WESTERN URBAN WATER COALITION

December 27, 2023

Submitted via //www.regulations.gov/

Public Comments Processing
Attn: Docket ID No. EPA–HQ– OW–2023–0551
U.S. Environmental Protection Agency
EPA Docket Center, Water Docket,
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments on Draft Guidance Implementing the Supreme Court's *Maui* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program

On November 27, 2023, the U.S. Environmental Protection Agency (EPA) published a notice of availability of draft guidance—Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination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. The purpose of the draft guidance is "to provide clarity to the public" regarding "the *Maui* decision's functional equivalent standard, considerations for determining which discharges through groundwater may require coverage under an NPDES permit, and the types of information that may be useful to NPDES permitting authorities in developing appropriate permit conditions."[1]

The Western Urban Water Coalition (WUWC) appreciates the opportunity to comment on the draft guidance from the regulated public on the draft guidance.[2] How EPA interprets its Clean Water

[1] *See* 88 Fed. Reg. 82891, 82891 (Nov. 27, 2023); Draft Guidance: *Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater* ("Draft Guidance"), available at https://www.epa.gov/ npdes/releases-point-source- groundwater.

[2]Our members include: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (East Bay Municipal Utility District, Eastern Municipal Water District, the City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities and Washington County Water Conservancy District); and **Washington** (Seattle Public Utilities). The Metropolitan Water District of Southern California does not participate in the submission of these comments.

Act (CWA) authority and various program requirements is critically important to WUWC members, which include the largest urban water utilities in the western United States. Together, our members serve more than 40 million urban water consumers in 20 major metropolitan areas across seven states. Many of our members not only provide a reliable, high-quality urban water supply for millions of users, they also operate other utilities, such as wastewater, natural gas, and electric, including hydroelectric, facilities. Because protecting water quality is fundamental to our members' activities, they have developed extensive compliance programs. But these programs function effectively and efficiently only when permitting requirements and associated procedures are clear and well-defined.

County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020), created considerable uncertainty regarding when a groundwater discharge qualifies as the functional equivalent of a direct discharge to navigable waters, requiring National Pollutant Discharge Elimination System (NPDES) permit. As EPA underscores in the draft guidance, the CWA is a strict liability statute.[3] Understanding when an NPDES permit is required is crucial because—as EPA acknowledges—"[i]f the operator does not seek permit coverage for a functional, equivalent discharge, the operator may be subject to administrative or judicial enforcement proceedings and associated liability under the CWA (including civil and criminal penalties)."[4]

The draft guidance unfortunately does little to clarify permitting obligations. WUWC has a number of concerns with the draft guidance and urges EPA to revise it to address the concerns enumerated below.

Comments

1. The draft guidance fails to provide operators the meaningful guidance they need to determine when a groundwater discharge will require an NPDES permit.

In *Maui*, the Supreme 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*."[5] The Court explained "an addition 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."[6] The decision acknowledges that determining whether a discharge through groundwater is the functional equivalent of a direct discharge involves uncertainty, but it expected EPA would "provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants

[3] Draft Guidance at 6-7.

[4] Draft Guidance at 2-3 (citing 40 U.S.C. § 309(c), (d), and (g)).

[5] *Maui,* 140 S. Ct. at 1476.

[6] *Maui*, 140 S. Ct. at 1476.

of individual permits, promulgation of general permits, or the development of general rules."[7] It also observed that "EPA and the States have often considered the Act's application to discharges through groundwater," presumably assuming that EPA would use that prior experience as examples to aid operators in determining whether an NPDES permit would be required.

The draft guidance, however, does little more than list the seven factors the Court identified and note that those are "just some of the factors that may prove relevant to determining whether a discharge is the functional equivalent of a direct discharge."[8] *Maui*'s factors include:

i. transit time;
ii. distance traveled;
iii. the nature of the material through which the pollutant travels;
iv. the extent to which the pollutant is diluted or chemically changed as it travels;
v. the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
vi. the manner by or area in which the pollutant enters the navigable waters; and
vii. the degree to which the pollution (at that point) has maintained its specific identity.[9]

The draft guidance includes two sections discussing these factors—one that focuses on transit time and distance and the second on "other potentially relevant factors." Neither provides operators with meaningful guidance. With respect to transit time and distance, the draft guidance largely quotes from *Maui.* It explains what the Supreme Court explained:

- A "discharge that only travels a few feet or a few yards through groundwater before reaching" navigable waters will require an NPDES permit;[10]

- A "100-year migration of pollutants through 250 miles of groundwater to a river" will not require an NPDES permit;[11] and

- A "point source pollutant discharge ending 50 miles from a navigable water with a groundwater transit time of 'many' years that first mixes with 'much other material[s]'" might.

