

Comments of the American Fuel & Petrochemical Manufacturers, the American Road & Transportation Builders Association, the National Mining Association, The Fertilizer Institute, and the U.S. Chamber of Commerce on the U.S. Environmental Protection Agency's Draft Guidance, Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollution Discharge Elimination System Permit Program to Discharges Through Groundwater (Nov. 20, 2023)

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I. Introduction

On November 20, 2023, EPA issued draft guidance on the application of the Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) ("*County of Maui*"), to discharges from point sources to jurisdictional surface water through groundwater.¹ We appreciate EPA's publishing the draft guidance for public comment and look forward to further opportunities to engage with EPA on such important issues.

Respectfully, however, we believe that the draft guidance contains major flaws and requires significant revision. In contrast to EPA's prior *County of Maui* guidance issued in January 2021, this draft document provides little (if any) direction to permitting authorities or regulated parties on what constitutes a covered discharge to navigable waters (e.g., waters of the United States ("WOTUS")) through groundwater under the Clean Water Act ("CWA"). This is a missed opportunity for EPA to provide regulatory certainty, especially since the agency's own observation just two years ago that *County of Maui* created "significant uncertainty concerning how the regulated community and permitting authorities should evaluate point source discharges that travel through groundwater before reaching a water of the United States."² Indeed, instead of proposing needed clarification, EPA's draft guidance creates even more confusion for the regulated community and permitting authorities. First, the guidance would distort the Supreme Court's decision in *County of Maui*. Second, the guidance improperly would preclude consideration of important factors other than time and distance in the "functional equivalent" analysis. Third, the guidance would introduce a new jurisdictional theory that is contrary to the CWA by suggesting that the detection of a "constituent" of a pollutant may be sufficient to trigger NPDES permitting requirements. Finally, the guidance loosely uses the statutorily defined term "discharge," creating additional confusion. For these reasons, EPA's draft guidance must be reconsidered in its entirety. Before proceeding to finalize any guidance on this topic, EPA should meaningfully engage the regulated community and repropose a new draft guidance for stakeholder consideration that is reflective of input received.

II. Background

A. The *County of Maui* Decision

In 2012, citizen groups sued the County of Maui for allegedly violating the CWA based on the allegation that pollutants from injection wells entered the Pacific Ocean through groundwater. According to the groups, such releases should have been authorized by a National Pollutant Discharge and Elimination System ("NPDES") permit. The district court and the Ninth Circuit agreed, although they articulated different tests for determining when an NPDES permit is required. The Supreme Court granted the County's petition for *certiorari* on the question of "whether the Act requires a permit when pollutants are conveyed to navigable waters by a nonpoint source, here, groundwater."³ In reversing the Ninth Circuit's decision, the Court did not decide whether a permit is required for the particular subsurface

¹ EPA, Draft Guidance, *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* (Nov. 20, 2023) ("EPA's 2023 Draft Guidance").

² EPA, Guidance Memorandum, *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* (Jan. 14, 2021) ("EPA's January 2021 Guidance"), rescinded September 15, 2021.

³ *County of Maui*, 126 S. Ct. at 1468 (quotations and citations omitted).

releases at issue⁴; rather, the Court interpreted the statutory term “discharge of a pollutant” under the CWA, 33 U.S.C. § 1362(12), and remanded for further proceedings consistent with its interpretation of that term.

In analyzing the meaning of “discharge of a pollutant,” all nine Justices rejected the interpretations proposed by (1) the Ninth Circuit (“fairly traceable”); (2) the citizen groups (“proximate cause”); and (3) EPA (exclusion of any discharges that travel through groundwater). Instead, the majority determined that an NPDES permit is required: (1) when there is a direct discharge from a point source into navigable waters; or (2) when there is the *functional equivalent of a direct discharge*.⁵ “That is, an addition falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches *the same result* through *roughly similar* means.”⁶ In other words, “[w]hether pollutants that arrive at navigable waters after traveling through groundwater are ‘from’ a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.”⁷

The Supreme Court recognized that this approach does not “clearly explain how to deal with middle instances” between those where “the permitting requirement clearly applies,” such as where “a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach),” and those where “permitting requirements likely do not apply,” such as where a “pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later.”⁸ Accordingly, the Supreme Court set forth “some of the factors that may prove relevant (depending upon the circumstances of a particular case)”: (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.⁹

According to the Supreme Court, “[t]ime and distance will be the most important factors in most cases, but not necessarily every case.”¹⁰ In addition, the Supreme Court’s test should not be applied in a manner that “create[s] serious risks ... of undermining state regulation of groundwater or ... creat[es] loopholes that undermine the statute’s basic federal regulatory objectives” to provide “federal regulation of identifiable sources of pollutants entering navigable waters.”¹¹ In all events, the Supreme Court did not anticipate that its new test would result in “unmanageable expansion” of the NPDES permitting regime.¹²

⁴ We use the phrase “subsurface releases” in these comments to refer to pollutants that enter navigable waters through groundwater.

