Does Discharged Groundwater Require a Clean Water Act NPDES Permit? U.S. EPA Issues Draft Maui Guidance Memorandum

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The United States Environmental Protection Agency ("EPA") is issuing for public comment draft guidance on applying the United States Supreme Court decision in *County of Maui vs. Hawaii Wildlife Fund*.

EPA had previously rescinded a guidance document issued during the Trump administration in response to the *Maui* decision.

Maui addressed Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permitting issues applicable to point sources discharges that travel through groundwater before reaching a water of the United States.

A Clean Water Act NPDES permit must be obtained if 5 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 a Clean Water Act NPDES permitting requirement.

Clean Water Act jurisdictional terms such as "point source" "waters of the United States", etc. have been the subject of debate, regulatory activity, litigation, and confusion for many years. Consequently, where and to what extent a discharge into groundwater potentially triggers NPDES permitting is a significant issue.

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

A key quote from the United States Supreme Court states:

"… as applicable to a discharge (from a point source) of pollutants that reach navigable waters, after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the

point source into the navigable waters … (the discharge is encompassed by the NPDES permit requirements)."

The Supreme Court's majority opinion enumerated factors for determining functional equivalents, 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 pollutant (at that point) has maintained its specific identity

The rescinded guidance 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 United States' Supreme Court decision. EPA's September 16, 2023 press release noting the rescission of the guidance states that it was reviewed and:

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

EPA also contended that "clean water protections" were reduced because of the Trump administration's guidance 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 draft guidance issued on November 27, 2023 is described by EPA as providing:

- Overview of *Maui's* functional equivalent analysis
- Explanation of the type of information *Maui* requires to be used to determine which discharges through groundwater may require NPDES permitting

Key sections of the November 27 draft guidance include:

- *Maui* affirmed that CWA Section 402 permitting requirements may apply to discharges to waters of the United States through groundwater and established the "functional equivalent" standard
- Operators of facilities with discharges to groundwater should evaluate, in the first instance, whether those discharges reach waters of the United States and, if so, whether those discharges are the functional equivalent of direct discharges that require NPDES permits
- How to assess whether a discharge through groundwater is a functional equivalent of a direct discharge requiring authorization by an NPDES permit.
    a. Overall approach
    b. Transit time and distance traveled
    c. Other potentially relevant factors
- Recommended information to be submitted with an NPDES permit application to request coverage for a discharge through groundwater that may be the functional equivalent of a direct discharge
    a. Discharge locations
    b. Transit time

c. Distance Traveled

d. Flow characteristics

e. Shallow subsurface geology and hydrology characterization

f. Description of pollutant-specific dynamics along the groundwater flow path

g. Treatment technologies

h. Effluent characteristics

i. An explanation of the permittee's functional equivalent of a direct discharge analysis

j. Other information

- Factors that should not be considered as part of the functional equivalent analysis

  a. Intent

  b. State groundwater protection program

EPA public noticed the draft guidance in the November 27 Federal Register, see 88 Fed. Reg. 82,891. Note that EPA states that the guidance:

"… will not have the force and effect of law and will not bind the public in any way."

A copy of the draft guidance can be downloaded here.