January 11, 2021

U.S. Environmental Protection Agency
Office of Wastewater Management
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Draft Guidance, Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination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, Docket No. EPA-HQ-OW-2020-0673

Dear Sir or Madam,

The GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments on the Draft Guidance, Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program ("Draft Guidance").

GPA Midstream Association has served the U.S. energy industry since 1921 and has nearly 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy. GPA Midstream members recover more than 90% of the NGLs such as ethane, propane, butane and natural gasoline produced in the United States from more than 400 natural gas processing facilities. In 2017-2019 period, GPA Midstream members spent over $105 billion in capital improvements to serve the country's needs for reliable and affordable energy.

GPA Midstream strongly supports EPA's interpretation that County of Maui did not alter the fundamental requirements of the National Pollutant Discharge Elimination System ("NPDES") Program: the need for a discharge of pollutants from a point source to reach a water of the United States. However, we urge EPA to provide industry and permitting agencies additional guidance to ensure County of Maui does not cause an unintended or incremental expansion of Clean Water Act jurisdiction. GPA Midstream supports EPA's consideration of treatment system design and performance as an additional factor in the County of Maui functional equivalent test. We also urge EPA to consider as an additional factor the Court's admonition that any interpretation of the Clean Water Act should preserve state regulation of groundwater and other non-point source pollution. Lastly, GPA Midstream requests that EPA provide more explicit guidance on the seven factors listed in the County of Maui decision.

GPA Midstream Association
Sixty Sixty American Plaza, Suite 700
Tulsa, Oklahoma 74135
(918) 493-3872

I. The County of Maui Decision Does Not Change the NPDES Program Requirements

GPA Midstream strongly agrees with EPA that the County of Maui's "functional equivalent" test did not change the basic NPDES Program requirements. There can be no "functional equivalent" of a direct discharge without (1) an actual discharge of pollutants, (2) from a point source, (3) that reaches a water of the United States. Draft Guidance at 4-6. EPA should make clear that nothing about the County of Maui decision allows a permitting agency to require, or a citizen suit plaintiff to demand, that a person obtain a NPDES permit based on speculative claims regarding whether a discharge to a water of the United States could occur in the future. County of Maui involved the very narrow factual situation where the treatment plant was intentionally injecting wastewater into disposal wells that leaked and those leaks could be traced to the ocean. An NPDES permit should not be required based on claims that a pipeline carrying NGLs or produced water may leak or rupture at some time in the undetermined future.

For similar reasons, GPA Midstream fully supports the Draft Guidance's position that neither the Clean Water Act nor the County of Maui decision "requires a facility owner or operator or a permitting agency to prove the absence of a discharge" in order to avoid requiring a NPDES permit. Draft Guidance at 5. It is important for EPA to emphasize that County of Maui did not, and could not, change the NPDES Program requirements in any significant way.

II. GPA Supports the Use of Additional Factors in Interpreting the "Functional Equivalent" Test and Urges EPA to Find that the Test Should not Conflict with State Groundwater Regulations

GPA Midstream agrees that the County of Maui decision, in addition to EPA's general authority to interpret and implement the NPDES Program, provides it with discretion to evaluate additional relevant factors when interpreting the "functional equivalent" test. Draft Guidance at 7. In this instance, GPA Midstream supports EPA's proposal to consider the design and performance of a treatment system or facility as informing the scope and extent of the "functional equivalent" test, including whether the "facility or system is designed and performs to discharge pollutants consistently or predictably...." GPA Midstream members operate equipment (such as gathering lines and compressor stations) that are designed to carry and move natural gas and NGLs, but are not designed to discharge "pollutants consistently or predictably." Only if there is an unintended breach would there be a discharge. As such, there is no consistent or predictable discharge that would warrant requiring an NPDES permit. This is a sound and essential factor to include in the analysis.

Pursuant to the same authority to interpret and implement the NPDES Program, GPA Midstream urges EPA to adopt another factor relevant to the "functional equivalent" test. Although not explicitly among the seven factors identified in the County of Maui decision, the Court recognized "the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution." Id. The Clean Water Act does not regulate nonpoint source discharges, including groundwater. See 33 U.S.C. § 1329(i); Rice v. Harken Exploration Co., 250 F.3d 264, 269-70 (5th Cir. 2001) (neither the Clean Water Act nor its legislative history demonstrate Congress' intent to regulate groundwater which is excluded from the Act's definition of "navigable waters"); Kelley v. United States, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985) (the Clean Water Act's legislative history is "unmistakably clear … that Congress did not intend the

Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination.").

Based on County of Maui's recognition of the need to preserve state authority over groundwater, as well as the text and structure of the Clean Water Act and the case holdings noted above, EPA should adopt as an additional factor the interpretation that NPDES permits should not be issued where States are already addressing the discharge by regulating or remediating the source as it travels through groundwater . The adoption of this additional factor could check an unduly expansive interpretation of NPDES permitting requirements that could encroach upon the long-standing recognition of Congressional intent to leave groundwater regulation to state agencies.

III. The Seven Maui Factors Require Additional Interpretation

In Maui, the Court held that whether or not a point source release of pollutants to groundwater that reaches a water of the United States is the "functional equivalent" of a direct discharge requires industry and permitting agencies to consider the situation on a case-by-case basis in light of seven (non-exclusive) factors: (1) transit time for the pollutants to reach a jurisdictional water, (2) the distance between the point source and the jurisdictional water, (3) the nature of "the material through which the pollutant travels," (4) the extent to which the pollutant is changed or diluted before reaching the jurisdictional water, (5) the amount of the pollutant discharging into the jurisdictional water compared to the amount discharged by the point source, (6) the "manner by or area in which the pollutant enters the navigable waters," and (7) the "degree to which the pollution (at that point) has maintained its specific identity." County of Maui, 140 S. Ct. at 1476-77.

These factors are not in the Clean Water Act itself or any EPA or Army Corps of Engineers regulation. Nor does the Court explain fully what these factors mean or how they would weigh for or against determining whether groundwater contamination is the "functional equivalent" of a direct discharge. These factors are ambiguous, use terms that are unclear, and have some overlapping criteria. Although the Court stated that "[t]ime and distance will be the most important factors in most cases, but not in every case," id. at 1477, the opinion did not provide guidance regarding whether the presence or absence of a factor means that a NPDES permit is more or less likely to be required. EPA should, in the final version of the Draft Guidance or future guidance, provide its interpretation as to what these factors mean and how they may be considered when determining the "functional equivalent" of a direct discharge. Potential interpretations are discussed below.

Transit Time and Distance Travelled

The Court illustrated the Transit Time and Distance Travelled factors in only the most broad sense in that it outlined two extreme scenarios: "Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters … and end up in navigable waters only many years later, the permitting requirements likely do not apply." 140 S. Ct. at 1476; see also id. at 1472 (citing cases where EPA opposed NPDES permitting where it took pollutants "dozens, and perhaps hundreds, of years" to reach navigable waters and where pollutants required "between 60 and 420 years" to travel "one to four miles" through

groundwater). This provides limited guidance for a situation where pollutants may travel, for instance, one mile from a point source to a jurisdictional water over the course of 20 to 25 years. Nor was it intended to, as the Court acknowledged that its "approach … does not, on its own, clearly explain how to deal with middle instances."

Although the Supreme Court left it to lower courts to "provide guidance through decisions in individual cases," id., this will likely result in a hodgepodge of holdings that create differing regional requirements for nationwide statutory requirements. Without guidance from EPA, some courts may take the County of Maui's examples to their outer limits and adopt unduly aggressive interpretations of NPDES permitting requirements. Other courts will likely issue divergent, fact-specific holdings that are difficult to apply on a broader basis, such as one court holding that a discharge three miles away requires a NPDES permit with another holding that a discharge 500 yards away does not.