⁵ *County of Maui*, 126 S. Ct. at 1468.

⁶ *Id.* at 1476 (emphasis added).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1476-77.

¹⁰ *Id.* at 1477.

¹¹ *Id.* at 1476-77.

¹² *Id.* at 1477.

B. EPA's January 2021 Guidance

In January 2021, EPA issued guidance on applying *County of Maui*.¹³ The guidance addressed “discharges of pollutants that reach waters of the United States through groundwater” and placed the “functional equivalent analysis into context within the existing NPDES permitting framework.”¹⁴ According to EPA, the *County of Maui* decision created “significant uncertainty concerning how the regulated community and permitting authorities should evaluate point source discharges that travel through groundwater before reaching a water of the United States.”¹⁵

To address this uncertainty in accordance with the Supreme Court’s decision and the statutory limits on CWA jurisdiction, the guidance “reiterated” two basic principles that govern whether an owner needs an NPDES permit: (1) there must be an actual discharge of a pollutant to a water of the United States; and (2) such a discharge must be from a point source. With respect to the second principle, EPA stated that the “requirement of a release from a point source applies to discharges through groundwater no less than it applies to direct discharges.”¹⁶

In conducting the analysis, EPA explained in its January 2021 guidance that “science ... informs ... whether that discharge is ultimately the ‘functional equivalent’ of a direct discharge.”¹⁷ If, for example, “the pollutant composition or concentration that ultimately reaches the water of the United States is different from the composition or concentration of the pollutant as initially discharged, whether through chemical or biological interaction with soils, microbes, plants and their root zone, groundwater, or other pollutants, or simply through physical attenuation or dilution, it might not be the ‘functional equivalent’ of a direct discharge to a water of the United States.”¹⁸ In such circumstances, there is neither a “direct[] deposit[]” from a point source into navigable waters nor a “discharge [that] reaches *the same result* through *roughly similar* means” to a direct point source release.¹⁹

EPA also identified an “additional factor that may prove relevant” to this inquiry and thus “should be considered when performing a ‘functional equivalent’ analysis: the design and performance of the system or facility from which the pollutant is released.”²⁰ For example, the point of discharge may (1) “be engineered to direct the pollutant into a subsurface aquitard or to a surface area designed to slow the transit time of a pollutant that ultimately reaches a water of the United States”; or (2) “be located to intentionally increase the distance the pollutant would travel before reaching a water of the United States.”²¹ In such cases, “it may be less likely that an NPDES permit would be required ... because the discharge is not the functional equivalent of a direct discharge to a water of the United States.”²²

¹³ EPA’s January 2021 Guidance. EPA issued a draft for public comment on December 10, 2020, and finalized the guidance on January 14, 2021. Along with the final guidance, EPA issued a “Summary of Responses to Major Concerns and Comments,” available at <https://www.regulations.gov/document/EPA-HQ-OW-2020-0673-0126>.

¹⁴ *Id.* at 1 n.2.

¹⁵ *Id.* at 2-3.

¹⁶ *Id.*

¹⁷ EPA’s January 2021 Guidance at 6.

¹⁸ *Id.*

¹⁹ *Id.* at 1476 (emphasis added).

²⁰ EPA’s January 2021 Guidance at 7.

²¹ *Id.*

²² *Id.*

C. EPA's Rescission of the January 2021 Guidance

In September 2021, without any prior notice or opportunity for public comment, EPA rescinded its January 2021 guidance. In doing so, however, EPA raised questions about only one aspect of that guidance—the consideration of “the design and performance of the system” in performing a “functional equivalent” analysis.²³ EPA otherwise expressed no disagreement with the main thrust of that guidance, (e.g., that the NPDES permit requirement applies to a release to groundwater only where the release “reaches the same result” as a direct discharge to navigable waters “through roughly similar means.”) As a result, while evaluating “appropriate next steps to follow the rescission of the guidance,” EPA said it would “continue to apply site-specific, science-based evaluations to determine whether a release from a point source through groundwater that reaches jurisdictional surface water is a ‘functional equivalent’ of a direct discharge.”²⁴

