Summary of Responses to Major Concerns and Comments for Memorandum on "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."

On December 10, 2020, the Environmental Protection Agency (EPA or the Agency) published for public comment a draft memorandum to provide guidance to the regulated community and permitting authorities on applying the recent decision of the United States Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) ("*Maui*"), on a case-by-case basis, in the Clean Water Act (CWA or the Act) Section 402 National Pollutant Discharge Elimination System (NPDES) permit program for point source discharges that travel through groundwater before reaching a water of the United States. Consistent with *EPA Guidance; Administrative Procedures for Issuance and Public Petitions*, 85 Fed. Reg. 66230 (Oct. 19, 2020), EPA solicited public comments on the draft guidance for thirty days. The Agency received approximately 4,457 of comments, including approximately 4,349 that are from mass mailers and approximately 108 unique comments. This document responds to major concerns and comments received during the public comment period.

A number of commenters made recommendations and requests for edits and clarifications to the draft guidance. EPA made certain changes to the guidance to increase clarity the guidance may provide. For example, EPA added additional citations to the guidance and, on page 2 of the guidance, EPA inserted a quote from the *Kinder Morgan* decision to replace a paraphrased statement. For transparency, other key changes to the guidance are summarized here. EPA received one comment that on page 5 of the guidance it was unclear whether facility owners and operators would develop technical analysis voluntarily or if it was mandatory. The guidance has been revised to note that such information may be requested by the permitting authority. Also on page 5, a commenter thought the example of when a public comment may be received concerning a "functional equivalent" discharge was confusing. EPA clarified this language in the guidance. Finally, some commenters interpreted the words "consistently and predictably" on page 8 (concerning the types of discharges of pollutants that may warrant further inquiry) to mean daily, monthly, or some other similar increment. EPA intended "consistently and predictably" to also include less frequent but still predictable events, like overflow, bypass, and other similar events that may cause predictable (even if not planned) discharges. To avoid confusion, EPA removed these words from the guidance.

Some commenters presented fact-specific questions and more general questions about the NPDES permit program, EPA-approved state NPDES permit programs, and EPA oversight of state-approved NPDES permit programs. Although these questions are beyond the scope of the guidance, EPA will continue to engage with permitting authorities and stakeholders to provide technical assistance and answer fact-specific and programmatic questions as they arise.

Some commenters stated that the guidance is inconsistent with the U.S. Supreme Court's decision in *Maui* because it identifies an additional factor that may prove relevant and thus should be considered when performing a "functional equivalent" analysis. One commenter asserted that identifying an additional factor requires a full notice and comment rulemaking process. EPA disagrees with these comments. The Court in *Maui* expressly noted that the seven factors it identified as potentially part of a "functional equivalent" analysis were not exhaustive. The Court held that the CWA "requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." *Maui*, 140 S. Ct. at 1476. The Court, however,

recognized that its approach "does not, on its own, clearly explain how to deal with middle instances" and that "there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language." *Id*. While the Court identified seven factors to consider when conducting a "functional equivalent" analysis, it described those factors as "just some of the factors that may prove relevant (depending upon the circumstances of a particular case)." *Id*. at 1467-77. Based on the Agency's technical and scientific expertise, and its experience administering the NPDES permit program and overseeing authorized state NPDES programs for several decades, the design and performance of the system or facility from which the pollutant is released can be an important consideration and is reasonably included in the guidance as a factor to consider. This factor is also a routine consideration in the NPDES permit program and consistent with EPA's authorities under the CWA.

The Court in *Maui* also expressly recognized that EPA could provide further guidance on conducting a "functional equivalent" analysis. The Court stated that "EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules." *Id*. at 1477. Thus, the Court did not preclude the identification, development, or characterization of additional factors that may be relevant in conducting a "functional equivalent" analysis.

