

Press Coverage | December 4, 2023

Former EPA Official Warns Maui Guide Deviates From SCOTUS Decision

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Anna Wildeman and Brooks Smith were quoted in the December 4, 2023 *Inside EPA* article, [“Former EPA Official Warns Maui Guide Deviates From SCOTUS Decision.”](#)

In a [Nov. 28 blog post](#) for law firm Troutman Pepper, Anna Wildeman, former deputy head of EPA’s water office in the Trump administration, and lawyer Brooks Smith write that EPA’s list of recommended information to include when seeking NPDES permit coverage includes a “description of in-situ processes such as sorption, biological uptake, or microbial transformation that may reduce the pollutant mass that reaches water(s) of the United States” and “[a]ny treatment technologies planning to be used” including chemicals or additives.

“These information items sound an awful lot like the system design and performance factor recommended in EPA’s 2021 *Maui* guidance that the agency later rescinded claiming such consideration would be inconsistent with the [CWA] and the *Maui* decision,” they write.

“With the benefit of more than two years of additional deliberation, it appears that EPA now believes understanding whether a system is designed to treat pollutants before they are discharged is not only a lawful consideration under the [CWA] and the NPDES program, but a relevant aspect of the functional equivalent analysis,” they add.

They also note that EPA’s guidance does “offer a new twist” on the CWA-defined term “pollutant.” EPA in its draft guidance notes that it may be helpful “in some situations” to evaluate “constituents of those pollutants” rather than the pollutants themselves.

And while the guide does not provide examples of pollutants versus indicator constituents, the blog says that finding a functional equivalent of a single “indicator constituent” would be sufficient to require a NPDES permit, also noting that finding no functional equivalent of an “indicator constituent” would not rule out the need for a NPDES permit.

“It will be interesting to see how stakeholders respond to this new twist on a statutorily defined term, especially since the Court in *Maui* was very focused on the pollutant itself. Indeed, *Maui* factors 4, 5, 6, and 7 all focus on the character of the pollutant—the extent of its dilution or chemical change as it travels, the amount entering the surface water relative to the amount in the initial point source discharge, and the degree to which the pollution has maintained its specific identity—not whether the pollutant can be reasonably inferred to have been discharged because of some undefined indicator constituents,” they said.

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