U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

December 21, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Michael Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC, 20460

Re: Draft Guidance Implementing the Supreme Court's Maui Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination Permit Program (Docket No. EPA-HQ-OW-2023-0551).

Dear Administrator Regan:

On November 27, 2023, the U.S. Environmental Protection Agency (EPA) published a Notice of Availability of Draft Guidance entitled Applying the Supreme Court's County of *Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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System (NPDES) Permit Program.[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the draft guidance.

Advocacy recognizes the draft guidance is not a proposed rule, however it contains the basic components of a regulation. Small entities will need to comply with the draft guidance in order to determine whether their activities require a NPDES permit.

Advocacy is concerned the lack of clarity of the draft guidance will increase regulatory uncertainty and costs for small entities. Advocacy is also concerned small entities will have difficulty being able to submit the recommended information required by the draft guidance. Advocacy also recommends that the EPA revise its discussion of state groundwater programs to note they should be considered in determining the scope of a NPDES permit. Finally, Advocacy is concerned the draft guidance's application of the functional equivalent analysis to "reasonable indicators" of pollutants or pollutants with "similar characteristics" exceeds the scope of the Clean Water Act (CWA).

[1] 88 Fed. Reg. 82891 (Nov. 27, 2023).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[4] Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.[5] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[6] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[7] The agency must provide a statement of factual basis that adequately supports its certification.[8]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[9] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[10]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[11]

---

[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[3] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[4] 5 U.S.C. § 603.
[5] *Id.* § 609.
[6] *Id.*
[7] *Id.* § 605(b).
[8] *Id.*
[9] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[10] *Id.*
[11] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

B. The Draft Guidance

In *County of Maui v. Hawaii Wildlife Fund* (*Maui*), the Supreme Court held that the CWA's National Pollutant Discharge Elimination System (NPDES) applied to certain discharges of pollutants travelling through groundwater into a "water of the United States" (WOTUS).[12] Further, the Court also held that a NPDES permit is required "when there is a direct discharge from a point source into navigable waters or when there is a functional equivalent of a direct discharge."[13] While the Court did not explicitly define the term "functional equivalent," it listed several factors to consider.

The EPA initially released guidance in 2021 interpreting the *Maui* decision.[14] However, the guidance was repealed later that year.[15] The agency then released a second draft guidance on November 27, 2023.[16] The revised draft guidance "provides an overall approach for conducting a functional equivalent analysis, including specific considerations for evaluating the transit time and distance traveled from a point source through groundwater to a water of the United States."[17]

In order to determine whether or not a NPDES permit is warranted, the draft guidance also recommends specific information in the following areas: discharge location, transit time, distance travelled, flow characteristics, shallow subsurface geology and hydrology characterization, description of pollutant-specific dynamics along the groundwater flow path, treatment technologies, effluent characteristics, an explanation of the permittee's functional equivalent of a direct discharge analysis, and "other information."[18] Finally, the draft guidance instructs that neither intent or the existence of a state groundwater permitting program should be considered when determining the need for a NPDES permit.[19]

II. Advocacy's Small Business Concerns

Advocacy is concerned the draft guidance will increase regulatory uncertainty and lead to greater permitting costs for small entities. Advocacy is also concerned that portions of the draft guidance exceed the EPA's authority under the CWA.

---

[12] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).
[13] *Id*. at 1476.
[14] 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, 86 Fed. Reg. 6321 (Jan. 21, 2021).
[15] 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, 86 Fed. Reg. 53653 (Sep. 28, 2021).
[16] 88 Fed. Reg. 82891 (November 27, 2023).
[17] ENV'T PROT. AGENCY, DRAFT GUIDANCE: 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 TO DISCHARGES THROUGH GROUNDWATER 3 (Nov. 27, 2023), https://www.epa.gov/system/files/documents/2023-11/maui-draft-guidance.pdf [hereinafter Draft Guidance].
[18] *Id*. at 6.
[19] *Id*. at 7.

