



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

September 15, 2021

MEMORANDUM

SUBJECT: 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 Pollutant Discharge Elimination System Permit Program”

FROM: Radhika Fox
Assistant Administrator

A handwritten signature in black ink, appearing to be "R. Fox", is written over the name and title of the sender.

TO: Water Division Directors
EPA Regions 1-10

After careful consideration, the U.S. Environmental Protection Agency’s (EPA) Office of Water is rescinding the guidance document, titled “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,” which was signed on January 14, 2021. 86 Fed. Reg. 6,321 (Jan. 21, 2021). The decision to rescind the guidance is informed by input from the agency workgroup established to evaluate the guidance, as well as by meetings with a broad range of stakeholders. It is also consistent with Executive Order 13990, “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 25, 2021).¹

Although the guidance stated that it lacked the force and effect of law, the Office of Water is rescinding the guidance for two primary reasons. First, the eighth factor identified in the guidance as part of the “functional equivalent” analysis and described as “the design and performance of the system or facility from which the pollutant is released,” is not consistent with the Clean Water Act or the Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund* because, among other things, the additional factor introduces an element of intent that is not reflected in or consistent with the *County of Maui* decision. 140 S. Ct. 1462 (2020) (*County of Maui*). Second, the guidance was issued without proper deliberation within EPA or with our federal partners.

The Office of Water is evaluating appropriate next steps to follow the rescission of the guidance. In the interim, the Supreme Court’s decision provides guiding principles regarding when a discharge to

¹ Please note also that the agency’s “Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater,” 84 Fed. Reg. 16,810 (Apr. 23, 2019), no longer reflects the interpretation of the agency because the Supreme Court’s decision in *County of Maui v. Hawaii Wildlife Fund* clearly rejected the interpretation the agency articulated in that statement. 140 S. Ct. 1462, 1474 (2020).

groundwater is jurisdictional under the Clean Water Act that permit writers can use to implement the decision. No language in the decision suggests that the existence, or lack, of a state groundwater protection program has any bearing on whether the “functional equivalent” analysis applies. Rather, the focus of the Court’s decision is on whether a permit is required to protect surface waters, not to protect groundwater itself. Therefore, the existence of state groundwater protection programs does not obviate the need for NPDES permitting authorities to apply the factors that the Supreme Court identified in its decision in deciding whether a discharge from a point source through groundwater that reaches jurisdictional surface water requires an NPDES permit.

Consistent with past practice, and now informed by the factors specified by the Supreme Court, EPA will continue to apply site-specific, science-based evaluations to determine whether a discharge from a point source through groundwater that reaches jurisdictional surface water is a “functional equivalent” of a direct discharge.

Thank you and your teams for your work in supporting the evaluation of the guidance. I look forward to our continued partnership in implementing the NPDES program.