Several commenters asserted that the guidance does not sufficiently define when a discharge is a "functional equivalent" of a direct discharge. Some commenters asserted that the guidance should include more detailed information to establish thresholds for each of the factors in *Maui* and establish a clearer line for when a discharge is the "functional equivalent" of a direct discharge. At least one commenter suggested that states should be able to establish specific thresholds for each of the *Maui* factors. Other commenters said that EPA should carve out certain discharges that are not akin to a direct discharge and therefore do not require permits. Some commenters requested that the agency reiterate the narrow scope of *Maui* and its limited application within the NPDES permit program. While the Agency agrees that the "functional equivalent" analysis will likely be applied in limited circumstances, and the Agency appreciates the desire for clear thresholds, bright line tests, and definitive statements regarding discharges to groundwater that do or do not require an NPDES permit, a guidance document is not the appropriate vehicle to set out bright line thresholds or tests or to make definitive statements concerning the applicability of a regulatory program. Such statements are only appropriate in regulations that have the force and effect of law and that are promulgated through notice and comment rulemaking. Additionally, the Supreme Court's functional equivalent analysis reflects the site-specific nature of these types of discharges. As such, decisions regarding functional equivalency should be based on more-precise information concerning the actual circumstances. Therefore, the guidance reiterates foundational principles of the NPDES program that are important to consider when determining whether a functionally equivalent discharge exists and identifies an additional factor that may prove relevant and thus should be considered when performing a "functional equivalent" analysis.

Some commenters suggested that the guidance's inclusion of the system or facility design and performance factor is inappropriate because commenters assert that it may narrow the situations in which a permit could be needed. These commenters further suggest that the guidance creates a loophole for a facility to claim that a permit is not needed because the system is designed to not discharge to navigable waters. Other commenters asserted that consideration of the facility design and performance is inconsistent with the plain language of the CWA, including the CWA's objective to

"restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Agency disagrees; the guidance does not suggest that decisions regarding functional equivalence should be based solely on the design and performance of a facility or treatment system. Nor does EPA's identification of this factor, or others, create a loophole in the regulatory program. Instead, as described in the guidance, this factor is potentially relevant and should be considered along with the Court's other non-exhaustive factors detailed in the guidance, to inform the functional equivalent analysis. As explained in the guidance, the design and performance of the system or facility in question, for example a stormwater infiltration basin, may be considered, as well as its proximity to navigable waters. In this example, the engineering design of the basin will provide the designed infiltration rate and inform the other factors identified by the Supreme Court. The soils, geology, and level of the water table are also important factors to consider, as outlined in the guidance. An engineered stormwater infiltration basin located in high permeability sandy soils and in close proximity to a navigable water could potentially cause a functionally equivalent discharge. On the other hand, an impoundment with a different designed infiltration rate that is located in soils consisting mostly of clay may not result in a discharge. These are site-specific factors relevant to the functional equivalent analysis that would be considered at each facility. .

Some commenters supported the inclusion of the system or facility design and performance factor and agreed that it can be an important aspect of a functional equivalent analysis. Other commenters asserted that facilities designed not to discharge pollutants should be excluded from the functional equivalent analysis. Other commenters asserted that the draft guidance created a factor of "intent" in the CWA, which is a strict liability statute. These commenters assert that considering the design and performance of a facility requires consideration of a polluter's intent. These commenters are incorrect. As described in the guidance, the design and performance of a system or facility is a routine consideration in the NPDES permit program and can be useful to inform the other factors the Court identified. The guidance does not create an "intent-based" factor. EPA clarifies that the additional factor in the guidance is the "design and performance" of a system or facility. A system or facility's performance is important, as it may reflect whether the facility is operated and maintained in accordance with its engineering design. If a facility is engineered and designed to abate or avoid a discharge, but its performance in fact results in a discharge of pollutants to waters of the United States, this is relevant information that a permitting authority should consider when evaluating whether an NPDES permit is required for a "functional equivalent" discharge.

Some commenters asserted that if a discharge of pollutants that travels through groundwater and reaches a water of the United States has any effect on water quality or if a discharge has a reasonable potential (RP) to cause or contribute to a violation of water quality standards, an NPDES permit should be required. EPA notes that the threshold conditions reiterated in the guidance must still be satisfied before an NPDES permit may be required. If those conditions are satisfied for a discharge through groundwater, a functional equivalent analysis should be conducted to determine if an NPDES permit may be necessary. EPA declines to establish a bright line test concerning the extent of water quality effects that may inform a "functional equivalent" analysis. EPA agrees that RP analysis is a common tool that NPDES permitting authorities use, and should continue to use, to evaluate whether a WQBEL may be necessary for a particular NPDES permit; however it is unclear how the RP would be used as part of a "functional equivalent" analysis as the commenter suggested.

