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Via Electronic Transmission

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Washington, DC 20460

Re: 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 (EPA-HQ-OW-2020-0673; FRL-10018-43-OW)

Dear Mr. Wilson:

The undersigned Attorneys General respectfully submit these comments on the Draft Guidance Memorandum titled "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program" ("the Draft Guidance").

Our states rely on the Clean Water Act ("the Act") to ensure that discharges to "navigable waters" (defined by the Act to include "waters of the United States") are monitored and comply with permits that further the Act's overall goal of protecting the Nation's waters and take into account the capabilities of treatment technologies. Among other things, our states rely on the Act to ensure a stable nationwide regulatory floor protecting their surface waters against pollution flowing downstream across state lines. Our states also rely on the Act's regulatory floor for assurance that protecting water quality will not give businesses an incentive to relocate to jurisdictions with less stringent water quality protections. For these and other reasons, nearly all of us joined an amicus brief supporting Respondents in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

As set forth below, the Environmental Protection Agency ("EPA") should omit from any final guidance the factor that the Draft Guidance adds to those listed in *County of Maui*—namely, "the design and performance of the system or facility from which the pollutant is released." Draft Guidance at 7. That factor contravenes the *County of Maui* decision and would be harmful as a policy matter.

The *County of Maui* Decision

In *County of Maui*, the Supreme Court considered whether the Clean Water Act's prohibition of unpermitted discharges of pollutants into navigable waters "applies to a pollutant that reaches navigable waters only after it leaves a 'point source' and then travels through groundwater

before reaching navigable waters." 140 S. Ct. at 1469. Despite not adopting the standard that the Ninth Circuit had adopted below, the Supreme Court squarely rejected the position urged by Petitioners and by EPA—namely, that the prohibition never applies in these circumstances. *Id.* at 1474-75. Instead, the Court held "that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters." *Id.* at 1468.

The Court offered guideposts for applying this "functional equivalent" standard. It contrasted a discharge a few feet from navigable waters with a discharge that reaches navigable waters only by traveling fifty miles over many years. *Id.* at 1476. As for "middle instances," the Court reasoned that "there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language." *Id.* After listing seven such factors, the Court explained that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case." *Id.* at 1477.

The Court also noted several potential sources of further guidance. It observed that "courts can provide guidance through decisions in individual cases." *Id.* Further, it stated that "[t]he underlying statutory objectives also provide guidance," warning against "creating loopholes that undermine the statute's basic federal regulatory objectives." *Id.* Finally, the Court commented that EPA "can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules." *Id.*

EPA Should Abandon Its Proposed Additional Factor

The new factor that the Draft Guidance introduces is unlawful and should be abandoned. [1] Beyond the factors discussed by the Supreme Court in *County of Maui*, EPA proposes to add "the design and performance of the system or facility from which the pollutant is released." Draft Guidance at 7. In support of this factor, EPA states that where an owner or operator applies for a National Pollutant Discharge Elimination System ("NPDES") permit for a new or proposed facility, "permitting authorities will likely establish NPDES permits based on the design of the new facility, including how the facility is planned and engineered to transfer, store, treat, or discharge wastewater." *Id.* EPA also states that "the design and performance of an existing facility can provide important information about the function and effectiveness of the engineered system, which can also be informed by actual discharge data and water quality information." *Id.* Thus, EPA suggests, in situations where the facility provides treatment or attenuation of pollution before

[1] We are also concerned by EPA's statement that "where there are indications that there may be a discharge of pollutants through groundwater to waters of the United States, *the Agency recommends considering whether* conducting a technical analysis would be prudent." Draft Guidance at 4 (emphasis added). In such circumstances, it may not be enough to merely "consider" whether conducting a technical analysis is "prudent," nor may such an analysis even be necessary to establish functional equivalence. In any event, we note that an unpermitted discharge of pollutants to navigable waters through groundwater, if functionally equivalent to a direct discharge to navigable waters, is a violation of the Clean Water Act regardless of whether a technical analysis was prepared in the first instance.

discharging into navigable waters via groundwater, "it may be less likely that an NPDES permit would be required . . . because the discharge is not a functional equivalent of a direct discharge." *Id.* at 8.

The additional factor that EPA proposes is inconsistent with the *County of Maui* decision. The ultimate question under *County of Maui* is whether an indirect discharge of a pollutant from a point source is the "functional equivalent" of a direct discharge of the same pollutant from the same point source. 140 S. Ct. at 1476-77. If so, then the discharge is regulated under the Clean Water Act just as a direct discharge would be.

EPA's proposed additional factor, however, concerns circumstances antecedent to the point of discharge. By definition, "the design and performance of the system or facility from which the pollutant is released" refers to the characteristics of the point source itself, and not to characteristics of a pollutant's journey from the point source to navigable waters. In other words, the proposed additional factor concerns what takes place *before* the pollutant in question is discharged by a point source. *See* Draft Guidance at 7 (envisioning consideration of "the design and performance of the system or facility *from which the pollutant is released*" (emphasis added)).

