



National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

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Attention: Docket ID No. EPA-HQ-OW-2023-0551, “Implementing the Supreme Court’s *Maui* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program”

Dear Mr. Zobrist:

The National Association of Wetland Managers (NAWM)) submits this letter to the U.S. Environmental Protection Agency (EPA) in response to its notice of available of draft guidance, “Implementing the Supreme Court’s *Maui* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program.”

NAWM is a non-partisan 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland and aquatic resource protection programs. As an association representing states and Tribes as co-regulators tasked with implementation of Clean Water Act (CWA) regulations, NAWM understands the complexity of the CWA and the challenges the Act poses. We have worked for many years together with federal, state, and tribal agencies in the implementation of regulatory and non-regulatory programs designed to protect waters of the United States, including the CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit program.

NAWM appreciates that EPA has issued a draft guidance document on how to implement the “functional equivalent” standard from the U.S. Supreme Court’s decision in *County of Maui v. Hawaii Wildlife Fund*. In *Maui*, the Supreme Court held that NPDES permits are required not only for direct discharges from point sources to “waters of the United States” (WOTUS), but also for discharges from point sources that travel through groundwater to surface WOTUS and are the functional equivalent of a direct discharge. As co-regulators, states and Tribes have a substantial interest in EPA regulations and guidance concerning the scope and implementation of CWA programs, including the NPDES program. The draft *Maui* guidance is helpful in explaining how states, Tribes, project proponents, and others should interpret the seven non-exclusive factors when assessing whether a discharge through groundwater is a functional equivalent of a direct discharge requiring authorization by a NPDES permit.

Waters of the United States (WOTUS)

The draft *Maui* guidance indicates that facility operators “should analyze, in the first instance, whether any of those discharges reach waters of the United States...” It has been over twenty years since identifying WOTUS was a relatively simple question. The scope of jurisdictional waters is particularly difficult at present in light of the recent U.S. Supreme Court decision in *Sackett* that EPA and the Army Corps of Engineers are still interpreting, a newly revised regulation defining WOTUS, different WOTUS definitions in effect across the country, and ongoing litigation on the scope of jurisdictional waters.

Recommendation: NAWM agrees that a first step for facility operators to take when analyzing if their discharge requires a NPDES permit should be to determine if the discharge might reach a WOTUS. WOTUS is a threshold question for many CWA programs, including NPDES. NAWM strongly supports the *Maui* guidance in not attempting to clarify the scope of WOTUS or otherwise duplicate efforts EPA is making jointly with the Army Corps of Engineers. Duplicative efforts could result in even more confusion in the scope of jurisdiction. NAWM recommends that the guidance explicitly acknowledge the current uncertainty regarding the extent of jurisdictional waters in a particular jurisdiction and urge facility operators to keep abreast of WOTUS developments. An easy way to encourage this, for example, would be for the final guidance to provide a link to EPA’s webpage on WOTUS and for EPA to continue to hold informational webinars on the scope of jurisdictional waters, among other actions.

Seven Factors Identified by the U.S. Supreme Court

The *Maui* Court provided a non-exclusive list of seven factors that may be relevant to whether a discharge of pollutants is the functional equivalent of a direct discharge, including: (1) transit time; (2) distance traveled; (3) the nature of the material through which the pollutant travels; (4) the extent to which a pollutant is diluted or chemically changed as it travels; (5) the amount of pollutant entering the navigable waters relative to the amount of pollutant that leaves the point source; (6) the manner by or area in which the pollutant enters the navigable waters; and (7) the degree to which the pollutant at that point has maintained its specific identity. The *Maui* Court stated that time and distance will be the most important factors in most cases, but not necessarily in every case. The Court did not discuss how to weigh these and other factors relevant to the fate and transport of pollutants through groundwater.

The draft guidance incorporates the *Maui* Court’s seven factors, while emphasizing that the weighing of relevant factors is also highly dependent on site-specific considerations. The draft guidance explains that a functional equivalent analysis may not require consideration of all, or even several of, the factors laid out in the *Maui* decision. The draft guidance discusses how to interpret transit time and distance traveled, by contrasting a short time and distance versus a long time and distance with the former more likely to constitute a functional equivalent discharge. It also notes that the *Maui* Court provided an illustrative list of factors, and that EPA or other implementing agencies might consider additional factors when relevant. The guidance concludes that there is no bright-line test for evaluating whether a NPDES permit is required based on these factors but instead that the factors must be evaluated on a site-specific basis. This theme of flexibility and site-specific evaluation runs throughout the draft guidance.

