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Supreme Court Fails to Unearth Clear Standard for Discharges to Groundwater

In *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court found that a Clean Water Act permit is required when a discharge through groundwater is the “functional equivalent of a direct discharge.”

Regulated businesses, government agencies, and environmental organizations have been anxiously awaiting a decision from the Supreme Court on whether the Clean Water Act requires a permit for a discharge of a pollutant that reaches a surface water *after* traveling through groundwater. Courts below had analyzed that question and reached very different conclusions.

The conflicting decisions caused uncertainty across different jurisdictions and a nearly unified call for the Supreme Court to provide clarity for the future. In response, the Supreme Court agreed to review the Ninth Circuit’s decision in *County of Maui v. Hawaii Wildlife Fund*, which had held that discharges that reach surface water after traveling through groundwater require a permit so long as they are traceable back to a point source.

Six months after hearing oral argument in that case, the Supreme Court finally issued its decision, holding that a Clean Water Act permit is required when a discharge reaches a surface water through groundwater if that discharge is the “functional equivalent of a direct discharge.” The Court offered a nonexhaustive list of nine factors to consider when determining whether a discharge is the functional equivalent of a direct discharge. Instead of providing clarity, the Supreme Court’s decision ensures years of additional uncertainty.

By looking to the past, however, can we get a sense of what to watch for in the future?

It has been 15 years since the still-controversial *Rapanos* decision, the last time the Supreme Court created a new test for whether something is regulated by the Clean Water Act. Many of the first wave of cases interpreting *Rapanos* were enforcement cases where the defendant had already been found guilty or to have otherwise violated the law, and the government was very successful in having courts find that Justice Kennedy’s “significant nexus” standard was broad and could be proven in several ways. By the time the Environmental Protection Agency (EPA) and Army Corps of Engineers finalized their administrative guidance interpreting the case, the courts had largely already coalesced around a common understanding of the decision.

But that is *not* how we are likely to learn what constitutes the “functional equivalent of a direct discharge.” Before the Supreme Court’s decision, the EPA issued a statement explaining that the agency’s interpretation of the Clean Water Act was that discharges into or through groundwater *never* require an NPDES permit. While the Supreme Court found that the EPA’s interpretation was “neither persuasive nor reasonable,” the EPA has not yet adopted a new interpretation. It is unlikely, therefore, that there will be government-led enforcement actions based on discharges into groundwater in the near term.

What we *will* see, however, are environmental and other advocacy organizations continuing to use the Clean Water Act's citizen suit provision when a pollutant reaches navigable waters only after it enters the groundwater. That is how this issue came before the Supreme Court, and we can expect to see an increase in those cases as organizations try to build out as broad a test as possible.

For companies that want to understand how the Clean Water Act applies to their operations, the consequences of waiting several more years for courts to determine what constitutes the "functional equivalent of a direct discharge" will be felt today. Businesses that have planned—or unplanned—discharges of pollutants that may reach a surface water after entering groundwater will need to evaluate whether to pursue a permit for such releases or risk being the target of an environmental organization's lawsuit. With the ground(water) constantly shifting, businesses should ensure they have the benefit of the most recent court decisions and government actions when making that difficult decision.

Federal Government Steps Up Action on "Forever Chemicals"

The federal government is taking historic action aimed at regulating PFAS under several environmental laws.

PFAS are a group of approximately 5,000 synthetic organic compounds that have been used for decades. They are found in a wide range of products, from nonstick cookware to firefighting foam. PFAS chemicals have been detected in the drinking water of 19 million Americans across 49 states.

In the past few months, the federal government has taken historic action to regulate PFAS. This action comes in the face of the COVID-19 pandemic, which has underscored demands for safe drinking water.

- **Senate Committee Pushes Action on PFAS:** In early May, the Senate Committee on Environment and Public Works pushed through a bipartisan water infrastructure bill that would direct the EPA to develop a national drinking water standard for PFAS. The recent piece of legislation, the Drinking Water Infrastructure Act of 2020 (S. 3590), would give the EPA two years to promulgate national drinking-water standards for PFOA and PFOS. The bill also proposes approximately \$2.5 billion in authorizations and \$300 million in proposed grants for cleaning drinking water from emerging contaminants, particularly PFAS.
- **National Defense Authorization Act (NDAA) for Fiscal Year 2020:** Signed into law on December 20, 2019, the NDAA takes significant steps to address PFAS contamination throughout the U.S. Some of the NDAA's notable provisions include adding 172 PFAS chemicals to the EPA's Toxic Release Inventory, requiring public water systems serving more than 10,000 persons to monitor PFAS under the Safe Drinking Water Act, and requiring the Department of Defense to phase out its use of firefighting foam containing PFAS at all military installations by October 1, 2024 and immediately stop military training exercises with these foams.

