

December 22, 2023

Via www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Water Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2023-0551
Implementing the Supreme Court's Maui Decision in the Clean Water Act
Section 402 National Pollutant Discharge Elimination System Permit Program

To whom it may concern:

The Southern Environmental Law Center ("SELC") provides these comments in response to the request of the U.S. Environmental Protection Agency ("EPA") for input on its draft guidance entitled "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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," 88 Fed. Reg. 82,891 (Nov. 27, 2023). SELC submits these comments on behalf of itself and the following organizations:

Alabama Rivers Alliance	Environmental Integrity Project
Alabama Sierra Club	Environmental Law & Policy Center
Alliance for the Great Lakes	Food & Water Watch
Bayou City Waterkeeper	Freshwater Future
Birds Georgia	Friends of the Rivers of Virginia
Black Warrior Riverkeeper	Georgia River Network
Blue Water Baltimore	The Grand Traverse Bay Waterkeeper and The
Buffalo River Watershed Alliance	Watershed Center Grand Traverse Bay
Cape Fear River Watch	Great Egg Harbor Watershed Association
Center for Food Safety	Harpeth Conservancy
Chesapeake Bay Foundation	Iowa Environmental Council
Clean Water Action/Clean Water Fund	Kentucky Waterways Alliance
Congaree Riverkeeper	Latino Farmers & Ranchers International, Inc.
Conservation Council for Hawai'i	Lower Susquehanna Riverkeeper Association
Coosa Riverkeeper	Mill Creek Alliance
The Clinch Coalition	Mobile Baykeeper
Dan River Basin Association	MountainTrue
Endangered Habitats League	Musconetcong Watershed Association
Environment America Research & Policy Center	National Wildlife Federation
	Natural Resources Defense Council

NC League of Conservation Voters
North American Climate, Conservation and
Environment (NACCE)
North Carolina Wildlife Federation
NY/NJ Baykeeper
Ogeechee Riverkeeper
Orange County Coastkeeper
The People’s Justice Council
Potomac Riverkeeper Network
San Pedro 100
Save the Sound
Sierra Club
Snake River Waterkeeper

Socially Responsible Agriculture Project
South Carolina Coastal Conservation League
Suncoast Waterkeeper
Surfrider Foundation
Tennessee Riverkeeper
Tennessee Scenic Rivers Association
Tree Fredericksburg
Virginia Conservation Network
Waterkeeper Alliance
Waterkeepers Chesapeake
West Virginia Rivers Coalition
Winyah Rivers Alliance

The draft guidance emphasizes several key points that we fully support about how the *Maui* decision applies to the discharge of pollutants from a point source via groundwater.

First, the draft guidance is correct that the *Maui* decision must be applied on a case-by-case basis. *See* Draft Guidance at 3. The specific circumstances of the discharge of pollutants from the point source to waters of the United States necessarily dictate the application of the Clean Water Act, informed by the Act’s objective to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. In other words, agencies and courts must examine the specifics of each situation to ensure that the Act’s objective is not undermined by allowing the unauthorized addition of point source pollution to waters of the United States. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

Second, the draft guidance is likewise correct to explain that consideration of “all, or even several” of the factors laid out by the Supreme Court is not required to find that a discharge is the functional equivalent of a direct discharge subject to the Clean Water Act. Draft Guidance at 3. As the draft guidance notes, this analysis “need not be complex.” *Id.*

Third, EPA correctly emphasizes that intent is not a relevant factor in applying *Maui*, rejecting the erroneous intent-based approach of the prior administration’s guidance. *See* Draft Guidance at 6–7. The Clean Water Act is a strict liability statute, and in many cases point source pollution is added to waters of the United States via groundwater due to leaks, negligent operation of facilities, or other unintended releases of pollution. It would undermine the Act in exactly the ways the Supreme Court rejected in *Maui* if the design of the facility or its intention to release pollutants into groundwater could weigh against Clean Water Act liability.

Fourth, the draft guidance helpfully clarifies that an indicator pollutant can be used to establish Clean Water Act coverage under *Maui*. Draft Guidance at 3–4. Particular pollutants can be important indicators of a groundwater plume—as we have seen in the case of coal ash pollution with boron, for example—and it is entirely appropriate to recognize that such indicators can be used to determine that there is a discharge subject to the Act. We would also note that other indicators, such as eutrophication or algal blooms in surface waters receiving nitrate pollution, or elevated electrical conductivity in a geophysical survey that indicates suspended

minerals and other solids are being discharged to surface waters, can also be important indicators of a discharge subject to the Act.

Fifth, EPA is correct to explain in Section 4, under “Description of pollutant-specific dynamics along the groundwater flow path,” that if the discharger fails to provide evidence that the pollutant discharge is transformed, permitting authorities can presume it is not. Draft Guidance at 6. The burden should be on the polluter to demonstrate any such transformation.

That said, several points in the draft guidance should be modified or clarified to ensure *Maui* is applied in a way that will not undermine the objective of the Clean Water Act.

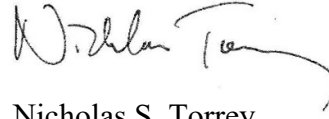
First, the draft guidance correctly notes that several factors—including minimal dispersion, a high percentage of original mass or concentration of pollutants reaching waters of the United States, or a discharge through porous subsurface material—may support a finding that the discharge is the functional equivalent of a direct discharge. Draft Guidance at 4–5. However, the guidance should clarify that the inverse is not necessarily true: the absence of any of these factors does not necessarily preclude a discharge being the functional equivalent of a direct discharge. For example, a discharge that travels through fractured bedrock, or through the silts or other fine-grained materials that frequently abut rivers and streams, can certainly be the functional equivalent of a direct discharge. Likewise, there is no basis for exempting a polluter from Clean Water Act coverage if a large volume or mass of pollution enters jurisdictional waters from a point source that is releasing an even larger volume or mass of pollutants, some of which does not reach waters of the United States—such as a hypothetical ten-million-gallon oil spill from a pipeline where one million gallons of oil flows into waters of the United States. In other words, EPA should clarify that a material discharge to surface waters can be the functional equivalent of a direct discharge, irrespective of these factors.

Second, EPA should add to its list of factors that should *not* be considered in the functional equivalent analysis. One additional irrelevant factor is dilution within the jurisdictional waterway itself. The functional equivalent analysis identifies when an addition of pollutants *to* the jurisdictional waterway is subject to the Act; what happens to the pollution *after* it enters the waterway is not part of the functional equivalent analysis.

Finally, the draft guidance refers to National Pollutant Discharge Elimination System (“NPDES”) permits potentially authorizing discharges via groundwater, but the guidance should also clarify that NPDES permits can prohibit such discharges. For example, EPA’s Concentrated Animal Feeding Operation general permit for New Mexico states, “There shall be no discharge of manure, litter, or process wastewater from retention or control structures to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters.” EPA Region 6, National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges for Concentrated Animal Feeding Operations (CAFOs) in New Mexico (NMG010000), Condition II.A.2.b.vi (Sept. 1, 2016), <https://perma.cc/99TC-8QTL>. EPA’s “longstanding regulatory practice” in addressing such discharges in NPDES permits informed the Supreme Court’s *Maui* decision. 140 S. Ct. at 1472.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Nicholas S. Torrey". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Nicholas S. Torrey
Senior Attorney
Southern Environmental Law Center

A handwritten signature in blue ink that reads "Frank Holleman". The signature is cursive and clearly legible.

Frank Holleman
Senior Attorney
Southern Environmental Law Center