A. The Draft Guidance Will Increase Regulatory Uncertainty and Costs for Small Entities

In *Maui*, the Court listed seven factors for the EPA to consider when evaluating whether a discharge into groundwater reaching a WOTUS would require a NPDES permit, with "[t]ime and distance being the most important factors in most cases."[20] Additional factors listed by the Court were the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically charged as it travels, the amount of the pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner or area in which the pollutant enters the navigable waters, and the degree to which the pollutant has maintained its specific identity.[21]

The Court properly recognized this multi-factor approach as "difficult."[22] However, the EPA's draft guidance magnifies this difficulty by setting forth a case-by-case approach offering little predictability for small entities attempting to determine whether they will need a NPDES permit. Despite the Court's emphasis on the importance of time and distance travelled, the draft guidance states "there is no bright line test for evaluating jurisdiction using these factors" and that they must be evaluated on a "case by case basis."[23] The draft guidance does note that time and distance will need to be the only factors considered "in many cases" but then goes on to state additional factors will be considered in cases "where time and distance are not dispositive."[24]

The approach taken by the draft guidance allows for broad discretion by EPA when determining federal jurisdiction over discharges into groundwater while at the same time providing the regulated community with very little clarity. This lack of clarity will be especially difficult for small entities that do not have the staff or resources to analyze the multiple factors outlined in the draft guidance. As a result, small entities may be put in situations where they incur the expense of applying for a NPDES permit where one is not needed.

The nature of the draft guidance's approach to jurisdiction bears a striking resemblance to the "significant nexus" approach to Clean Water Act jurisdiction struck down by the Court in *Sackett v. Environmental Protection Agency*[25] in that there is no specific limit to jurisdiction over functional discharges. In *Sackett*, the Court noted that the similarly broad "significant nexus" approach gave rise to "serious vagueness concerns."[26] The Court went on to explain that CWA jurisdiction should be asserted "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement."[27]

The draft guidance lists ten different types of supplemental information which the EPA recommends permit applicants submit to the agency. However, the guidance then states that it

---

[20] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1477 (2020).
[21] *Id*. at 1476-77.
[22] *Id*. at 1476.
[23] Draft Guidance, *supra* note 17, at 4.
[24] *Id*.
[25] 143 S. Ct. 1322 (2023).
[26] *Id*. at 1342.
[27] *Id*.

"may determine if it needs the information in its entirety, just a subset of this information, none of this information, or any other additional written information."[28] As described in the draft guidance, neither the decision to seek a NPDES permit or what information to submit to the agency is described "with sufficient definiteness that ordinary people can understand." Advocacy strongly recommends the EPA consider rewriting the draft guidance in a manner which will reduce confusion and address regulatory uncertainty. The goal should be a document that a small entity can rely upon to clearly define when a permit is needed and what information is necessary to apply for that permit.

B. The Multiple Types of Information Requested by the Draft Guidance for a NPDES Permit Decision Will Impose Substantial Costs on Small Entities

Among the types of recommended information for permit applicants to submit listed in the draft guidance is "shallow subsurface geology and hydrology characterization." This is defined as "measured, calculated, or estimated values of site-specific hydraulic connectivity, hydraulic gradient, groundwater flow velocity, soil type, and effective porosity, considered along the trajectory of groundwater flow from the point source to the surface water body."[29]

Obtaining this type of highly specific information can require trained professional staff, such as hydrologists, geologists, and biologists. Small entities are not likely to have these sorts of professionals on staff and will have to contract out for their services. Before asking small entities to incur this additional expense, the EPA should ensure the information is required for a NPDES permit as opposed to something which "may or may not be needed."[30] In order to prevent small entities from bearing additional regulatory costs which may ultimately prove to be unnecessary, Advocacy recommends the EPA revise the draft guidance to place greater weight on time and distance travelled by the discharge, which the Court noted were "obviously important" in *Maui*,[31] and only require additional information in cases where it is absolutely necessary.