Some commenters generally opposed issuance of this guidance document. Other commenters provided general support for issuance of the guidance document as proposed. As discussed above, the U.S. Supreme Court's decision in *Maui* left room for the Agency to issue guidance to assist the regulated community, the public, and permitting authorities in evaluating whether a discharge is the "functional equivalent" of a direct discharge from a point source to a water of the United States. This guidance document places the "functional equivalent" analysis into context within the existing NDPES permitting framework and identifies an additional factor that may prove relevant and thus should be considered when performing a "functional equivalent" analysis.

Some commenters asserted that the guidance will make it easier for dischargers, including sewage treatment plants, industrial agriculture, oil and gas operators, and coal plants, to pollute waters of the United States. These commenters also stated that the guidance does not advance EPA's mission to protect public health and the environment because they assert that it leaves gaps in water protections and fails to hold polluters accountable for contaminating groundwater that in turn contaminates waters of the United States. EPA disagrees with these comments. The guidance does not change any existing regulations or requirements applicable to the NPDES program and permits, and it supports water quality protection efforts by assisting the regulated community and permit writers with incorporating the *Maui* decision into existing CWA NPDES permit programs and authorized state programs. Importantly, the *Maui* decision did not change the overall statutory or regulatory structure of the NPDES permit program, and EPA cannot modify the NPDES program through guidance. Issuance of this guidance is not a rulemaking, and the guidance does not amend or impose requirements, as would a rule. As such, this guidance does not create loopholes in existing regulatory requirements, nor does it change those requirements. *Maui*, however, did identify an additional analysis that should be conducted in certain factual scenarios to determine whether an NPDES permit is required. This guidance is intended to inform how the Court's "functional equivalent" analysis may be applied within the framework of the longstanding NPDES permit program.

Some commenters stated that EPA should require certain technical analyses, such as groundwater modeling, to determine whether a discharge is the functional equivalent of a direct discharge. Commenters suggested that the guidance should include examples of jurisdictional and non-jurisdictional discharges and should provide more technical detail on how to evaluate each factor from *Maui*. EPA disagrees with these comments. While there are additional tools and information that may be helpful to assist in determining whether a discharge is a "functional equivalent" of a direct discharge, these issues relate to site-specific factors that are beyond the scope of this guidance.

Some commenters articulated a concern that implementation of *Maui* should not displace or supplant existing state programs that regulate groundwater. Some commenters asserted that states have significant experience with discharges of pollutants to groundwater that eventually lead to surface water and asserted that EPA should conduct additional outreach with states before issuing the guidance. Other commenters noted that states can regulate groundwater through permit programs that regulate "waters of the state" more broadly than the federal NPDES permit program, or through a separate groundwater permitting program. At least one commenter suggested that in some states there is no "gap" for *Maui* to fill because these states already regulate groundwater comprehensively. EPA agrees that states with experience regulating groundwater may have significant experience evaluating the movement of pollutants through groundwater. Given the narrow scope of this guidance, EPA does not agree that additional stakeholder or co-regulator outreach is necessary prior to issuing this guidance.

Finally, EPA agrees that state regulation of groundwater, nonpoint sources, and discharges to waters of the state that are not also waters of the United States should not be displaced or supplanted by implementation of the *Maui* decision in the NPDES permit program to discharges to groundwater that reach waters of the United States. The CWA NPDES permit program regulates point source discharges of pollutants to waters of the United States, and this guidance addresses application of the "functional equivalent" analysis in the CWA NPDES permit program. EPA also agrees with commenters asserting that states are in the best position to understand their own legal frameworks and protect their own resources, and that the *Maui* decision should not disrupt existing state regulatory programs, particularly where state regulation already addresses functional equivalent discharges consistent with the NPDES program. The Supreme Court was very clear that states have primary authority to regulate groundwater and nonpoint sources, and that the "functional equivalent" analysis should not be used to encroach upon or deny states their traditional authority to regulate groundwater and nonpoint sources. *Maui*, 140 S. Ct. at 1471 (explaining that "the structure of the [CWA] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States").

Some commenters requested EPA revise the guidance to specifically state that neither *Maui* nor the guidance negates or otherwise impacts existing exemptions to the NPDES permit program, including the exemption for irrigation return flows. The *Maui* decision does not address any existing exemptions to the NPDES permit program and, as a result, EPA declines to include this language in the guidance.