III. EPA's Draft 2023 Guidance Is Legally Flawed

More than two years later, on November 20, 2023, EPA issued its latest draft guidance regarding application of *County of Maui*.²⁵ In this draft guidance, EPA largely summarizes the holding in *County of Maui*, stating that whether a “discharge through groundwater” is the “‘functional equivalent’ of a direct discharge” to navigable waters is “highly dependent on site-specific considerations.”²⁶ In doing so, however, the draft guidance (1) distorts key aspects of the Supreme Court’s holding; (2) attempts to preclude consideration of an important factor in the “functional equivalent” analysis; (3) introduces a new jurisdictional theory that is contrary to the CWA; and (4) confuses the issues by loosely using the statutory term “discharge.” As explained below, EPA must correct these legal deficiencies, and should reissue proposed guidance that takes an appropriate tack, before finalizing any guidance on applying *County of Maui*.

A. EPA's Draft Guidance Distorts the Supreme Court's Holding in *County of Maui*

As an initial matter, we note that *County of Maui* speaks only to determining whether there is a discharge of a pollutant from a point source to navigable waters within the meaning of the statute; it does not address the question whether a particular facility is a “point source” in the first place. Consistent with its January 2021 guidance, EPA should reiterate in the guidance that the “requirement of a release from a point source applies to discharges through groundwater no less than it applies to direct discharges.”²⁷ Thus, only after it is established that an addition of a pollutant “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.”²⁸

Putting aside the “point source” issue, EPA’s draft guidance distorts key aspects of *County of Maui*. While noting that “time and distance” are important factors to the functional equivalent analysis, the

²³ EPA, Rescission of the January 2021 Guidance Document, “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollution Discharge Elimination System Permit Program” (Sept. 15, 2021).

²⁴ *Id.*

²⁵ EPA’s 2023 Draft Guidance.

²⁶ *Id.* at 3.

²⁷ EPA’s September 2021 Guidance at 5.

²⁸ *Id.* at 6 (emphasis added).

agency's draft guidance construes the Supreme Court's discussion of "50 miles" of distance and "many years" of time as "helpful *reference points* for case-specific functional equivalent analyses."²⁹ But these are hardly "reference points" that a permitting authority should begin with for case-specific analyses. Rather, the Supreme Court's discussion indicated that these time and distance numbers are extreme examples of circumstances where the NPDES requirements would not apply. The Supreme Court was not concerned about these extreme circumstances but about situations involving the "middle instances."³⁰ EPA's draft guidance does nothing to clarify how to apply the *County of Maui* factors to determine whether a conveyance of a pollutant via groundwater to navigable waters is the functional equivalent of a direct discharge and thus needs a permit. Nor does the draft guidance account for the recent decision in *Sackett v. EPA*, 143 S. Ct. 1322, 1337 (2023), where the Supreme Court expressed concern about an interpretation of the CWA that would require costly experts to determine whether there is jurisdiction.

EPA's draft guidance also fails to address the legal standard enunciated by the Supreme Court in *County of Maui* governing whether a subsurface release is the "functional equivalent" of a direct discharge to navigable waters—that is, whether the conveyance of a pollutant via groundwater to navigable waters "reaches the same result" through "roughly similar means" as a direct discharge.³¹ Although the outcome of each case will depend on the application of the factors identified by the Supreme Court to the facts of the specific case, this legal standard governs how those factors are to be evaluated and weighed. In many "middle instances," subsurface releases into navigable waters will not reach those waters through "roughly similar means" as a direct discharge from a point source or "reach[] the same result" once in navigable waters, and thus *cannot be* the "functional equivalent" of a direct discharge under the standard specified in *County of Maui*.³²

For example, unlike a subsurface release, a direct discharge of a pollutant to navigable waters is detectable, can easily be monitored, and enters the navigable water shortly after it exits the point source, with the result that there is little if any dilution in the pollutant concentration between exiting the point source and entering the navigable water.³³ A direct discharge usually consists of a single stream at a single location, whereas subsurface releases are typically more diffuse and cover larger areas. Likewise, subsurface releases often move more slowly than direct discharges, mix with other materials (including other pollutants), and may be "highly diluted."³⁴ And, unlike direct discharges of a pollutant to navigable waters, subsurface releases often travel through disjointed pathways (e.g., soil, sand, and permeable rock) that require advanced technologies to trace, such as dye tracer studies or similar approaches. EPA should make clear that mere traceability is insufficient to establish a discharge through groundwater that requires a permit. In short, in many "middle instances," the discharge will not (1) "reach[] the same result" as a direct discharge due to dilution and physical or chemical transformation of constituents in the discharge or (2) reach that result through "similar means."

Any final guidance should emphasize such key aspects of the legal standard the Supreme Court provided for evaluating its "functional equivalence" factors. Applying the standard properly, any guidance

²⁹ EPA's 2023 Draft Guidance at 4.

³⁰ *County of Maui*, 140 S. Ct. at 1476.

³¹ *County of Maui*, 140 S. Ct. at 1476.

³² *Id.*

³³ See, e.g., 41 Fed. Reg. 24,709, 24,710 (June 18, 1976) ("water pollution" regulated under the NPDES program is "characterized by discrete and confined conveyances from which discharges of pollutants into navigable water *can be controlled by effluent limitations*") (emphasis added).

³⁴ *County of Maui*, 140 S. Ct. at 1470.

should make clear that even if a permitting authority focused solely on the time and distance factors, the permitting authority might still conclude that:

- A subsurface release entering navigable water after several days or weeks is not the “functional equivalent” of a direct discharge entering the water in a matter of seconds or minutes because the means of release is not “roughly similar” to a release from a direct point source;
- A subsurface release traveling hundreds of yards is not the “functional equivalent” of a direct discharge traveling a few yards because it is not “roughly similar” to a direct point source release; or
- A release that takes that much time or travels that distance will be more diluted when it reaches navigable waters than one entering directly from a point source and therefore does not “reach[] the same result” as a direct point source release.

In other words, the Supreme Court’s “functional equivalent” test is meant to plug so-called “obvious loophole[s]” in the NPDES permitting program, not to cover all releases to groundwater that may migrate to a jurisdictional surface water.³⁵

The Supreme Court’s five other factors discussed above (factors 3 through 7) support this point. A release that is diluted and whose composition is altered as it travels may not be “functionally equivalent” to a direct discharge because it does not enter navigable waters through “roughly similar means” or “reach[] the same result” as a direct discharge, even if this occurred over a relatively short time or distance.³⁶ As a result, any final guidance should not suggest that a short time and distance may alone be sufficient to require an NPDES permit.³⁷ EPA should emphasize that the overarching question in evaluating “functional equivalence” is “how similar to (or different from) the particular discharge is to a direct discharge.”³⁸ In addressing this question, time and distance provide only part of the analysis of whether a subsurface release is the “functional equivalent” of a direct discharge.

B. EPA’s Draft Guidance Improperly Precludes Consideration of Key Factors

The Supreme Court made clear that courts should not apply the “functional equivalent” test “in a way that could interfere ... with States’ traditional regulatory authority” over groundwater.³⁹ Thus, EPA disregards its obligations and the limits of its authority by asserting in the draft guidance that “a state groundwater protection program is not relevant to whether the functional equivalent of a direct discharge analysis applies....”⁴⁰ The CWA requires that EPA “preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the

³⁵ *Id.* at 1473.

³⁶ *Id.* at 1476.

³⁷ *See, e.g.*, 2023 Draft Guidance at 4 (“time and distance traveled will ... in many cases [be] the only factors that need [to] be considered”).

³⁸ *County of Maui*, 140 S. Ct. at 1476.

³⁹ *Id.* at 1471.

⁴⁰ EPA’s 2023 Draft Guidance at 7.

Administrator in the exercise of his authority under this chapter.”⁴¹ Therefore, the guidance should recognize that a groundwater standard could potentially be relevant to the analysis of “functional equivalence,” particularly if EPA is attempting to interfere with a sovereign state function.⁴²

Moreover, groundwater near waste management facilities is often regulated by the Resource Conservation and Recovery Act and equivalent state laws, which include requirements for monitoring and restoring groundwater to ensure protection of human health and the environment. In this regard, EPA’s suggestion in its draft guidance that it would be inappropriate to consider existing groundwater regulation in evaluating “functional equivalence” is contrary to *County of Maui*. As one court recently explained, “extending federal authority [under *County of Maui*] in such a way that would undermine existing efforts of state and local authorities ... to regulate the state’s ... groundwater [is] ... an outcome that the Supreme Court explicitly rejected in *Maui*.”⁴³ Moreover, how a specific release has historically been regulated may bear on whether the release should be considered “roughly similar” to a direct discharge from a point source into navigable waters and whether the discharge through groundwater would “reach[] the same result” as a direct point source discharge.⁴⁴ As the Supreme Court explained, the “context” of the CWA “imposes natural limits” and “the need ... to preserve state regulation of groundwater and other nonpoint sources of pollution.”⁴⁵ EPA should confirm in any final guidance the relevance of existing groundwater regulation in the “functional equivalent” analysis and the need to preserve state regulation over groundwater.

