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December 21, 2023

The Honorable Radhika Fox
Assistant Administrator
Office of Water

U.S. Environmental Protection Agency
William Jefferson Clinton Building
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Docket ID No. EPA-HQ-OW-2023-0551

Re: Comments of the WateReuse Association on the U.S. Environmental Protection Agency's Draft Guidance Memorandum, "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge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 to Discharges through Groundwater."

Submitted electronically via regulations.gov

Dear Assistant Administrator Fox:

The WateReuse Association (WateReuse) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) draft guidance memorandum, "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System Permit (NPDES) Program."

WateReuse is a not-for-profit trade association for water utilities, businesses, industrial and commercial enterprises, non-profit organizations, and research entities that engage in and on water reuse. WateReuse and its state and regional sections represent nearly 250 water utilities serving over 60 million customers, and over 300 businesses and organizations across the country.

The WateReuse Association's mission is to empower communities and businesses to embrace water recycling as the cornerstone to safe, resilient, and sustainable water resources. WateReuse members manage a wide variety of water recycling projects, including those in which highly treated water is infiltrated or injected

into groundwater aquifers for a range of beneficial purposes.

Groundwater projects for water reuse and recycling intentionally convey highly treated wastewater into groundwater for future beneficial reuse as freshwater supply, which typically does not result in a discharge to surface waters, and therefore operates under different regulatory regimes, such as those established by the Safe Drinking Water Act or in accordance with State-adopted water recycling regulations. Recycling projects are also engineered to treat and remove pollutants and abate their discharge into surface waters, thereby comporting with the analytical factors identified by EPA in the draft guidance. As a result, including language in EPA's draft guidance that generally excludes environmentally beneficial activities such as groundwater recharge for reuse or recycling from the scope of the NPDES program when there is no direct surface water discharge involved would be consistent with the objectives of the CWA and application of the Supreme Court's "functional equivalence" *Maui* analysis.

The U.S. EPA should include language in their guidance to clarify how this Ruling may impact groundwater that is stored for the purposes of reuse and recycling.

Highly treated water that is stored as groundwater for water reuse and recycling has been treated for pollutants and meets its respective water quality standards.

Water reuse agencies and utilities often infiltrate or inject highly treated water into underground aquifers for storage and eventual reuse. When these practices are employed, the water is treated to the water quality standards necessary to protect the aquifer and/or underground basin and enable future beneficial use of the water for a range of freshwater purposes, including drinking.

These water reuse agencies are often subject to state and federal permitting regimes outside of the CWA Sec. 402 context that provide tailored protections resulting in comprehensive environmental protection without the corresponding financial burdens, delays, and litigation risks associated with obtaining an NPDES permit. Steps taken to comply with such programs ensure that potential pollutants that may be harmful to the environment are removed, leaving only naturally occurring compounds. Due to this, it is unlikely that these projects would be point sources for pollutants.

Highly treated water that is stored as groundwater for water recycling and reuse is not a discharge.

Groundwater replenishment projects for water reuse and recycling that use highly treated water are not the "functional equivalent" of direct surface water discharges and should not be classified as effluent discharges at all, but rather are beneficial uses of a water supply source. As previously mentioned, these systems are designed to use the underground basin as a temporary storage site until the water is pumped back to the surface for use. In this way, the recycled water is not a waste and should not be considered a "discharge."

WaterReuse requests that EPA include some of this language in their guidance and frame how groundwater projects for water reuse may not be impacted by this Ruling given that they are neither point sources of pollution nor are they discharges.



The U.S. EPA should provide further information and specification in their guidance on the characteristics of groundwater that may require an NPDES permit.

While EPA correctly identified the characteristics that may define a scenario that is out of compliance with this Ruling, further specification on each of those characteristics will allow our members to get a better understanding of how and if this Ruling may apply to them in future projects and how other types of reuse projects may be impacted. Understanding the limitations of the water reuse field within the confines of the law, as well as the trajectory of the law, is valuable and will allow those pursuing groundwater projects the ability to adequately prepare and comply.

As innovation in water reuse continues to expand, WaterReuse considers this type of Ruling important to the context of future projects and their viability. Because of this, WaterReuse is requesting that EPA further define which groundwater projects may put an entity out of compliance under this Ruling by providing further information on each of the characteristics that they have already outlined including 1.) specific distances of groundwater to surface waters, 2.) specific depths of groundwater (groundwater, subsurface flows, and surface waters need to be defined), 3.) specific levels of treatment of groundwater, 4.) specific time that it takes for groundwater to reach a surface water, among many others that have already been identified but need to be expounded upon further. The more information that EPA can include in their guidance, the more the water sector can be prepared to comply.

Conclusion

Projects that store highly treated groundwater for reuse are implemented to protect the environment, public health, and water security throughout the country. EPA's Water Reuse Action Plan (WRAP) acknowledges the important role water reuse and recycling can play to supplement drinking water supplies.¹ Recycled water can also be used for other applications such as landscape or agricultural irrigation, climate resilience activities, prevention of saltwater intrusion, combatting land subsidence, etc. As EPA's WRAP explains, such reuse can help reinforce water sustainability and security in communities. The further clarification of which groundwater projects might now require NPDES permitting ensures that the progress made in this vital sector is not hindered. Regulatory certainty is critical for water reuse agencies and utilities to invest the resources necessary to continue their important work and to further the CWA's objectives. The more information and specification about how this Ruling might apply to the water sector, the easier it will be for entities to comply in a timely manner.

Thank you for considering our views.

Sincerely,



Patricia L. Sinicropi, J.D.
Executive Director

¹ EPA Water Reuse Action Plan, available at <https://www.epa.gov/waterreuse/water-reuse-action-plan> (last visited Jan. 5, 2021).

