

January 11, 2021

Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: EPA–HQ–OW–2020–0673; submitted via regulations.gov

Dear Mr. Wilson:

The undersigned organizations submit the following comment on EPA’s draft guidance, titled “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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.” The draft guidance is contrary to the Clean Water Act and the Supreme Court’s decision. EPA must not finalize it.

Numerous polluters endanger the nation’s rivers, lakes, and other waters because of discharges that travel through groundwater. In the first words of the Clean Water Act, Congress set out one controlling statutory objective: “[T]o restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The Act also declares a central goal “that the discharge of pollutants into the navigable waters be eliminated by 1985.” Accordingly, a new policy – like this one – that seeks to minimize dischargers’ responsibility under the law is inconsistent with the Act.

In *Maui*, the Court ruled that a discharge through groundwater into the waters of the United States triggers Clean Water Act permitting “if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.” The draft guidance ignores the Supreme Court’s direction that the most important considerations in determining functional equivalence are time and distance, suggesting at one point that a polluter may be able to avoid permitting responsibility “simply through physical attenuation or dilution” of the discharge. Because pollutants discharged into groundwater routinely will be diluted somewhat in that groundwater before reaching surface waters, the guidance improperly suggests that many dischargers will be able to dodge their obligations, even if their pollution is rapidly conveyed to nearby waters. The “integrity of the Nation’s waters” would be undercut simply due to relative dilution of actual water pollution.

Additionally, the draft guidance invents a new factor – one not identified by the Court – that appears designed to let notoriously polluting facilities off the hook. EPA says that “the design and performance of the system or facility from which the pollutant is released” should be considered and that the evaluation of this factor should look at whether the facility is

intentionally designed to route pollution through soil or is otherwise designed to “promote dilution, adsorption or dispersion of the pollutant...” EPA must reject this new factor. The Act, as articulated by the Supreme Court, focuses on the actual consequences of a facility’s discharge, not the intent of its designer. It is well-established law that the Clean Water Act is a strict liability statute and that the intent or design of the polluter is irrelevant. Finalizing the guidance with this new factor risks authorizing operations that commonly and seriously pollute surface waters through groundwater, like coal ash dumps and lagoons at industrial livestock feeding facilities. In fact, EPA lists settling ponds when describing the kinds of systems that may avoid responsibility because of this factor.

Finally, the draft guidance imposes an unreasonable burden on people and organizations that seek to enforce the Clean Water Act with respect to sources that pollute through groundwater. It describes the kind of information that typically leads to a conclusion that a facility must obtain a permit, including “hydraulic conductivity based on the soil type or porosity and hydraulic gradient through which the pollutant travels, depth to groundwater, groundwater flowpath (including distance and transit time over which the pollutant reaches the receiving water of the United States), or pollutant-specific dynamics along the groundwater flowpath (e.g., sorption, biological uptake, microbial processing).” The draft guidance then says that permitting authorities do not even have to investigate a facility’s discharge unless members of the public produce affirmative evidence of a covered discharge:

[A] mere allegation (i.e., without supporting evidence) that a point source discharge of pollutants is or may be reaching a water of the United States via groundwater is not sufficient to trigger the need for an NPDES permit. Such an allegation made in a public comment on a draft NPDES permit, for example, typically would not trigger a requirement for the permitting agency to investigate the unsupported comment.

The implication of these passages is that, unless concerned stakeholders marshal detailed pollutant fate and transport data, EPA and state permitting authorities can ignore facilities’ pollution of nearby waters. A properly issued permit should be designed to prevent pollution; the Clean Water Act does not place a burden on stakeholders to prove pollution before protective permit provisions are put in place.

Together, these aspects of the draft guidance send a signal that EPA is uninterested in polluters that route their discharge through groundwater, despite the Clean Water Act and the Supreme Court’s rejection of EPA’s view that discharges via groundwater are exempt from permitting. The draft guidance should be abandoned.

Sincerely,

Alabama Rivers Alliance
Alliance for the Great Lakes
American Rivers

Anthropocene Alliance
Atchafalaya Basinkeeper
Buzzards Bay Coalition
Center for a Sustainable Coast
Center for Biological Diversity
Clark Bullard
Clean Water Action/Clean Water Fund
Colorado Latino Forum
Coosa River Basin Initiative/Upper Coosa Riverkeeper
Coosa Riverkeeper
Earthjustice
Emerald Coastkeeper
Endangered Habitats League
Endangered Species Coalition
Environment America
Environmental Law & Policy Center
Environmental Working Group
For Love of Water (FLOW)
Freshwater Future
Friends of Santa Cruz River
GreenLatinos
Gunpowder RIVERKEEPER
Healthy Gulf
Humboldt Baykeeper
Illinois Council of Trout Unlimited
Lake Erie Waterkeeper
Lake Worth Waterkeeper
League of Conservation Voters
Los Angeles Waterkeeper
Miami Waterkeeper
Midwest Environmental Advocates
Milwaukee Riverkeeper
Mississippi River Collaborative
Missouri Confluence Waterkeeper
MountainTrue
National Latino Farmers & Ranchers Trade Association
National Parks Conservation Association
Natural Heritage Institute
Natural Resources Defense Council
Nebraska Wildlife Federation
Ogeechee Riverkeeper
Our Children's Earth Foundation
OVEC-Ohio Valley Environmental Coalition

Peconic Baykeeper
Pennsylvania Council of Churches
Puget Soundkeeper Alliance
Raritan Riverkeeper
Rio Grande Waterkeeper (WildEarth Guardians)
River Network
Rural Coalition
San Antonio Bay Estuarine Waterkeeper
Savannah Riverkeeper / Waterkeeper
Save The Sound
ShoreRivers
Southern Environmental Law Center
Suncoast Waterkeeper
Tampa Bay Waterkeeper
Tennessee Clean Water Network
Tennessee Riverkeeper
Tualatin Riverkeepers
U.S. Public Interest Research Group
Upper Colorado River Watershed Group (UCRWG)
Waterkeeper Alliance