C. EPA’s New Jurisdictional Theory Is Contrary to the Clean Water Act

In addition to distorting the Supreme Court’s decision, EPA’s draft guidance raises a new jurisdictional theory that was not addressed in *County of Maui*—that is, the theory that a detection of a “constituent” of a pollutant may be sufficient to trigger NPDES permitting requirements as a functional equivalent of a direct discharge to navigable waters.⁴⁶ EPA fails to cite any statutory language or case law to support this theory. The NPDES permitting program applies to the discharge of *pollutants* from a point source to navigable waters, not to the mere detection of a constituent of a pollutant in groundwater or a surface water. Consistent with this approach and the CWA, the Supreme Court in *County of Maui* focused on pollutants—indeed, four of the seven factors focus on the character of the pollutant itself, not whether the pollutant can be inferred to have been discharged because of some detected constituent.

Further, a detected constituent is often naturally occurring in the environment, the result of a permitted NPDES discharge, or the result of other sources such as non-point source pollution or upstream sources. In such cases, the detection of a constituent would have no bearing on whether the unpermitted discharge of a pollutant from a point source is occurring or has occurred at a particular facility. Quite the contrary: if all that is present is a constituent, this would suggest that the release through groundwater was not “functionally equivalent” to a direct discharge from a point source because that release did not

⁴¹ 33 U.S.C. § 1251(b).

⁴² *County of Maui*, 149 S. Ct. at 1472 (“... Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.”).

⁴³ *Conservation Law Found., Inc. v. Town of Barnstable*, 615 F. Supp. 3d 14, 27 (D. Mass. 2022).

⁴⁴ See, e.g., 2023 Draft Guidance at 5 (EPA’s “current permit application forms are not specific to discharges through groundwater”).

⁴⁵ *County of Maui*, 149 S. Ct. at 1476.

⁴⁶ EPA’s 2023 Draft Guidance at 3-4.

“reach[] the same result” as a direct discharge once it entered navigable waters.⁴⁷ Consistent with the plain language of the CWA, EPA should make clear in any final guidance that the mere detection of a “constituent” in a nearby water would not trigger NPDES permitting under the CWA.

D. The Draft Guidance Is Undermined by its Loose Use of the Term “Discharge”

The term “discharge” is a critical component of the statutory framework. The CWA prohibits “the discharge of any pollutant by any person” unless the discharge is permitted or otherwise in compliance with the Act.⁴⁸ The Act defines “‘discharge’ when used without qualification [to] include[] a discharge of a pollutant, and a discharge of pollutants.”⁴⁹ In turn, the Act defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.”⁵⁰

Reflecting the statutory distinction between “addition” and “discharge,” *County of Maui* holds “the statute requires a permit ... when there is the functional equivalent of a direct discharge. ... That is, an addition falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.”⁵¹

EPA’s draft guidance, however, does not reflect the statutory distinction between “addition” and “discharge.” Rather than address when the “addition” of a pollutant to navigable waters via groundwater would be the functional equivalent of a direct discharge, the guidance describes all releases of pollutants into groundwater that reach navigable waters as “discharges” and then provides factors EPA will consider when determining whether the predetermined “discharge” is the functional equivalent of a direct discharge.

Generic use of the term “discharge” to cover all releases of pollutants to groundwater that reach navigable waters is at best confusing, particularly for members of the public who are not familiar with any nuances EPA may have in mind between its broad use of “discharge” in this context and the statutory prohibition on the “discharge of any pollutant.” EPA should refrain from using “discharge” to generically describe releases of pollutants to groundwater that reach navigable waters and should instead follow the Supreme Court’s lead in using terms such as “release” or “emit.”

IV. Conclusion

Respectfully, we submit that EPA’s draft guidance fails to provide needed clarity to regulators or the regulated community; creates new confusion in significant areas; and is contrary to *County of Maui* and the CWA. Accordingly, we request that EPA reconsider the draft guidance in its entirety, consistent with the comments above; engage stakeholders; and repropose new draft guidance for public review and comment. We appreciate EPA’s consideration and look forward to working with the agency as it continues its evaluation of these important issues and develops guidance consistent with Supreme Court precedent.

⁴⁷ *County of Maui*, 149 S. Ct. at 1476.

⁴⁸ 33 U.S.C. § 1311(a).

⁴⁹ 33 U.S.C. § 1362(16).

⁵⁰ 33 U.S.C. § 1362(12).

⁵¹ *County of Maui*, 149 S. Ct. at 1476.