

**EPN Comments on Draft Guidance Regarding
CWA Section 402 NPDES Permitting of Certain Discharges
through Groundwater to Surface Waters**

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

December 21, 2023

The [Environmental Protection Network](https://www.epn.org/) (EPN) harnesses the expertise of more than 600 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

As described in more detail below, EPN fully supports the EPA draft guidance titled, *Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater*. The draft guidance supports the court's outlined approach to identify the types of information that may be used to show that a discharge through groundwater is regulated under the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program using a functional equivalent analysis. EPN does have a few comments and suggestions regarding the draft guidance as discussed below.

The wastewater treatment system used in Maui injected their treated wastewater into deep wells, which is a fairly common approach. The deep wells were intended to inject wastewater into a confined substrate so that liquid would not migrate from the injection point. However, when it became clear that the aquifer was not confined and wastewater was migrating through a form of a continuous connection into the near shore waters, a dye tracer study was conducted which provided evidence that the wastewater was being discharged into the ocean.

The wastewater facility pumps approximately 4 million gallons of water daily into the aquifer using four injection wells located about one half mile from the Pacific Ocean. The Hawaii Wildlife Fund brought a citizen's suit under CWA alleging a discharge to waters of the U.S. without a permit when the wastewater constituents were found in the Pacific Ocean. The District Court held in favor of the Hawaii Wildlife Fund, finding the discharge through the wells was "functionally one into navigable water."¹ The County of Maui appealed the decision to the Ninth Circuit Court of Appeals, which affirmed the District Court finding that when "pollutants are fairly traceable from the point source to a navigable water," an NPDES permit is required.²

Ultimately, the U.S. Supreme Court held that a discharge from a point source that flowed to a water of the United States through groundwater was a discharge that could require an NPDES permit if, under the relevant facts, the discharge was the "functional equivalent" of a direct discharge.³ *County of Maui v. Hawaii Wildlife Fund*.⁴ The Court identified a series of factors that should be considered when making this

¹ 24 F. Supp 3d. 980, 998, (Haw. 2014).

² 886 F. 3d. 737, 749, (2018).

³ See draft guidance, Pg 1.

⁴ See *County of Maui, Hawaii v. Hawaii Wildlife Fund et al*, 140 S. Ct. 1462 (2020).

determination. The EPA draft guidance, following the factors identified by the Court, is intended to provide permitting authorities, the regulated community, and other stakeholders some of the factors that should be considered in appropriately applying the “functional equivalent” standard in the NPDES permits program. “This draft guidance applies to discharges from point sources that reach waters of the United States via groundwater or other subsurface flows.”⁵

As an introductory matter, the draft guidance recognizes that many states regulate groundwater and, in some cases, define state waters more broadly than waters of the U.S. The focus of this draft guidance is on federal regulation of these discharges. EPA notes that dischargers should check to determine whether state laws apply if there is a discharge to state waters.⁶ The draft guidance also notes that the document does not create any rights and does not have the force and effect of law.⁷ To add support to the draft guidance, EPN suggests adding a notation that notwithstanding the limitations, to the extent the draft guidance is consistent with the Supreme Court decision, the underlying requirements are consistent with the CWA.

The draft guidance provides an outline of factors identified by the Court as some of the factors that may be considered when evaluating if the discharge meets the functional equivalent test. These include “(1) transit 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; and (7) the degree to which the pollution (at that point) has maintained its specific identity.”⁸ These factors are intended to be illustrative and the draft guidance notes that there are many other factors that could be considered. EPN supports this flexible approach that allows for additional relevant factors to be considered.

The draft guidance focuses on point sources that discharge to groundwater, noting the dischargers should assess whether the discharges reach waters of the U.S. when deciding whether to apply for an NPDES permit. The draft guidance outlines an approach that sets out some general principles that can be applied, focusing on the constituents in the wastewater. As discussed further below, the draft guidance notes that a single constituent could be adequate to show a connection.

EPN agrees with this approach; however, we recommend that the guidance note that a water-soluble dye study can be an effective way to determine whether there is a connection to jurisdictional waters. These dyes can be added to the waste stream at a known concentration and measured in the receiving waters to assess the presence of a continuous connection, time of travel, dilution, and locations of the discharges. It will allow many of the factors identified by the Court and in the draft guidance to be fully assessed. This is the same approach that was used in Maui to show that the discharges were being released to the near shore waters.

The draft guidance, citing the Supreme Court, notes that dispersion in the receiving water is a factor to consider using the concept of a discharge “plume.”⁹ The more confined the plume is in the receiving waters of the U.S., the more evidence this provides that the discharge is the functional equivalent. The draft

⁵ *Id.*

⁶ *See* draft guidance fn 2.

⁷ *See* draft guidance fn 3.

⁸ *See* draft guidance, Pg 2, citing Opinion at 1476-77.