- **Preliminary Determinations to Regulate PFOA and PFOS:** Under the Safe Drinking Water Act, the EPA has regulated more than 90 drinking-water contaminants. The EPA has the authority to set enforceable maximum contaminant levels (MCLs) for specific chemicals and can require monitoring of public water supplies. While the EPA has issued unenforceable health advisory levels for PFOA and PFOS, there are currently no MCLs established for any PFAS chemical. On February 20, 2020, the EPA initiated steps to evaluate the need for MCLs for PFOA and PFOS under the regulatory determination process.
- **Supplemental Proposal Under the Toxic Substances Control Act (TSCA):** On February 20, 2020, the EPA proposed to supplement a previously proposed significant new use rule under the TSCA by clarifying the categories of products that would be covered under the significant new use rule. The TSCA provides the EPA with authority to regulate products that are imported as an “article,” meaning goods that are imported as a component of another product. The agency is proposing regulations on imported products that contain certain persistent long-chain PFAS chemicals that are used as surface coatings on articles.

These recent actions at the federal level come in addition to an onslaught of PFAS regulations at the state level. The regulatory actions will continue to directly impact industries that manufacture, process, or utilize PFAS chemicals.

The Patchwork of COVID-19 Waste Regulation

It comes as no surprise that COVID-19 has produced significant medical waste, including contaminated personal protective equipment (PPE) such as masks and gloves, sharps, laboratory waste, and pathological waste. Medical waste is regulated by a mix of federal and state agencies, including:

- **The Occupational Safety and Health Administration (OSHA):** Regulates the safe handling of medical waste and addresses the management of sharps, containers that hold medical waste and labeling of those containers, and employee training.
- **The Centers for Disease Control and Prevention (CDC):** Provides guidance on infectious substances.
- **The Department of Transportation (DOT):** Regulates the packaging and transportation of medical waste. Medical waste is regulated as a hazardous material under the DOT’s Hazardous Materials Regulations, and these regulations apply to the transporter of the waste.
- **State environmental agencies or departments of health:** Address on-site management of medical waste, including packaging and storage, transportation, treatment of medical waste to render it noninfectious, and disposal. States also impose permitting, tracking, reporting, and recordkeeping requirements for medical waste, and determine whether PPE related to COVID-19 should be managed as medical waste.

In light of COVID-19, medical waste management has remained largely unchanged at the federal level, with additional flexibilities across many states. OSHA and the CDC have released guidance specific to COVID-19 waste. OSHA guidance for COVID-19 waste management is based on the CDC's determination that the COVID-19 virus is a Category B infectious substance, which means that medical waste generated in the treatment of COVID-19 patients and patients under investigation should be managed in accordance with routine and existing procedures. OSHA guidance also addresses municipal waste from businesses and households where there is potential COVID-19 exposure. Workers should follow safe work practices and engineering and administrative controls, as well as wear PPE such as puncture-resistant gloves, face masks, and eye protection. In general, the protections employers should implement are to be based on the level of exposure of its workers.

The DOT issued a notice clarifying that shipping papers may be exchanged by using social distancing (leaving a clipboard on a table) or electronically, and shipper certifications may be transmitted electronically, including through text message.

The following states have issued COVID-19-specific waste management guidance: [California](#), [Colorado](#), [Idaho](#), [Illinois](#), [Massachusetts](#), [New Hampshire](#), [New Jersey](#), [New Mexico](#), [New York](#), [Oregon](#), [South Carolina](#), [Tennessee](#), [Texas](#), [Virginia](#), [Wisconsin](#). These guidance documents address issues ranging from waste from COVID-19 testing facilities and waste generated by commercial cleaning companies disinfecting facilities where someone has been diagnosed with COVID-19 to regulatory relief for medical waste transporters and disposal facilities.

States have taken divergent approaches to PPE waste. Some states, like Idaho, require all PPE from health care facilities to be managed as medical waste, regardless of contamination or potential for infection. In other states, it depends on whether there is COVID-19 contact. Some states require, and others recommend as a best practice, that PPE from a business with confirmed COVID-19 contact be managed as medical waste. Given the varied positions, it is best to confirm requirements in your state and with your waste management providers, or over-manage PPE as medical waste.

Third Circuit Revisits and Reinforces *Bestfoods'* Teachings About Operator Liability

The Third Circuit offers insight on when and how Superfund operator liability can attach even in the absence of physical plant operations.

Operator liability has vexed courts and litigants since the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Operators are one class of "potentially responsible parties" that may be held strictly liable for releases of hazardous substances at a facility. But what makes one into an operator has not always been clear.

CERCLA itself unhelpfully defines “operator” as “any person ... operating such facility.” In its landmark 1998 decision *United States v. Bestfoods*, the Supreme Court considered what “operator” means in the context of a parent and subsidiary relationship. It held that operator liability extends only to those that “manage, direct, or conduct operations specifically related to pollution.”

