Federal StormWater Association

January 11, 2021

Submitted electronically via [https://www.regulations.gov]
Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: FSWA Comments on EPA Draft Guidance: Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water act National Pollutant Discharge Elimination System Program: Docket ID No. EPA-HQ-OW-2020-0673

Dear Sir or Madam:

The Federal StormWater Association (FSWA) submits the following comments on EPA's Draft Guidance Memorandum: Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act National Pollutant Discharge Elimination System Program (Draft Guidance). 85 *Fed. Reg.* 79,489 (Dec. 10, 2020).

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations in areas in which EPA serves as the National Pollutant Discharge Elimination System Program (NPDES) permitting authority, that generate "stormwater associated with industrial activity" as defined at 40 CFR § 122.26(b)(14) and are subject to National Pollutant Discharge Elimination System (NPDES) permitting.[1]

FSWA members, also, operate in states that have been authorized to issue their own NPDES permits for industrial stormwater, and some of these facilities also operate pursuant to non-NPDES permits and/or regulations that impose control requirements as to potential additions of pollutants to groundwater. In addition, many have adopted Green Infrastructure practices for groundwater recharge and others have been required to infiltrate in lieu of strict limits on surface water discharges. Individual members of FSWA may have additional concerns with various aspects of the Draft Guidance, which they may be filing separately.

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[1] A list of FSWA members is available upon request.

EPA's Draft Guidance is intended to spell out how the Agency and the States, as permitting authorities, can decide if an addition of pollutants to groundwater is the "functional equivalent" of a direct discharge of pollutants to surface waters, requiring an NPDES permit. FSWA supports the basic concepts set forth in the Draft Guidance. As an initial matter, EPA recognizes that in determining when an addition of pollutants to groundwater requires an NPDES permit, the permitting authority must consider the seven factors laid out by the Supreme Court in *Maui County*, and we agree with that conclusion. We also agree with EPA's determination that an additional factor should be considered: the design and performance of the system from which the addition of pollutants originates. Consideration of design and performance of the system would assist the permitting authority in assessing the other factors that the Supreme Court said were relevant to a "functional equivalent" determination.

The Draft Guidance explains how the "design and performance" factor would apply to some example situations, illustrating how this factor is useful in making "functional equivalent" determinations. In many cases, FSWA members operate systems in which water is intended to be filtered into the ground, and ultimately into groundwater – often, to replenish groundwater sources and/or to prevent runoff of pollutants into surface waters. Examples of these types of systems are green infrastructure measures and aquifer storage-and-recovery systems. These systems are not intended to transfer pollutants into surface waters, so they do not represent the kind of intentional avoidance of NPDES permit requirements that the Court was concerned about in *Maui County*. If some pollutants do end up in surface waters, simply because of hydrologic connections between groundwater and those surface waters, that is a far cry from the "functional equivalent" of a direct discharge that the Court indicated should obtain an NPDES permit.

But FSWA members also operate systems that are not intended to result in releases to surface water or groundwater. Examples include petroleum and chemical pipelines, stormwater retention basins, and water/wastewater conveyance systems (including sewers and water mains). Despite the fact that these systems are not specifically designed to convey pollutants into groundwater, unintentional leaks or incursions can develop and related effluent may eventually reach surface waters. Clearly, these situations do not occur due to any intentional avoidance of the NPDES permit requirements. Moreover, there is no possible way for the system operator to apply for a permit in advance of the unplanned release, and it is hard to imagine how the permit requirements could be applied in that instance. These occurrences should not be deemed to meet the "functional equivalent" test.

The Draft Guidance also lays out several principles, in addition to laying out the factors that should be considered, in applying the "functional equivalent" test that we believe are critical in making a determination as to whether an NPDES permit is required. One of those principles is that in order for a permit to be required, there must be a "point source" from which the discharge emanates. The fact that pollutants start out in a unit or system, and end up in the ground and then into groundwater, does not mean that they got there through a "point source." Pollutants can get into the ground in many ways.

In many situations, pollutants may be found in the groundwater, but there is no information as to the origin of those pollutants. Only if there is a discrete, confined conveyance through which pollutants flow is there a "point source" that can be subject to an NPDES permit. Nonpoint sources of pollutants (*e.g.*, residential septic systems) are not

regulated by the NPDES program – and certainly, if no sources can be determined at all, the NPDES requirements cannot also apply.

The Draft Guidance another important principle that asserts that in order for the NPDES requirement to apply, the pollutants discharged through the point source need to actually reach a surface waterbody that qualifies as a water of the United States. While that may seem obvious, it is important to keep that principle in mind in applying the *Maui County* decision.

More specifically, perhaps, *Maui County* should be read consistently with at least one other case that was before the Supreme Court with *Maui County*. Petitions for certiorari had been filed in two other cases, asking the Supreme Court to consider whether NPDES permitting also should apply to other specific fact patterns from pollutant discharges resulting in Tennessee (*StarLink Logistics, Inc. v. ACC, LLC, et al*) and South Carolina (*Kinder Morgan Energy, et al. v. Upstate Forever, et al*).

In the StarLink LLC case, it had claimed that ACC illegally "discharges pollutants from point sources" without an NPDES permit. ACC operated a landfill in Tennessee that had been remediated pursuant to Tennessee law. The landfill remediation effort had been overseen by Tennessee regulators and at no time had they ever mandated an NPDES permit, relying upon other regulatory authorities to clean up the landfill and otherwise protect the environment. In that case, pollutants migrated underground from the closed landfill through the adjacent aquifer, ultimately emerging down gradient in the surface water. One of the key issues was whether the migration of contaminants through groundwater for an extensive distance before reaching surface water is a regulated discharge.

