

January 11, 2021

U.S. Environmental Protection Agency
EPA Docket Center
Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Filed via <http://www.regulations.gov>

Re: **Docket ID No. EPA-HQ-OW-2020-0673**

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, 85 Fed. Reg. 79,489 (Dec. 10, 2020)

The agricultural organizations listed below appreciate the opportunity to comment on EPA's draft memorandum providing guidance to the regulated community and permitting authorities on applying the recent decision of the U.S. Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in the Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) permit program for point source discharges that travel through groundwater before reaching waters of the United States (WOTUS).¹

The scope and administration of the CWA has been a focal point of the agricultural community since the Act's inception. The undersigned groups and their members represent, own, and operate facilities that are water-dependent enterprises. Farmers and ranchers need to know whether their day-to-day activities are subject to the CWA's NPDES permitting program or whether they are instead addressed by states in accordance with the Act's nonpoint source programs. Farmers and ranchers have long had to defend against activist litigation seeking to expand the scope of the NPDES permitting program. Likewise, the undersigned organizations have frequently represented their members' interests on the proper scope and limits of the NPDES program before Congress, federal regulatory agencies, and the courts. For instance, many of the undersigned organizations filed an *amicus* brief supporting the County of Maui in the Supreme Court.² Many of the undersigned organizations also commented on EPA's April 23, 2019, Interpretive Statement addressing whether the CWA's NPDES permit program applies to releases of pollutants from point sources to groundwater.³ Finally, many of the undersigned

¹ See 85 Fed. Reg. 79,489 (opening 30-day comment period).

² See Brief *Amicus Curiae* for Agricultural Business Organizations Supporting Petitioner, *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (May 2019), available at https://www.supremecourt.gov/DocketPDF/18/18-260/99914/20190515162627560_18-260.tsac.Agricultural.Business.Organizations.pdf.

³ See Comments of Agribusiness Association of Iowa, et al., EPA-HQ-OW-2019-0166-0210 (June 7, 2019).

organizations submitted comments on EPA's February 20, 2018, request for comment on the Agency's previous statements regarding the CWA and whether pollutant discharges from point sources that reach jurisdictional water may be subject to CWA regulation.⁴

As explained below, the undersigned organizations generally support EPA's Draft Guidance and its effort to help guide the regulated community and permitting authorities in applying the functional equivalent analysis in specific cases. The Draft Guidance reinforces important threshold requirements that must be satisfied before the need for an NPDES permit is triggered. And based on its decades of experience administering and enforcing the CWA, EPA reasonably concludes that only a small percentage of overall NPDES permits will continue to be issued for discharges that indirectly reach waters of the U.S. via groundwater. We agree with EPA's discussion of these issues in the Draft Guidance, and we offer some suggestions to further strengthen the Agency's analysis.

1. The Draft Guidance Correctly Reinforces that an Actual Discharge Is a Threshold Condition That Must Be Satisfied Before the "Functional Equivalent" Analysis Even Applies.

As explained in the Draft Guidance (at 3-4), *Maui* did not modify the threshold requirement that there be an actual discharge of a pollutant to a WOTUS before the need for an NPDES permit is triggered. The operative statutory prohibition states: "Except as in compliance with [*e.g.*, section 402] . . . of this title, the *discharge of any pollutant* by any person shall be unlawful."⁵ Nothing in this provision or any other provision in the CWA makes it unlawful to be *at risk* of discharging. Nor is there a need for permit coverage for discharges that are *wholly past*. Where a discharge has occurred in the past but has been corrected, there is no longer a need for permit authorization to discharge or for effluent limitations to restrict the quantity of pollutants discharged. Indeed, once a past discharge has been corrected, there is nothing more than a *potential* future discharge.

Multiple courts of appeals have confirmed that EPA's authority is limited to regulating actual discharges, not point sources themselves. Of particular relevance to the undersigned organizations, the Second and Fifth Circuits made this clear in 2005 and 2011 decisions invalidating EPA's attempts to impose a duty to apply for a permit on CAFOs.⁶ And long before those two decisions, the D.C. Circuit reached similar conclusions in a pair of decisions rejecting EPA's attempts to ban the construction of sources under certain circumstances.⁷ In the first decision, the Court explained that "the [Clean Water] Act only prohibits new sources from

⁴ See Comments of Agricultural Retailers Association, et al., EPA-HQ-OW-2018-0063-0666 (May 18, 2018).

⁵ 33 U.S.C. § 1311(a).

