



Committee on Transportation and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

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Chairman

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December 21, 2023

The Honorable Radhika Fox  
Assistant Administrator  
Office of Water (4101M)  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Request for 60-Day Extension of Comment Deadline for 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 to Discharges through Groundwater.**

Dear Assistant Administrator Fox:

On November 27, 2023, the United States Environmental Protection Agency (EPA) published in the Federal Register draft guidance titled “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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 to Discharges through Groundwater.”<sup>1</sup> The draft guidance provides for only a 30-day public comment period ending on December 27, 2023.<sup>2</sup> We are concerned that a 30-day comment period is an insufficient amount of time for our constituents, state co-regulators, and other stakeholders to thoroughly analyze the proposed guidance and provide meaningful feedback to the agency. Therefore, we request the comment period be extended for, at least, an additional 60 days.

On April 23, 2020, the United States Supreme Court held in *County of Maui v. Hawaii Wildlife Fund* (*Maui*) that the *Clean Water Act* (*CWA*) requires a permit for direct discharges of pollutants from a point source into navigable waters or when there is a “functional equivalent” of a direct discharge through groundwater.<sup>3</sup> On January 14, 2021, the EPA, under the previous administration, issued guidance for the application of this “functional equivalent” standard to the

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<sup>1</sup> Applying the Supreme Court’s *Maui* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program, 88 Fed. Reg. 82891 (Nov. 27, 2023) [hereinafter *Maui* Decision 82891].

<sup>2</sup> *Id.*

<sup>3</sup> *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), 590 U.S. \_\_\_\_ (2020) [hereinafter *Maui*].

*CWA* Section 402 National Pollutant Discharge Elimination System Permit (NPDES) program.<sup>4</sup> This guidance was subsequently rescinded on September 16, 2021.<sup>5</sup>

In *Maui*, the Supreme Court outlined seven non-exclusive factors to be considered when determining whether a groundwater discharge is a functional equivalent to a point source discharge under the *CWA*.<sup>6</sup> The recent draft guidance introduces new considerations for the application of the functional equivalent standard to the NPDES program that were not contemplated in *Maui*, nor in the previously issued guidance. For example, it identifies the dispersion of plumes as a potentially relevant factor.<sup>7</sup> The draft guidance also states that a relatively higher concentration or mass of pollutants reaching a navigable water, relative to the amount leaving a point source, would be sufficient to meet the functional equivalent test.<sup>8</sup>

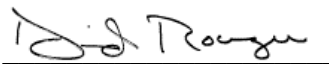
While we believe that the goal of this guidance should be to provide clarity and consistency, the 30-day time frame is insufficient to review and thoroughly understand EPA's proposal. To ensure appropriate engagement, interested parties will need to devote significant time and resources to fully consider the legal, technical, and practical implications of the draft guidance. The agency will benefit from allowing additional time for the public and the regulatory industry to comprehensively analyze the guidance and provide comments before issuing the final guidance. For these reasons, we encourage EPA to extend the comment period for at least an additional 60 days.

Thank you for your prompt attention to this important matter. If you have any questions, please contact Ryan Hambleton, Majority Staff Director, Subcommittee on Water Resources and Environment, at (202) 225-9446.

Sincerely,



Sam Graves  
Chairman  
Committee on Transportation  
and Infrastructure



David Rouzer  
Chairman  
Subcommittee on Water Resources  
and Environment

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<sup>4</sup> 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 (Jan. 21, 2021).

<sup>5</sup> Press release, EPA, *EPA Rescinds Previous Administration's Guidance on Clean Water Act Permit Requirements*, (Sept. 16, 2021), available at <https://www.epa.gov/newsreleases/epa-rescinds-previous-administrations-guidance-clean-water-act-permit-requirements>.

<sup>6</sup> *Maui*, *supra* note 3, at 16.

<sup>7</sup> *Maui* Decision 82891, *supra* note 1, at 4.

<sup>8</sup> *Id.* at 4 and 5.