

# CLEAN WATER ACT PERMITS FOR DISCHARGES TO GROUNDWATER: EPA ISSUES GUIDANCE ON COUNTY OF MAUI V. HAWAII WILDLIFE FUND

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## Environment, Land, and Natural Resources Alert

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On 14 January 2021, the U.S. Environmental Protection Agency (EPA) issued a guidance memorandum on the application of the U.S. Supreme Court's 23 April 2020 decision in *County of Maui v. Hawaii Wildlife Fund (Maui)*.<sup>1</sup>

As a result of the *Maui* ruling, a range of activities—from stormwater management systems, wastewater management systems such as drain fields, and leaking infrastructure such as storage tanks or impoundments that might pollute groundwater—may now be subject to regulation and permitting under the Clean Water Act (CWA). In the wake of the *Maui* decision—and in particular the “functional equivalent” test laid out by the Supreme Court—the regulated community and permitting agencies were left with more questions than answers and more uncertainty than clarity.

As we wrote in our [alert](#) on the *Maui* decision back in April 2020, EPA and the courts were left to fill the void created by the Supreme Court's amorphous “functional equivalent” test. Now EPA has stepped in to offer the regulated community and permitting authorities guidance on the application of the *Maui* decision to the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) permit program.<sup>2</sup> Perhaps the most important aspect of EPA's Guidance to both the regulated community and permitting authorities is the inclusion of a new “functional equivalent” factor: the design and performance of the system or facility from which the pollutant is released to groundwater.

Below we summarize key elements of EPA's Guidance. We will continue to track this issue, including EPA's and state permitting agencies' application of the Guidance and whether the Biden administration will review, revise, or rescind the Guidance.

## THE *MAUI* “FUNCTIONAL EQUIVALENT” TEST & EPA'S GUIDANCE AT A GLANCE

In *Maui*, the Supreme Court rejected a bright-line test for whether point source discharges to groundwater are subject to the CWA permitting requirement in favor of the nebulous “functional equivalent” test requiring a case-by-case analysis. The Court identified seven non-exclusive factors that may be relevant in that analysis, including (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant 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 the navigable waters, and (7) the degree to which the pollution (at that point) has maintained its specific identity.<sup>3</sup>

EPA's Guidance states that its intent is to “place[ ] the functional equivalent analysis into context within existing NPDES permitting framework and identif[y] an additional factor for the regulated community and permitting authorities to consider when evaluating whether and how to perform a 'functional equivalent' analysis.”<sup>4</sup>

To do so, EPA's Guidance offers direction on four key areas for applying the *Maui* holding to CWA NPDES permitting.

**1. NPDES permitting requirements apply only where there is an actual (vs potential) discharge of pollutants to jurisdictional waters.**

EPA's Guidance clarifies that, because the CWA only applies to actual discharges of pollutants to jurisdictional waters, the *Maui* test is not triggered unless the discharge to groundwater results in an actual discharge to waters of the United States. EPA explains that “an actual discharge of pollutants to a water of the United States is a cornerstone of the NPDES permit program and a threshold condition that must be met before there is a need to consider whether the discharge . . . is a 'functional equivalent' of a direct discharge into a water of the United States.”<sup>5</sup> In emphasizing this threshold inquiry, EPA notes “*Maui* did not instruct NPDES permitting authorities to assume that discharges to groundwater that occur in the vicinity of a jurisdictional water are the 'functional equivalent' of direct discharges to that water.”<sup>6</sup>

There are several reasons why discharges through groundwater may never reach waters of the United States, including pollutant characteristics and subsurface hydrology. However, where “there are indications that there may be a discharge of pollutants through groundwater to waters of the United States,” EPA “recommends considering whether conducting a technical analysis would be prudent.”<sup>7</sup> Such indications may include “a discharge of highly mobile pollutants from a point source directly to sandy soils, or in an area with shallow groundwater in close proximity to a water of a United States.”<sup>8</sup>

The purpose of performing such an analysis would be two-fold: first, it would assist in determining whether an actual discharge of a pollutant is occurring to a water of the United States via groundwater, and second, it would help determine if such discharge is the “functional equivalent” of a direct discharge.<sup>9</sup> EPA clarifies, however, that a “mere allegation” that a point source discharge of pollutants may be reaching a water of the United States via groundwater is “likely not sufficient” to require an NPDES permit, and that nothing in the CWA or the *Maui* decision requires an owner, operator, or permitting authority to “prove the absence of a discharge.”<sup>10</sup>

**2. NPDES permitting requirements apply only where there is a discharge through a point source (vs a non-point source).**

EPA next explains that, because the CWA only applies to discharges from a point source, the *Maui* test is only applicable if the discharge of a pollutant through groundwater originates from a point source.<sup>11</sup> As a result, “[o]nly after it is established that an actual discharge of pollutants from a point source to waters of the United States via groundwater occurs (or will occur) would there be a need to consider the Supreme Court's 'functional equivalent' analysis.”<sup>12</sup> EPA has historically defined a point source as any discernible, confined, and discrete conveyance, such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container. Discharges from nonpoint sources are not regulated under *Maui* although most states do have programs to control nonpoint sources of pollution to groundwater or surface water.