Recommendation: NAWM supports the flexible approach adopted in the draft guidance, including its emphasis on the importance of site-specific evaluation, and urges EPA to retain this approach in the final guidance. Flexibility allows agencies administering the NPDES program to ensure discharges that are either direct or a functional equivalent of direct will be subject to permitting

requirements. Many factors potentially relevant to a functional equivalent analysis differ among sites and among proposed projects, including discharged pollutants and the degree they are transformed, diluted, or absorbed while traveling through groundwater towards a WOTUS, differences in subsurface materials through which groundwater and pollutants travel, and differences in status of the jurisdictional receiving water are only some of the potential considerations.

Permit Application and Coordination Meeting

The draft guidance observes that the permit applicant may request to meet with the permitting authority early in the permitting process to discuss informational needs. Such a meeting could help ensure that a NPDES permit application is complete and includes any supplemental information necessary to do a functional equivalent analysis. A project proponent has the option, at its discretion, to submit a NPDES permit application for a discharge into groundwater without a functional equivalent analysis, essentially agreeing that the activity is regulated.

Recommendation: NAWM supports the draft guidance's observation that a permit applicant may request an early meeting with the permitting authority to discuss information needs, but suggests it be more strongly worded. In addition to clarifying required information, an early meeting also would provide an opportunity for project proponents to discuss with permitting authorities the presence or absence of WOTUS potentially affected by an indirect pollutant discharge, and any recent changes or uncertainties regarding WOTUS in the project area. Given the potential benefits of early coordination, NAWM recommends that the final guidance strongly encourage or require such a meeting request. One potential approach might be adapted from the CWA section 401 water quality certification process, which requires the project proponent to request a pre-application meeting at least thirty days in advance of a section 401 application and allows the state certifying authority to decline such a meeting.

Factors Not Relevant

The draft guidance highlights two factors that should not be considered part of the functional equivalent analysis. One is the intent of the project proponent and whether a discharge was intended. The second inappropriate factor is whether the state has established a groundwater protection program.

Recommendation: NAWM supports the draft guidance conclusion about the two factors being not relevant to a functional equivalent analysis. The CWA is a strict liability statute and therefore intent is irrelevant to applicability of its programs including NPDES. The presence of a state groundwater program similarly seems different from the seven factors provided by the *Maui* Court. The factors listed by the *Maui* Court all relate to how much the discharge through groundwater is likely to have equivalent effect as a direct discharge on the receiving WOTUS, and a state groundwater protection program may be focused on protecting the quality of groundwater instead of the CWA focus on surface water quality. In order to avoid confusion, NAWM recommends the final guidance emphasize that the need to apply for a NPDES permit does not relieve a project proponent from determining if a state groundwater protection program applies to their activity.

Implementation Challenges

Forty-seven states administer the NPDES program under state law. As a result, successful implementation of the *Maui* decision rests primarily with the many authorized permitting authorities. To avoid a wide disparity in implementation, it will be essential for states and EPA to routinely coordinate, share information and "lessons learned," and highlight emerging issues in need of clarification.

Recommendation: NAWM recommends that EPA and its Regions have ongoing discussions with state permitting authorities and associations regarding implementation of the *Maui* indirect discharge issue. Such ongoing discussions could highlight for both EPA and implementing states how permitting authorities are applying the “functional equivalent” factors, identify what additional factors agencies have developed to reflect site-specific circumstances, flag useful examples of equivalency analyses and types of helpful information, and generally identify areas in which additional clarity and discussion is needed.

Closing

Thank you for the opportunity to submit comments on the Agencies’ proposed guidance on implementing the *Maui* decision. NAWM believes EPA’s draft guidance increases clarity about when discharges through groundwater into a WOTUS are subject to the NPDES program, and therefore will be helpful when finalized. Although these comments have been prepared by NAWM reflecting insights from conversations with our state and Tribal members, the comments do not necessarily represent the individual views of all states and tribes. We encourage your full consideration of the comments of individual states and tribes, and other state and tribal associations.

Sincerely,

Marla J. Stelk



Executive Director

Cc: NAWM Board of Directors