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

Re: Comment on Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, Docket ID No. EPA–HQ–OW–2018–0063

This letter provides comments on behalf of the Western Urban Water Coalition (“WUWC”) on the U.S. Environmental Protection Agency (“EPA”) Request for Comment, “Clean Water Act Coverage of ‘Discharges of Pollutants’ via a Direct Hydrologic Connection to Surface Water,” 83 Fed. Reg. 7126 (Feb. 20, 2018). WUWC appreciates the opportunity to comment on this important matter.

Created in June 1992 to address the West’s unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 40 million western water consumers in major metropolitan areas in the western states. The membership of WUWC includes the following urban water utilities:

- *Arizona* – Central Arizona Project, City of Phoenix and Salt River Project;
- *California* – Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission;
- *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water;
- *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority;
- *New Mexico* – Albuquerque Bernalillo County Water Utility Authority; and
- *Washington* – Seattle Public Utilities.

WUWC is committed to presenting a new and different perspective on the management of water resources in the modern West. WUWC articulates the needs and values of Western cities to provide a reliable, high quality urban water supply for present and future generations. As operators of public water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock and every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental

protection programs in a time when water is becoming more scarce and critical to the West's sustainability.

WUWC members have a strong interest both in clean water for municipal water supplies and in the regulatory processes protecting water quality. WUWC members are concerned with predictability and certainty regarding whether specific discharges of pollutants are subject to the Clean Water Act ("CWA") and in reducing costs and delays in obtaining permits. The scope of section 402 of the CWA is of great significance to WUWC members because, as municipal water providers, WUWC members build reservoirs and other essential water-supply related infrastructure, including groundwater recharge facilities, recycling projects, and injection wells.

For these reasons, WUWC has been very active in legislative and regulatory initiatives related to the jurisdictional scope of the CWA. We have appeared before congressional committees, met with federal agencies, and commented during many rulemaking procedures. We have historically been, and will continue to be, ardent supporters of the CWA. We are the on-the-ground partners with EPA and the states in the implementation of both the CWA and the Safe Drinking Water Act.

BACKGROUND

The CWA prohibits any "discharge of any pollutant" "from a point source" to "navigable waters" without a permit. Navigable waters are defined to mean "the waters of the United States, including territorial seas." Groundwaters are not waters of the United States. Therefore, as a general matter, discharges of pollutants to groundwaters do not run afoul of the CWA's prohibition against discharges of pollutants to navigable waters. However, EPA's longstanding position has been that the discharge of a pollutant from a point source that makes its way to a navigable water through groundwater via a direct hydrologic connection is subject to the prohibition on discharges of pollutants of section 301 of the CWA and requires an appropriate permit.¹ The determination of whether a permit is required for a discharge to groundwater requires a factual inquiry into the specifics of the proposed discharge.

Recently, the U.S. Courts of Appeals for the Fourth and Ninth Circuits have issued decisions regarding discharges of pollutants that reach navigable waters via groundwater.² Additionally, the U.S. Court of Appeals for the Sixth Circuit will likely issue a decision on the groundwater issue in the not too distant future.³ These decisions raise important questions concerning section 301 of the CWA and the discharge of pollutants to groundwater that eventually reaches navigable waters. EPA's Request for Comment is an important first step in bringing regulatory certainty and clarity to this evolving question of law under the CWA. WUWC appreciates the opportunity to provide comments.

¹ Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126, 7127 (summarizing EPA's longstanding position).

² *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018); *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

³ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155 (6th Cir. filed Oct. 3, 2017); *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115 (6th Cir. filed Feb. 1, 2018).

COMMENTS

EPA seeks comment on whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA. If EPA has the authority to permit such releases, EPA seeks comment on whether those releases would be better addressed through other federal authorities as opposed to the NPDES permit program.

The quality of water sources is of concern to all WUWC members. To date, this issue has been addressed through a variety of federal, state, and local mechanisms. It is important to WUWC members that federal regulatory programs be effectively administered within the confines of their statutorily authorized scope. Groundwater's interaction with surface water is a complex issue driven by local conditions. As an organization, we are considering the proper scope of the CWA in the groundwater context and offer the following responses to some of the questions posed by EPA.

EPA seeks comment on whether some or all such releases are addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs, such as, for example, state programs that implement EPA's underground injection control regulations promulgated pursuant to the Safe Drinking Water Act.

WUWC does not believe that other existing federal authorities, such as the Resource Conservation and Recovery Act or the Comprehensive Environmental Response, Compensation, and Liability Act, should be expanded to cover the release of pollutants to groundwater beyond the scope of those discharges already covered by those authorities. The release of pollutants must comply with all applicable federal, state, and local laws and regulations. In many cases, state and local permitting and regulatory programs adequately address the issues caused by the release of pollutants to groundwater. WUWC has been, and will continue to be, a consistent advocate at the state and local level for clean, safe municipal water supplies.

EPA also seeks comment on whether EPA should clarify its previous statements concerning pollutant discharges to groundwater with a direct hydrologic connection to jurisdictional water in order to provide additional certainty for the public and the regulated community. Such a clarification could address the applicability of the CWA to groundwater with a direct hydrologic connection to jurisdictional water, or could define what activities would be regulated if not a discharge to a jurisdictional surface water (i.e., placement on the land), or which connections are considered "direct" in order to reduce regulatory uncertainties associated with that term. EPA also seeks suggestions on what issues should be considered if further clarification is undertaken, including, for example, the consequences of asserting CWA jurisdiction over certain releases to groundwater or determining that no such jurisdiction exists. Finally, EPA seeks comment on what format or process EPA should use to revise or clarify its previous statements (e.g., through memoranda, guidance, or in the form of rulemaking) if the Agency pursues further action in response to this request for comment.

The public and regulated communities would be well-served if EPA responds to these judicial decisions as it did in promulgating its successful Water Transfers Rule.⁴ EPA's use of notice and comment rulemaking on water transfers resulted in a clear rule that was upheld after judicial review⁵ and provides certainty for regulated communities. Such regulatory clarity is sorely lacking in the context of pollutants released into groundwater that migrate to jurisdictional waters. EPA should bring regulatory certainty to these situations by issuing any necessary clarifications through the formal rulemaking process as expeditiously as possible.

This issue has direct implications not only for the more traditional water delivery activities noted above, but for other water-related municipal activities, such as stormwater control programs, septic systems, landfills, and other common practices with a potential to impact navigable waters. WUWC believes that an additional round of stakeholder input, including the opportunity for in-person meetings, will more quickly bring regulatory clarity to the public and regulated communities by providing EPA with additional guidance that would aid EPA in expeditiously developing an effective rule capable of surviving judicial review. WUWC is committed to engaging in efforts to bring regulatory clarity to this area and would welcome the opportunity for stakeholder engagement.

We appreciate the opportunity to provide these comments. If you have any questions regarding our comments, please contact our counsel Don Baur of Perkins Coie, LLP at (202) 654-6234, dbaur@perkinscoie.com or me at (415) 934-5787, mcarlin@sflower.org.

Sincerely,



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Chairman

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⁴ National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697 (June 13, 2008).

⁵ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. Env'tl. Prot. Agency*, 846 F.3d 492 (2d Cir. 2017), cert. denied sub nom. *New York v. U.S. Env'tl. Prot. Agency*, 138 S. Ct. 1164 (2018), and cert. denied sub nom. *Riverkeeper, Inc. v. U.S. Env'tl. Prot. Agency*, 138 S. Ct. 1165 (2018).