Last year, the Supreme Court granted certiorari to the Ninth Circuit in *Maui*, and StarLink asserted that its petition even more clearly than *Maui* provided a scenario mandating Clean Water Act permitting. Two days after *Maui* was decided, StarLink filed a supplemental brief, further arguing that the facts of its case clearly fit the Court's "functional equivalent" test.

But the facts of that case differed significantly from those in *Maui*. For one, while StarLink had argued that the landfill was a "point source" discharging pollutants into groundwater, in fact ACC argued that the pollutants left over from the landfill remediation were not "point source" discharges but were the type of diffuse discharges traditionally considered "non-point source" pollutants subject to state – not federal – authority. Further, StarLink had unsuccessfully appealed a state action all the way through the Tennessee Supreme Court. Tennessee regulators never demanded an NPDES permit, nor did any Tennessee court take issue with the lack of NPDES permitting, to control diffuse migration of pollutants into groundwater.

The U.S. Supreme Court denied the StarLink LLC petition on May 4. While no clear message can be drawn from summary action by the Supreme Court, one might infer that these facts did not meet the Court's new "functional equivalent" test; and that no NPDES permit was required. That outcome should also help to inform EPA's Draft Guidance.

The Draft Guidance focuses on the threshold issue of when an addition of pollutants to groundwater may become subject to NPDES permit requirements. We support the Draft Guidance, and we recommend that EPA issue it in final form, after considering the comments set forth above. In addition, we believe that it is also important that EPA consider issuing guidance on issues that are related and just as important: (1) what information must be provided in a permit application for a "functionally equivalent" discharge, and (2) how the permitting authority should determine the effluent limits and other requirements that have to be included in the NPDES permit for that discharge. Neither of those issues is covered in the Draft Guidance, but they both need to be addressed, and that needs to happen soon. Understanding that some additions of pollutants to groundwater will be covered by the Maui County test and EPA's final version of the Draft Guidance, the operators of the relevant facilities need to know how to apply for an NPDES permit, and the States and EPA Regions that will issue the permits need to know what those NPDES permits should look like. Other stakeholders, as well, deserve to know how EPA and the States will approach these issues.

FSWA recognizes that EPA has issued detailed regulations that specify the content of NPDES applications and permits, and has developed extensive guidance documents that further specify how the NPDES rules should be implemented. However, none of the rules or guidance documents address the "functional equivalent" situation that the Supreme Court has now brought within the NPDES program. And while perhaps more of the questions and issues relate to the long-established wastewater NPDES permitting program, they arguably become even more clouded when attempting to apply them in the stormwater context. These include, for example, how the permitting agency would evaluate the "reasonable potential" of the "functional equivalent" discharge to groundwater to "cause or contribute" to a water quality standard violation.

Given that pollutants can attenuate in the soil and groundwater, and undergo other fate and transport changes, how are those changes taken into account in determining whether a particular discharge should receive a permit limit for a specific pollutant? And once the permit limit is calculated, where is the point of compliance? The answers to these questions, for a "functional equivalent" discharge, are not obvious. FSWA recommends that EPA work closely with the States, regulated parties, and other stakeholders, to ensure that the permitting of "functional equivalent" discharges takes place in a manner that is efficient, effective and scientifically appropriate.

Beyond those permit application and permit issuance questions, there are other, more procedural, issues that EPA should consider as it addresses "functionally equivalent" discharges. For instance, if a permitting agency determines that a system or facility adds pollutants to groundwater in a manner that requires a permit under the "functionally equivalent" test, the system or facility will have to submit an NPDES permit application. It will take some time to prepare the application – especially because as of yet, there is no guidance as to what information should be contained in the application. Then, once the application is submitted, the permitting authority will need to develop a draft permit, take public comment, and then issue a final permit.

In the interim, the system or facility operator will not have an NPDES permit until that process concludes. We are concerned about the potential for liability, including through citizen suits, during this new permitting process. Someone could bring a claim that the

system or facility, which has been determined to require an NPDES permit (but only due to the *Maui County* decision) is in violation of the CWA until that permit is issued. But it serves no legitimate purpose to subject that system or facility operator to potentially heavy penalties, when it had no notice that it was required to have a permit, it is complying with the new requirement to obtain a permit, and it is awaiting its new permit. EPA should make it clear that in such a situation, the system or facility operator should not be subject to claims for past or current CWA noncompliance as long as it is meeting the application schedule set forth by the agency and working with the agency to obtain the new permit.

FSWA also recognizes that EPA's obligation to issue NPDES permits for "functionally equivalent" discharges could very well overlap and potentially interfere with other important programs. Groundwater has long been recognized (including in the CWA) as primarily a State responsibility, and accordingly, many States have adopted and implemented extensive groundwater regulatory programs. Also, there are other EPA-managed programs that already address groundwater issues, such as: (1) the Underground Injection Control (UIC) regulations; (2) the remediation programs that are implemented under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); (3) the CWA Section 319 program to address nonpoint source pollution; and (4) requirements imposed under the Coastal Zone Management Act for on-site wastewater treatment systems. Those programs often contain detailed requirements that address additions of pollutants to groundwater. EPA needs to make sure that its new program does not create conflicts with those current State and EPA requirements.

FSWA appreciates the opportunity to submit these comments on the Draft Guidance. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

Very truly yours,

Jeffrey S. Longsworth
FSWA Coordinator and Counsel

cc: FSWA Membership