**3. Only those discharges to groundwater that are the “functional equivalent” of a direct discharge are subject to permitting.**

EPA notes that only point source discharges to groundwater that are the “functional equivalent” of a direct discharge to a water of the United States are regulated under *Maui*. Thus, “[a] demonstration that pollutants from a point source have reached or will reach a water of the United States via groundwater does not by itself trigger the requirement for an NPDES permit.” Certain point source discharges to groundwater, EPA explains, may not be the functional equivalent of a direct discharge based on a number of factors identified in *Maui*, and “what happens to the discharged pollutant over [the] time and distance traveled to the water of the United States, is critical to the ‘functional equivalent’ analysis.”<sup>13</sup>

For example, discharged pollutants may travel through a system that treats, provides uptake of, dilutes, or retains pollutants before the pollutant reaches the water of the United States. “If the pollutant composition or concentration that ultimately reaches the water of the United States is materially different from the composition or concentration of the pollutant as initially discharged, whether through chemical or biological interaction with soils, microbes, plants and their root zone, groundwater, or other pollutants, or simply through physical attenuation or dilution, it might not be the ‘functional equivalent’ of a direct discharge.”<sup>14</sup> However, if the discharge via groundwater reaches the water of the United States “in the same or nearly the same chemical composition and concentration,” it may be more like a direct discharge to the jurisdictional water.<sup>15</sup>

**4. In evaluating whether a discharge to groundwater is a “functional equivalent” of a direct discharge, the design and performance of the system or facility from which the pollutant is released matters.**

Finally, relying on the Court’s statement in *Maui* that EPA can provide administrative guidance on the issue,<sup>16</sup> EPA identifies an eighth factor to consider when assessing whether a discharge to groundwater is a “functional equivalent” to a direct discharge: system design and performance of the system or facility from which the pollutant is released.<sup>17</sup>

EPA states that NPDES permitting authorities routinely consider facility design and performance during the permitting process and that these considerations can inform or affect the other seven factors identified in *Maui*.<sup>18</sup> EPA’s Guidance focuses on how a facility affects the time it takes for pollutants to travel from a point source, through groundwater, and discharge to a water of the United States and how facility design and performance affect the composition and concentration of discharges of pollutants.

The upshot here is that, according to EPA, the more a facility’s design and performance is engineered to slow pollutant transit time, increase distance traveled, alter the chemical composition of pollutants, and/or create diffuse rather than discrete and confined discharges, the less likely it is that such a discharge through groundwater will be deemed the “functional equivalent” of a direct discharge requiring an NPDES permit.

## IMPACTS OF EPA’S GUIDANCE

As a guidance document, EPA’s Guidance does not have the force and effect of law. However, it provides helpful insight into EPA’s analysis when determining whether a particular discharge of pollutants to groundwater requires an NPDES permit under Section 402 and *Maui*. In particular, it confirms that EPA will not presume that a permit is required just because there is a discharge to groundwater that interacts with jurisdictional waters of the United States. Instead, EPA will consider whether the threshold requirements for a permit are met and then determine whether the discharge is a functional equivalent under *Maui*’s seven factors, as well as EPA’s additional design

and performance factor. Whether the Biden administration's EPA will take a different view of the analysis is yet to be seen.

## FOOTNOTES

<sup>1</sup>140 S. Ct. 1462 (2020).

<sup>2</sup>Guidance Memorandum, Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program from Anna Wildeman, Acting Assistant Administrator, United States Environmental Protection Agency, Office of Water (Jan. 14, 2021) (available at [https://www.epa.gov/sites/production/files/2021-01/documents/final\\_ow\\_maui\\_guidance\\_document\\_-\\_signed\\_1.14.21.pdf](https://www.epa.gov/sites/production/files/2021-01/documents/final_ow_maui_guidance_document_-_signed_1.14.21.pdf)) (Guidance).

<sup>3</sup>140 S. Ct. at 1476–77.

<sup>4</sup>Guidance at 1.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 4.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 5.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 6.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>See 140 S. Ct. at 1476–77.

<sup>17</sup>Guidance at 7.

<sup>18</sup>*Id.*

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