

Publications

USEPA Issues Draft Guidance on County of Maui's "Functional Equivalent" Test for NPDES Permits

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On December 10, 2020, the USEPA issued a Draft Guidance Memorandum on how permitting authorities should apply the United States Supreme Court's recent decision in *County of Maui v. Hawaii Wildlife Fund* within the NPDES permitting process. That memorandum is available at this [LINK](#).

The Supreme Court's opinion^[1] held that a point source discharge to groundwater could be the "functional equivalent" of a discharge to a navigable water and, therefore, could require a NPDES permit. The Court identified seven factors to be evaluated in this determination. The factors include:

- transit time to reach the navigable water;
- distance between discharge and navigable water;
- the nature of the material through which the pollutant travels;
- the extent to which the pollutant is diluted or chemically changed as it travels;
- the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
- the manner by or area in which the pollutant enters the navigable waters; and,
- the degree to which the pollution has maintained its specific identity when it enters the navigable water.

The Court explained that not all factors would be relevant in all cases. But the opinion held that the time and distance factors would usually be most important. USEPA released this guidance to provide direction as to how it will interpret the decision in NPDES permitting.

USEPA first explains that the Court's recent decision has not altered the "two threshold conditions for triggering NPDES permit applicability"—(1) an actual discharge of a pollutant to a water of the United States; and (2) the source of the pollution is a point source. If one or both of these conditions is absent, the new functional equivalent analysis

should not be applied. Specifically, the guidance makes clear that this would not impact nonpoint source discharges, as defined in the Clean Water Act. Therefore, this new guidance could only apply if a facility discharges a pollutant via a point source (without a current NPDES permit for that discharge) to groundwater that might impact surface water.

If both threshold conditions are met, then a regulated entity would need to consider whether a discharge to groundwater is the functional equivalent of a direct discharge to a water of the United States. In evaluating that connection, USEPA adopted the factors outlined by the Court. However, USEPA also explained that it will also give considerable weight to an additional factor, which the Supreme Court did not identify: the design and performance of the system from which the pollutant is released.

USEPA explains that point source discharges of pollutants that reach waters of the United States via groundwater have been analyzed on a case-by-case basis in the past, and permitting authorities have issued very few permits for these types of discharges in the past. Compared to the overall number of NPDES permits issued, USEPA anticipates that the percentage of permits due to the functional equivalent test will be very small.

The USEPA guidance document is not final and was not promulgated as a draft regulation. The public comment period on the Draft Guidance will be open until January 11, 2021. The Biden Administration may withdraw or revise this guidance before it is finalized. If you have questions about how this guidance, please reach out to Nat Morse, Kristin Watt, Mark Norman, or your Vorys attorney.

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[1] A copy of the full Supreme Court decision is available at: https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf.