

EPA issues draft guidance for ‘functional equivalent’ test for point source discharges to surfacewater through groundwater

On December 10, the U.S. Environmental Protection Agency (EPA) issued for public comment its draft guidance regarding the U.S. Supreme Court’s *County of Maui* “functional equivalent” analysis within the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program (85 Fed. Reg. 79489). The comment period closed on January 11.

In *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Supreme Court held that an NPDES permit is required in instances when a point source discharge of a pollutant through groundwater to a navigable water is the “functional equivalent” of a direct pollutant discharge from a point source into a navigable water. Babst Calland discussed the Supreme Court’s April 23, 2020, decision and its far-reaching implications in the May 2020 PIOGA Press article “Potential Clean Water Act liability extends to discharges to groundwater that reach surface water.”

The Supreme Court offered a non-exclusive list of seven factors to consider on a case-by-case basis:

- Transit time;
- Distance traveled;
- Nature of the material through which the pollutant travels;
- Extent to which the pollutant is diluted or chemically changed as it travels;
- Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
- Manner by or area in which the pollutant enters the navigable waters; and
- Degree to which the pollution (at that point) has maintained its specific identity.

Emphasis on threshold requirements for NPDES permits

The draft guidance stresses that the *County of*

Maui decision did not change the structure of the NPDES permit program, and, at most, only adds another step in determining whether an NPDES permit is required under a limited number of scenarios. In fact, EPA devotes much of the eight-page draft guidance to discussing the following two threshold conditions that trigger NPDES permitting:

1. An actual discharge of a pollutant to a water of the United States must occur; and
2. The discharge of a pollutant must be from a point source.

The draft guidance emphasizes that unless both of these thresholds are met, the “functional equivalent” analysis is not necessary, concluding that “[o]nly after it is established that an actual discharge of pollutants from a point source to waters of the United States via groundwater occurs (or will occur) would there be a need to consider the Supreme Court’s ‘functional equivalent’ analysis.”

Consideration of identified factors

Although the seven factors in the *County of Maui* decision were not extensively discussed, the draft guidance does briefly address how transit time and distance traveled may affect the “functional equivalent” evaluation. For example, EPA reaffirmed that permitting authorities cannot assume that all releases “near a water of the United States” are the functional equivalent of a direct discharge to that water. Instead, the draft guidance suggests that where there are indications that a discharge of pollutants through groundwater has reached navigable waters, the permitting authority should consider conducting a technical analysis (e.g., an evaluation of hydraulic conductivity and/or hydraulic gradient) to understand whether there is either an actual discharge of a pollutant to a navigable water or the functional equivalent of such a discharge.

The draft guidance recognizes that what happens to the discharged pollutant over time and distance is also “critical” to the “functional equivalent” analysis. For example, the pollutant composition and/or concentration that reaches the navigable water may differ from the composition/concentration of the

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discharge “through chemical or biological interaction with soils, microbes, plants and their root zone, groundwater, or other pollutants, or simply through physical attenuation or dilution,” such that the discharge through groundwater may not be the functional equivalent of a direct discharge.

Introduction of an eighth factor

EPA introduces an eighth factor to consider in performing a “functional equivalent” analysis: the design and performance of the system or facility from which the pollutant is released. EPA includes this factor because a facility or system may be designed or operated in a way that significantly changes the composition and/or concentration of pollutants that reach navigable water, thereby affecting whether the pollutant released by the point source is the “functional equivalent” of the pollutant that enters the surface water. For example, a system may be designed to “promote dilution, adsorption or dispersion of the pollutant, thereby affecting the extent to which the pollutant is chemically changed, the amount of pollutant entering the water of the United States relative to the amount of the pollutant that leaves the point source, and the degree to which the pollutant has maintained its specific identity at the point it reaches a water of the United States.” Facilities with a storage or treatment system (e.g., a septic system or settling pond) may be less likely to require a NPDES permit because the function of the system could prevent the functional equivalent of a discharge of pollutants to waters of the United States.

“Functional equivalent” test still evolving

The “functional equivalent” analysis is factually dependent and can be determined only on a case-by-case basis. The draft guidance does not provide any “hard and fast” rules that the regulated community can rely on to assess whether a point source discharge that enters a navigable water through groundwater would require a NPDES permit. Continued uncertainty and differences in the application of the analysis among the regulatory agencies and/or jurisdictions are nearly certain, especially with the possibility that the incoming Biden administration may revise or rescind the draft guidance.