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*Dedicated to protecting our nation's ground water*

**Date:** January 11, 2021

**To:** US Environmental Protection Agency  
Docket ID No. EPA-HQ-OW-2020-0673, at <https://www.regulations.gov>

**Subject:** Comments on EPA-HQ-OW-2020-0673; FRL-10018-43-OW, 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Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program, Notice of availability of draft guidance and request for comment.

The Ground Water Protection Council (GWPC) ([www.gwpc.org](http://www.gwpc.org)) appreciates the opportunity to provide comments and feedback to the Environmental Protection Agency (EPA) regarding their draft memorandum which will provide guidance to the regulated community and permitting authorities on applying the recent decision of the United States Supreme Court in County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020), in the Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) permit program for point source discharges that travel through groundwater before reaching waters of the United States.

GWPC's membership consists of representatives of state water quality and underground injection control (UIC) regulatory agencies that mutually work toward the protection of groundwater nationwide. Our focus is specifically on protecting groundwater supplies, conserving groundwater resources for all beneficial uses, and recognizing groundwater as a critical component of the ecosystem. The GWPC is unique among state associations in that its members are the state officials who set and enforce regulations for groundwater protection and underground injection control. The following comments are intended to broadly address the draft memorandum, but do not necessarily reflect the individual member state's positions or all of their concerns.

### **Jurisdictional Concerns:**

GWPC recognizes that groundwater is not and has never been a jurisdictional water under the definition of waters of the United States. States have full authority over their groundwater resources. Many of our member agencies protect groundwater quality and resources utilizing both federal and state authorities that are outside the regulatory jurisdiction of the CWA.

We urge EPA, as they move forward to finalize the draft guidance memorandum, to ensure that nothing will limit or impede any state or tribal effort to protect state or tribal waters. While EPA NPDES programs might not consider impacts to groundwater, states must retain their current jurisdictional flexibilities to regulate potential and actual discharges that impact state waters, which often includes groundwater. Some states currently issue NPDES permits to regulate discharges of pollutants to groundwater leading to surface water via hydrologic connection. Regardless of EPA's current position on this matter, EPA should not issue guidance that undermines

the enforceability of state issued permits. States are in the best position to understand their own legal frameworks and recognize how to appropriately implement the various federal and state laws and regulations concerning the discharge of pollutants to groundwater.

## UIC as a Method for Stormwater and Wastewater Disposal, and Aquifer Recharge, Management and Enhanced Recharge:

GWPC notes that the definition of point source under 40 CFR §122.2 includes wells as part of the definitions and general requirements under the NPDES permit program.

*“Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.” Emphasis added.*

GWPC also notes that some pollutant discharges may or may not require an NPDES permit for discharges to waters of the US. However, the associated structures which discharge to groundwater may meet the definition of an injection well under the Safe Drinking Water Act’s Underground Injection Control (UIC) program and may be subject to regulation under that federal or state program (especially Class V injection wells which can be shallow wells used to place a variety of fluids above and directly below the land surface). Under the UIC program, a well is “any bored, drilled, driven shaft, or dug hole that is deeper than its widest surface dimension, or an improved sinkhole, or a subsurface fluid distribution system” and an “injection well” is a “well” into which “fluids” are being injected (40 CFR §144.3). An injection well is used to place fluid underground into porous geologic formations. These underground formations may range from deep sandstone or limestone, to a shallow soil layer. Injected fluids may include water, wastewater, brine (salt water), or water mixed with chemicals.

Wastewater facilities that meet the definition of an injection well should also be permitted or authorized under the appropriate UIC program, including the injection/infiltration of wastewater, stormwater, aquifer replenishment water, or aquifer management water. These facilities should be designed, constructed, and operated in a manner that is protective of underground sources of drinking water.

