

EPA's CWA Groundwater Guidance Says Little, Will Likely Be Rescinded

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EPA's recent [draft guidance memorandum](#) on applying the Supreme Court's decision in [County of Maui v. Hawai'i Wildlife Fund](#), 140 S. Ct. 1462 (2020), provides little clarity for determining when a release to groundwater is the "functional equivalent" of a direct discharge such that it requires an NPDES permit. Instead, the guidance largely stresses how the *Maui* decision did not fundamentally change permitting under the Clean Water Act (CWA), while explaining how permit writers might consider system design and performance in assessing functional equivalence. Comments on the memo are due by [January 11, 2021](#), but the incoming Biden administration will likely pull this guidance back as new leadership starts to redefine the agency's priorities.

The Decision – Setting an Open-Ended Standard

The *Maui* decision announced two circumstances under which an NPDES permit is required: when there is either (1) a "direct discharge" or (2) its "functional equivalent." Writing for the Court, Justice Breyer identified seven nonexclusive factors, like transit time and distance traveled, "that may prove relevant" to determining whether a release is the functional equivalent of a discharge. Having announced this broad, loosely-defined test, the Court invited both EPA and the federal courts to provide guidance on how this test will be applied.

Emphasizing Maui's Limits

EPA devotes the bulk of the draft memo to clarifying what the *Maui* decision *did not do* rather than elaborating on application of the functional equivalence test. The memo's substantivae discussion first emphasizes that *Maui* did not obviate the need for an actual discharge—pollutants actually reaching surface waters—in order to trigger the CWA's permitting requirement. Although this issue was not disputed in *Maui*, EPA explains that a release into groundwater near waters of the United States does not necessarily require an NPDES permit; it needs one only if pollutants reach jurisdictional waters in a manner that is the functional equivalent of a direct discharge. The draft memo similarly goes on to specify that *Maui* in no way altered the need for a "point source" to trigger the CWA's permitting requirements.

Having articulated *Maui*'s limits, EPA explains that only a "subset of discharges ... to groundwater that ultimately reach [jurisdictional waters]" will require NPDES permits under the functional equivalence test. In part, EPA rests this conclusion on the Supreme Court's rejection of the Ninth Circuit's broad "fairly traceable" standard for when a discharge occurs. EPA further suggests that there will likely be many instances when, due to the effects of time and distance traveled, a release through groundwater will not be a functional equivalent of a direct discharge. As a result, EPA anticipates that NPDES permits for releases through groundwater will "be a small percentage of the overall number of NPDES permits issued"

System Design and Performance

Having staked out *Maui*'s limits, the draft memo proposes an eighth functional equivalence factor—the design and performance of the facility or system that is releasing pollutants. This new factor adds an entirely new component to *Maui*'s functional equivalent test. EPA explains that the "design and performance of a system or facility can affect or inform all seven factors identified in *Maui*." The guidance notes specifically how certain systems, like settling ponds or green infrastructure, may slow transit time through groundwater or abate potential discharges to surface waters. These effects, in EPA's view, make it less likely that these types of treatment or control structures will require NPDES permits.

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