



Mr. Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Docket ID No. EPA-HQ-OW-2020-0673

In Re: Comments of the National Association of Clean Water Agencies and the WaterReuse Association on the U.S. Environmental Protection Agency's Draft Guidance Memorandum, "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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"

Submitted electronically via regulations.gov

Dear Mr. Wilson:

The National Association of Clean Water Agencies (NACWA) and the WaterReuse Association appreciate the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) draft guidance memorandum, "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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." 85 Fed. Reg. 79,489 (Dec. 10, 2020).

NACWA represents the interests of publicly-owned wastewater and stormwater utilities across the country. NACWA's members include more than 320 municipal clean water agencies that own, operate, and manage publicly-owned treatment works (POTWs), wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment and disposal.

NACWA's members have for decades operated under and complied with National Pollutant Discharge Elimination System (NPDES) permits issued pursuant to Sec. 402 of the Clean Water Act (CWA). Numerous CWA provisions specifically address POTWs, and a POTW was in fact among the first sources to be issued an NPDES permit.¹ Understanding the CWA's requirements and structure has been and will continue to be critical to the clean water operations of NACWA's members.

¹ See EPA Press Release: EPA Issues First Municipal Wastewater Discharge Permit in the Nation (July 30, 1973), available at <https://archive.epa.gov/epa/aboutepa/epa-issues-first-municipal-wastewater-discharge-permit-nation.html> (last visited Jan. 5, 2021).

WaterReuse is a not-for-profit trade association for water utilities, businesses, industrial and commercial enterprises, non-profit organizations, and research entities that engage in and on water reuse. WaterReuse and its state and regional sections represent nearly 250 water utilities serving over 60 million customers, and over 300 businesses and organizations across the country.

The WaterReuse Association's mission is to engage its members in a movement for safe and sustainable water supplies, to promote acceptance and support of recycled water, and to advocate for policies and funding that increase water reuse. WaterReuse members manage a wide variety of water recycling projects, including those in which highly treated effluent is injected or allowed to percolate underground for a range of beneficial purposes. Projects that intentionally inject (either directly or indirectly through percolation) highly treated wastewater into groundwater for future beneficial reuse as fresh water supply typically do not result in a discharge to surface waters, and therefore operate under different regulatory regimes such as those established by the Safe Drinking Water Act.

Introduction

NACWA and WaterReuse appreciate EPA's efforts to provide guidance to both the regulated community and permitting authorities on the application of the U.S. Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*,² and to help place the "functional equivalent" analysis articulated by the Court into the context of the existing NPDES permitting framework. The municipal clean water and water recycling communities devote significant resources to comply with all applicable regulatory requirements and provide affordable, sustainable clean water for all Americans. Clarity concerning the scope of the NPDES permitting program is critical to those efforts.

In particular, clean water agencies routinely engage in innovative water management practices designed to enhance surface water quality, reduce environmental impacts, and promote water sustainability which may nevertheless result in minimal pollutants reaching navigable waters subject to CWA jurisdiction. These activities include, among other things, green infrastructure development, water reuse and recycling, and groundwater recharge.

The draft memorandum appropriately acknowledges that "stormwater controls, infiltration or evaporation systems or other green infrastructure; water reuse, recycling or groundwater recharge facilities...prevent or abate discharges of pollutants to waters of the United States," and may therefore be less likely to require NPDES permit coverage under the *Maui* "functional equivalent" analysis even where discharges from such activities reach a jurisdictional water. Indeed, such practices are often specifically designed to *eliminate* direct discharges into navigable waters and accordingly are not the "functional equivalent" of them.

² 140 S. Ct. 1462 (2020).

These and other activities undertaken by clean water agencies are also often subject to state and federal permitting regimes outside of the CWA Sec. 402 context that provide tailored coverage resulting in comprehensive environmental protection without the corresponding financial burdens, delays, and litigation risks often associated with the need to obtain an NPDES permit. Steps taken to comply with such programs mitigate the environmental impact of any potential pollutant discharges to navigable waters and may directly impact application of the *Maui* factors in many circumstances.

NACWA and WaterReuse encourage EPA to provide additional clarity to the regulated community and permit writers concerning the applicability of the NPDES program to practices such as green infrastructure development, water reuse and recycling, and groundwater recharge in light of the *Maui* decision. Regulatory certainty is critical for clean water agencies to invest the resources necessary to continue their important work of protecting the health of communities nationwide, providing sustainable water resources, and furthering the CWA's objectives.

