



**North Santiam
Sewer Authority**

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P.O. Box 256
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**NSSA Monthly Board Meeting Agenda
January 3, 2024 at 6:00 PM
Mill City, City Hall**

<https://zoom.us/j/934>

[14748822?pwd=MjJkM3VyY21YS1BDK2doVEplZ25uUT09](https://zoom.us/j/93414748822?pwd=MjJkM3VyY21YS1BDK2doVEplZ25uUT09)

Meeting ID: 934 1474 8822

Passcode: 454959

- A. Roll Call and Declarations of Conflicts of Interest
- B. Announcements
- C. Public Comment and Questions (please limit Public Comments to 3 minutes each)

Action Agenda

Old Business:

- A. December 4th Summary Notes (Motion Needed)
- B. Treasurer's Report - (Motion Needed)

New Business:

- A. COG Staff Report (Conroy)
- B. Executive Session

Upcoming Events:

Date	Event	Location
1/17	Work Session	Mill City, City Hall/Zoom

Executive Session

The NSSA will now meet to hold the following executive session: In accordance with ORS 192.660(2)(f) to consider information or records that are exempt from disclosure by law, including written advice from the NSSA attorney. ORS 192.660(2)(f).

Executive Sessions are closed to the public and all members of the audience are asked to leave the room and for those attending virtually we will place you in the waiting room. Representatives of the news media and designated staff may attend Executive Sessions. Representatives of the news media are specifically directed not to report on any of the deliberations during the Executive Session.

No decision may be made in executive session. At the end of the executive session, we will return to open session and welcome the audience back into the room.



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Date: January 2, 2024
To: NSSA Board
From: Scott Dadson, Executive Director
Laura Conroy, Project Manager
Subject: December Staff Report

Introduction

This memo provides an overview of staff activities for December in support of the NSSA.

County Coordination Meetings

COG staff convened meetings with NSSA attorneys and county engineers to review potential changes in federal rules that could impact the project. NSSA attorneys provided comment to the federal Environmental Protection Agency regarding the possible rule change. Marion County and DEQ also provided public comment on the proposed rules. Copies of all comments submitted are attached. COG staff also attended bi-weekly Keller project meeting and Marion County Commissioner work session regarding the IGA amendment.

IGA amendments

COG staff continued to work with county economic development director Chris Eppley to create an amendment to the current IGA between NSSA and Marion County. The amendment will provide additional funding to NSSA for legal counsel to assist NSSA in making decisions about asset ownership, rate making authority, and governance.

Administrative Activities

COG staff worked with NSSA board members to resolve questions regarding access to gmail and google folders, and questions about Ken Woodward's SSN and credit card connection to EIN and payment accounts.



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**NSSA Board Meeting #84
Summary Notes
December 4th at 6:00 PM @ Mill
City, City Hall and via Zoom**

Meeting called at 6:05

- A. Roll Call and Declarations of Conflicts of Interest
Present: Ken Woodward Detroit; Janet Zeyen-Hall, Mill City: Denny Nielsen, Tim Kirsch, Emily Scofield, Ron Evans
Absent: Morones
County Staff: Brian Nicholas, Chris Einmo, Chris Eppley
COG Staff: Scott Dadson, Laura Conroy

B. **Announcements**

C. **Public Comments**

Old Business:

1. **November 6th Summary Notes**

Motion to accept the Summary Notes by Ron Evans, second Denny Neilson
Motion passed

2. **Treasurer's Report**

Motion to accept the Treasure's Report by Janet Zeyen-Hall, Second, Emily Scofield
Motion Passed

New Business:

1. **Jan NSSA Meeting dates (Kirsch)**

The members agreed on the Dates for January 2024
January 3, 2023, 6 pm Board Meeting with Executive Session
January 17, 2023, 6 pm Work Session with Executive Session

2. **County Update (Einmo)**

3. **COG Staff Report (Conroy)**

4. **Executive Session with NSSA attorneys**

Executive Sessions are not recorded. No decisions will be made in the Executive Session.

