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EPA Releases Final Guidance on Federal Permitting for Discharges Via Groundwater

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On January 14, 2021, the United States Environmental Protection Agency (EPA) released final guidance for making case-by-case determinations on the need for federal permitting of surface water discharges through groundwater. The guidance applies the United States Supreme Court's recent decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). Although a draft of the guidance was released for public comment in December 2020, EPA finalized the guidance with minimal changes.

In *Maui*, the Court held that a discharge from a point source to surface waters through groundwater requires a National Pollutant Discharge Elimination System (NPDES) permit when the addition of pollutants to surface water is the "functional equivalent of a direct discharge." The Court provided a non-exclusive list of seven factors to be considered by EPA or the permitting authority in determining whether a conveyance of pollutants through groundwater is the "functional equivalent of a direct discharge." These seven factors include:

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.

A detailed analysis of these factors can be found here in a previous Client Alert.

EPA's final guidance identifies one additional factor for consideration when evaluating whether and how to perform a "functional equivalent" analysis—the "design and performance of the system or facility from which the pollutant is released." EPA observed that, although this factor was not identified by the Court in *Maui*, "inquiries concerning design and performance are important and relevant and are routinely considered by permitting authorities in the administration of the NPDES permit program."

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