



July 14, 2021

The Honorable Radhika Fox
Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

SENT VIA ELECTRONIC MAIL

Subject: NPDES Functional Equivalence of Discharge to Waters of the United States

Dear Assistant Administrator Fox,

The National Ground Water Association and state groundwater associations thank you and your staff for reaching out stakeholders in the groundwater field for input to Environmental Protection Agency policy questions relating to groundwater use, protection and sustainability. NGWA has been in discussions with your staff in the Office of Wastewater Management regarding NPDES Functional Equivalence of Discharge to Waters of the United States in response to the U.S. Supreme Court's decision in the case of County of Maui v. Hawaii Wildlife Fund (No. 18–260). We ask, please, that you consider rescinding the guidance memorandum "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"¹ (dated January 14, 2021) as soon as possible. Rescinding the guidance memorandum will eliminate the challenges and possible confusion created now for states that already have dischargers applying for permits and renewals based on the guidance memorandum.

Excerpt from NGWA's Previous Comments to EPA on the Guidance Memorandum

As a statement of EPA policy, EPA's memorandum falls well short of providing "focused guidance" to the states, industries that generate point source pollutants that may be discharged to groundwater and travel to waters of the United States, and consultants who may assist states and industry in addressing this pollution. No guidance, focused or otherwise, is provided for a point source discharger or its regulatory authority to determine whether a consistent and predictable pollutant discharge through groundwater and reaching waters of the United States should initiate permit action. Thus, through this guidance memorandum, EPA maintains the status quo, and potentially creates confusion amongst stakeholders, to the detriment of state water managers needing to deal with situations in which groundwater serves as a conduit for surface-water pollution. As guidance, no useful direction is provided to potential dischargers or to state regulators on how to evaluate their individual sites and

¹ https://www.epa.gov/sites/production/files/2021-01/documents/final_ow_maui_guidance_document_-_signed_1.14.21.pdf

implement consistent decisions that are protective of the environment and aligned with the intent of the guidance. Decisions about applicability of the Supreme Court decision should be based on the pollutants of the wastewaters involved and the science and engineering principles for pollutant fate and transport applied to individual sites, regardless of the facility type.

Invitation to Partner with NGWA in Responses to the SCOTUS Decision on Maui v. Hawaii Wildlife

We also would like to invite you and others from EPA to participate with our association and other groundwater-mission associations as we address the technical and science-based matter of determining whether groundwater receiving a point source pollutant discharge and conveying it to surface water is a functional equivalent of a direct discharge to a water body. The Ground Water Protection Council will hold its Annual Forum on September 27-29 in Salt Lake City UT and plans to devote a session to state regulatory factors in functional equivalence determination. NGWA in collaboration with state associations will draw on the output of the GWPC conference as input to a discussion of technical and science-based factors and practical tools for functional equivalence at its virtual Groundwater Summit on December 7-8, and being virtual it will all be video-recorded in advance. Yours and EPA's participation will be an important contribution and input to developing functional equivalence determination practices.

NGWA, the largest trade association and professional society of groundwater professionals in the world, represents over 10,400 groundwater professionals within the United States and internationally. NGWA represents four key sectors: scientists and engineers, to assess groundwater quality, availability, and sustainability; water-well contractors responsible for developing and constructing water-well; and the manufacturers and the suppliers responsible for manufacturing and providing the equipment needed to make groundwater development and enhancement possible. NGWA's mission is to advocate for and support the responsible development, management, and use of groundwater. NGWA also produces technical documentation to guide groundwater-related decisions. The NGWA works collaboratively with state groundwater associations on subjects of mutual interest and concern.

The National Ground Water Association and the state groundwater associations appreciate your consideration of our efforts to address this subject with EPA. We look forward to working with EPA in developing tools and practices for determining functional equivalence.

For follow-up, please contact: Charles Job, Regulatory Affairs Manager, National Ground Water Association, cjob@ngwa.org, (202)660-0060.

Thank you for your time and consideration to this important groundwater policy matter,

Terry Morse, CAE, CIC
Chief Executive Officer
National Ground Water Association

cc: Andrew Sawyers, Christopher Kloss, Marcus Zobrist



Address 601 Dempsey Road, Westerville, Ohio 43081-8978 U.S.A.
Phone 800 551.7379 • 614 898.7791 **Fax** 614 898.7786
Email ngwa@ngwa.org **Websites** NGWA.org and WellOwner.org