Circumstances antecedent to an indirect discharge are irrelevant to whether that discharge is "functionally equivalent" to a direct discharge. Indeed, it is a non sequitur to suggest that such circumstances bear on functional equivalence, for that concept relates to the discharge's journey *from* the point source to navigable waters. *See County of Maui*, 140 S. Ct. at 1476 (making clear that the Court's functional equivalence inquiry is meant to answer "[w]hether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source" and "depends upon how similar to (or different from) the particular discharge is to a direct discharge"). *County of Maui* made clear that an indirect discharge is the "functional equivalent" of a direct one "when the discharge reaches the same result through roughly similar means." *Id.* Circumstances antecedent to a discharge, such as "the design and performance of the system or facility from which the pollutant is released," are not part of the "means" by which the discharge reaches navigable waters; rather, they bear on what is discharged in the first place.[2]

The factors that the Supreme Court *did* list in *County of Maui* confirm this point. Each of those factors relates to events subsequent to the discharge, or to aspects of a pollutant's journey through groundwater after it leaves the point source. *See id.* at 1476-77 (listing "transit time," "distance traveled," "the nature of the material through which the pollutant travels," "the extent to which the pollutant is diluted or chemically changed as it travels," "the amount of pollutant

[2] In a similar vein, it is irrelevant whether, as the Draft Guidance states, "[t]he composition and concentration of discharges of pollutants directly from a pipe or other discrete or discernible conveyance into a water of the United States with little or no intervening treatment or attenuation" in fact "often differ significantly from the composition and concentration of discharges of pollutants into a system that is engineered, designed, and operated to treat or attenuate pollutants or uses the surface or subsurface to treat, provide uptake of, or retain water or pollutants." Draft Guidance at 7. The potentially relevant comparison is not between the pipe's direct discharge into navigable waters and the discharge of pollutants *into* a treatment system; it is between a direct discharge and an indirect discharge into navigable waters *from* the treatment system.

entering the navigable waters relative to the amount of the pollutant that leaves the point source," "the manner by or area in which the pollutant enters the navigable waters," and "the degree to which the pollution (at that point) has maintained its specific identity"). None of the listed factors concerns events prior to the discharge.

A comparison of two hypothetical discharging facilities illustrates the illogic of EPA's proposed additional factor. Suppose that the two facilities are identical in nearly every respect, including how they treat the wastewater they discharge. The only difference is that facility A discharges directly into a navigable river and facility B discharges into groundwater near the river. In this scenario, the fact that the Facility B treats its wastewater should not diminish functional equivalence, because it is a circumstance equally present for Facility A's direct discharge. Yet under the Draft Guidance, Facility B's treatment of the wastewater—part of the facility's design and performance—evidently *could* support an argument that its discharge is not the functional equivalent of Facility A's.[3]

Nor can EPA's additional factor find support in the assertion that "[t]he design of a system or facility can affect or inform all seven factors identified in *Maui*." Draft Guidance at 7. It may be true, as a factual matter, that a particular facility is designed to direct the pollutant in manner that increases the time it takes for pollutants to reach navigable waters, or the distance the pollutants travel to reach such waters. But if that is so, there is no need to consider the facility's design as a *separate* factor: the increased time and distance can themselves be taken into account, as the Supreme Court envisioned. Considering the facility's design in its own right, on the ground that it prolongs the time or the distance of travel, would be double-counting and would stack the deck against functional equivalence.

Finally, the additional factor that EPA proposes would be harmful as a matter of policy. First, this additional factor would give polluters a new (yet meritless) way to argue, whether to regulators or in court, that their discharges fall outside the Clean Water Act's prohibition on unpermitted discharges. For instance, an indirect discharger would be able to argue that, because it treats its effluent before discharging it into groundwater, the discharge is not the functional equivalent of a direct discharge and thus is not regulated by the Act. These arguments would complicate, confuse, and delay permitting processes and decisions. They would do the same for judicial proceedings, including proceedings that involve unpermitted facilities. And they would do so even though this additional factor does not itself inform the functional equivalence analysis directed by *County of Maui*, as explained above.

Second, this additional factor would give polluters an incentive to avoid regulation simply by relocating discharge pipes from navigable waters to groundwater. That is the sort of strategic behavior that troubled the Supreme Court in *County of Maui*. *See* 140 S. Ct. at 1473 (rejecting statutory interpretation that would enable "the pipe's owner, seeking to avoid the permit

[3] Of course, a facility owner or operator still has ample reason to treat its effluent and to design the facility in an environmentally sound manner. Most notably, facility design may bear on whether the facility complies with effluent limitations or other permit conditions. Under the terms of the Supreme Court's decision, however, facility design cannot bear on whether a discharge requires a permit in the first place.

requirement," to "simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea"). Suppose, for instance, that a facility treats its wastewater, then discharges it directly into a navigable river. The additional factor that EPA proposes would mean that the facility could move its discharge pipe into immediately adjacent groundwater, then use the fact of treatment to argue that the discharge should now be unregulated based on the facility's "design." Yet the environmental benefits of treatment alone are no greater than when the facility discharges directly into the river, so it is illogical to consider the fact of treatment differently in the two scenarios.

To be sure, relocating a discharge pipe might mean that discharged effluent takes time to reach navigable waters, or is diluted before it reaches navigable waters. But such circumstances are already accounted for in the factors that the Supreme Court enumerated and that earlier pages of the Draft Guidance discuss. And they are entirely independent of whether effluent is treated before being discharged.

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In sum, if EPA finalizes the Draft Guidance, it should omit the factor that it proposes to add to those already listed in the *County of Maui* decision. We appreciate your consideration of these comments.

Respectfully submitted,

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