Regulatory schemes function optimally with bright line definitions, allowing both the regulating and the regulated parties to clearly understand when requirements apply. With respect to County of Maui's Transit Time and Distance Travelled factor, it may not be practical to apply a bright line definition, such as finding that discharges of one mile away or more from a jurisdictional water, or taking 15 years or more to travel, do not require a NPDES permit. EPA may, however, use a sliding scale interpretation. For instance, it may find that where a discharge to groundwater is more than a mile away from a jurisdictional water, or taking more than 15 years to reach the water, there must be compelling circumstances under the other Maui factors to require a NPDES permit and that the necessity for a NPDES permit becomes even less likely with greater distance and time.

GPA Midstream provides these numbers only by way of example. Groundwater velocity varies dramatically from area to area and pollutants rarely, if ever, travel at the same velocity as groundwater due to differences in geochemistry, partition coefficient, and groundwater depth, among other variables. See generally EPA, Understanding Variation in Partition Coefficient, K_d Values, EPA 402-R-99-004A (Aug. 1999). Based on its technical experience with how pollutants travel through groundwater, EPA should establish guidance for presumptive transit times and distance travelled or times and distances for use in a sliding scale. This can provide guidance to permitting agencies, regulated parties, and courts in assessing what the Supreme Court deemed to be the likely most important criteria in any given situation.

The Nature of the Material Travelled Through

The County of Maui decision stated that "the nature of the material through which the pollutant travels" may be a relevant factor in determining whether or not a NPDES permit is required. 140 S. Ct. at 1476. The Court provided no further explanation as to how this factor would function, nor what "material" it may be referring to. The "nature of the material" may mean soil type, e.g., sandy soil that yield relatively high groundwater velocities versus relatively low velocity clay soils. However, if this is what the Court intended, then this factor may largely duplicate the Time Travelled factor. An alternative interpretation could be a consideration of whether the pollutants are travelling through the vadose zone, the saturated zone, or fractured bedrock. But, if so, there is no indication as to whether pollutants travelling in any of these materials tilt for or against the need for an NPDES permit.

Since the County of Maui decision failed to explain how this factor would operate (i.e., what does "the nature of the material" mean?), GPA Midstream urges EPA to either provide its own interpretation or explain that this factor carries less weight than other factors. GPA Midstream notes that the County of Maui decision stated that all factors may not be relevant in all situation. See 140 S. Ct. at 1476 (factors "may prove relevant (depending upon the circumstances of a particular case)." (emphasis added).

Pollutant Dilution or Transformation

Another potentially relevant factor is "the extent to which the pollutant is diluted or chemically changes as it travels." 140 S. Ct. at 1476. As with the "nature of the material" factor, the Court provided no further explanation as to how this factor would operate. Any pollutant discharged to groundwater will be subject to dilution or, through adsorption or absorption, see their concentrations reduced when compared to the source. And pollutants will frequently break down into one or more other pollutants, depending on site-specific soil chemistry, such as ammonium sulfate transforming to calcium sulfate. The Court, however, provided no guidance as to how these mechanisms would weigh for or against the need for a NPDES permit. EPA should provide some guidance as to how the degree of pollutant dilution or transformation effects a consideration of whether a discharge to groundwater is the "functional equivalent" of a direct discharge.

The Amount of a Pollutant Entering the Navigable Water

The factor evaluating the amount of a pollutant entering a navigable water, when compared to the amount of that pollutant discharged by the point source, appears to involve a consideration of the point source's contribution of a pollutant when compared to other point sources or naturally occurring contributions. County of Maui provided no further explanation of this factor. EPA could evaluate this factor in any number of ways.

For instance, EPA could determine that a NPDES Permit would only be required only where the groundwater pollutants causes the exceedance of water quality standards. This would provide a relatively clean and objective criterion for determining whether the amount of a pollutant reaching the jurisdictional water is the "functional equivalent" of a direct discharge. Other potential alternative interpretations include finding that the amount of a pollutant entering a jurisdictional water weighs in favor of a NPDES permit when the groundwater discharge contributes substantial amounts of a pollutant when compared to other sources of the same or similar pollutant or finding that no permit is required when there is only a de minimis contribution.