C. The Existence of State Groundwater Programs Should be Considered in NPDES Permit Discussions

The draft guidance states "[t]he existence, or lack, of a state groundwater protection program is not relevant to whether the functional equivalent of a direct discharge analysis applies, and the existence of a state groundwater protection program does not obviate the need for a NPDES permit."[32] In *Maui*, the Court acknowledges that despite the existence of a state groundwater program, the EPA has required permits for "some (but not all) discharges through groundwater for over 30 years."[33] However, the Court also cautions that permit decisions should not create serious risk of "undermining state regulation of groundwater."[34]

---

[28] Draft Guidance, *supra* note 17, at 5.
[29] *Id*.
[30] *Id*.
[31] *Maui* at 1476.
[32] Draft Guidance at 7.
[33] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1477 (2020).
[34] *Id*.

If state regulatory programs are not considered during federal permit discussions, state regulations could be either undermined or duplicated. This would result in unnecessary confusion for the regulated community, including small entities. To avoid this scenario, Advocacy recommends the draft guidance be rewritten to clarify that while the existence of a state groundwater program will not be considered when determining whether a permit should be issued, it may be considered in determining the scope of the permit itself.

D. The Application of the Functional Equivalent Analysis to Pollutants in the Draft Guidance Exceeds the Authority of the Clean Water Act

Under the CWA, NPDES permits are required for the discharge of a pollutant through a point source into a WOTUS.[35] In *Maui*, the Court held that NPDES permits may be also required for the "functional equivalent of a direct discharge."[36] The draft guidance notes that "the functional equivalent analysis may be based on an analysis of one constituent pollutant where that pollutant is a reasonable indicator for other constituent pollutants."[37] If the functional equivalent of a direct discharge of an indicator pollutant is found, the draft guidance states "the facility must submit a permit application to the NPDES permitting authority (or eliminate the discharge) for that pollutant and the other pollutants with similar characteristics.[38]

In applying the functional equivalent analysis to constituent pollutants, the draft guidance exceeds both the Court's holding in *Maui* and the jurisdiction of the CWA. The *Maui* decision only applies the functional equivalent analysis to discharges of pollutants, not "reasonable indicators" of pollutants. Similarly, NPDES permits are required for discharges of pollutants, not "reasonable indicators" of pollutants. By expanding NPDES permitting requirements to "reasonable indicators" of pollutants and discharges with "similar characteristics," the EPA is broadening permitting requirements beyond specific pollutants and including anything similar to that pollutant.

The CWA does not allow federal jurisdiction to be expanded in this manner. To do so would subject small entities to permitting requirements beyond the act's scope and increase regulatory costs by forcing them to guess whether something that is similar to a pollutant, but may not be the actual pollutant in question, also requires a permit. Advocacy recommends the EPA revise the guidance to clearly state that specific pollutants are covered by the functional equivalent analysis, not discharges with "similar characteristics" or that are "reasonable indicators."

Conclusion

Advocacy recommends the EPA revise the draft guidance to reduce regulatory uncertainty and costs for small entities. The draft guidance should also recognize that small entities may not be able to supply all the categories of "recommended information" and prioritize time and distance travelled by discharges. Advocacy also recommends the draft guidance revise its discussion of

[35] 33 U.S.C. §1251 et. seq.
[36] *Maui* at 1476.
[37] Draft Guidance, *supra* note 17, at 3.
[38] *Id.* at 3-4.

state groundwater programs to note they should be considered in determining the scope of a NPDES permit. Finally, Advocacy is concerned the draft guidance's application of the functional equivalent analysis to "reasonable indicators" of pollutants or pollutants with "similar characteristics" exceeds the scope of the CWA.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or by email at nick.goldstein@sba.gov.

Sincerely,

/s/
Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/
Nick Goldstein
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget