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California Land Use & Development Law Report

Supreme Court Rules Clean Water Act May Regulate Discharges Through Groundwater to Navigable Waters

Does the Clean Water Act apply when an underground discharge mixes with groundwater and then ultimately reaches a river or a bay? In a 6-3 opinion written by Justice Stephen Breyer, the Supreme Court ruled that the Ninth Circuit erred by finding that the Act applies whenever a discharge to groundwater is "fairly traceable" to a downgradient surface water, concluding this interpretation was overly expansive. The Court determined that the Act's permitting requirements cover only discharges through groundwater that are the "functional equivalent" of a direct surface discharge. Rather than establish a bright-line rule for defining a "functional equivalent" discharge, the Court provided a nonexclusive list of factors that may be relevant depending on the circumstances presented in each case, highlighting two elements -- transit time and distance traveled -- as the most important. Our update containing a full analysis of the case and its implications, by [Marc R. Bruner, Robert A. Maynard, Jeffrey \(Jeff\) L. Hunter, Christopher D. Thomas, Jacob E. Aronson](#) and [Andrea Driggs](#) is available [here](#).

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