GPA Midstream believes that the Court's intent was to only require a NPDES Permit where groundwater pollutant contributions to jurisdictional waters were of a volume or concentration typically associated with direct discharges. These volumes and concentrations will vary depending upon the pollutant but, as a general rule, EPA should interpret this factor in a way where smaller contributions weigh heavily against the need for a NPDES Permit.

The Manner or Area Where the Pollutant Enters

The "manner by or area in which the pollutant enters the navigable waters" may be relevant to whether groundwater contamination is the functional equivalent of a direct discharge, but the County of Maui opinion provided no further explanation as to what this factor may mean. It may

refer to the Court's fears that the bright line rule favored by the United States – that all releases of pollutants to groundwater are excluded from permitting – would lead to circumvention of the NPDES Program, such as when "a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach)…." 140 S. Ct. at 1476. In this sense, the "manner or area" factor would be largely duplicative with the "distance travelled" factor.

Otherwise, if the Court intended some other use for the "manner by or area" factor, it is not clear how it would go to the question of whether or not a discharge that travels through groundwater to reach a water of the United States is the "functional equivalent" of a direct discharge. The pollutant may enter a jurisdictional water through groundwater infiltration or in the water's banks. It is not clear how these interactions between groundwater and jurisdictional waters are relevant to the question of whether or not traveling through groundwater is the "functional equivalent" of a direct discharge. An additional complication is that groundwater could potentially enter a navigable water through ephemeral features or hydrologic connections that would not ordinarily be subject to federal jurisdiction under the Navigable Waters Protection Rule. Guidance on how the "manner by or area" factor would function – if it is given significant weight at all – could avoid potential conflicts with EPA's regulatory revisions to the definition of waters of the United States.

Pollutant Identity

The Court suggested that the "degree to which the pollution (at that point) has maintained its specific identity" may be relevant to whether or not groundwater contamination is the "functional equivalent" of a direct discharge. County of Maui, 140 S. Ct. at 1477. The transformation of the pollutant, however, was already discussed in the decision's fourth factor, "the extent to which the pollutant … chemically changes as it travels." Id. at 1476. Thus, the final factor listed by the Court appears to be entirely duplicative. Industry and permitting agencies could benefit from EPA's view on whether the pollutant identity factor has a distinct meaning and, if so, how it may be applied.

EPA should take the lead in interpreting the Maui factors in order to provide industry and permitting agencies with more certainty. Otherwise, permitting agencies and courts may provide conflicting, confusing, or untenable interpretations over the next several years, leading to a patchwork of inconsistent standards. As the agency that interprets and implements the Clean Water Act, GPA Midstream would like to see EPA provide its own interpretation first in either the final version of the Draft Guidance or in a future guidance.

IV. EPA Should Consider the Practical Consequences of Potentially Permitting Releases to Groundwater

The seven factors specifically identified by the Court are not an exhaustive list of considerations. See County of Maui, 140 S. Ct. at 1476 ("there are too many potentially relevant factors applicable to factually different cases"). EPA may consider additional factors and GPA Midstream urges EPA to consider as a factor the potential inconsistencies and complications that would arise under the NPDES Program in certain situations. These complications could include (1) the ability to issue a NPDES permit that satisfies the Clean Water Act's requirements and (2)

the interaction of the NPDES Program with other federal laws addressing groundwater contamination. Both of these issues could raise significant difficulties that should be addressed through EPA guidance. More specifically, EPA should advise that NPDES permitting is not warranted when such complications would arise in specific applications.

A. NPDES Permitting is Impractical in Many Cases

The Clean Water Act and its related regulations require that NPDES permits contain terms that are not practically incorporated into a permit for pollutant discharges through groundwater. Section 402(a)(2) requires that NPDES permits include "conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection." This refers to compliance with, among other sections "all applicable requirements under sections 1311, 1312, [and] 1316 … of this title…." 33 U.S.C. §§ 1342(a)(1), (2). Sections 1311(e) and 1316 require NPDES permits to incorporate pollutant effluent limitations based on standards of performance derived from the best available demonstrated control technologies and Section 1312 requires water quality-related effluent limitations for some jurisdictional waters.

