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January 11, 2021

David P. Ross, Assistant Administrator
OFFICE OF WATER
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Re: Alaska Miners' Association comments on "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"

Docket # EPA-HQ-OW-2020-0673

Dear Mr. Ross:

Thank you for the opportunity for the Alaska Miners' Association (AMA) to provide comments on the Environmental Protection Agency's December 4, 2020 Draft Guidance Memorandum on "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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 AMA appreciates the effort of EPA "to inform how the Supreme Court's "functional equivalent" analysis in *Maui* may be applied within the framework of the longstanding NPDES permit program." (Draft Guidance at 3)

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,400 members that come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

Rather than laying out a bright-line rule describing when a NPDES permit is required for which the parties had argued in *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court fashioned a test which focuses on whether a discharge to groundwater is the "functional equivalent of a direct discharge." "Whether pollutants that arrive at navigable waters after travelling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge." (Opinion at 16).

The Supreme Court's Opinion states that "the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels" may be relevant. (Opinion at 17). The Supreme Court described seven additional factors "that may prove relevant" to deciding whether a discharge is the functional equivalent of a direct charge which the Draft Guidance lists on page three. The Supreme Court also directed: "Decisions should not create serious risks either of

undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives." (Opinion at 17). The Supreme Court recognized that its Opinion leaves uncertain the question of when a discharge is the functional equivalent of a direct charge. It says clarity will be provided over time through case law by the traditional common-law method, and by EPA administrative guidance. (Opinion at 17). Accordingly, the AMA appreciates the EPA's early effort to provide such guidance.

As a general matter it would be helpful if EPA would attempt to provide more precise guidance on how changes to discharges over time and distance affect the determination whether a discharge is the functional equivalent of a discharge to a water of the United States.

In addition, it would be useful for EPA to quote/refer to case law where time and distance (at least) have been considered by the courts to provide some basis for interpreting the technical analysis that the guidance suggests. How far, how long, how much dilution of pollutants?

The Guidance Document contains important observations/groups of observations about what the Supreme Court's decision does and does not do that are numbered below. The AMA's comments and questions are presented below each numbered guidance point:

"Maui clarified that an NPDES permit is required for only a subset of discharges of pollutants that reach a water of the United States through groundwater—those that are the "functional equivalent" of direct discharges to jurisdictional waters. (pages 3-4).

Maui did not instruct permitting agencies to assume that discharges to groundwater that occur in the vicinity of a jurisdictional water are the "functional equivalent" of direct discharges to that water. "Indeed, such discharges may never reach jurisdictional waters for a number of reasons, including characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology." (page 4).

COMMENTS AND QUESTIONS:

What actions must a permitting authority take, if any, in lieu of such an assumption, to permit a discharge to groundwater that occurs in the vicinity of a jurisdictional water? For example, what steps would a permitting authority take to permit a Land Application Disposal (LAD) system that discharges to groundwater in the vicinity of a jurisdictional water?

However, 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. Indications may include, for example, a discharge of highly mobile pollutants from a point source directly to sandy soils, or in an area with shallow groundwater in close proximity to a water of a United States. "The purpose of such an evaluation would be to understand not only whether an actual discharge of a pollutant is occurring to a water of the United States via groundwater, **but also whether any such discharge is the functional equivalent of a direct discharge to a water of the United States.**" (Page 4). (Emphasis added).

COMMENTS AND QUESTIONS:

This Guidance Point seemingly requires two distinct tests: 1) Does the discharge reach waters of the United States? and 2) Is the discharge the functional equivalent of a direct discharge? Point 4 below sets

out a third test: Is the discharge water similar in chemical composition and concentration as the water discharged?

While this Guidance Point provides some direction, it falls short of providing guidance on how to interpret the results of the technical analysis. For example, if the mobile pollutant is detectable in WOTUS but is diluted to comply with WQS or diluted by 50% or? It could help answer whether the discharge reports to WOTUS but does not help with the determination of "functional equivalence"

Please provide examples of "indications that there may be a discharge of pollutants through groundwater to waters of the United States" that would trigger a permitting authority's request for a technical analysis in such a situation.

What type of technical test/evaluation should be employed to determine "not only whether an actual discharge of a pollutant is occurring to a water of the United States via groundwater, **but also whether any such discharge is the functional equivalent of a direct discharge to a water of the United States.**?"

Please provide an example of an actual discharge of a pollutant to jurisdictional waters that is **NOT the functional equivalent of a direct discharge to a water of the United States.**

Would a comparison of pollutants discharged to groundwater with pollutants exceeding water quality standards in surface water be useful in determining whether a discharge to groundwater that reaches surface water is the functional equivalent of a direct discharge to a water of the United States.?"

"In a typical NPDES permitting process, the facility owner or operator and its consultants may provide to the permitting agency engineering, modeling or other technical information to support a permit application. These analyses often evaluate the likely fate and transport of pollutants that travel from the point source and into the environment and are often included in the record of decision for a final NPDES permit." (Page 5).

"Neither the "functional equivalent" analysis set out by the Supreme Court nor the CWA itself requires a facility owner or operator or a permitting agency to prove the *absence* of a discharge." (Page 5).

COMMENTS AND QUESTIONS:

The Guidance Document also says that: "[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." (Page 5). AMA agrees with this approach emphasizing that permitting authorities and owners and operators should not have to affirmatively demonstrate that there are not releases to surface water via groundwater that require an NPDES permit. This is consistent with the acknowledgment in Guidance Document that the number of NPDES permits issued for discharges through groundwater should be "extremely low".