- D. **Adjourn - 6:45 pm**

Upcoming Events:

Date	Event	Location
December 18 th , 6-8 pm	NSSA WS Meeting	Mill City, City Hall
January 3 rd , 6-8 pm	NSSA Board Meeting	Mill City, City Hall
January 17 th , 6-8 pm	NSSA WS Meeting	Mill City, City Hall

DRAFT

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Colm Willis, Chair
Kevin Cameron
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Director of Public Works
Brian Nicholas, PE

27 December 2023

Electronic Delivery

Marcus Zobrist
Office of Wastewater Management
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2023-0551 Implementing the Supreme Court's Maui Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program

Marion County, Oregon, appreciates the time and effort the EPA has invested in developing the referenced draft guidance document for public review. Upon reading the draft text, we submit the following comments due to the relevance of EPA's draft guidance to a project that is critical to an entire region of Marion County and the cities and citizens therein. This project serves as an example of a "middle instance" referred to in the Opinion of the Court¹ in *County of Maui v. Hawaii Wildlife Fund*, which requires changes to the draft guidance or further clarification regarding the existing draft text to avoid uncertainty of permitting jurisdiction.

Background

Marion County is one of thousands of municipal governments throughout the United States that operates domestic sewage treatment facilities under permits of the National Pollutant Discharge Elimination System (NPDES) in accordance with the Clean Water Act.

Marion County shares two similarities with Maui County, Hawaii, the operator of the facility at the heart of the Supreme Court's *Maui* decision: (1) both counties are home to domestic sewage treatment facilities that historically discharge highly treated wastewater effluent into the groundwater, and (2) both counties were recently devastated by catastrophic wildfires in which thousands of people lost their homes and businesses. For Marion County, it was the Beachie Creek and Lionshead Wildfires, known locally as the 2020 Labor Day fires, which forced the evacuation of twelve cities and rural communities – Mill City, Gates, Detroit (OR), Idanha, Lyons, Mehama, Marion Forks, Elkhorn, Taylor Park, Santiam Park, Dogwood and Niagra, all located within the North Santiam River watershed, as the forests around them were set ablaze. Many of these communities suffered total, catastrophic loss of public and private infrastructure.

In the years since this tragedy, Marion County has worked tirelessly to support wildfire reconstruction efforts, including the foremost concern to aid these communities in sustaining potable water, sanitation

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and other infrastructure as they rebuild. To that end, Marion County is the lead agency designing, permitting, and constructing new sewer systems and sewage treatment facilities (the “Project”) for the four largest incorporated cities within the wildfire zone; Mill City, Gates, Detroit (OR) and Idanha. Most residents and businesses within these cities lack the land needed to build rural septic systems to modern standards. The lack of access to domestic sewage systems is the single greatest impediment to the economic recovery efforts of individuals and communities in the wake of these tragic wildfires.

The effort to build new city sewer systems and sewage treatment facilities – far out of reach of the communities reeling from the economic damage of the wildfires – was funded through the American Rescue Plan Act (ARPA) in which the U.S. Congress imposed strict deadlines to obligate all ARPA the funds by the end of 2024. Therefore, time is of the essence. To meet this obligation date, Marion County and its contractors must know with a high degree of certainty the technological nature of these new facilities and how they will be permitted. There are no other known means to support the reconstruction efforts to such a degree, further emphasizing the critical role a clear and reliable permitting pathway plays in the overall feasibility of Marion County’s Project.

Since EPA issued its draft guidance in January 2021, Marion County used that guidance to develop permitting strategies for the Mill City, Gates, Detroit (OR) and Idanha municipal wastewater treatment system Project by locating the proposed facilities as far from Waters of the United States as possible and designing infiltration basins to percolate highly treated effluent into the groundwater. The 2021 guidance was rescinded by EPA, but absent any other guiding document Marion County carried on using the 2021 guidance as the best available information during early project development.

Our Project designs are of modern wastewater treatment facilities capable of complying with the water quality requirements of the Clean Water Act fully permissible under State of Oregon’s Water Pollution Control Facility (WPCF) permitting and compliance programs. Oregon’s own state rules prohibit rural communities from obtaining NPDES permits of any type within the North Santiam River watershed. We note the EPA is aware of Oregon’s rules prohibiting NPDES permits in the North Santiam River watershed since the agency has previously published this rule on its website². The confluence of the draft EPA guidance referenced, above, and state law creates a conflict that threatens to bring the recovery and enhancement of municipal wastewater infrastructure in the North Santiam River watershed to an abrupt and irreversible stand still. Resolving this conflict requires actions by the state that need further clarification from the EPA regarding where State of Oregon jurisdiction applies so the state can adapt its own groundwater protection rules accordingly.

