



January 11, 2021

U.S. Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

**Re: Docket No. EPA-HQ-OW-2020-0673, 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**

Today I respectfully offer comments on the Dec. 10 proposed draft guidance applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund (Maui)* decision in the Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) permit program.

**Background**

In planning, designing and building transportation improvement projects, ARTBA's 8,000 members seek to maximize safety, efficiency and cost-effectiveness. Transportation construction industry professionals also serve as environmental stewards, protecting essential water resources through the federal wetlands permitting program and other compliance with the CWA.

In some cases, discharge of pollutants from active transportation construction projects is inevitable. As such, industry personnel are responsible for complying with applicable regulations to mitigate that discharge. Provisions in the CWA regulate pollutants discharged from point sources (such as projects described above) into navigable "waters of the United States." Operators of point sources must obtain a permit under the NPDES, which limits what pollutants may be emitted and specifies treatments required for those that are discharged.

The *Maui* decision related to scenarios where pollutants travel from a point source through groundwater to reach navigable waters. The U.S. Supreme Court held that a federal permit is required when that discharge of pollutants is "the functional equivalent of a direct discharge from the point source into navigable waters." The Court then provided a list of factors to be considered when determining if a particular discharge meets that "functional equivalency" test. The EPA subsequently issued draft guidance to assist regulators in determining when a federal permit would be required under *Maui*.

As described herein, ARTBA supports the EPA's proposed guidance pursuant to the Supreme Court's *Maui* decision.

## **The EPA's Proposed Guidance Reflects the Appropriate Federal Role in Regulating Groundwater**

The EPA's draft guidance properly recognizes that federal regulation of groundwater under the *Maui* decision should be a rare instance. Specifically, the guidance states "discharges of pollutants that reach a water of the United States via groundwater may not be the functional equivalent of a direct discharge" and that "historically few" federal permits have been required for discharges into groundwater. The EPA also notes its expectation that federal permits for discharges into groundwater will "continue to be a small percentage" of the total number of federal permits issued. The draft guidance acknowledges that states should assume the primary role in regulating groundwater.

Full federal regulation of groundwater would result in a blanket jurisdictional determination, meaning the EPA and U.S. Army Corps of Engineers could regulate any waterbodies connected via groundwater or subsurface waters. Such a broadening of jurisdiction would apply to all transportation projects regardless of its location, as every body of water in the United States links to at least one source of groundwater. On many projects, compliance with this additional regulatory layer would inevitably lead to delays and increased costs.

## **The EPA's Proposed Guidance Is Consistent with the Navigable Waters Protection Rule (NWPR)**

The NWPR, which took effect in June of 2020, restored clarity to federal CWA regulations, thereby reducing potential bureaucratic delays for many transportation improvements. The NWPR specifies four separate categories of waterbodies as appropriate for federal regulation. Perhaps more importantly, the NWPR also delineates types of waterbodies which should not be federally regulated and places groundwater in that category.

The draft guidance on groundwater is consistent with the NWPR's terms. The draft states "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 a federal permit. The groundwater guidance's adherence to the NWPR will help provide a consistent, predictable regulatory regime. This will help facilitate compliance by transportation construction professionals and other members of the regulated community.

## **Congress Has Shown Strong Bipartisan Support for Streamlining of Transportation Projects**

The two most recent surface transportation reauthorization laws – the "Moving Ahead for Progress in the 21<sup>st</sup> Century" (MAP-21) Act (2012) and "Fixing America's Surface Transportation" (FAST) Act (2015) – included provisions streamlining the transportation project review and approval process. These reforms resulted from bipartisan, collaborative efforts in both houses of Congress. Examples include empowering "lead agencies" to set decision

schedules by cooperating federal government entities, imposing deadlines for permitting decisions, and enabling states to assume responsibility for the federal role in project reviews.

In this way, Congress has shown its clear intent to keep transportation projects moving while not compromising environmental stewardship. EPA's draft *Maui* guidance is consistent with Congress' efforts in this regard.

### **Conclusion**

ARTBA supports the EPA's proposed guidance and its measured approach in addressing the Supreme Court's *Maui* decision. We look forward to continuing our work with the agency as ARTBA's members build important transportation improvements while serving as capable environmental stewards.

Sincerely,

A handwritten signature in black ink that reads "David Bauer". The signature is written in a cursive, flowing style.

David Bauer  
President & CEO