

EPA Drafts Guidance on County of Maui's "Functional Equivalent" Test

Related Professionals

Michael Traynham
803.540.2164
MTraynham@nexsenpruet.com

Practices

Environmental Law

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On Tuesday, December 8, 2020, the U.S. Environmental Protection Agency (EPA) issued a Draft Guidance Memorandum attempting to place the recent Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund* "into context within the existing NPDES permitting framework[.]" The Draft Memo identifies an additional factor above those outlined in the opinion for permitting authorities to consider when determining whether to perform a "functional equivalent" analysis.

County of Maui was decided on April 23, 2020, and determined that a discharge to groundwater from a wastewater treatment facility's injection well could be the "functional equivalent" of a discharge to navigable waters where the wastewater's migration from the injection well to the ocean was clearly ascertainable. The decision opened up the possibility that myriad discharges of pollutants that make their way through groundwater to navigable waters may now require a Clean Water Act permit, regardless of the nature of the source of the pollution or the intentions of the source's owner. In creating the new "functional equivalent" standard, the Supreme Court outlined seven factors that may be relevant in determining whether a given discharge does or does not require a permit under the Clean Water Act:

→ (1) [T]ransit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the 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. 140 S.Ct. 1462. 1476-77 (2020).

The Supreme Court made clear this list of factors is not intended to be exclusive, and not every factor is likely to be relevant in every case. The court noted that "time and distance will be the most important factors in most cases, but not necessarily in every case."

The EPA Draft Memo attempts to give regulators additional clarity on how and when the functional equivalent test should be applied. EPA first notes that *County of Maui* did not alter 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) that such discharge originate from a point source. In EPA’s view, the *Maui* opinion does not require regulators to assume a discharge of a pollutant from a point source to the ground in the vicinity of a navigable water triggers permit requirements. Rather, there must be some evidence the discharge reaches the navigable water such that both threshold criteria are met. EPA also strongly emphasized the requirement of a point source is alive and well, suggesting certain types of pollution sources that may have highly diffuse connections to groundwater (i.e. certain impoundments, landfills, etc.) may not ever trigger NPDES permitting requirements.

This possibility, that some types of facilities might be functionally exempt from NPDES permitting, was further underlined by EPA’s addition of a new factor to those outlined by the Supreme Court. EPA suggested that system design and performance should be considered to determine whether a particular discharge is a “functional equivalent” in much the same way design and performance criteria are considered when facilities directly apply for NPDES permitting. EPA opined that facility design may impact or inform all seven factors listed in *County of Maui*, in that a discharge point may be intentionally engineered where the transit time or distance to a navigable water is maximized, or a system may be designed to “promote dilution, adsorption or dispersion of the pollutant[.]” EPA also expressly recognized that whether a system’s discharge was designed to be “discrete and confined or diffuse” affects how pollutants may enter navigable waters, and can inform the functional equivalent analysis.

While the *County of Maui* decision directly acknowledged application of the new test would require administrative guidance from EPA, it is a foregone conclusion that some stakeholders will accuse EPA of giving a pass to broad categories of polluters with its current interpretation of the Supreme Court opinion. The Draft Memo does not have the force and effect of law, however, and cannot be directly challenged through litigation. Moreover, with a new administration beginning in just over a month, the likelihood the Draft Memo survives its infancy is uncertain at best.

EPA is currently soliciting comments on the Draft Memo for 30 days, and comments may be submitted to Docket # EPA-HQ-OW-2020-0673.