

**H. System Design and Performance.**

On January 14, 2021, the EPA issued “guidance to the regulated community and permitting authorities” regarding the determination of whether a discharge of a pollutant into groundwater that then travels to navigable water is or is not subject to the NPDES permitting requirements. See ECF No. 473-2 (copy of Guidance Memorandum). The EPA itself notes that its guidance “does not have the force and effect of law and it does not bind the public in any way.” *Id.* n.1, PageID # 13491. This court discusses the EPA guidance here without endorsing its treatment as a factor relevant to the issue before this court.

In essence, in the waning days of the previous presidential administration, the EPA, in issuing its guidance, was proposing an additional factor--the design and performance of the pollution-producing system--to be considered in determining whether there was the functional equivalent of a direct discharge of a pollutant from a point source into navigable waters. See *id.*, PageID #s 13497-98. The EPA says that, under 40 C.F.R. § 122.21, the design and performance of facilities “can affect or inform all seven factors identified” by the Supreme Court in considering applications for NPDES permits. *Id.*, PageId # 13497.

While the County argues that the system-design-and-performance factor weighs in favor of not applying the permit requirements here, see ECF No. 473, Plaintiffs say this court

should ignore the EPA guidance, as it does not bind this court, invites dodging the purposes of the Clean Water Act, and may be rescinded by the current administration. See ECF Nos. 474, 474-2 (e-mail from EPA stating that it is "re-evaluating" the guidance). As it turns out, the EPA's proposed system-design-and-performance factor does not add anything to the analysis in this case.

This court has already considered the design and performance of the LWRF in examining the specific-identity, nature-of-material, dilution/chemical-change, and manner-by-or-area-in-which-the-pollutant-enters-the-water factors. There is no dispute that the LWRF was intentionally designed to treat sewage and place it in injection wells. From there, the treated wastewater was intended to flow through the aquifer on its way to the ocean. While the wastewater undergoes changes along that journey, there is no dispute that it is still considered a pollutant when 100 percent of it discharges into the Pacific Ocean. There is also no dispute that some of the wastewater is now being diverted for irrigation. Given those undisputed facts, the EPA's additional factor adds nothing here. The EPA's proposed factor does not change this court's balancing of

factors. In short, the EPA's guidance plays no role in this case.<sup>7</sup>

**I. The Volume of Wastewater Reaching Navigable Waters.**

The Supreme Court's seven factors discussed above are not necessarily the only factors relevant to a determination of whether the wastewater from the wells is the functional equivalent of a direct discharge into navigable waters. The Supreme Court identified those factors as circumstances "that may prove relevant (depending on the circumstances of a particular case)." Something not captured in those seven factors is the immensity of the wastewater volume. At most, one of those factors looks at "the amount of pollutant entering navigable waters relative to the amount of the pollutant that leaves the point source." If the wastewater as a whole is considered the pollutant, rather than each toxin or chemical contributing to that polluted status, then 100 percent of the pollutant reaches the sea. But just referring to 100 percent does not fully capture how much wastewater is traveling from the wells to the Pacific Ocean. As noted at the start of this order, more than a million gallons of wastewater is discharged from a single well every day, all of it going to the sea.

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<sup>7</sup> Plaintiffs have argued that a deliberate plan to pollute should actually count against a polluter. This court has not added an intent-based factor to its consideration.