



January 11, 2021

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RE: 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, Docket: EPA-HQ-OW-2020-0673

Dear Mr. Sawyers and Mr. Wilson:

The Association of Clean Water Administrators (ACWA) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers who, on a daily basis, implement the water quality programs of the Clean Water Act (CWA). As the primary entities responsible for carrying out most of the CWA programs, states are very interested in any national regulatory updates or policy positions that may impact their ability to implement the CWA in their states.

The Environmental Protection Agency (EPA) is issuing a draft memorandum to provide guidance on how to apply the recent court decision *County of Maui v. Hawaii Wildlife Fund (Maui)*¹² and we offer the following recommendations to address the test outlined by the Court. In particular, the Supreme Court held that a National Pollutant Discharge Elimination System (NPDES) permit is required for a discharge of pollutants from a point source that reaches waters of the United States after traveling through groundwater,

¹ *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* found at <https://www.epa.gov/npdes/draft-guidance-memorandum-applying-supreme-courts-county-maui-v-hawaii-wildlife-fund-decision>.

² *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). Discusses when an NPDES §402 permit is needed under the Clean Water Act for point source discharges that travel through groundwater before reaching waters of the United States.

if that discharge is the “functional equivalent” of a direct discharge from the point source into navigable waters. The *Maui* decision outlines seven non-exclusive factors that should be considered when evaluating such a discharge.

Coregulator Collaboration

On June 7, 2019 – prior to the *Maui* decision – ACWA provided a four-page comment letter explaining how point source discharges to groundwater were being managed across the country. In this letter ACWA expressed the importance of further engagement with states because: 1) states have significant experience with discharges of pollutants to groundwater that eventually lead to surface water via direct hydrologic connection; 2) states have technical expertise and firsthand knowledge of the suite of federal and state authorities and approaches that have historically been used to manage and regulate these types of discharges; 3) policies affecting this issue directly affect state implementation of the NPDES program in 47 states.

ACWA appreciates EPA seeking comment from stakeholders on this important issue. However, because of states’ congressionally designated role under the CWA as co-regulators, ACWA again requests that EPA collaborate with states to develop a workable policy/rule that recognizes the diversity of state programs, while applying the Supreme Court’s decisions.

Recommendation 1: EPA should engage in meaningful collaboration with states before finalizing this guidance and/or a future rule making. Meaningful collaboration includes early engagement, reviewing draft products, identifying intended and unintended consequences, assessing opportunities for state program improvement & enhancement, considering implementation obstacles and challenges, discussing administrative resource implications, and supporting states with appropriate training, tools and support materials.

Guidance vs. Rulemaking

Policy/guidance generally supplements and helps clarify new or existing rules. Guidance can come as memoranda, interagency statements, advisories, bulletins, policy statements, FAQs, letters of interpretation, etc. Properly drafted guidance does not attempt to mandate and therefore does not have the force of law. The proposed guidance reiterates what states already know from the *Maui* decision regarding the requirement of a NPDES permit for discharges to waters of the U.S. from point sources.

Recommendation 2: EPA should narrowly focus this guidance on expressing support for state and federal permitting authorities in making **all** interpretative and analytical decisions regarding the *Maui* Supreme Court decision. In the alternative, should EPA wish to pursue a more substantive policy/rulemaking, EPA should further consider ACWA’s major comments, concerns, and recommendations found below.

Seven Factors Identified by Supreme Court

EPA's draft memorandum provides the Supreme Court created list of factors that should be considered when determining whether the groundwater discharge was the "functional equivalent" of a surface water discharge that would require an NPDES permit. This non-exclusive list includes: (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. What the EPA guidance does not clearly articulate is whether the permitting authority is free to develop their own threshold criteria for each factor. The guidance also does not discuss a weighting/balancing of the factors.

Recommendation 3: EPA should work with states to identify and share examples of analysis and criteria associated with the *Maui* factors. EPA should more clearly confirm that final criteria development for the factors, weighting of the factors, and associated analysis for each these types of facility discharges is at the discretion of the permitting authority.

Recommendation 4: EPA should provide states the types of tools, training, support materials, and other resources that would be most helpful to states in considering the factors.

Recommendation 5: EPA, with the assistance of ACWA, should compile a compendium of practices that states currently employ when regulating discharges to ground water, including permitting, application of ground or surface water quality standards, and engineering standards of design for treatment facilities that may introduce pollutants into ground water.

System Design and Performance

EPA also identified an eighth factor to be considered. EPA believes the design and performance of the system or facility from which the pollutant is released can help inform the scope and extent of the "functional equivalent" analysis and inform the factors identified in *Maui*. EPA believes the "composition and concentration of discharges of pollutants directly from a pipe or other discrete or discernible conveyance into a water of the United States with little or no intervening treatment or attenuation often differ significantly from the composition and concentration of discharges of pollutants into a system that is engineered, designed, and operated to treat or attenuate pollutants or uses the surface or subsurface to treat, provide uptake of, or retain water or pollutants."

Recommendation 6: EPA should further discuss and confer with states regarding the legal analysis followed in determining whether this kind of technology evaluation would be consistent with the CWA and the *Maui* Supreme Court Decision. As part of this discussion, states and EPA should discuss the implications of using

technology/treatment to avoid CWA liability, while potentially concentrating pollutants that might trigger CERCLA, solid waste, RCRA, etc.

Recommendation 7: EPA should work with states to identify and provide further examples of facilities/systems per design and performance that would heavily influence the analysis of whether an NPDES permit is needed or not.

Recommendation 8: EPA should discuss with states any other factors not yet included in the memorandum that states believe would also be important for the analysis.

Implementation Challenges

ACWA and states believes implementation of the *Maui* decision rests largely with the authorized permitting authorities. To avoid future debates on how factors and permits are applied, states would like to maintain an ongoing discussion with EPA over implementation issues.

Recommendation 9: States and EPA should discuss technical issues associated with the *Maui* decision implementation and this guidance, including but not limited to:

1. What is the minimum facility data set needed to assist a permitting authority in completing the *Maui* decision analysis?
2. What does a permit application look like? Will states/EPA need a new/revised application form? How does this affect the NPDES eReporting Rule required data elements?
3. What does an NPDES permit that addresses discharges of this nature look like?
4. What does the reasonable potential analysis look like for a permit of this nature?
5. What examples exist where permitting authorities have designed and conducted to determine if a discharge is occurring via groundwater?
6. In looking at the entire permitted system, from facility, through groundwater, to waters of the United States, where is the point from which compliance is measured? How will this be handled where the contribution to groundwater or waters of U.S., or both, is fairly diffuse?
7. How should a permitting authority analyze mixing zones, attenuation, groundwater standards, other water quality standards, etc.?
8. Can EPA confirm more directly, in any guidance or rule issued, that the agency is not intending to **limit** states' permitting or other groundwater authorities over these discharges?

Recommendation 10: ACWA invites EPA to jointly present this guidance and implementation of the *Maui* decision at ACWA's 2021 Mid-Year Meeting.

Though ACWA's process to develop comments is fairly robust and intended to capture the diverse perspectives of the states that implement these programs, EPA should always consider the comments and recommendations that come directly from states, interstates, and territories as well. Please contact ACWA's Executive Director, Julia Anastasio, at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,

A handwritten signature in blue ink that reads "Thomas C. Stiles". The signature is written in a cursive style.

Thomas C. Stiles
ACWA President
Director, Bureau of Water
Kansas Department of Health and Environment