However, to address a discharge that travels through groundwater could require the treatment of groundwater. However, groundwater treatment is not as amenable to end-of-pipe effluent limitations as a traditional point source. And, as noted below, groundwater is typically remediated through other federal or state regulatory schemes rather than permitted as an ongoing industrial waste disposal process. Regulated entities may have very limited options with respect to treating groundwater to comply with effluent limitations other than through remediation.

Moreover, a point source discharge that moves through groundwater may result from a singular event, such as spills or leaks, instead of on-going operations. It would be wholly impractical to invoke the NPDES Program for that type of discharge. For instance, the Upstate Forever v. Kinder Morgan Energy Partners litigation involved a one-time pipeline "leak caused by the failure of a patch over a dent … The leak resulted in a discharge of an estimated 369,000 gallons of petroleum products. The pipeline leak was repaired within a few days of discovering the leak and remediation efforts commenced." 252 F. Supp. 3d 488, 491 (D. S.C. 2017). No meaningful regulation could result from requiring a person to obtain a NPDES permit after a release or leak – or alternatively how it would ever be permitted before the release when there is no intention to discharge in the first place. Such a release is simply not a regular disposal practice to be regulated under the NPDES Program, but a one-time accident to be cleaned up.

This assumes that the current owner or operator of the property is even responsible for the release or leak deemed to be a Clean Water Act "discharge" when it reaches a jurisdictional water. Given the length of time required for groundwater to migrate, the pollutant discharge may have occurred decades before it was discovered, with the source of the release or leak having been long since repaired or removed and the property from where it originated owned by a different party. EPA should address how a NPDES permit could potentially regulate releases or leaks that are several years old or were the responsibility of prior owners or operators.

B. Groundwater Contamination is Typically Regulated by Other Statutes

Moreover, groundwater contamination is typically a condition to be remediated under other federal and state statutes, once it reaches certain concentrations. Where a point source releases hazardous wastes to groundwater, it can be subject to a corrective action order under Section 3008(h) of the Resources Conservation Recovery Act ("RCRA") to remediate the groundwater. 42 U.S.C. § 6928(h). Where a point source releases hazardous substances to groundwater, it can be subject to undertake (or pay for) a removal or remedial action under Sections 104, 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. §§ 9604, 9606, 9607. And States often have regulations governing groundwater monitoring, reporting, and remediation based on groundwater quality standards. See, e.g., 15A NCAC 02L.0101-.0515 (North Carolina regulations); N.Y. ECL § 17-0303; 6 NYCRR 701.1, 701.15-18 (prohibiting the discharge of wastes into groundwaters and having the power to require the abatement and remediation of such pollution); OAC 252:690-5-1 through 5-19 (Oklahoma groundwater protection regulations governing discharges, monitoring, remediation). Unlike these statutes, however, Congress did not provide the Clean Water Act with provisions for remediating groundwater contamination.[1] Yet, as noted above, remediation may be the only way to regulate a "functional equivalent" of a direct discharge, if imposing effluent limitations for groundwater contamination is not practical

EPA should provide guidance on how NPDES permits which regulate the discharge of pollutants would interact with these other federal statutes and state groundwater programs to avoid potential conflicts. Otherwise, parties could find themselves with a NPDES permit purporting to allow continued movement of a pollutant through groundwater, while also being ordered to remediate the groundwater contamination by another authority.

***

GPA Midstream appreciates the opportunity to submit these comments in response to EPA's Draft Guidance and is standing by to answer any questions that the agency may have.

Respectfully submitted,

Matt Hite

Vice President of Government Affairs
GPA Midstream Association

[1] The Oil Pollution Act, 33 U.S.C. § 1321(b)(10), is the only exception in that it provides for the recovery by the United States of removal costs from the owner or operator of the source that discharged oil.