a permit, observing that this part of the 9th Circuit's test was unnecessary to that court's decision.

The groups deny that a ruling in their favor would have unmanageable effects on the act's permitting system or upset the federal-state balance struck in the Clean Water Act. They argue that the Environmental Protection Agency has long regulated indirect discharges of pollutants into navigable waters. They also assert that the pollution from many of the sources that the county fears will be subject to permitting if the court rules in their favor will not be "fairly traceable" to these sources.

Depending on the outcome of the case, the groups say, a remand may be in order on the question whether the subsurface features through which the groundwater flows satisfy the definition of a point source.

The Maui County Council recently voted to settle this litigation. The chair of the council accordingly asked the Supreme Court to dismiss the case. The county's corporation counsel, however, informed the court that the mayor must agree to the withdrawal of the appeal, and the mayor has not agreed. The justices have taken no action in response to these filings. The case remains scheduled for argument on November 6.

[**Disclosure**: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is counsel on an amicus brief in support of the respondents in this case. The author of this post is not affiliated with the firm.]

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