

# Maui County Decision: Questions and Implications

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ACWA Conference  
March 18, 2021

# Maui County/Groundwater Issue

- Question: if pollutant goes into soil and/or groundwater, then into surface water, does it require NPDES permit?
- This issue could apply to any unit or operation from which pollutants eventually end up in surface water – septic tank, treatment basin, water storage basin, coal ash pond, green infrastructure system, drain tiles...

# Maui County Case

- Maui County discharged wastewater into injection wells
- Evidence showed migration into ocean
- Supreme Court decision: an NPDES permit is required if release into groundwater is “functional equivalent” of direct discharge into surface waterbody
- Left to lower courts and EPA to figure out what “functional equivalent” means

# Factors in “Functional Equivalence” Test in Maui County

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

# EPA Action on Maui County Issue

- EPA issued draft guidance on 12/10/20
- Final guidance issued in FR 1/14/21
- Guidance follows Court's 7 factors, but also lays out an 8<sup>th</sup> factor: design and performance of system or facility from which pollutant released
- Guidance also stresses that there must be an actual discharge from a point source to a water of the US in order for NPDES permit to be required
- Unclear what new Administration will do with the guidance – keep it, withdraw it, modify it?
- Several cases already pending that will apply Maui County – not clear how guidance will affect them

# Issues Not Yet Addressed

- If discharge passes “functional equivalent” test, what info has to be provided in permit application?
- How are effluent limits and other permit requirements determined?
  - How do you do “reasonable potential” analysis?
  - How do you consider fate and transport?
  - Where is point of compliance with limits?
  - Can you get a mixing zone? How is it done?
  - Where do you monitor?
- What if discharge is already regulated under existing EPA or state program?

# Questions?

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