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U.S. Environmental Protection Agency Draft Maui Guidance Memorandum/Clean Water Act: U.S. Small Business Administration Office of Advocacy Comments

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The United States Small Business Administration Office of Advocacy (“SBA”) submitted December 21st comments addressing the United States Environmental Protection Agency’s (“EPA”) document titled:

Draft Guidance Implementing the Supreme Court’s Maui Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination Permit Program (“Draft Guidance”)

See Docket No. EPA HQ-OW-2023-0551.

The *Draft Guidance* is outlined by a previous [post](#).

The *Draft Guidance* provides EPA’s interpretation of the United States Supreme Court decision in County of Maui vs. Hawaii Wildlife Fund. It rescinds a guidance document issued during the Trump Administration in response to the Maui decision.

EPA contended in the *Draft Guidance* that “clean water protections” were reduced because of the Trump Administration’s guidance creation of a new factor: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 ground water that reaches a water of the United States is the “functional equivalent” of a direct discharge to such water.

Key provisions in the new *Draft Guidance* included:

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

The December 21st SBA comments initially note:

- Statement that the *Draft Guidance* is not a proposed rule but nevertheless contains the basic components of a regulation
- Small entities will need to comply with the *Draft Guidance* in order to determine whether their activities require a National Pollutant Discharge Elimination System permit

Concern is expressed by SBA that:

- Lack of clarify of the *Draft Guidance* will increase regulatory uncertainty and costs for small entities
- Small entities will have difficulty being able to obtain the recommended information required by the *Draft Guidance*
- The *Draft Guidance's* application of the functional equivalent analysis to “reasonable indicators” of pollutants or pollutants with similar characteristics exceeds the scope of the Clean Water Act

SBA also recommends that the existence of state groundwater programs should be considered in Clean Water Act NPDES permit discussions.

A copy of the SBA comments can be downloaded [here](#).