Because the UIC program is contained within the Safe Drinking Water Act (SDWA), its authority is focused on preventing contamination of underground sources of drinking water which are defined under 40 CFR 144.3 as:

“Underground source of drinking water (USDW) means an aquifer or its portion:

- (a) (1) Which supplies any public water system; or
- (2) Which contains a sufficient quantity of ground water to supply a public water system; and
  - (i) Currently supplies drinking water for human consumption; or
  - (ii) Contains fewer than 10,000 mg/l total dissolved solids; and
- (b) Which is not an exempted aquifer.”

To meet the spirit and the intent of footnote 1 on the first page of the memorandum which reads: “By issuing this draft guidance memorandum, the Agency intends only to provide clarity to the public regarding existing requirements under the law or Agency policies” GWPC encourages EPA to provide clarification that certain discharge designs may require an additional UIC state or federal authorization in addition to the requirements of the NPDES program. We suggest that the memorandum contain a statement which makes the public aware that some of the infiltration methods that could be used to discharge wastewater to groundwater may be

considered injection wells, subject to the jurisdiction under the Safe Drinking Water Act and should also be compliant with regulations for groundwater protection and underground injection control.

While groundwater is not a jurisdictional water under the CWA, that should not prevent coordination with the UIC program. GWPC points out that there should be a common purpose for protecting drinking water sources under both the CWA and the SDWA. The practice of infiltration of wastewater to groundwater should also be protective of groundwater quality. If polluted wastewater is directed to groundwater for either disposal or shallow recharge, GWPC recommends that the two Acts be implemented to prevent rather than redirect contamination from surface water resources to the detriment of groundwater resources.

We also recommend a clarification be added to the memorandum on page 7 under the section, *Considering System Design and Performance as Part of the “Functional Equivalent” Analysis*. This section should also provide a reminder that certain designs may require a UIC state or federal authorization in addition to the requirements of the NPDES program. Because the UIC program is focused on preventing contamination of underground sources of drinking water, additional standards or practices may need to be considered in the system design before infiltration would be allowed. The standards under the UIC or other types of regulatory programs may result in the “functional equivalent” factors being irrelevant.

Authorizations under the UIC program require the safe injection of fluids. It is a violation of the UIC program for an owner or operator of an injection well to construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation pursuant to 40 CFR part 142 or may otherwise adversely affect the health of persons (40 CFR §144.12). The applicant has the burden of demonstrating that these requirements are met.

We also note that EPA cannot depend on the UIC program to review and authorize infiltration or injection activities based upon potential impacts to waters of the US as part of the support for this proposed interpretation under the memorandum. It is not the intent of the UIC program to assess whether pollutant discharges to groundwater can reach jurisdictional waters of the US. We would point out that this would be an unfunded mandate which may be beyond the intent of the act or the approved UIC state and tribal delegated programs. The potential financial impact to the UIC program has not been considered by the guidance under the memorandum.

### Impacts on Funding for Groundwater Activities Under the Clean Water Act:

GWPC would like to echo the statements made by EPA in their recent preamble to the proposed rule changes to the definition of Waters of the US (Federal Register, Vol. 84, No. 31, February 14, 2019, p. 4169),

“non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the States in controlling pollution in the nation’s waters, not just its navigable waters. These non-regulatory sections of the CWA reveal Congress’ intent to restore and maintain the integrity of the nation’s waters using federal assistance to support State and local partnerships to control pollution of in the nation’s waters in addition to a federal regulatory prohibition on the discharge of pollutants into its navigable waters.”

GWPC is concerned that the EPA NPDES program areas may assume that the draft memorandum justifies reduced support for existing groundwater provisions and programs contained within 40 CFR Sections 106, 305, and 319 and in other conforming programs. We would like to reiterate that financial support for state and tribal

programs that focus on non-regulatory groundwater quality protection is important for restoring and maintaining the integrity of not only waters within a state but also waters of the US. The ability of states and tribes to request funding for groundwater protection programs from EPA under these sections should not be impeded by the proposed rule interpretation.

### Enforcement Considerations:

GWPC suggests that in the discussion of when a permit is needed (page 4 and 5), the memorandum should provide information on potential enforcement actions. Due to the lag time between wastewater that is released to groundwater and the impact to waters of the US, the unpermitted discharges can continue to take place, even if the release to groundwater ceases. If such a result occurs, what are the penalty consequences? What are the consequences if the discharge occurs and continues to occur because an evaluation of the potential for discharge to waters of the US was not made?

