



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Rescinds Maui Guidance Memorandum

09/20/2021

The United States Environmental Protection Agency (“EPA”) rescinded a guidance document it had previously issued titled:

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 (“Guidance”)

The *Guidance* had been issued on January 14th during the Trump Administration in response to the United States Supreme Court Decision in *County of Maui v. Hawaii Wildlife*.

A Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit must be obtained if five jurisdictional elements are met:

- A person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source.

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

Clean Water Act jurisdictional terms such as “point source,” “waters of the United States,” etc., have been the subject of debate, regulatory activity, litigation, guidance, and confusion for many years.

Consequently, whether, and to what extent, a discharge of pollutants into groundwater potentially triggers permitting is a significant issue.

The United States Supreme Court in *Maui* determined that the Clean Water Act is potentially applicable to pollutant that migrates to groundwater. NPDES permitting requirements are held applicable if there is a direct discharge from a point source into navigable waters or when there is a functional equivalent of a direct discharge.

Justice Breyer in the Supreme Court’s Majority Opinion enumerated factors for determining functional equivalence which included:

1. Transit time,
2. Distance traveled,
3. Nature of the material through which the pollutant travels,
4. Extent to which the pollutant is diluted or chemically changed as it travels,
5. 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,
7. The degree to which the pollution (at that point) has maintained its specific identity

The *Guidance* memorandum issued during the Trump Administration was stated to be an intent to provide clarity to the public regarding existing requirements under law or agency policies in regards to the U.S. Supreme Court Decision. The *Guidance* addressed the inner relationship between the Court's functional equivalent test and principles that address whether an NPDES permit is needed. However, also included was an additional factor which involved an assessment of the design and performance of the system or facility from which the pollutant is discharged.

Of particular importance, EPA had noted that it believed (at the time) the *Maui* Decision did not mandate that NPDES permitting authorities presume discharges to groundwater in close proximity to waters of the United States result in a functional equivalent of a direct discharge.

EPA's September 16th press release noting the rescission of the *Guidance* states it was reviewed and:

. . . found that it was inconsistent with EPA's authority to limit pollution discharges to our waters.

The federal agency also contended that "clean water protections" were reduced because of the *Guidance's* creation of a new factor:

. . . for determining if a discharge of pollution from a point source through groundwater that reaches a water of the United States is the "functional equivalent" of a direct discharge to such water.

The addition of this factor was stated to skew the functional equivalent analysis in such a way that could reduce the number of discharges requiring the NPDES permit.

EPA's Office of Water is stated to be "evaluating appropriate next steps." As to the interim, the federal agency states that:

. . . consistent with past practice and informed by the factors specified by the Supreme Court, EPA will continue to apply site-specific, science-based evaluations to determine whether a discharge from a point source through groundwater that reaches jurisdictional surface water requires a permit under the Clean Water Act.

A copy of the EPA press release can be found [here](#) and accompanying memorandum [here](#).