



Melissa Reynolds

Partner
801.799.5875
Salt Lake City
melreynolds@hollandhart.com



Ashley Peck

Partner
801.799.5913
Salt Lake City
aapeck@hollandhart.com

EPA Draft Guidance on *County of Maui, Hawaii v. Hawaii Wildlife* Decision

Insight — 12/10/2020

Today, the Environmental Protection Agency (“EPA”) published notice of draft guidance (the “Draft Guidance”) intended to assist regulated entities and permitting authorities in applying the United States Supreme Court’s decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund* concerning Clean Water Act (“CWA”) jurisdiction over discharges to groundwater.¹ *Maui* involved a discharge to groundwater that ultimately discharged into the Pacific Ocean. The Supreme Court held that the CWA requires a permit for both direct discharges from point sources into navigable waters and the “functional equivalent” of direct discharges. The Court then set forth seven non-exclusive factors to determine whether a discharge is “functionally equivalent” to a direct discharge and thus requires a permit. The Draft Guidance aims to put this new test into context under the National Pollutant Discharge Elimination System (“NPDES”) program and identifies an additional factor to consider in conducting a functional equivalent analysis.

EPA reiterates two foundational regulatory principles that together trigger the requirement to obtain a NPDES permit—(1) there must be an *actual discharge* of a pollutant to waters of the United States; and (2) the discharge in question must originate *from a point source*. Only once these two conditions are met does EPA recommend conducting the analysis to determine if a discharge to groundwater is the functional equivalent of a direct discharge. However, EPA clarifies that not all discharges of pollutants to groundwater that reach a jurisdictional water will meet this test. As the *Maui* decision makes clear, various factors—including transit time and distance traveled—must be considered before making that determination. The Draft Guidance indicates that “what happens to the discharged pollutant over that time and distance traveled . . . is critical to the ‘functional equivalent’ analysis.” This suggests that EPA will be less likely to find the functional equivalent of a direct discharge where the composition or concentration of the pollutant changes as it travels from the point source to the jurisdictional water.

EPA also identifies an eighth factor to consider in conducting a functional equivalent analysis—system design and performance. EPA notes that examining the design and performance of the regulated entity’s system is an important and routine consideration for permitting agencies. The Draft Guidance suggests that the design of the system can affect the composition and/or concentration of pollutants, the transit time of pollutants, the distance travelled by pollutants, and the amount of pollutant entering the water, and can therefore provide helpful insight into whether a

discharge is the “functional equivalent” of a direct discharge.

While the Draft Guidance provides some additional clarity into the way EPA and other permitting authorities might interpret *Maui*, and it frames the decision as applying only to a narrow subset of discharges to groundwater, it is not binding and does not have the force and effect of law. The functional equivalent test requires a detailed analysis that will vary from case to case, and regulated entities should carefully examine any discharges that could potentially meet the test. Pursuant to recent changes to guidance procedures, EPA will be accepting public comments on the Draft Guidance until January 11, 2021.

¹ 140 S. Ct. 1462 (2020).

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