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Office of Water - Docket

U.S. Environmental Protection Agency

1200 N. Pennsylvania Avenue, N.W.

Washington, D.C. 20460

Re: FSWA Comments on EPA Draft Guidance: Applying the Supreme

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EPA's Draft Guidance is intended to spell out how the Agency and the States, as permitting authorities, can decide if an addition of pollutants to groundwater is the "functional equivalent" of a direct discharge of pollutants to surface waters, requiring an NPDES permit. FSWA supports the basic concepts set forth in the Draft Guidance. As an initial matter, EPA recognizes that in determining when an addition of pollutants to groundwater requires an NPDES permit, the permitting authority must consider the seven factors laid out by the Supreme Court in *Maui County*, and we agree with that conclusion. We also agree with EPA's determination that an additional factor should be considered: the design and performance of the system from which the addition of pollutants originates. Consideration of design and performance of the system would assist the permitting authority in assessing the other factors that the Supreme Court said were relevant to a "functional equivalent" determination.

The Draft Guidance explains how the "design and performance" factor would apply to some example situations, illustrating how this factor is useful in making "functional equivalent" determinations. In many cases, FSWA members operate systems in which water is intended to be filtered into the ground, and ultimately into groundwater – often, to replenish groundwater sources and/or to prevent runoff of pollutants into surface waters. Examples of these types of systems are green infrastructure measures and aquifer storage-and-recovery systems. These systems are not intended to transfer pollutants into surface waters, so they do not represent the kind of intentional avoidance of NPDES permit requirements that the Court was concerned about in *Maui County*. If some pollutants do end up in surface waters, simply because of hydrologic connections between groundwater and those surface waters, that is a far cry from the "functional equivalent" of a direct discharge that the Court indicated should obtain an NPDES permit.

But FSWA members also operate systems that are not intended to result in releases to surface water or groundwater. Examples include petroleum and chemical pipelines, stormwater retention basins, and water/wastewater conveyance systems (including sewers and water mains). Despite the fact that these systems are not specifically designed to convey pollutants into groundwater, unintentional leaks or incursions can develop and related effluent may eventually reach surface waters. Clearly, these situations do not occur due to any intentional avoidance of the NPDES permit requirements. Moreover, there is no possible way for the system operator to apply for a permit in advance of the unplanned release, and it is hard to imagine how the permit requirements could be applied in that instance. These occurrences should not be deemed to meet the "functional equivalent" test.

The Draft Guidance also lays out several principles, in addition to laying out the factors that should be considered, in applying the "functional equivalent" test that we believe are critical in making a determination as to whether an NPDES permit is required. One of those principles is that in order for a permit to be required, there must be a "point source" from which the discharge emanates. The fact that pollutants start out in a unit or system, and end up in the ground and then into groundwater, does not mean that they got there through a "point source." Pollutants can get into the ground in many ways.

In many situations, pollutants may be found in the 000912 0 612 792 reW*inBa/F30 0 1 282.05 146.

regulated by the NPDES program – and certainly, if no sources can be determined at all, the NPDES requirements cannot also apply.

The Draft Guidance another important principle that asserts that in order for the

The Draft Guidance focuses on the threshold issue of when an addition of pollutants to groundwater may become subject to NPDES permit requirements. We support the Draft Guidance, and we recommend that EPA issue it in final form, after considering the comments set forth above. In addition, we believe that it is also important that EPA consider issuing guidance on issues that are related and just as important: (1) what information must be provided in a permit application for a “functionally equivalent” discharge, and (2) how the permitting authority should determine the effluent limits and other requirements that have to be included in the NPDES permit for that discharge. Neither of those issues is covered in the Draft Guidance, but they both need to be addressed, and that needs to happen soon. Understanding that some additions of pollutants to groundwater will be covered by the Maui County test and EPA’s final version of the Draft Guidance, the operators of the relevant facilities need to know how to apply for an NPDES permit, and the States and EPA Regions that will issue the permits need to know what those NPDES permits should look like. Other stakeholders, as well, deserve to know how EPA and the States will appderddr50oo

system or facility, which has been determined to require an NPDES permit (but only due to the *Maui County* decision) is in violation of the CWA until that permit is issued. But it serves no legitimate purpose to subject that system or facility operator to potentially heavy penalties, when it had no notice that it was required to have a permit, it is complying with the new requirement to obtain a permit, and it is awaiting its new permit. EPA should make it clear that in such a situation, the system or facility operator should not be subject to claims for past or current CWA noncompliance as long as it is meeting the application schedule set forth by the agency and working with the agency to obtain the new permit.

FSWA also recognizes that EPA's obligation to issue NPDES permits for "functionally equivalent" discharges could very well overlap and potentially interfere with other important programs. Groundwater has long been recognized (including in the CWA) as