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Date:

December 23, 2023

To:

Marcus Zobrist
Office of Wastewater Management
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

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

Re:

Association of Clean Water Administrators (ACWA) Comments on
Proposed Draft Guidance

Dear Mr. Zobrist:

The Association of Clean Water Administrators (ACWA) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers (hereafter referred to simply as "states"), who on a daily basis implement the clean water quality programs of the Clean Water Act (CWA). As the primary entities responsible for carrying out most of the CWA programs, states are very interested in national policy updates that may impact how they implement the CWA in their states.

Overview

ACWA appreciates that EPA has drafted a guidance document that reinforces support for the Supreme Court created list of seven factors that could be considered when determining whether a discharge through groundwater from a point source is the "functional equivalent" of a surface water discharge requiring an NPDES permit. The proposed guidance also acknowledges that "time" and "distance" will likely be the most important factors, but not always in every case. ACWA provides several recommendations below, the most important being that EPA work closely with states as you consider updates to this guidance document. We are however disappointed that EPA did not extend the comment period another 30 days as requested by a multitude of organizations.

Waters of the United States (WOTUS)

The proposed guidance recommends as a first step that operators of facilities with point source discharges through groundwater determine whether those discharges reach a WOTUS. While the question of whether the discharge reaches a WOTUS seems straightforward, over the last decade the CWA

jurisdictional definition has been in flux and may not yet have reached a steady state, as litigation on the current definition continues.

Recommendation 1: EPA should develop a very simple, comprehensive, but non-exhaustive, definitional table that clearly and effectively defines the most common water body types/features covered by the CWA, along with pictures that provide a visual reference. A clear visual reference would provide the general public with transparency and could be used for a multitude of programs including helping operators determine if their discharge through groundwater reached a WOTUS and/or whether further analysis may be needed.

Seven Factors Identified by Supreme Court

EPA's proposed guidance highlights the Supreme Court created list of factors that could be considered when determining whether a discharge through groundwater from a point source is the "functional equivalent" of a surface water discharge that would require an NPDES permit. This non-exclusive list includes: (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the 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 pollution (at that point) has maintained its specific identity.

Recommendation 2: ACWA recommends EPA continue to support permitting authority and facility efforts to collect data and provide the functional equivalent analysis, as appropriate. The proposed guidance should continue to acknowledge that the decision is highly site specific, that the seven factors are not an exhaustive list, and that "time" and "distance" will likely be the most important factors, but not always.

EPA then discusses how pollutant constituents may be indicators of the presence of other prohibited pollutants and this could support a finding of functional equivalent (i.e., it can be inferred that the pollutant would have similar characteristics as other pollutants in the effluent). In a footnote EPA also notes that "a finding of a lack of functional equivalent established for one constituent pollutant does not necessarily demonstrate that the functional equivalent of a direct discharge does not exist for the remaining constituent pollutants if the one analyzed pollutant is not a reasonable indicator for the other pollutants."

Recommendation 3: ACWA believes the idea of using indicator pollutant constituents to identify the presence of other pollutants or prohibited discharges is a complex topic that can apply to all types of discharges, not just those that are discharged underground and/or through groundwater. Several states believe that some popular indicators can result in misleading conclusions. ACWA is not sure the current inclusion of this language improves this policy document, and in some ways, inclusion raises more questions than it answers.

Recommendation 4: ACWA supports inclusion of the 50-mile, 250 mile, and "just a few feet" examples provided by the Supreme Court and discussion around distance

and time. As more examples become available, ACWA recommends EPA reference and publish those at the earliest convenience.

Recommendation 5: ACWA supports inclusion of the discussion on other potentially relevant factors and how they may be considered separately and together. Especially when considering the nature of the material the pollutant travels through and the amount of pollutant entering the WOTUS as compared to what was discharged to groundwater.

Recommendation 6: EPA should clarify whether it matters or not that the movement of the pollutants to the WOTUS is solely by groundwater gradient creating a hydraulic head, and where it is clear movement is not occurring because of further pressure coming from the facility's discharge through groundwater.