Green Infrastructure Should Generally Be Excluded from NPDES Requirements Under the *Maui* “Functional Equivalent” Analysis in Furtherance of the CWA’s Objectives

“Green infrastructure” refers to various stormwater control practices which include a variety of wet weather management features that mimic the natural hydrologic cycle by using natural vegetation to capture and store runoff and allow it to gradually infiltrate into the ground so as to avoid unnatural flow regimes and erosive flows that can destroy stream habitat and disrupt aquatic systems.

Multiple EPA guidance documents describe how these practices can be used to protect surface waters by treating runoff through methods including infiltration, storage, filtration, and evaporation.³ Many states also encourage or require the use of green infrastructure to meet groundwater recharge, stormwater runoff quantity, and stormwater runoff quality standards.⁴

³ See, e.g., EPA’s *Green Infrastructure Municipal Handbook* (2008), available at <https://www.epa.gov/green-infrastructure/green-infrastructure-municipal-handbook> (last visited Jan. 5, 2021); see also EPA’s *National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas*, at Chapter 5 (2005), available at https://www.epa.gov/sites/production/files/2015-09/documents/urban_guidance_0.pdf (last visited Jan. 5, 2021).

⁴ See, e.g., the New Jersey Administrative Code, NJDEP-N.J.A.C. § 7.8.1.2 (defining green infrastructure to mean stormwater management measures “that manage stormwater close to the source either by infiltration into subsoil, treatment by vegetation or soil, or storage for reuse”); see also, Boston Zoning Code Art. 32 § 32-6 (requiring certain development projects in the Groundwater Conservation Overlay District to “promote infiltration of rainwater into the ground by capturing within a suitably-designed system a volume of rainfall on the lot equivalent to no less than 1.0 inches across that portion of the surface area of the lot to be occupied by the Proposed Project”).

Notably, green infrastructure can be the source of mitigated releases of pollutants that indirectly reach jurisdictional surface waters through groundwater. However, as EPA explains in its draft guidance memorandum, the *Maui* decision is clear that the NPDES program only applies to indirect discharges to navigable waters from point sources which are the “functional equivalent” of direct discharges, and that factors relevant to the “functional equivalence” analysis include how far and long pollutants travel before reaching a navigable water, as well as the nature of the material through which the pollutant travels, and the extent to which the pollutant is diluted, chemically changed, or decreased.

While green infrastructure and stormwater control practices vary, they often do not involve discharges from a point source, and even where they do they are frequently designed to slow down the transit time of pollutants and reduce the amount of pollutants that would otherwise end up in jurisdictional surface waters through methods such as settling, biological and chemical reactions, or other processes. They likewise decrease runoff volumes and mitigate turbidity.

Thus, as EPA references in the draft guidance, the design and performance of green infrastructure can affect and inform all of the factors listed by the Supreme Court in its *Maui* decision. Green infrastructure often increases the time and distance pollutants in stormwater must travel before reaching navigable waters. Components of green infrastructure can promote dilution, adsorption or dispersion of pollutants and effect the extent to which pollutants are chemically changed or the amount of pollutants is decreased. And green infrastructure is expressly designed to affect the manner by which pollutants may enter a surface water so as to address otherwise unabated runoff and stormwater flows. Application of the *Maui* analysis to green infrastructure therefore clearly indicates that such practices do not produce discharges “functionally equivalent” to direct discharges and should generally be excluded from NPDES coverage.

Importantly, the Supreme Court also expressly stated in *Maui* that “the underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute’s basic federal regulatory objectives.”⁵ As mentioned above, green infrastructure practices may be subject to and required by state laws which are tailored to local circumstances, and they are specifically designed to stop unabated pollution from entering surface waters in furtherance of the CWA’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶ Generally excluding green infrastructure from the NPDES program would therefore also not undermine, but would in fact serve, the objectives of the CWA, consistent with the *Maui* decision.

NACWA and WaterReuse encourage EPA to clarify that, under the “functional equivalence” analysis and consistent with the Supreme Court’s admonition to not undermine the overall objectives of the CWA, green infrastructure practices that may result in indirect discharges to navigable waters from point sources are not generally subject to the NPDES program.

⁵ 140 S. Ct. 1462, 1477.

⁶ 33 U.S.C. §1251(a).