Some commenters claimed that the draft guidance was recommending permitting authorities adopt a "means-of-delivery" test, also known as the terminal point source theory. As the guidance explains, the Supreme Court rejected the terminal point source theory. The guidance does not adopt, present, or recommend permitting authorities adopt the terminal point source theory. *Maui* instructs that "an addition [of a pollutant to navigable waters] falls within the statutory requirement that it be 'from any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means." *Id.* at 1476.

Some commenters expressed concern and requested clarification about CWA liability for wholly past discharges that have been corrected and potential liability for current discharges of pollutants through groundwater for which a discharger may not have had notice that an NPDES permit may be required prior to *Maui.* Specific issues of liability are beyond the scope of the guidance document.

One commenter asserted that EPA cannot issue this guidance without first complying with section 7 of the Endangered Species Act (ESA). EPA disagrees with this commenter's assertion. Consultation under section 7(a)(2) of the ESA applies when an agency exercises authority under its enabling act to authorize, fund, or carry out an action that may affect listed species or designated critical habitat. 16 U.S.C. 1536(a)(2); 50 CFR 402.14(a). As noted in the guidance document, the guidance does not have the force and effect of law and it does not bind the public in any way. By issuing the guidance, EPA intends only to provide clarity to the public regarding existing requirements under the law or Agency policies. Thus, the guidance is not an "action" under the ESA; that is, because it does not authorize, fund, or carry out an activity, section 7 of the ESA does not apply. Furthermore, even if issuance of the guidance were an action under the ESA, the guidance has no effect on listed species or designated critical habitat and thus does not trigger Section 7 of the ESA. In addition, the guidance is not a reviewable final agency action. The guidance does not exceed the ESA's "may affect" threshold and trigger EPA's section 7(a)(2)

consultation duties. This guidance does not authorize any activity that could affect a listed species or designated critical habitat. Moreover, the relationship between this guidance and any potential effects from future third-party activities is too attenuated to establish legal causality. *See, e.g.*, 50 CFR 402.17(b) (providing that "[c]onsiderations for determining that a consequence . . . is not caused by the proposed action" include where "(1) [t]he consequence is so remote in time from the action . . . that it is not reasonably certain to occur . . . or (3) [t]he consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur"). Indeed, any harm to listed species or designated critical habitat resulting from future activities would result from the activities themselves, not this guidance. The potentially harmful effects of future third-party activities would also result from a lengthy causal chain that is too speculative and hypothetical to be meaningfully analyzed in a consultation on this guidance, and the consequences of such projects would depend on a host of factors unrelated to this guidance.

Several commenters asserted that the draft guidance attempted to narrow the "functional equivalent" analysis beyond what these commenters claim to be a broad mandate in *Maui* to eliminate all discharges of pollutants. These commenters are incorrect. As explained in the guidance the Court in *Maui* rejected the Ninth Circuit's broad "fairly traceable" test in part because it could interfere "seriously with States' traditional regulatory authority" over nonpoint source pollution and groundwater. *Maui.* at 1471. This guidance respects the Court's disciplined approach to addressing the relatively narrow universe of discharges through groundwater that are the "functional equivalent" of a direct discharge by placing the functional equivalent analysis into context within the existing NPDES permitting framework. This guidance also identifies an additional potentially relevant factor for the regulated community and permitting authorities to consider when evaluating whether and how to perform a "functional equivalent" analysis.

One commenter articulated concerns that a regional groundwater recharge system that is the result of significant infrastructure investments could be subject to CWA liability or required to obtain an NPDES permit under *Maui.* This commenter asserted that regulation under the NPDES program would penalize the municipality and disincentivize future conservation efforts. EPA strongly supports water conservation and reuse efforts. As noted in the guidance, the design and performance of a facility or system is a relevant area of inquiry as part of the "functional equivalent" analysis. The guidance specifically identifies "water reuse, recycling or groundwater recharge facilities" as ones where the design and performance of the system may be particularly relevant to determining whether there is a "functional equivalent" discharge that may require an NPDES permit.

One commenter suggested that the system or facility design and performance factor is irrelevant because, according to the commenter, the system or facility would affect only what is discharged in the first place, and would not affect what happens between the point source discharge and the water of the United States. EPA disagrees with this comment. As stated in the guidance, a facility may be engineered, designed and operated to use the surface or subsurface—including pollutant-specific dynamics *along the groundwater flowpath* (e.g., sorption, biological uptake, microbial processing)—to treat, provide uptake of, or retain pollutants.