

INSIGHTS

EPA Draft Guidance Memorandum on the Application of County of Maui

December 9, 2020

By: [Sara M. Burgin](#) and [Daniel J. Pope](#)

On December 8, 2020, the U.S. Environmental Protection Agency (“EPA”) released a [draft guidance memorandum](#) (“Draft Guidance”) to provide guidance to the regulated community and permitting authorities, including the EPA, on applying the recent decision of the United States Supreme Court (“Court”) on *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) (“*Maui County*”), in the Clean Water Act (“CWA”) Section 402 National Pollutant Discharge Elimination System (“NPDES”) permitting program. EPA notes that the Draft Guidance only addresses discharges of pollutants that reach waters of the United States through groundwater, the issue addressed in *Maui County*. EPA acknowledges that the Draft Guidance document does not have the force and effect of law and does not bind the public. But, it is intended to provide clarity to the public regarding existing requirements under law or EPA policies. EPA is soliciting public comments on the Draft Guidance memorandum for thirty (30) days. Comments may be submitted to Docket No. EPQ-HQ-OW-2020-0673.

Although *Maui County* confirmed that a facility might need a NPDES permit if its point source discharges passed through groundwater to reach a water of the United States, the Court did not clarify precisely when permits were required for indirect discharges. Instead, the Court concluded that a permit might be needed for an indirect discharge if the discharge is a “functional equivalent of a direct discharge.” The Court identified seven factors that could be useful in determining whether an indirect discharge was such a functional equivalent of a direct discharge, but did not provide direction on how to weight such factors (and the Court even suggested that other factors may be relevant).

EPA’s Draft Guidance first discusses the how the functional equivalent test set out by the Court applies to the basic principles that govern whether a NPDES permit is needed. EPA also identifies an additional factor that it believes should be considered when performing a functional equivalent test. That factor is the design and performance of the system or facility from which the pollutant is released.

EPA makes several important points in its discussion of the intersection of the functional equivalent test and the fundamental principles of Section 402 of the CWA. First, EPA notes that an actual discharge of a pollutant to a water of the United States is a threshold condition that must be satisfied before the need for a NPDES permit is triggered. Where there are indications that there may be a discharge of pollutants through groundwater, the agency recommends that the facility owner or operator consider whether conducting a technical analysis is prudent to evaluate such questions as whether the pollutants are highly mobile, the type of soils, and

evidence of shallow groundwater in close proximity to a water of the United States. Second, EPA states that the discharge of pollutants that reaches, or will reach, a water of the United States must be from a point source. The need to consider the Court's functional equivalent test arises only after it has been established that a discharge of pollutants from a point source to waters of the United States via groundwater occurs or will occur.

Regarding the functional equivalent test, EPA states that only a subset of discharges of pollutants to groundwater that ultimately reach a water of the United States are the functional equivalent of a direct discharge. EPA supports that position by stating that in the agency's experience science (e.g., characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology) inform the effect of time and distance of travel and what happens to the discharged pollutant over that time is critical to the test. Changes in pollutant composition or concentration by chemical or biological interaction with soils, microbes, plant roots, groundwater or simple attenuation, etc, should be considered in a functional equivalent determination.

Importantly, EPA emphasizes that *Maui County* does not require permitting authorities to presume that discharges to groundwater that occur near jurisdictional waters result in a functional equivalent of a direct discharge and that, because of proximity alone, the discharger is required to apply for a NPDES permit. Further, EPA emphasizes that allegations that a point source discharge to groundwater reaches a water of the United States, if unsupported by scientific evidence, are insufficient to establish that NPDES permitting is required for a facility.

EPA also proposed an eighth factor for the functional equivalent analysis—the system design and performance of a facility with respect to its wastewater management. EPA asserts its proposal of an additional factor is within its discretion because EPA remains the authoritative interpreter of the statutes it administers and its addition of a factor is fully consistent with and specifically contemplated by the Court in *Maui County*. EPA notes that design or performance of a facility or system can affect all seven factors identified in *Maui County*. EPA specifically mentions that some systems are designed to promote dilution, adsorption or dispersion of the pollutant with the intent to chemically change the pollutant and the amount of pollutant that would enter a water of the United States relative to the amount that leaves the point source. EPA then provides examples of systems typically thought of as being designed and that perform as storage or treatment systems such as septic systems, settling ponds, runoff management systems, infiltration or evaporation systems, and reuse, recycling or groundwater recharge systems. EPA points out that it may be less likely that an NPDES permit would be required for these types of systems either because the pollutants do not reach a water of the United States or because the discharge is not the functional equivalent of a direct discharge to a water of the United States.

It goes without saying that this interpretation of the functional equivalent test set out in the Draft Guidance reflects the thinking of the current EPA that provided guidance to the Court during its consideration of *Maui County* that regulation of releases of pollutants to groundwater should be left to the states and other statutory authorities than the CWA. Thus, it is no surprise that EPA states in the Draft Guidance that application of the Court's functional equivalent should not significantly affect the percentage of NPDES permits issued for point source discharges that reach waters of the United States via groundwater. Bracewell will continue to track developments on this issue and will provide updates as they occur.

As always, it is important for facility owners and operators who may be affected by application of the functional equivalent test to consider providing comments on the Draft Guidance.