Response to the Draft Guidance

The Court notes that EPA can provide technical guidance to aid operators and states in navigating its opinion, including “the development of general rules”³ utilizing its considerable resources and technical

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expertise. We recognize that this guidance document is not meant to take the place of eventual rules, but the draft as written offers little to aid an operator in knowing if they must acquire a NPDES permit.

For “middle instances,” which the Court admits it does not clearly explain how to address, EPA’s draft guidance helpfully suggests (in Section 3.a.) the examination of one constituent of a pollutant (i.e. a single chemical component of wastewater). However, pollutants as defined under the Clean Water Act are composed of thousands of constituents, many of which are conservative and may remain unchanged indefinitely. This leaves the question of which constituent should an operator consider, and what would be the basis of selection? An operator seeking a reliable basis to judge NPDES permit compliance might choose the constituent that is most readily attenuated by microbial activity or one that is most adsorbed by soil, but this selection of constituent requires some sort of rule-based framework to be consistent and defensible.

In its ruling on *Maui*, the Court identifies seven factors, and that time and distance will be more important than the other five factors *in most cases but not all*. The draft document offers no clarifying guidance on how these factors should be weighted in determining functional equivalence. In applying this test to the Project in question, our geologist’s model estimates that time and distance are similar to the Lahaina WRF of the *Maui* case, but in regard to the other five factors, our site conditions differ considerably. How, then, are we to weight the importance of these other factors?

Indeed, EPA’s draft guidance (Section 3.b.) draws contrast between a “long” transport distance and time vs. a “short” transport distance and time without any basis of significance to distinguish between the two. The draft document notes that even the time and distance must be “evaluated on a site-specific basis” but offers no indication on which site characteristics might be considered in regard to time and distance, nor how they would influence the determination of functional equivalence.

To pursue either an exemption or a legislative path towards a NPDES permit, Marion County or the State of Oregon requires some meaningful predictor as to whether groundwater infiltration will be subject to the CWA. The ambiguity of not knowing which set of mutually exclusive rules we must follow poses such excessive risk of delay and loss of funding that it very nearly represents a total project dead end. The resulting lack of wastewater systems would pose nothing less than an existential threat to four cities who’s citizens cannot occupy their homes or use their plumbing without the ability to dispose of their domestic sewage.

With assurance that highly-treated-effluent infiltration facilities would not, by blanket rule or definition, constitute a functional equivalence and, therefore, not solely mandate NPDES permitting when other state-level, CWA-compliant permitting methodologies exist – guidance that was clearly stated in EPA’s previous (2021) guidance document – such assurance would allow the Oregon Department of Environmental Quality (ODEQ) to permit the proposed Project under the rules of the state’s groundwater protection program. Such exemptions have been an explicit requirement for communities within the

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Clackamas, McKenzie and North Santiam River basins under Oregon's state rules for decades. Similarly, if the EPA's guidance provides a means to clearly demonstrate a functional equivalent, the clear requirement of a NPDES permit could provide an alternative pathway for communities to rebuild.

When federal law compels that which the state prohibits, it becomes imperative for the state legislature to revise its rules to allow operators a means to comply with the Clean Water Act by obtaining a NPDES permit. Even if the EPA is not able to provide a perfectly defined "bright line" distinction, the legislature cannot make an informed decision about changing one of its fundamental rules for surface water protection without at least some confidence on where the NPDES permit would take its place. Therefore we must respectfully urge EPA, in its issuance of the final guidance document, to provide clearer parameters that would, at the very least, establish weighted parameters for the seven-factor test in *Maui*; to clarify what the seven-factor test means in more finite scientific and engineering terms by "site-specific analysis" of those factors and site-specific determination of functional equivalence; and to make progress towards consistent general rules as identified by the Courts.

Without the clarity from EPA requested, herein, the draft guidance provided for public comment would result in two clear outcomes. First, it will abruptly and irrevocably kill time-critical municipal wastewater treatment projects for established cities in the North Santiam River watershed, projects that by all measures will significantly enhance surface water quality in the basin, by leaving ODEQ with no permitting pathway. Second, it will prevent communities from employing future improvements needed for the long-term operation, maintenance and enhancement of existing treatment facilities needed for the protection of surface waters, again due to a lack of permitting pathway. This would further diminish and prevent the recovery of the rural economy of the North Santiam River watershed which, we argue, is not an intended consequence of the *Maui Decision*.