Twenty-two years later, the Third Circuit doubled down on *Bestfoods*’ teachings in *PPG Industries Inc. v. United States*. Like many CERCLA cases, the facts date back to World War II, a time when the United States regulated chromium production and controlled chromium distribution due to chromium’s designation as a critical war material for military use. In 1954, the plaintiff purchased a facility from a former chromium chemical manufacturer, continuing to process chemicals and stockpile large volumes of waste on site until 1965. The plaintiff filed CERCLA cost recovery and contribution claims against the government seeking recovery of the \$367 million it has spent to date cleaning up that facility.

The plaintiff made two arguments in support of its claims. First it argued that the operator test in *Bestfoods* did not apply because it involved a parent-subsidiary, not a government contractor. Second, even if *Bestfoods* did apply, the plaintiff argued that the government should be held liable as an operator because of its “direction” or “general control” over the chromium chemical facility. A unanimous Third Circuit disagreed. *Bestfoods*, it held, is not limited to the parent-subsidiary context, and even though the government controlled certain aspects of chromium distribution (e.g., pricing, customer priority), the government did not manage, direct, or conduct operations related to pollution. The Third Circuit specifically rejected the plaintiff contention that the government’s directive to increase output of chromium made the government liable as an operator because “more production meant more waste.” Instead, the court found that it was entirely the plaintiff’s predecessor’s decision, not the government’s, to stockpile waste on site. The government’s alleged knowledge of that practice was insufficient for liability to attach; to be liable as an operator, it must actually “manage, direct, or conduct operations specifically related to pollution.”

The Third Circuit’s holding offers valuable insight on the scope of operator liability. First, it clarifies that *Bestfoods*’ standard applies regardless of the parties: parent-subsidiary, government–private industry—the standard is the same. Second, the decision reinforces that operator liability depends on the relationship between the potentially responsible party and the operations at the facility itself—not the potentially responsible party and the owner of the facility. Critically, an entity does not have to physically operate a facility to be liable as an “operator.” Instead, the key inquiry is whether an operator controls, directs, or manages “operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”

Environmental Compliance During the COVID-19 Pandemic

Environmental regulatory and permitting obligations remain in effect, but the EPA has provided helpful guidance for facilities struggling with maintaining compliance due to the COVID-19 pandemic.

The response to the COVID-19 pandemic has affected nearly every aspect of every business, and environmental compliance monitoring is not immune from the disruption. Many businesses have been ordered to close, and even those that are deemed essential have staff working at home—or at least six feet apart from each other in the office. Even as many states begin to reopen, few workplaces will return to normal operations in the near term.

The EPA recognized that the impacts from the pandemic are widespread across the country and across industry sectors, and the agency responded by issuing guidance on how companies can demonstrate compliance with environmental requirements even if they cannot report that compliance to the EPA as they normally would. The EPA first issued a broad policy that explains how companies impacted by the pandemic should document those impacts and discusses how the EPA may exercise enforcement discretion for routine monitoring and reporting of noncompliance due to the pandemic.

The EPA followed that broad policy with additional guidance specific to different environmental laws. For example, the EPA issued the guidance “Temporary Advisory for National Pollutant Discharge Elimination System (NPDES) Reporting in Response to COVID-19 Pandemic” to its regional offices and state counterparts that provides direction on implementing changes to NPDES compliance reporting during the pandemic. It provides the following instructions for facilities with water discharge permits.

- **Always do your best to report.** NPDES permit conditions remain in effect during the COVID-19 pandemic, and facilities are expected to continue routine monitoring and reporting compliance. If you are having difficulty satisfying these obligations, the EPA is clear that you must still do your best to report according to your permit conditions.
- **Report the data you have, even if incomplete.** You are expected to report any data you have for the monitoring period.
- **Use new EPA-identified codes to explain missing data.** If you are reporting incomplete data due to the pandemic, you must follow the EPA’s or your state’s instructions when filing reports electronically and when submitting a Discharge Monitoring Report to properly document the reason why the data is not complete.
- **Electronic reporting waivers are available.** If you’re unable to report electronically, the EPA or an authorized state program may grant a temporary waiver from the electronic reporting requirement—but you must apply for a waiver.

- **Facilities must take specific measures to minimize noncompliance.** All the EPA's policies are identified as temporary, and the EPA expects facilities to minimize the scope and length of any noncompliance—and to file any incomplete and missing reports as soon as facilities are able.

These measures can help if your facility is having difficulty maintaining or reporting compliance, but as temporary policies they are subject to change. Facilities also need to know how their state is implementing any changes related to the COVID-19 pandemic.

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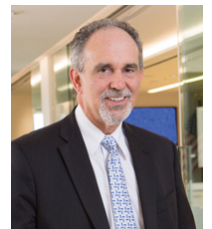
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