It’s Not the Destination, It’s the Journey

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The Impact of Groundwater on the Treatment of Point Source Pollution Under the Clean Water Act

“It’s not the [origin or the] destination, it’s the journey”—an apt quote for the issue before the Supreme Court in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al*.[1] The Court must decide whether the Clean Water Act (Act) requires a National Pollutant Discharge Elimination permit (Permit) for pollutants that originate from a point source, but travel through groundwater, before being discharged into navigable water. The Act defines a point source as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, . . . , from which pollutants are or may be discharged.[2]

When the lower court—the Ninth Circuit—held that the Act requires a Permit when pollutants are “fairly traceable” to a point source,[3] it created a circuit split; the Fourth Circuit had previously held that the Act requires a point-source conveyance for the pollutant’s journey to navigable water.[4] On November 6, 2019, the Court heard arguments from three parties: (1) Petitioner, the County of Maui; (2) Respondent, Hawaii Wildlife Fund; as well as (3) the Deputy Solicitor General. A ruling is expected next year, with the caveat that the Court will not issue an opinion if the parties settle the case prior to the Court’s ruling. A Hawaii Circuit Court is currently examining whether the Maui County Council, which has voted in favor of settlement, has the authority to settle the case without the Mayor’s consent.[5]

The origin. The pollutants at issue originate from underground injection wells at a wastewater treatment plant in Maui, Hawaii. These wells fall squarely within the Act’s textual definition of point source. The parties do not disagree on the point of origin—both describe an injection well as a point source. Even though the parties agree that the pollutants *originate* from a point source, the parties disagree about whether the origin matters.

Justice Kagan pointed out: “the point of this regulation is to go at the source, and the source is still . . . a point source,” implying that a point source origin requires a Permit to discharge pollutants. Kagan toiled over Petitioner’s position, parsing the statute’s words: “ . . . this statute reads pretty firmly. It requires a permit when there’s any addition of any pollutants to navigable waters *from* a point source. So, here, it’s from a point source, which is the well, and it’s to navigable waters, which is the ocean, and it’s an addition. How does this statute not apply?”

Petitioner responded that “from” is the operative word, and it reveals the “relationship between . . . ‘addition’ and ‘point source.’” “From,” Petitioner articulated, is associated with “conveyance, which is a thing that transports, carries, and delivers”; therefore, attenuated point sources are not covered by the Act.

While Petitioner concluded “from” does not have a causal meaning, Respondent argued the polar opposite: “from . . . indicate[s] the starting point, *cause*, or source of something.” Respondent, whose position agrees with Justice Kagan, also pointed out that the Act’s “prohibition [of unpermitted additions of pollutants to navigable waters from a point source] is not limited to pollutants that flow *directly* from a point source to navigable waters. The word ‘directly’ is nowhere in the text.”

Petitioner, seeing things differently, noted that Congress’s use of “any” prior to its list of exemplary point sources indicates its apathy toward the origin of point source pollutants, thereby moving the focus to the journey.

The journey. The pollutants from the injection wells are discharged into groundwater and travel through the groundwater toward the Pacific Ocean, a navigable water. The Act requires a permit for pollutants “from” a point source that are discharged “to” a navigable water, but is silent on how the pollutants get from the origin to the destination and whether that journey matters. The parties contest whether the journey changes the permitting requirements for pollutants that originate from a point source.

Petitioner argued that a point source pollutant’s travel through groundwater really is all about the journey. This journey—the County argued—strips the pollutant of its point source origins and federal permit requirements—and places it within a state’s nonpoint-source regulatory scheme. Thus, the Act requires a Permit only when a point source is the *means* of delivering a pollutant to navigable waters, such as would be the case when a pipe conveys water directly into the ocean. In support of its position, Petitioner relied on the Act’s definition of point source as a “discernible, confined, and discrete conveyance.” Here, Petitioner assured Justice Roberts, the groundwater is the means of conveyance.

To sum it up, Petitioner gave an example to articulate its position that the point of origin and the conveyance are distinct: “If you said . . . this arrived from Miami, Miami is a place of origin, and so, yes, ‘from’ is indicating the source, the place where that started. But, if you said this arrived today from a truck, I posit . . . that truck is being used as a conveyance there. It’s not necessarily the point of origin.”

