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Clean Water Act: Circuit and District Courts Start Addressing the Supreme Court's "Functional Equivalent" Requirement

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Due to an April 2020 Supreme Court opinion re-interpreting when a discharge permit is required under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES), courts are beginning to address and reconsider Clean Water Act (CWA) permitting cases and requirements. This recently occurred on September 20, 2021 in *Inland Empire Water Keeper v. Corona Clay Co.*, in which the 9th Circuit Court of Appeals vacated a judgment from the U.S. District Court for the Central District of California for reconsideration under the new functional equivalent of a direct discharge requirement.

The CWA NPDES requires a permit and includes specific monitoring requirements for anyone (often industrial, manufacturing, or water sewage treatment facilities) to document and monitor any discharges of various pollutants. Under the CWA, if a pollutant is being discharged from a point source to navigable waters, the discharging entity is required to receive a permit and conduct specific monitoring. Prior to an April 23, 2020 decision by the U.S. Supreme Court, the various circuits had come to different conclusions on when specifically the permitting and monitoring requirements are triggered. For example, in the 9th Circuit, the test was whether the discharge was "fairly traceable" to the point source. This was a very broad test capturing a large number of discharges. The Supreme Court firmly rejected this test (as well as more stringent tests offered by the Environmental Protection Agency (EPA)) in favor of a requirement that the NPDES permitting and monitoring is required "when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*."

While the Supreme Court admitted this new "functional equivalent" requirement is not a clear-cut test, they also provided some factors in determining a functional equivalent:

1. Transit time;
2. Distance traveled;
3. The nature of the material through which the pollution 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 navigable waters; and
7. The degree to which the pollution (at that point) has maintained its specific identity.

As already discussed, the lower courts are starting to address this new permitting requirement in cases that have already been before them and will be addressing this new functional equivalent standard going forward. For example, in the case discussed above, *Inland Empire Waterkeeper v. Corona Clay Co.*, the 9th Circuit vacated the judgment and order from the district court to re-address whether the citizen group had standing to even bring claims against Corona Clay Co. for purported violations of the permitting and monitoring requirements because the parties presented evidence and conducted discovery under the 9th Circuit's now overruled "fairly traceable" test.

Takeaway

While the Supreme Court interpretation of the CWA NPDES permitting and monitoring requirements is not as broad as the old 9th Circuit interpretation, the new "functional equivalent" test is likely to impact how courts, the EPA, and the state agencies empowered to issue permits under the NPDES generally enforce these. This will impact many businesses and industries including, but certainly not limited to, manufacturing, oil and gas, shipping, water sewage treatment, and others as they seek to make sure they comply with their permitting and monitoring requirements and avoid potential EPA regulatory action, state regulatory action, or citizen suits as the one brought in *Inland Empire Waterkeeper v. Corona Clay Co.* It is likely that future opinions from the appellate courts addressing the "functional equivalent" requirement will continue to be issued as the courts come to grips with this highly fact intensive inquiry and the factors outlined by the U.S. Supreme Court.

If you have any questions about these provisions, please contact the author or any member of Baker Donelson's [Water Technology and Water Treatment Team](#).