EPA's only guidance is that:

[7] *Maui*, 140 S. Ct. at 1477.

[8] Draft Guidance at 3 (citing *Maui*, 140 S. Ct. at 1477).

[9] *Maui*, 140 S. Ct. at 1476–77.

[10] Draft Guidance at 4.

[11] *Id.* (citing *Maui*, 140 S. Ct. at 1471).

- A "discharge that is a long distance from a water of the United States and that takes a long time to reach a water of the United States might not be the functional equivalent of a direct discharge"; and

- A "discharge that is a short distance from a water of the United States and that takes a short time to reach a water of the United States is likely the functional equivalent of a direct discharge."

On other words, the draft guidance provides no guidance at all regarding how operators should apply "the most important factors in most cases."[12]

The draft guidance provides little information on the "other potentially relevant factors," as well. For the "manner or area a pollutant enters" navigable waters, EPA notes that pollutants often form a contaminant plume. If the plume has "minimal dispersion" before entering navigable waters, "the discharge may be the functional equivalent of a direct discharge."[13] The guidance does not address what constitutes "minimal dispersion." Likewise, the draft guidance explains that a discharge through a porous subsurface is also evidence of that the discharge may be the functional equivalent, but the guidance does not provide any examples.

Also of concern is how EPA will evaluate the mass or concentration of pollutants reaching navigable waters. The draft guidance explains that a "relatively higher" mass or concentration of pollutants reaching navigable waters compared to the mass or concentration leaving the point source can support the finding of a functional equivalent direct discharge. The draft guidance does not define what it means by "relatively higher" or whether a pollutant's mass or concentration alone justifies an enforcement action or a demand that a facility obtain a permit.

The draft guidance does not provide any concrete examples of the types of discharges that EPA believes meet the functional equivalent test or how it has approached this question in other cases. EPA should establish ranges to assist operators in determining when certain factors, such as concentrations, timelines or distances, are likely to trigger permitting requirements. EPA could qualify those ranges with factors that it has looked to in specific cases or thinks will likely affect the analysis.

[12] *Id.* at 4.

[13] *Id.*

2. The draft guidance should explain how EPA will weigh *Maui* factors.

The draft guidance not only fails to provide any useful information regarding how an operator should apply the *Maui* and "other standards," it also fails to explain how EPA staff are to go about weighing them. The draft guidance only provides that "[t]he weighing of the relevant factors is also highly dependent on site-specific considerations."[14]

This approach not only leaves operators to guess how EPA will evaluate individual factors, it places no limits on agency discretion. Under the draft guidance, it is likely that EPA enforcement will expand the scope of its authority well beyond what has been anticipated, which in turn create even greater uncertainty regarding permitting obligations. This approach is precisely what Justice Alito warned against in his dissenting opinion: "We should not require regulated parties to 'feel their way on a case-by-case basis' where the costs of uncertainty are so great."[15]

3. The use of "indicator constituent" is inconsistent with the statute and the *Maui* factors.

The draft guidance also proposes that a functional equivalent analysis evaluate *constituents of pollutants* instead of the pollutants themselves.[16] The draft guidance refers to "constituents of pollutants" in various ways, including "constituent pollutant" and "indicator pollutant." The use of various terms without clear definitions makes the guidance misleading, but the basic point seems to be that EPA staff can base a functional equivalent of a direct discharge finding solely on the presence of a substance that is not actually a CWA pollutant under the CWA. In EPA's view, a constituent of a CWA-listed pollutant—"is a reasonable indicator for other constituent pollutants (i.e., it can be inferred that the pollutant would have similar characteristics as other pollutants in the effluent with regard to the relevant factors under *Maui*)."[17]More, if an operator determines that a discharge of a *constituent* pollutant is the functional equivalent of a direct discharge, an NPDES permit is required for that pollutant *and* "other pollutants with similar characteristics."[18] Notably, *not* finding a functional equivalent of a single "indicator constituent" does not rule out the need for a NPDES permit.

This approach is inconsistent with the CWA and the *Maui* factors. The CWA only prohibits the discharge of "pollutants" specifically identified in the Act without a permit—not constituents of

[14] *Id.*

[15] *Maui*, 140 S. Ct. at 1491 (Alito, J., dissenting) (citing *Rapanos v. United States*, 547 U. S. 715, 758 (2006)); *see also Maui*, 140 S.Ct. at 1481 (Thomas, J., dissenting) ("The Court suggests that the EPA could clarify matters through 'administrative guidance,' but so far the EPA has provided only limited advice and recently shifted its position. In any event, the sort of 'general rules' that the Court hopes the EPA will promulgate are constitutionally suspect.") (internal citations omitted).