Discharges to waters of the US from groundwater cannot be stopped immediately and are subject to a lag time that results from longer groundwater travel times, slow plume velocities, and slow discharge of the plume as it moves through the aquifer. Even if the discharge were stopped, the wording of the memorandum does not provide guidance on pollution already in the groundwater that will continue to travel to a surface water body into the future and may result in long-term pollutant loading to the waters of the US. Will the violation be considered to have taken place for the entire period of the time the plume enters waters of the US, for the time it takes to reduce the concentration in the discharge so that it no longer impacts the receiving water, or for the time it took for the discharge to groundwater to reach the waters of the US? Would the penalty that results be that provided in statute (a per day penalty) until the discharge no longer occurs?

The memorandum also states that “An actual discharge of a pollutant to a water of the United States is a threshold condition that must be satisfied before the need for an NPDES permit is triggered.” How will the NPDES permit loadings be determined, when the loadings from the in-transit pollution plume are already in the groundwater and will continue to discharge regardless of discharge limits that may be based on impacts to designated uses of the water body? A complication to loading estimations is the potential for the chemical composition of the discharge to groundwater (memorandum page 6) to be degraded or altered (potentially to a more toxic form), as is commonly seen at some remediation sites under RCRA and Superfund.

### Communication Between Coregulators:

Part of GWPC’s mission is to provide a forum for stakeholder communication and research to improve the role of government in the protection and conservation of groundwater. GWPC feels that collaboration and cooperation with the States is necessary to effectively address issues that may arise from EPA’s memorandum on releases of pollutants from point sources to groundwater and potential discharges to waters of the US.

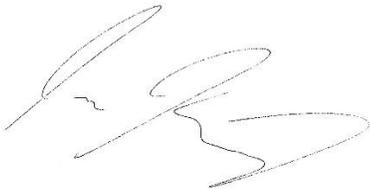
In the spirit of cooperative federalism, the GWPC recommends that the concepts contained within the memorandum be communicated to UIC programs, and that discussions take place to minimize or eliminate misunderstanding that could inhibit rather than support state jurisdiction/flexibility and allow for cost-effective and state appropriate regulatory strategies.

GWPC appreciates the information in footnote 1 which states “This draft guidance document does not have the force and effect of law and it does not bind the public in any way.” EPA Regional offices should make it clear that states are not required to follow this interpretative memorandum and issue a clarifying statement that EPA recognizes that the states may have separate authority to address discharges to groundwater. EPA should communicate to the States and Tribes that their memorandum is only guidance related to permitting and should, therefore, not be regarded as binding on the state or tribal delegated programs. In addition, States should be given the flexibility to address releases to groundwater and other issues in a manner that meets state regulations, rules, and practices.

GWPC supports communication between the NPDES and UIC programs at both the Federal and State levels and believes that this communication and exchange of information is essential to protecting both surface water and groundwater quality. We would be pleased to convene a workgroup of state water quality and UIC agencies and federal and non-governmental experts in hydrogeology to assess the potential for NPDES-UIC regulatory coordination that will allow the goals of both the CWA and SDWA to be met.

GWPC appreciates the opportunity to provide comment on EPA’s draft memorandum regarding *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*. We look forward to working with the NPDES, Water Quality, Drinking Water, and UIC programs to implement the groundwater protection provisions contained within the SDWA, CWA and other programs. If you have questions or would like to follow-up on any of these items, please contact Mike Paque, GWPC Executive Director, at (405) 516-4972 or [mpaque@gwpc.org](mailto:mpaque@gwpc.org).

Thank you,

A handwritten signature in black ink, appearing to read 'Jon Kenning', written over a light gray grid background.

Jon Kenning, PhD  
President Ground Water Protection Council and  
Water Protection Bureau Chief  
Montana Department of Environmental Quality