



Kentucky Energy and Environment Cabinet
Department for Environmental Protection

From: Anthony R. Hatton Commissioner

ARH

Date: May 29, 2025

Subject: Senate Bill 89 – Functional Equivalent
Analyses

Water
Advisory
Memorandum

WAM #2

All discharges to waters of the Commonwealth require a permit through the Kentucky Pollutant Discharge Elimination System (KPDES). Senate Bill 89 was passed during the 2025 regular session of the Kentucky General Assembly amending the KRS 224.1-010 definition of “waters of the Commonwealth” as follows:

"Water" or "waters of the Commonwealth" means and includes:

- (a) Navigable waters, as defined in 33 U.S.C. sec. 1362;
- (b) Sinkholes with open throat drains;
- (c) Naturally occurring artesian or phreatic springs, as well as any other spring used as a source of domestic water supply; and
- (d) Wellhead protection areas;

that are situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction.

The amended definition of “waters of the Commonwealth” (WOTC) continues to require a KPDES permit for any discharge impacting navigable waters, which are defined in 33 USC sec. 1362 as “waters of the United States” (see 40 C.F.R. 120.2); or sensitive features listed in subsections (b) through (d) above.

The agency will not be conducting a comprehensive independent review of all active KPDES permits to determine whether a functional equivalent analysis may be required. If a permittee has an active KPDES permit or intends to submit a permit application in which a functional equivalent analysis may be required, and would like agency review, the permittee must submit a request for review in writing to the cabinet.

The informational bullets in this Water Advisory Memorandum (WAM) should be considered when an applicant is amending a KPDES permit.

- A point source is defined as “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container,

rolling stock, concentrated animal feed operation, or vessel or other floating craft.” (40 CFR 122.2)

- On April 23, 2020, the United States Supreme Court ruled, in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*, that the Clean Water Act (CWA) requires a discharge permit when a point source adds pollutants to navigable waters through groundwater if this addition of pollutants is “the functional equivalent of a direct discharge” from the source into those waters. The *Maui* decision applies to discharges that originate from point sources. This analysis is not intended to be used for pollution that originates from nonpoint sources.
- This WAM is intended to clarify that the *Maui* decision applies to point source discharges to groundwater, among other things, that discharge to a Water of the Commonwealth.
- Under the Clean Water Act, compliance with a KPDES discharge permit, shields the permit holder from both agency and citizen suit enforcement action. However, discharges or releases of pollutants into waters or onto land without a permit may lead to liability under state law (KRS Chapter 224) and/or the Clean Water Act.

Questions related to this Water Advisory Memorandum, Senate Bill 89 – Functional Equivalent Analyses and/or coordination should be directed to the Commissioner of the Department for Environmental Protection, Anthony R. Hatton, via email at Tony.Hatton@ky.gov.