Respectfully submitted,

A handwritten signature in blue ink that reads "Brian Nicholas".

Brian Nicholas, PE
Director of Public Works
Marion County, Oregon

¹590 U. S. ____ (2020) *Cnty. of Maui v. Haw. Wildlife Fund*, 1476

²<https://www.epa.gov/sites/default/files/2020-11/documents/orwqs.pdf>

³590 U. S. ____ (2020) *Cnty. of Maui v. Haw. Wildlife Fund*, 1477



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December 27, 2023

Via Electronic Delivery

Marcus Zobrist
Office of Wastewater Management
Water Permits Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2023-0551
Implementing the Supreme Court's Maui Decision in the Clean Water Act Section 402
National Pollutant Discharge Elimination System Permit Program

Dear Mr. Zobrist:

The North Santiam Sewer Authority (NSSA) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) 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 to Discharges through Groundwater* (Guidance).

NSSA was formed in May 2020 as an independent intergovernmental entity under Oregon law. The North Santiam Canyon cities of Mill City, Gates, Detroit, and Idanha, recognizing shared interests in the vitality of the Canyon and health of the North Santiam River watershed, formed the NSSA to address the collective need for a Canyon wastewater solution. Three of these communities (Detroit, Gates and Idanha) currently rely on individual septic systems, while Mill City maintains a STEP sewer system. Under these conditions, the North Santiam Watershed is at risk of widespread toxic septic system failures, and the four Canyon communities are limited in their capacity for business, housing, and industry development. The 2020 Labor Day wildfires, which severely impacted the economy and infrastructure of much of the Canyon, increased the urgency for a wastewater solution.



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NSSA is currently pursuing two wastewater projects to address water quality needs and promote long-term economic growth in the Canyon, including a joint sewer system between Mill City and Gates. Wastewater flows from the two communities would meet at a new mechanical treatment plant, replacing the current wastewater treatment facility at Mill City. Treated effluent at the proposed mechanical treatment plant will be disposed of via a new rapid infiltration basin.

Infiltration of wastewater via rapid infiltration basins is likely the only feasible method of wastewater in the North Santiam Canyon because Oregon's Three Basin Rule prohibits new or increased discharges of wastewater to the waters of the North Santiam Subbasin, where our four member communities are located, along with two other subbasins, the McKenzie River and the Clackamas River Subbasins. See O.A.R. 340-041-0350(1)(c). According to the Three Basin Rule, no NPDES permits for new domestic sewage treatment plants may be issued. See O.A.R. 340-041-0350(8)(a). Under existing Oregon law, wastewater treatment plants, such as the existing Mill City treatment plant, may discharge wastewater to groundwater pursuant to a Water Pollution Control Facility (WPCF) permit issued by the Oregon Department of Environmental Quality (ODEQ).

Because of the Three Basin Rule's prohibition on new NPDES permits in the North Santiam Subbasin, the Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) (*Maui*) has created great uncertainty on the viability of NSSA's Mill City Project. That is, if EPA or ODEQ determined that the wastewater discharged at a rapid infiltration basin pursuant to a WPCF permit that ultimately discharges to the North Santiam River is the functional equivalent of a point source discharge of a pollutant to the river, then NSSA would be required to obtain a NPDES permit that ODEQ is prohibited from issuing under Oregon law.

Understanding this predicament, NSSA offers the following comments on the above-referenced draft Guidance.

- 1. The Guidance should provide clearer guidance on factors other than time and distance of travel.**

EPA's draft Guidance concentrates on the time and distance factors discussed by the Supreme Court in *Maui* and gives operators such as NSSA very little guidance on how to evaluate potential projects under the other five factors. While the Supreme Court noted that time and distance of travel are the most important factors to be considered, the Court left it to EPA's discretion – but, in reality, mostly the state regulatory agencies' discretion – how to weigh the



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relevant factors. See *Maui*, 140 S.Ct. at 1476-77. Unfortunately, the draft Guidance only discusses vague situations and does not offer bright line tests that state regulatory agencies can use to evaluate projects where time and distance are not the most important factors.