"Discharges of pollutants that reach a water of the United States via groundwater may not be the functional equivalent of a direct discharge, based on a number of factors identified in *Maui*." (Page 6) Conversely, "[a] demonstration that pollutants from a point source have reached or will reach a water of the United States via groundwater does not by itself trigger the requirement for an NPDES permit. *Id.* at

1476-77. **To say otherwise would amount to adoption of the “fairly traceable” test that the *Maui* Court rejected.”** (Emphasis added). (Page 6).

“The Agency’s experience suggests that science (e.g., characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology) informs the effect of time and distance traveled on a discharge, and thus whether that discharge is ultimately the functional equivalent of a direct discharge. In other words, what happens to the discharged pollutant over that time and distance traveled to the water of the United States, is critical to the “functional equivalent” analysis.” (Page 6).

COMMENTS AND QUESTIONS:

This guidance offers a list of variables to consider but fails to provide case history or offer any numerical values for the time/distance variables or for the amount of dilution that might occur between the point source and WOTUS. It would be beneficial if EPA provided some examples from case law.

Would a positive result from a dye study require a determination that a discharge to groundwater reaches a water of the United States is the functional equivalent of a direct discharge? Or would such a dye study “amount to adoption of the “fairly traceable” test that the *Maui* Court rejected.”

What are the “characteristics of the pollutant itself” and the “nature of the subsurface aquifer and hydrogeology” that are most relevant to whether a discharge is the functional equivalent of a direct discharge?

“Pollutants may be discharged from a point source and migrate through a system that treats, provides uptake of, dilutes, or retains pollutants before the pollutant reaches a water of the United States. If the pollutant composition or concentration that ultimately reaches the water of the United States is different from the composition or concentration of the pollutant as initially discharged, whether through chemical or biological interaction with soils, microbes, plants and their root zone, groundwater, or other pollutants, or simply through physical attenuation or dilution, it might not be the “functional equivalent” of a direct discharge to a water of the United States.” (Page 6).

COMMENTS AND QUESTIONS:

To what extent will installing a system that treats, provides uptake of, dilutes, or retains pollutants before the pollutant reaches a water of the United States bear on the determination whether a discharge from that system to water of the United States is the functional equivalent of a direct discharge?

How different must the pollutant composition or concentration that ultimately reaches the water of the United States be from the composition or concentration of the pollutant as initially discharged to avoid being categorized as be the “functional equivalent” of a direct discharge to a water of the United States?” Some? A significant amount? Which is more important in making the determination - the pollutant concentration or the composition?

Is it correct to read this Guidance Point to not only require a third party to prove that discharge water reports to surface water, but also to show that it is similar in chemical composition and concentration as the water discharged?

“Historically, few NPDES permits have been issued for point source discharges of pollutants that reach waters of the United States via groundwater. Permits issued for these types of discharges were based on a case-by-case analysis that was grounded in a “direct hydrologic connection” analysis. *See e.g.*, 84 FR 16810, 83 FR 7126, 66 FR 2959. Compared with the hundreds of thousands of NPDES permits that have been issued since the inception of the program, the number of NPDES permits issued for discharges through groundwater is extremely low. EPA anticipates that the issuance of such permits will continue to be a small percentage of the overall number of NPDES permits issued following application of the Supreme Court’s “functional equivalent” analysis.” (Page 6).

COMMENTS AND QUESTIONS:

We support these points and agree that there should continue to be few instances where NPDES permits are required for groundwater discharges under the functional equivalency requirements.

The Guidance Document also introduced the concept of “Considering System Design and Performance as Part of the “Functional Equivalent” Analysis:”

“[I]f a facility is designed and performs with a storage or treatment system such as a septic system, cesspool or settling pond; if the facility is operating as a runoff management system, such as with stormwater controls, infiltration or evaporation systems or other green infrastructure; or if the facility operates water reuse, recycling or groundwater recharge facilities, and these system components in fact prevent or abate discharges of pollutants to waters of the United States, it may be less likely that an NPDES permit would be required—either because those pollutants do not reach a water of the United States or because the discharge is not a functional equivalent of a direct discharge to a water of the United States.” (Pages 7-8).

COMMENTS AND QUESTIONS:

This seems to say that “if a facility is designed and performs with a storage or “treatment system” (such as an “infiltration system” (like LAD) which would “abate discharges of pollutants to waters of the United States,” it “may be less likely” to require an NPDES permit “because the discharge is not a functional equivalent of a direct discharge to a water of the United States.”

General Comments

At a broad level, we suggest that the information necessary to assess NPDES permit obligations should be limited to the requirements already identified in NPDES permit applications or other related Federal and State permitting documents. The Guidance Document could better clarify that demonstrations of pollutant fate/transport, information on hydraulic gradient, documentation on groundwater flowpath and pollutant-specific dynamics, among other technical issues, should be able to be satisfied in nearly all cases with the data already required by the NPDES application forms and/or other Federal and State permitting documents and a desk top evaluation of that data. Importantly, the The Guidance Document could better clarify that the evaluation of functional equivalency should not trigger substantial baseline data gathering beyond what is already obligatory in the NPDES and other existing permit application processes.



In conclusion, the AMA appreciates the thought and work that has gone into this Guidance Document and urges its prompt promulgation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Deantha Skibinski".

Deantha Skibinski
Executive Director