

What's up with Maui? One year after the SCOTUS decision on the Clean Water Act and groundwater discharges, significant uncertainty remains

By Edward McTiernan, Esq., and Thomas E. Santoro, Esq., *Arnold & Porter**

MAY 26, 2021

Discharges directly into groundwater are generally not covered by the Clean Water Act, but for years, there was confusion about whether the Act applies to discharges to groundwater, where the groundwater has a direct hydrological connection to surface waters. The courts were split, and EPA argued both sides of the issue.

In April 2020, in *County of Maui v. Hawaii Wildlife Fund*,¹ the Supreme Court announced a seemingly major expansion of the Act, holding that it applies “if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters.”

Although the Biden Administration has been eager to reverse policies put in place by the Trump Administration, it has not yet publicly turned its attention to the dilemma created by Maui and the Trump EPA's 11th hour Guidance Memo.

SCOTUS identified a *non-exclusive list of seven factors* to determine “functional equivalency,” giving presumptive predominance to the first two factors:

(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.

SCOTUS provided little guidance on how the “functional equivalency” factors should be applied, and the decision left most scratching their heads as to the practical implications.

On January 14, 2021, the Trump EPA issued a Guidance Memorandum² on applying the *Maui* “functional equivalency” test, taking a narrow view of when a Clean Water Act NPDES permit is required under SCOTUS's seven factors and adding an eighth factor: “the design and performance of the system or facility from which the pollutant is released.” The Guidance Memo was short on specifics and seemingly made the “functional equivalency” test even more complicated.

Although the Biden Administration has been eager to reverse policies put in place by the Trump Administration, it has not yet publicly turned its attention to the dilemma created by *Maui* and the Trump EPA's 11th hour Guidance Memo.

The Biden EPA may withdraw the Trump EPA's Guidance and replace it with guidance or a rule taking a broader view of when an NPDES permit is required for discharges to groundwater hydrologically connected to surface waters. The Biden Administration might also seek to direct some infrastructure funding to dealing with the issue of groundwater discharges.

In the meantime, the states, which in most cases are left to implement *Maui* through their federally delegated NPDES permitting authorities, but have yet to receive any additional resources to address indirect discharges, are likely to resort to issuing general permits for many groundwater discharges.

Notes

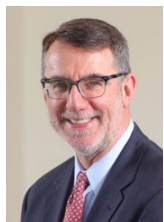
¹ <https://bit.ly/3oPgQCF>

² <https://bit.ly/3p0Sfex>

This article was published on Westlaw Today on May 26, 2021.

* © 2021 Edward McTiernan, Esq., and Thomas E. Santoro, Esq., Arnold & Porter

ABOUT THE AUTHORS



Arnold & Porter partner **Edward McTiernan** (L) is an environmental litigator who focuses on state and federal regulatory issues, including site remediation, Brownfield redevelopment, natural resource damages, energy and infrastructure projects, and environmental permitting and due diligence in support of real estate development and energy infrastructure. He is resident in the firm's New York office and can be reached at edward.mctiernan@arnoldporter.com. Senior associate **Thomas E. Santoro**'s (R) practice focuses primarily on environmental litigation and on federal and state environmental enforcement and regulatory compliance matters. He is based in the firm's

Washington, D.C., office and can be reached at thomas.santoro@arnoldporter.com. This article was originally published May 11, 2021, on the firm's website. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.