[16] Draft Guidance at 3.

[17] *Id.* at 3.

[18] *Id.* at 3 n.11.

pollutants. As the draft guidance states at the outset, the CWA prohibits "the discharge of any pollutant by any person" unless authorized under the Act.[19] The presence of constituents of pollutants does not indicate that a discharge is the functional equivalent of a direct discharge because it is not evidence of the discharge of a pollutant. Lacking from the draft guidance are any examples of constituents of a pollutant.

In addition, relying on a constituent of a pollutant is inconsistent with *Maui* factors that consider dilution or chemical change as a pollutant 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. Inferring from the discharge of an undefined "constituent pollutant" the functional equivalent of a direct discharge of pollutant requiring an NPDES permit would render meaningless several of the *Maui* factors.

From a practical perspective, EPA's proposed reliance on "constituent pollutants" will force operators to undertake costly and technical evaluations to determine whether an NPDES permit is required. Relying on "constituent pollutants" will be particularly problematic there may be multiple sources in nearby groundwater. This is an expansion of NPDES permitting requirements and is neither justified under the plain language of the CWA or inconsistent with the Court's factors in *Maui.* EPA should eliminate from the guidance consideration of "constituent pollutants" as "a reasonable indicator for other constituent pollutants (i.e., it can be inferred that the pollutant would have similar characteristics as other pollutants in the effluent with regard to the relevant factors under Maui)."

4. The draft guidance will place unreasonable compliance burdens on operators and displace state authority to regulate groundwater.

Perhaps in recognition that the draft guidance does little to clarify permitting obligations, EPA observes in a footnote that an operator may, "in its discretion, choose to submit a permit application for NPDES permit coverage for a discharge into groundwater in the absence of a functional equivalent analysis. In such cases, the permitting authority may proceed to process the application."[20] The draft guidance leaves operators little choice but to go through the NPDES permitting process. Otherwise, they will risk "administrative or judicial enforcement proceedings and associated liability under the CWA (including civil and criminal penalties)."[21]

As a result, operators will not only incur the compliance burdens associated with seeking an NPDES permit where it might not be needed, it will also incur substantial additional costs associated with meeting the long list of informational requirements the draft guidance recommends. The "recommended" information includes: (1) discharge location; (2) transit time; (3) distance

[19] 33 U.S.C. § 1311(a).

[20] Draft Guidance at 6, n.14.

[21] *Id*. at 3.

travelled; (4) flow characteristics; (5) shallow subsurface geology and hydrology characterization; (6) a description of pollutant-specific dynamics along the groundwater flow path; (7) treatment technologies; effluent characteristics; (8) an explanation of the permittee's functional equivalent of a direct discharge analysis; and (9) other information. Developing this information will require costly and time-consuming technical analyses.

More, this approach displaces states' primary role in regulating ground water. The draft guidance states that "existence, or lack, of a state groundwater protection program is not relevant to whether the functional equivalent of a direct discharge analysis applies, and the existence of a state groundwater protection program does not obviate the need for an NPDES permit."[22] Because the draft guidance provides so little guidance to operators that many will feel compelled to seek an NPDES permit, EPA will assume substantial control over ground water discharges.

This approach is inconsistent with *Maui* and the CWA. As the Court emphasized in the decision, "perhaps most important, the structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States."[23] The Court explained that it "must doubt that Congress intended to give EPA the authority to apply the word "from" in a way that could interfere as seriously with States' traditional regulatory authority" over nonpoint source regulation or groundwater regulation.[24] The Court interpreted the CWA to "reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater."[25]

The draft guidance does the opposite. By leaving the *Maui* factors ambiguous and their weighing completely within EPA's discretion, the draft guidance allows EPA to assume a far greater role over groundwater permitting than Congress authorized in the CWA. WUWC urges EPA to revise the draft guidance to provide clear standards and meaningful guidance to the functional equivalent analysis.

[22] *Id.* at 7.

[23] *Maui*, 140 S. Ct at 1471.

[24] *Id.*

[25] *Id.* at 1472.

Conclusion

Thank you for the opportunity to provide these comments. If you have any questions, please contact me at (303) 739-7378 or mbrown@auroragov.org, or WUWC national counsel, Ted Boling, at (202) 661-5872 or TedBoling@perkinscoie.com.

Very truly yours,

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