⁶ See *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749-51 (5th Cir. 2011) (holding that the 2008 CAFO Rule's requirement that CAFOs that "propose" to discharge must apply for an NPDES permit is *ultra vires*); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (holding that the 2003 CAFO Rule's "duty to apply" provision was *ultra vires*).

⁷ See *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) ("*NRDC I*"); *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988) ("*NRDC II*").

discharging pollutants without a permit, or in violation of existing standards. It does not prevent such sources from being built.”⁸ Likewise, in the second decision, the D.C. Circuit emphasized that “the CWA does not empower the agency to regulate point sources themselves; rather, EPA’s jurisdiction under the operative statute is limited to regulating the discharge of pollutants.”⁹

These cases confirm what the statutory text makes plain: EPA’s NPDES jurisdiction is limited to regulating the discharge of pollutants from a point source. Nothing in *Maui* changed this threshold requirement that there be an actual discharge. Moreover, as noted in the Draft Guidance, it is not enough that there be a release of pollutants from a point source. The mere release of pollutants from the point source is not sufficient to trigger NPDES permitting because a release does not necessarily constitute a “discharge,” i.e., an “*addition of any pollutant to navigable waters.*”¹⁰ The Draft Guidance appropriately reminds all stakeholders that: (i) “*Maui* did not instruct NPDES permitting authorities to *assume* that discharges to groundwater that occur in the vicinity of a jurisdictional water are the ‘functional equivalent’ of direct discharges to that water;” (ii) “a mere allegation (i.e., without supporting evidence) that a point source discharge of pollutants is or may be reaching a water of the United States via groundwater is not sufficient to trigger the need for an NPDES permit;” and (iii) “[n]either the ‘functional equivalent’ analysis set out by the Supreme Court nor the CWA itself requires a facility owner or operator or a permitting agency to prove the *absence* of a discharge.”¹¹

The undersigned organizations agree with all these important clarifications concerning the burden of proof and the scope of the *Maui* decision. Put simply, non-discharging facilities, such as CAFOs that have not (and may never) discharge, as well as CAFOs that have discharged in the past but corrected the cause of the discharge, are not subject to NPDES permit requirements, nor are they obligated to disprove that any pollutants may be reaching a water of the U.S.

2. *Maui* Did Not Change the Requirement that There Be a *Point Source* Discharge Before Regulatory Jurisdiction Can Be Established Under the CWA.

The Draft Guidance also correctly explains that there is no need to even consider the “functional equivalent” analysis unless there is an actual discharge of pollutants *from a point source* to WOTUS via groundwater. The undersigned organizations agree with and support EPA’s characterization of the “longstanding threshold condition” that pollutants that reach a WOTUS must be “from a point source” before the functional equivalent analysis in *Maui* comes into play.¹² The undersigned organizations recommend that, when EPA finalizes the Draft Guidance, it should clarify that *Maui* did not address either of the statutory exclusions from the definition of “point source” (“agricultural stormwater discharges” and “return flows from irrigated

⁸ *NRDC I*, 822 F.2d at 128 n.24, 129.

⁹ *NRDC II*, 859 F.2d at 169-70.

¹⁰ 33 U.S.C. § 1362(12) (emphasis added).

¹¹ Draft Guidance at 5.

¹² *See id.* at 5-6.

agriculture”),¹³ nor did that case deal with any of EPA’s regulatory exclusions from NPDES permitting, such as the “introduction of pollutants from non point-source agricultural and silvicultural activities” or “[d]ischarges from a water transfer.”¹⁴ Because the *Maui* decision did not modify any of these exclusions, if a discharge at a particular facility or parcel of land falls within the scope an exclusion, that is the end of the matter. There is no need to conduct a functional equivalent analysis because there is no discharge *from a point source*.

Similarly, if a discharge is subject to one of the statutory permitting exemptions in CWA Section 402(I),¹⁵ there is no need to conduct a functional equivalent analysis because Congress directed that EPA “shall not require a permit” for several categories of discharges in that section. In particular, Section 402(I)(1) provides that EPA “shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.”¹⁶ That permitting exemption eliminates the need to walk through the functional equivalent analysis for any such discharges.

In conclusion, the undersigned organizations support the discussions in the Draft Guidance explaining that *Maui* reinforces the basic principle that the discharge of pollutants that reaches, or will reach, a WOTUS must be from a point source to trigger NPDES permitting requirements. The undersigned organizations recommend that EPA should also explicitly state that *Maui* did not modify any of the exclusions from the definition of “point source” or from the NPDES permitting requirement.

3. The Undersigned Organizations Agree that the Majority of Discharges Through Groundwater Are Not the Functional Equivalent of a Direct Discharge and Thus, Remain Outside the Scope of NPDES Permitting.

The Draft Guidance states that only a subset of discharges of pollutants to groundwater that ultimately reach a WOTUS are fairly considered the “functional equivalent” of a direct discharge to a WOTUS. According to EPA, “[h]istorically, few NPDES permits have been issued for point source discharges of pollutants that reach waters of the United States via groundwater” and the number of such permits is “extremely low” compared to the “hundreds of thousands of NPDES permits that have been issued since the inception of the program[.]”¹⁷ This characterization is consistent with the undersigned organizations’ experience and with filings in various cases leading up to and including *Maui*, where litigants were only able to identify a handful of permits that have ever been issued for discharges via groundwater—several of which were EPA general permits that merely contained general statements about permit coverage for discharges to groundwater that have a “direct hydrologic connection” to WOTUS. Against this sparse permitting history, it is not surprising that EPA expects that such permits “will continue to be a

¹³ 33 U.S.C. § 1362(14).

¹⁴ See generally 40 C.F.R. § 122.3.

¹⁵ See 33 U.S.C. § 1342(I).

¹⁶ *Id.* § 1342(I)(1).

¹⁷ See Draft Guidance at 6.

small percentage of the overall number of NPDES permits issued following application of the Supreme Court’s ‘functional equivalent’ analysis.”

The undersigned organizations agree that the *Maui* decision should not lead to an increase in the number of NPDES permits issued for discharges to WOTUS via groundwater. Whether a discharge meets the functional equivalent test could depend on many factors in the Supreme Court’s view. This sort of multi-factor, fact-intensive analysis is quite similar to the fact-intensive “direct hydrological connection” analysis that EPA had previously applied for many years when determining whether discharges via groundwater were subject to NPDES permitting. For example, in a 1991 water quality standards rulemaking, EPA stated that NPDES permits are required “for discharges to groundwater where there is a direct hydrological connection between groundwaters the surface waters . . . because such discharges are effectively discharges to the directly connected surface waters.”¹⁸

In the 2001 proposed CAFO Rule, EPA further stated that a determination of whether the direct hydrological connection test is satisfied would be “a factual inquiry, like all point source determinations” and that “time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site-specific factors, such as geology, flow, and slope.”¹⁹ Finally, in its *amicus* brief to the Ninth Circuit during the *County of Maui* case, EPA argued that:

Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water. Ascertaining whether there is a direct hydrological connection is a fact-specific determination. . . . To qualify as ‘direct,’ a pollutant must be able to proceed from the point of injection to the surface water without significant interruption. *Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. These factors will be affected by the type of pollutant, geology, direction of groundwater flow, and evidence that the pollutant can or does reach jurisdictional surface waters.*²⁰

Arguably, the “direct hydrological connection” test that served as a basis for issuing some NPDES permits prior to *Maui* was broader than the Supreme Court’s functional equivalent test, at least to the extent it led to the issuance of permits based on considerations such as “traceability” and evidence that pollutants merely “can” reach jurisdictional surface waters. And even then, permits were rarely issued for discharges via groundwater, as the Draft Guidance notes. Nonetheless, if one assumes that the “direct hydrological connection” and “functional equivalent” tests are roughly identical, the universe of discharges requiring NPDES permits

¹⁸ See 56 Fed. Reg. 64,876, 64,982 (Dec. 12, 1991).

¹⁹ 66 Fed. Reg. 2,960, 3,017 (Jan. 12, 2001).

²⁰ See Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Hawaii Wildlife Fund v. County of Maui*, No. 15-17447 Dkt. No. 40, at 26 (9th Cir. filed May 31, 2016).

following *Maui* should remain essentially unchanged from what it has been over the past few decades.

The undersigned organizations recommend that EPA further support its conclusion that the issuance of permits for discharges via groundwater will continue to be a small percentage of the overall number of NPDES permits by emphasizing the majority opinion's emphasis on states' authority over groundwater and nonpoint source pollution control. According to that opinion, perhaps the most important reason for rejecting the Ninth Circuit's fairly traceable test—and the environmental groups' proximate cause test—was the “structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States.”²¹ The majority further stressed that the CWA's “context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater” and that the “context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution.”²² Finally, the majority warned that application of the functional equivalent test “*should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives.*”²³

The foregoing discussions in *Maui* underscore that the functional equivalent test must not be applied in a way that would markedly expand the scope of the NPDES program, because such a result would alter the delicate federal-state balance that Congress struck in the CWA. Again, it is important to emphasize here that EPA and state permitting authorities had, for many decades, asserted authority to impose NPDES requirements with respect to discharges via groundwater, at least on a case-by-case basis, but they declined to require permits in most instances. While *Maui* confirms that those permits may have been appropriately issued (assuming those discharges would now satisfy the functional equivalent test), that decision should not be construed as an open invitation for EPA and states to start issuing new permits with respect to discharges that they have previously declined to require permits for.

With respect to addressing agricultural seepage in particular, it remains the case that state programs and control are the best policy approach, as opposed to the NPDES program. Such seepage is not the functional equivalent of a direct discharge, even assuming it reaches a WOTUS. As a general matter, whether and how some portion of fertilizers and pesticides applied to crop fields might reach groundwater is highly uncertain, and at best intermittent, if at all. Soil and land conditions, unpredictable rainfall patterns, other environmental factors, and the specific agronomic practices being used create this uncertainty. Any eventual further movement of these substances into a WOTUS is even more remote, uncertain, and subject to change driven by these and other uncertain conditions. There is thus little or no correlation, and certainly no consistent one, between regulation of what comes out of the point source and what, if anything, ever reaches WOTUS. Moreover, groundwater often does not enter WOTUS through a single point, but at any number of places that can be many miles away from the point source and beyond the control of the owner or operator of the point source. And the groundwater will almost certainly

²¹ *Maui*, 140 S. Ct. at 1471.

²² *Id.* at 1476.

²³ *Id.* at 1477.

contain pollutants from a multitude of different sources, making it impossible for any one owner or operator to determine if his or her own control measures are effective—particularly when the pollutant takes months to diffuse through the groundwater before reaching navigable waters. Compounding matters, at certain times of year, surface water can flow back into groundwater, and current NPDES regulations do not account for this possibility. Unlike with a direct point source addition to navigable waters, it is impossible to see how technology- or water quality-based effluent limits could sensibly be used to regulate seepage to groundwater that eventually, in complex, uncertain, and variable and inconstant ways, reaches navigable waters. For all of these reasons, agricultural seepage is not the functional equivalent of a direct discharge; it is nonpoint source pollution subject to state control.

This is not to say such pollution is beyond the purview of the CWA. Indeed, as documented on EPA’s website, there are a host of CWA Section 319 nonpoint source pollution success stories involving agricultural seepage, where states have received funding from EPA and other sources to partially or fully restore waterbodies. Section 319 remains an important and proper tool for addressing most water quality impairments associated with agricultural activities.

Finally, the undersigned organizations support EPA’s determination that system design and performance are a relevant factor in the functional equivalent analysis. The Supreme Court’s list of “just some of the factors that may prove relevant” plainly is not exclusive.²⁴ And the Court recognized EPA’s authority to “provide administrative guidance” on when permits might be required for discharges through groundwater.²⁵ Appropriately exercising that authority, EPA has sensibly concluded that stakeholders should consider whether points of discharge are engineered to direct pollutants in a way that slows the transit time or increases distance that pollutants must travel before reaching WOTUS. Or certain features may be designed to promote dilution, adsorption, or dispersion of pollutants, which would affect both the composition of pollutants and the amount that ultimately reaches WOTUS relative to the amount that was released from a point source. The undersigned organizations strongly agree that if a facility, system, or landscape feature is designed to operate as a runoff management, reuse/recycling, or storage system, such that they either prevent, slow down, or decrease the amount of pollutants that reach WOTUS, it is likely that there would no longer be the functional equivalent of a direct discharge to a WOTUS and thus, permits should not be required.

²⁴ *See Maui*, 140 S. Ct. at 1476.

²⁵ *See id.* at 1477.

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We appreciate the opportunity to offer these comments. Should you have any questions, we welcome the opportunity to discuss with you further.

Respectfully submitted,

American Farm Bureau Federation

Agricultural Retailers Association

Illinois Farm Bureau

Minnesota Agricultural Water Resources Council

National Cattlemen's Beef Association

National Council of Farmer Cooperatives

National Corn Growers Association

National Milk Producers Federation

National Pork Producers Council

The Fertilizer Institute

United Egg Producers

USA Rice

US Poultry and Egg Association