The Deputy Solicitor General, who advocated on behalf of the United States and, in this case, sided with the Petitioner, agreed that groundwater will break the causal chain between the origin of a point source and the destination. The Deputy Solicitor supported his position by pointing to the facts that other parts of the Act give attention to the regulation of groundwater and other laws also regulate groundwater. Both the Deputy Solicitor and the Petitioner argued that requiring a Permit for pollutants entering groundwater would eviscerate the Act’s nonpoint source program.

Respondent, on the other hand, took the position that a pollutant discharged from a point source to navigable water requires a permit, regardless of the journey. Respondent pointed out that the drafters could have added “directly” before “from,” had they envisioned that pollutants must come directly from a point source, just prior to discharge into navigable water. Respondent, with his own transportation hypothetical, gave the example of bringing groceries home from the store. A common understanding of where groceries come from is the store, he said, rather than the trunk of the car, even though that is the last place the groceries are before the kitchen. Respondent also pointed out the perverse incentive in Petitioner’s position (about which the Court was also aware)—if Permits are only required for those whose point sources “directly” discharge into navigable waters, pointing a pipe underground or a few feet away from the navigable water would eliminate the permitting requirement.

The destination. After traveling through groundwater, the pollutants reach the Pacific Ocean, a navigable water covered by the Act. Neither party disputed that the pollutants from the wells end up in the Pacific Ocean on the west side of Maui.

Justice Sotomayor questioned whether Petitioner's position would require changing the statute's language "to navigable waters" to "into navigable waters." Petitioner, however, did not provide a direct answer.

Respondent, whose position would potentially require permits for many, articulated two limiting principles, one of which was proximate cause. Respondent argued that not all pollutants that wind up in navigable water require a permit—"[for example, where] discharges from a mine would enter groundwater, and it would take 60 to, I believe 400 years to get to a navigable water, and [by] the time that it did that, [the amount] would be de minimis . . . that [would] cut off the causal chain."

Drawing a line. With Petitioner advocating for no Permits unless the discharge is directly from a point source to a navigable water and Respondent advocating for Permits for all point sources that eventually discharge into navigable waters, the Justices sought answers from the parties about where to draw a line.

The Petitioner dodged Justice Alito's request for a limiting principle by articulating a "means of delivery test," which he stated would be a "case-by-case factual determination," but conceded that "there are lines that need to be drawn, but we think in the overwhelming majority of cases it's going to be clear."

Respondent answered Justice Roberts' request for a limiting principle directly, by advocating for a test that would require traceability and proximate cause. He described the traceability test as requiring the pollutant in the navigable water to be "fairly traceable," to a particular point source, thereby eliminating miniscule point sources of pollution. Also, on the nudge of Justice Sotomayor, he excluded pollutants coming from sources that, because of their proximity to other sources (i.e. a group of homeowners who all have septic tanks), could not be parsed out—or traced—as being from a particular source.

In explaining proximate cause as a limiting principle, Respondent advanced the idea that the Act's use of "from," is, essentially, proximate cause. This offered only some relief to Justice Breyer, who worried that "the sky's the limit," with the number of people who may need to get permits: "I am worried about 500 million people or something suddenly discovering that they have to go apply for a permit [sic] for the EPA." Respondent, however, assured Justice Ginsburg that the fairly traceable test puts fewer people under the regulatory burden than that imposed by the Fourth Circuit's "direct hydrological connection" test because, he said, Respondent's test requires some level of foreseeability and does not bring in sources that are "too attenuated . . . [or] remote."

The Justices' questioning indicates that the Court's position will likely fall between the Fourth and Ninth Circuits, with language that will beg explanation by the regulators. For Clean Water Act regulation, the origin and destination cannot be ignored, but it may just be the journey that determines a pollutant's regulatory fate.

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[1] Transcript and audio of oral arguments available at www.supremecourt.gov.
[2] 33 U.S.C. § 1362(14).
[3] *Haw. Wildlife Fund v. Cnty. of Maui,* 881 F.3d 754, 765 (9th Cir. 2018).
[4] *See Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018).

[5] Complaint available at https://www.inversecondemnation.com/files/complaint-mckelvey-v.-victorino-no.----haw.-2d-cir.-oct-28-2019.pdf.