For example, the draft Guidance notes that a “discharge through a subsurface comprised of porous material provides evidence that the discharge may be the functional equivalent of a direct discharge,”¹ but this statement only echoes the Supreme Court’s language and does not give operators or regulators any guidance for evaluating how the porosity of subsurface material effects the functional equivalency test (especially in ways that are not related to time of travel). Similarly, the draft Guidance also parrots the Supreme Court’s language with respect to the “amount of pollutant” and “dilution or chemical changes” factors without giving any more specifics than the *Maui* decision itself. Accordingly, the draft Guidance is of little use to operators such as NSSA because it provides operators with no direction for determining how their projects will be regulated, and, in the case of NSSA and similarly situated entities, whether their projects can move forward at all.

In his dissent in *Maui*, Justice Alito bemoaned that “[e]ntities like water treatment authorities that need to know whether they must get a permit are left to guess how this nebulous [functional equivalent] standard will be applied.” 140 S.Ct. at 1483. EPA’s draft Guidance does not alleviate Justice Alito’s concern, and NSSA is still guessing how the functional equivalent standard will apply to its project. EPA should therefore rescind the current draft Guidance document and replace it with a more robust guidance document that allows operators to evaluate facts and data related to all seven factors (and possibly others). This guidance should show operators how to evaluate mixing zones and/or dilution, how to identify potential compliance locations, and how to evaluate the presence of naturally occurring compounds and chemical interactions with substrate and groundwater in a functional equivalent analysis.

2. EPA should recognize elements of state groundwater protection that are protective of surface waters.

NSSA has reviewed the comments submitted by ODEQ to EPA on December 18, 2023, and concurs with ODEQ’s recommendation that EPA “when a groundwater permit (or other state issued permit) would contain more restrictive limits compared with an NPDES permit, that the

¹ Guidance, at p.4.



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state issued permit be given priority as vehicle for the protection of water quality.”² Moreover, NSSA recommends that EPA promulgate guidance that would determine whether applicable state groundwater limits are more protective of NPDES limits, and, where so, allow for a presumption that the discharge from groundwater is *not* a function equivalent to a discharge to a water of the United States.

Section 5(b) of the draft Guidance, which relates to state groundwater protections, should not be included in any final Guidance document. Here, EPA states that the Supreme Court’s “clearly stated intent in *Maui* to avoid creating loopholes in the CWA confirms that the existence of a state groundwater protection program is not relevant to whether a discharge through groundwater is subject to the” Clean Water Act. But EPA takes the Supreme Court’s language out of context. The Supreme Court’s “loophole” concern was based on a hypothetical situation where an operator could “seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching” a water of the United States. *Maui*, 140 S.Ct. at 1473. The Supreme Court did *not* state that the existence of state groundwater protection programs created loopholes. Therefore, there is no reason for EPA to ignore the existence of state groundwater protection programs, and Section 5(b) should be eliminated.

3. EPA should expand the Guidance to clarify when a “reasonable indicator” analysis can be used.

EPA notes that “the functional equivalent analysis may be based on an analysis of one constituent pollutant where that pollutant is a reasonable indicator for other constituent pollutants.”³ EPA also notes, however, “that a finding of a lack of functional equivalence established for one constituent pollutant does not necessarily demonstrate that the functional equivalent of a direct discharge does not exist for the remaining constituent pollutants if the one analyzed pollutant is not a reasonable indicator for the other pollutants.”⁴ Unfortunately, EPA’s discussion of the “reasonable indicator” does not explain how an operator (or regulator) can determine when a “reasonable indicator” test is applicable and when it is not. EPA should expand its Guidance to provide specific factors for operators and regulators to consider, and concrete examples of proper and improper uses of this test.

² Letter of Jennifer Wigal, ODEQ, to Marcus Zobrist, dated December 18, 2023, p.3.

³ Guidance, p.3.

⁴ Guidance, p.3, n.11.



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4. EPA should clarify whether the “time” factor relates to the pollutants or constituents.

The draft Guidance discusses the “transit time” for a discharge of pollutants to reach a water of the United States, an “important” factor identified by the Supreme Court in *Maui*. However, a discharge of wastewater might reach a water of the United States before constituents of the discharge reach a water of the United States, such as when contaminants move slower because they adsorb to materials in the subsurface. EPA should clarify if the functional equivalent test evaluates the time the discharge reaches a water of the United States, or the time it takes for contaminants to reach that point.

Thank you for your consideration of these comments.

Tim Kirsch
Chair, North Santiam Sewer Authority