EPA Should Clarify that Water Reuse and Recycling and Aquifer Recharge Should Likewise Generally Be Excluded from NPDES Coverage

Clean water agencies also engage in a number of activities designed to preserve water resources and achieve environmental objectives, such as water reuse and recycling and aquifer recharge. As with green infrastructure, generally excluding such environmentally beneficial activities from the scope of the NPDES program would be consistent with the objectives of the CWA and application of the Supreme Court's "functional equivalence" *Maui* analysis.

Water reuse and recycling for the purpose of aquifer recharge is a process through which treated water is conveyed underground to replenish groundwater stored in aquifers for beneficial purposes, especially to supplement drinking water supplies. This water conveyed underground is often highly treated recycled water from POTWs. Recycling projects are engineered, designed, and operated to treat and attenuate pollutants and abate their discharge into surface waters, thereby comporting with the analytical factors identified by EPA in the draft guidance.

As with green infrastructure, water is purposefully discharged into groundwater in this process for the benefit of the hydrologic cycle. It is not the "functional equivalent" of a direct discharge into surface water; effluent reaching surface waters does so indirectly, through other media that help to further purify it, and only after mixing with groundwater reserves. The amount, characteristics, and even identity of a pollutant discharged from a water recycling facility will change significantly as it moves through time, space, and various media.

Water reuse and recycling also play critical roles in achieving other human health and environmental objectives. EPA's recently published Water Reuse Action Plan (WRAP) acknowledges the important role water reuse and recycling can play to supplement drinking water supplies.⁷ Likewise, recycled water can also be reused for other applications such as irrigation. As EPA's WRAP explains, such reuse can help reinforce water sustainability, resilience, and security in communities.

While land application of recycled water can ultimately result in indirect discharges into surface waters, these discharges are generally nonpoint source discharges, and have therefore traditionally been handled under nonpoint source management programs. Moreover, they are not the "functional equivalent" of direct discharges in light of the time and distance pollutants travel before reaching a navigable water, as well as the intervening media and soils any pollutants must travel through. Continuing to manage land applications of irrigation water under nonpoint source management programs would both further the purposes of the CWA and support the important policy goal of promoting water resilience in local communities.

⁷ EPA Water Reuse Action Plan, available at <https://www.epa.gov/waterreuse/water-reuse-action-plan> (last visited Jan. 5, 2021).

Finally, saltwater intrusion into freshwater aquifers can, among other things, degrade drinking water quality. Various methods can be undertaken to prevent such intrusion, including artificial groundwater recharge and the creation of underground injection barriers. While constituents of the injected water can end up in surface waters as a natural result of the hydrologic cycle, in light of the time and distance any pollutants would travel before reaching a jurisdictional water, minimal amount of pollutants reaching navigable waters, and lack of any identifiable outfalls, such instances are not the “functional equivalent” of direct discharges into surface waters. Additionally, because prevention of saltwater intrusion is designed to protect the quality of drinking water sources, treating such activities as “nonpoint” sources serves the purposes of the CWA.

Conclusion

NACWA and WateReuse support EPA’s efforts to provide greater clarity to the regulated community and permit writers on the important issue addressed by the Supreme Court in the *County of Maui* decision concerning which indirect discharges to jurisdictional surface waters require coverage under the NPDES program.

Utilities are making substantial investments in infrastructure, technologies, and practices that provide significant environmental and health benefits to communities throughout the country, but that have the potential to add, however minutely, pollutants to surface waters. Clean water agencies are dedicated to protecting the communities they serve and transforming their social, economic, and environmental health while meeting all regulatory obligations. Certainty concerning the application of the complex yet critical NPDES program is vital to supporting those efforts.

Activities such as green infrastructure development, water reuse and recycling, and aquifer recharge serve the objectives of the CWA. Under the *Maui* analysis any pollutants reaching navigable waters from these activities are generally not the “functional equivalent” of direct discharges. EPA should make clear that such activities therefore are unlikely to require NPDES permits.

As Congress intended, states have enacted groundwater regulations tailored to local circumstances, and multiple federal programs also regulate operations likely to pose risks of groundwater contamination. These permitting regimes generally provide more appropriate coverage for such innovative clean water technologies.

Sincerely,



Amanda Aspatore
Chief Legal Counsel
NACWA



Patricia Sinicropi
Executive Director
WateReuse Association