⁹ *See* draft guidance Pg 4 (c) Other potentially relevant factors.

guidance notes that “minimal dispersion before entering a water of the US . . . provides evidence that the discharge may be a functional equivalent of a direct discharge.”¹⁰ Although EPN understands the concept, variability in the analysis of plumes opens the door for differences in application of the functional equivalent concept and the potential claim that this is equivalent to a non-point source discharge. As drafted, dischargers may use the argument that their discharge is dispersed more than minimally to claim it is not the functional equivalent. We recommend EPA clarify that the level of dispersion is only one factor to consider and more than minimal dispersion does not limit the application of the functional equivalent analysis. EPN does note that the guidance states that the presence of one individual wastewater constituent (or potentially dye) in the discharge area “is a reasonable indicator for other constituent pollutants.”¹¹ This could be adequate evidence to trigger a functional equivalent analysis even if the discharge is dispersed. For example, boron is a common pollutant in the wastewater in ash ponds or impoundments. In those cases, the presence of boron in the discharge to waters of the U.S. should trigger a functional equivalent analysis.

In discussing other potentially relevant factors, the draft guidance states that a “relatively higher mass of pollutant(s) reaching a water of the United States relative to the measured or estimated mass of pollutant(s) leaving the point source” and, similarly, a “relatively higher concentration of pollutant(s) reaching a water of the United States relative to the measured or estimated concentration of pollutant(s) leaving the point source would support the finding of a functional equivalent discharge.”¹² Although EPN agrees that this potentially could be a factor in making a functional equivalent determination, we recommend the draft guidance provide more detail on how this comparison should be made in terms of the range of levels of mass or concentration that would be relevant.

EPN also agrees with the discussion of other potentially relevant factors discussed in the Maui opinion to identify a functional equivalent discharge but suggests some clarification in the draft guidance would be helpful.¹³ These factors include the type of material the pollutant travels through to reach the discharge and whether the pollutant is “diluted or chemically changed” during the movement through the substrate to the discharge. We recommend EPA clarify that although these are important factors to review, the dilution or chemical changes that may occur do not mitigate a showing of functional equivalence. Similarly, the draft guidance includes flow characteristics and whether the flows are continuous or intermittent.¹⁴ The guidance should clarify that it is the discharge of a pollutant that triggers the CWA, not whether it is continuous or intermittent. The draft guidance also notes that “[a]ny treatment technologies planning to be used and whether chemicals or additives will be used in the treatment.”¹⁵ To help with the analysis, EPA should add specific guidance as to how this information would be used in making a functional equivalent analysis.

EPN agrees that EPA’s current permit application forms do not require some of the information related to discharge through groundwater that would be necessary to make the functional equivalent determination. Under the NPDES regulations, an applicant must provide other information necessary for the Director to assess and make a determination on issuing an NPDES permit. To address this requirement, the applicant should include the factors that are relevant to the functional equivalent analysis.¹⁶ By way of illustration, the

¹⁰ *Id.*

¹¹ *See* draft guidance Pg 3.

¹² *See* draft guidance Pgs 4-5.

¹³ *See* draft guidance Pg 4.

¹⁴ *See* draft guidance Pg 6.

¹⁵ *Id.*

¹⁶ *See* draft guidance Pg 5, Section 4.

draft guidance identifies what supplemental information may be needed to have a complete application under the NPDES regulations. Both the permitting authority and the applicant will have to determine what level of information is needed. EPN agrees with this flexible approach.

It is important to recognize that this draft guidance, by clarifying the test articulated by the Supreme Court, puts dischargers on notice that they will need to assess the potential for functional equivalent discharges in their situations. The draft guidance also sets the stage for enforcement actions and citizen suits if the discharger does not obtain NPDES permit coverage. EPN supports this approach as consistent with how the CWA is implemented and urges EPA to be transparent about where these functionally equivalent discharges are located.¹⁷

The draft guidance also outlines factors that should not be considered in making a functional equivalent analysis.¹⁸ The draft guidance references court opinions on intent and notes that the CWA is a strict liability statute so the intent of the discharger is not relevant to the analysis. The draft guidance also notes the Court in Maui found that the existence of a state program does not preclude the application of the CWA. EPN agrees with this analysis. State groundwater protection programs are an important tool for states to use to protect their state waters, but they should not preclude the appropriate assertion of federal jurisdiction. We recommend EPA add to this list of factors that should not be considered. Dilution that may occur in the receiving water body is not an appropriate factor to consider in the functional equivalent analysis. It is the discharge of the pollutant into the water body that is covered by the CWA.

In conclusion, EPN appreciates the EPA efforts to implement the Supreme Court's decision in the Maui case and fully supports this draft guidance. The potential environmental impacts of these types of discharges need to be addressed, and this draft guidance will help states more fully understand the necessary analysis to make a functional equivalent determination.

Thank you for providing the opportunity to comment on this important draft guidance.

¹⁷ The draft guidance should also note that an NPDES permit can prohibit discharges to groundwater. An example of this can be found in the EPA general permit for Concentrated Animal Feeding Operations for New Mexico which does not authorize discharges of pollutants including wastewater to surface waters through groundwater. See <https://perma.cc/99TC-8QTL>

¹⁸ See draft guidance Pg 6, Section 5.