Permit Application

In the proposed guidance EPA recognizes that the current Federal NPDES Permit application forms are not specific to discharges through groundwater but, notwithstanding a future federal form or current specific state form, facilities can still use the standard NPDES application form. The guidance notes that the permitting authority will likely require additional site-specific information related to the discharge through groundwater. EPA then goes on to list a number of site-specific criteria that might be helpful in determining whether an NPDES permit is needed, and which also might be helpful in developing such a permit.

Recommendation 7: In the proposed guidance EPA should “highly recommend” the facility meet with the permitting authority, well in advance of submitting an NPDES application, to determine which site-specific criteria are most important for their specific discharge in their specific location. Footnote 14 raises a multitude of questions regarding process, data submission, analysis, and burden.

Recommendation 8: ACWA recommends EPA maintain this non-exhaustive list of supplemental, site-specific data/criteria as an example of the types of information permitting authorities may request, specifically noting the list is just an example. EPA should consider including other example data/criteria for this list that may come in from states.

Factors Not for Consideration

As part of the proposed guidance, EPA includes factors that the permitting authority should not consider as part of the functional equivalent analysis. These include whether there was intent for the groundwater discharge to reach a WOTUS and whether or not a state groundwater protection program exists. While some states have historically believed the existence of a robust state ground water program could and should be a factor in any NPDES jurisdictional analysis, the policy document does not appear to leave room for further consideration and discussion.

Recommendation 9: EPA should further explain why permitting authorities would be precluded **in all** instances from considering “system design and performance” as part of a functional equivalent analysis. Especially when it is understood that mere existence of a system does not preclude the need for a full functional equivalent analysis, and the Supreme Court in *Maui* made clear “there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language.”

Recommendation 10: EPA should make clear in the proposed guidance that the need to apply for and/or the existence of an NPDES permit, does not relieve a facility from determining whether a state groundwater program applies to them and/or their discharge.

Implementation Challenges

ACWA and states believe implementation of the *Maui* decision rests largely with the authorized permitting authorities. To avoid future debate with EPA Regions on how factors are applied, and permits are to be written, states would like to maintain an ongoing discussion with EPA over implementation issues.

Recommendation 11: States and EPA should continue to discuss technical issues associated with the *Maui* decision implementation including but not limited to:

1. What permit/factsheet examples exist where permitting authorities have determined a function equivalent discharge is occurring via groundwater?
2. What does the reasonable potential analysis look like for a permit of this nature?
3. In looking at the entire permitted system, from facility, through groundwater, to WOTUS, where is the point from which compliance is measured?
4. How should a permitting authority analyze mixing zones, attenuation, groundwater standards, other water quality standards, etc.?
5. Has EPA considered how to view/handle delays between wastewater generation and when the discharge occurs? Especially in situations where wastewater generation has ceased, and no new wastewater generation is expected?
6. Has EPA estimated the number of decentralized/septic systems that might be covered by the *Maui* decision and this guidance? What about leaking coal ash and mining waste ponds, non-discharging lagoons, groundwater remediation projects, and wetlands that are part of a treatment train?

Conclusion

As you consider public input on the Draft Guidance, we respectfully request that EPA directly engage with and consult state/interstate/territorial clean water administrators outside of – and in addition to – the public comment process. As we have unique experiences with and perspectives on CWA challenges, needs, and successes. Early, meaningful, substantive, and ongoing EPA engagement in the development of CWA policies results in more effective and efficient program implementation.

Though ACWA's process to develop comments is robust and intended to capture the diverse perspectives of the states that implement these programs, EPA should always consider the comments and recommendations that come directly from states, interstates, and territories as well. Please contact ACWA's Executive Director, Julia Anastasio, at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,

A handwritten signature in black ink that reads "Amanda Vincent". The signature is written in a cursive, flowing style.

Amanda Vincent
ACWA President