

EPA Issues Aggressive Interpretation of Maui Supreme Court Decision in Latest Draft Guidance

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The U.S. Environmental Protection Agency (EPA or Agency), on November 27, 2023, released its **draft guidance** addressing its proposed interpretation to apply the Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). This draft guidance would place an unprecedented burden on regulated entities that may have a groundwater discharge to surface waters, including new expectations of technical due diligence for National Pollutant Discharge Elimination System (NPDES)

permit applications, greater scrutiny of these newly needed and costly technical evaluations, and aggressive compliance and enforcement efforts by EPA. Regulated entities that may be affected by the “functional equivalent” concepts outlined in the *Maui* opinion should review and consider commenting on the EPA draft.

Background

In *Maui*, the Court established a “functional equivalent” test for determining when the Clean Water Act (CWA) requires an NPDES permit for facilities that discharge pollutants to a water of the United States (WOTUS) *via groundwater*. Though not providing a bright-line test, the Court identified several factors for determining when a discharge via groundwater is the “functional equivalent” of a direct discharge that requires an NPDES permit. The draft guidance, as currently written, would now create a new EPA-imposed expectation that operators of facilities that discharge to groundwater should first determine if the affected groundwater resource reaches WOTUS, and, if so, whether its discharges to groundwater are the “functional equivalent” of direct discharges to a surface water that is a WOTUS. Additionally, the Agency is warning that if operators do not obtain permit coverage for a “functional equivalent” direct discharge, EPA intends to aggressively pursue administrative or judicial enforcement actions, including civil and criminal penalties and injunctive relief.

What the Guidance Says

The draft guidance sets forth EPA’s perspective on how facilities—and, more importantly, EPA enforcement and legal staff—should assess whether a discharge via groundwater is a “functional equivalent” of a direct discharge. This evaluation will be “highly dependent on site-specific considerations.” EPA notes that the Court “identified time and distance as the most important factors in most cases” but also left how best to weigh relevant factors to Agency discretion. The draft guidance further emphasizes that the seven factors the *Maui* opinion identified were “just some of the factors that may prove relevant” and that “the functional equivalent analysis may not require consideration of all, or even several of, the factors laid out by the Court.”

This broad, open-ended language signals that EPA intends to pursue the broadest possible interpretation of what the Court may have intended. As a result, there may be an increased risk of overzealous and after-the-fact enforcement actions based on the expansive reading of *Maui*, which the guidance advances. If a facility determines in good faith it does not have a “functional equivalent” groundwater discharge to surface water and therefore does not seek NPDES permit coverage for groundwater, EPA’s draft guidance implies that judgment could be second-guessed in likely aggressive and subsequent permitting and enforcement actions by the Agency. Presumably, NPDES-authorized states would be expected to follow EPA’s guidance.

Analysis

While the draft guidance additionally highlights that intent is not a relevant factor in the assessment of functional equivalence and provides an extensive list of “recommended information” that should be considered when submitting an NPDES permit application, it raises two issues of concern—among others—that may greatly expand the scope of its authority and particularly that of EPA staff implementing it.

First, the draft guidance states that the “functional equivalent” test may be based on analyzing constituent pollutants—not all effluent—if such pollutants may be a “reasonable indicator” for the effluent pollutants. In Footnote 11, the Agency even states that when “determining that the discharge of just one constituent pollutant is the functional equivalent of a direct discharge, [this] would trigger the permitting requirement.” This raises the prospect of facilities needing to undertake costly, in-depth, and technically subjective evaluations when analyzing whether they require an NPDES permit, especially when there may be commingling of plumes/pollutants from multiple sources in nearby groundwater. The draft guidance, in this way, seems to stretch existing regulations and guidance for submitting NPDES permit applications, especially effluent and process information that is typically relied upon to complete a permit application.

Second, the draft guidance emphasizes that a higher mass or concentration of pollutants reaching WOTUS compared to the mass or concentration leaving the point source can support the finding of a “functional equivalent” direct discharge. This reading may also be inconsistent with current regulations and industry best practices for completing an NPDES permit

application, which, when combined with EPA's asserted discretion as to which factors it considers in its analysis, could allow EPA staff to solely evaluate a pollutant's mass or concentration to justify an enforcement action or a demand that a facility obtain a permit. This again leaves room for the Agency and its staff to go well beyond what the Court intended and may even be less supported than the "fairly traceable" test that the Court held in *Maui*, which was inconsistent with the CWA. See [SCOTUS: Clean Water Act Permits Required for Some Releases into Groundwater](#).

While the draft guidance includes the same standard disclaimer language stating that it is non-binding like other EPA guidance documents, application of this guidance by EPA enforcement and legal staff will likely greatly expand the scope of its authority—especially when compared to what industry anticipated following the *Maui* decision—and will certainly lead to more scrutiny, oversight, and enforcement for facilities with discharges to groundwater if not re-evaluated.

Suggested Actions

Affected NPDES permit holders and any facility that manages groundwater not currently subject to an NPDES permit should consider commenting on this potentially far-reaching draft guidance. At a minimum, affected parties should ask EPA to explain in a revised version of this guidance how this new interpretation of *Maui* is consistent with current NPDES permit regulations that have gone through formal rule-making procedures and justifications, as well as NPDES permit guidance, forms, and instructions

that the regulated community and NPDES permit writers (most of which are states, not EPA) are accustomed to using during the NPDES permitting process. Ultimately, any facility that manages groundwater should closely track developments with this draft guidance and prepare in advance for its implementation should it be finalized.

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