



## EPA Issues Clean Water Act Guidance Regarding Discharges to Groundwater

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Section 402 of the Clean Water Act (CWA) prohibits the discharge of any pollutant from any point source to navigable waters (?Waters of the United States? or ?WOTUS?) unless authorized by a permit (Section 402 NPDES Permits). EPA recently published a ?Guidance Memorandum? to clarify the applicability of Section 402 NPDES Permits where the discharge occurs through groundwater to WOTUS (Section 402 Guidance). However, due to a recent Executive Order from President Biden, it is not clear whether EPA will postpone reliance on the Guidance Memorandum until receiving the green light from the White House.

### 1. Biden?s Executive Order

EPA published its Section 402 Guidance in the United States *Federal Register* on January 21, 2021. The Biden Administration issued a memorandum to all federal agency heads one day earlier, on January 20th, putting a ?regulatory freeze pending review? on health and environmental rules, regulations and guidance that were still pending. Where a guidance document was sent to the *Federal Register* prior to January 20, 2021, but not yet published, the Biden memorandum directs EPA and other agencies to immediately withdraw it. If a guidance document was already published in the *Federal Register* on January 20, 2021, but ?had not yet taken effect?, the memorandum directs the agency to ?consider? postponing it for 60 days or beyond. EPA did not withdraw the Section 402 Guidance from publication, either because it was too late or by choice. Therefore, it currently remains effective until and unless EPA announces a postponement or withdrawal.

### 2. The Maui Seven-Part Functional Equivalent Analysis

Over the years, there has been disagreement among federal district courts as to whether Congress intended Section 402 NPDES Permits to cover a discharge to groundwater that reaches WOTUS. The Supreme Court was asked to settle the issue and attempted to do so in the *Maui* opinion. The Court did not accept EPA?s position that all discharges of pollutants to groundwater are excluded from the NPDES permit program, even where the pollutants are eventually conveyed to WOTUS. However, the

Court also rejected the Ninth Circuit's "overly broad" interpretation holding that where pollutants found in WOTUS are "fairly traceable" to a discharge to groundwater, the NPDES permitting program applies.

Instead, the Supreme Court held that Section 402 NPDES permits apply only if the discharge of pollutants to WOTUS via groundwater is "the functional equivalent" of a direct discharge (i.e. through a pipe to the waterway). To make a "functional equivalent" determination, the Court imposed seven factors to be considered: (1) transit time, (2) distance traveled, (3) nature of the material through which the pollutant travels, (4) extent to which the pollutant is diluted or chemically changed as it travels, (5) amount of pollutant entering the WOTUS, (6) manner by or area in which the pollutant enters navigable waters, and (7) degree to which the pollution (at that point) has maintained its specific identity.

### **3. The EPA Section 402 Guidance**

The EPA Section 402 Guidance is short and non-technical and does little to explain how permitting authorities and the regulated community should interpret and use the seven factors in the Functional Equivalent analysis. Rather, the memo explains why the Court's opinion is limited in its application to the Section 402 NPDES Permitting scheme and adds an additional factor to the analysis.

#### **a. The Functional Equivalent Analysis is not Always Necessary**

EPA begins the Section 402 Guidance explaining that the Functional Equivalent analysis does not change the overall statutory structure of the Section 402 NPDES permitting scheme. EPA warns regulators not to apply the Functional Equivalent analysis unless they make the threshold determination that there is an actual discharge of pollutants from a point source. Specifically, EPA states that a discharge to groundwater in the vicinity of WOTUS should not be assumed to require a Section 402 permit, stating that the permit program covers "actual discharges" not potential discharges." Second, EPA recommends a strong evaluation of whether the discharge is actually "from a point source" as defined in the CWA. If it is proven through a technical analysis or other evidence that the discharge will not reach WOTUS or that there is no "point source" where the pollutants originate, the review should end prior to a Functional Equivalent analysis. EPA gives spends no time explaining relevant statutory or regulatory history, guidance, circumstances or case law of significance to illuminate what is, or is not, an "actual discharge" versus a potential one, or a "point source" versus another means of discharge, but merely warns that not all circumstances lead to a discharge and not all discharges come from a point source.

#### **b. The EPA Eighth Factor: Design and Performance**

Where the regulators find there is a discharge of pollutants from a point source that will make it to WOTUS via groundwater, EPA warns that "only a subset" of these discharges are the functional equivalent of a direct discharge. EPA states that, unlike directly discharged pollutants, those discharged to soils and groundwater can change significantly before they make it to WOTUS. EPA suggests that science inform the effect of time, place, and distance traveled and the ways in which pollutant composition or concentration may be materially different as a result of the journey from discharge, to

soil, to groundwater, to WOTUS.

Finally, EPA uses its discretion to identify an eighth relevant factor to be considered in making a "functional equivalent" analysis: design and performance of the system or facility from which the pollutant is released. EPA clarifies that the composition and concentration of a pollutants discharged directly from a pipe to WOTUS "differ significantly" from those of pollutants discharged from an engineered system designed to treat, attenuate or retain pollutants (i.e. a wastewater treatment system). Although design and performance will affect the analysis of the other seven factors even without being identified specifically by EPA, EPA adds it in the analysis in an apparent effort to raise its level of importance in the process.

#### 4. Conclusion

If the Section 402 Guidance Memorandum remains effective, the regulated community will have to decide whether to model new or existing discharges to prove the absence of an actual or functionally equivalent discharge of pollutants to WOTUS via groundwater. Decisions will be made on a case-by-case basis, depending on how regulators across the Country and at EPA choose to use and enforce the Guidance Memorandum's directives.

***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, 86 Fed. Reg. 6321 (January 21, 2021)***

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