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U.S. Supreme Court decision on groundwater discharges is a huge win for the environment



GUEST COLUMN

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📷 The ash impoundments at Dominion Energy's shuttered Chesapeake Energy Center along the Elizabeth River was listed as a climate-vulnerable facility in a report this past spring. Dominion is in the process of removing the ash from the site. (Ryan M. Kelly/ For the Virginia Mercury)

By Bobby Whitescarver

When do prepositions protect our groundwater? When the Supreme Court of the United States says so.

In *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*, Justice Stephen Breyer used the words *from* and *to* in declaring that pollution discharged *from* a point source or its *functional equivalent* that flows to jurisdictional waters of the United States must be regulated by permit, even if that discharge is into groundwater first.

The ruling occurred on Wednesday, April 23, 2020, the day after Earth Day in a 6-3 decision with Justices Roberts, Ginsburg, Sotomayor, Kagan, and Kavanaugh joining. Justices Thomas, Alito and Gorsuch dissented.

Justice Breyer also used the word *loophole* 10 times, occasionally including the adjectives *massive*, *serious* and *obvious* with it, to describe the weakening of the Clean Water Act that would occur if Trump's solicitor general's arguments had won the day.

The Maui County wastewater facility collects sewage from the surrounding area, partially treats it, and then discharges it—four million gallons a day—into wells that empty into the groundwater. *From* there the polluted discharge travels a half-mile *to* the Pacific Ocean—coastal waters under the jurisdiction of the United States.

The County of Maui and the solicitor general of the United States argued that the facility did not need a permit to discharge pollution into groundwater.

SCOTUS ruled that it did.

Trump's solicitor general argued that “all releases of pollutants to groundwater” are excluded from the scope of the permitting program, “even where pollutants are conveyed to jurisdictional surface waters via groundwater.”

Justice Breyer countered in his opinion, “That reading, which would open a loophole ... is neither persuasive nor reasonable.”

This ruling is huge. It's a *Roe v. Wade* moment for the environment. It means polluters can't use groundwater or other nonpoint methods to get rid of their pollution without a permit.

And the ruling has widespread implications. For

example, in *Sierra Club v. Virginia Electric and Power* (Dominion Energy), the U.S. Fourth Circuit Court of Appeals **reached a different conclusion** in a case about Dominion's unlined coal ash pond in Chesapeake that leached arsenic *from* the unlined pond through the groundwater *to* the Elizabeth River and Deep Creek. The court found Dominion not in violation of the Clean Water Act, partly because the arsenic went through groundwater – and groundwater was not covered under the Clean Water Act.

SCOTUS now says it is.

The first sentence of the Clean Water Act:

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The *Maui* ruling provides new guidance for the courts and is a welcome and positive step forward in the protection of surface waters and groundwater as well.

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