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May 21, 2018

Water Docket Environmental Protection Agency
Mail Code 2282-IT
1200 Pennsylvania Ave.
NW Washington, DC 20460
Attn: Docket ID No. EPA-HQ-OW-2018-0063

Re: WESTCAS Comments 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

The following comments are submitted by WESTCAS, a coalition of nearly 100 water and wastewater districts, cities, towns, and professional organizations focused on water quality and water quantity issues in the States of Arizona, California, Colorado, Nevada, New Mexico, and Texas. Our mission is to work with Federal, State, and regional water quality and quantity agencies to promote scientifically-sound laws, regulations, appropriations and policies that protect public health and the environment while meeting water needs in the arid west.

We appreciate the opportunity to provide comments on the question of the applicability of the Clean Water Act Section 402 to discharges to groundwater that is hydrologically connected to surface water. In the arid west, the protecting the quality of groundwater is vital because one-half to three-quarters of our water supply is groundwater. We are acutely aware that the groundwater and surface water are connected and that hydrologic connection is used every day in our water management activities. We strongly believe that it is the role of the states to regulate the quality and use of groundwater and that the imposition of the National Pollutant Discharge Elimination System (NPDES) on groundwater would be a duplicative and an onerous burden on water and wastewater service providers. In addition to the comments below, WESTCAS fully supports the comments provided by the Federal Water Quality Coalition (FWQC) and the National Association of Clean Water Agencies (NACWA).

The Voice of Water Quality in the Arid West

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In the Federal Register notice (Vol. 83, No. 34 / Tuesday, February 20, 2018), comments were requested on the following questions:

- Whether EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES permit program to pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection
- Whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA
- Whether those releases would be better addressed through other federal or state statutory or regulatory programs
- 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.
- 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.
- What format or process EPA should use to revise or clarify its previous statements

Our comments address each of these questions.

Whether EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES permit program to pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection

Prior EPA statements on this issue are inconsistent and incomplete and EPA's position statement should clearly rescind previous statements. In the Notice, EPA discusses its prior statements regarding pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements. However, as EPA states in the Notice, the previous statements in various

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rulemaking, permitting, and guidance documents regarding discharges to groundwater are inconsistent and were ancillary to the central focus of a rulemaking or adjudication.

Specifically, EPA should clearly state the following: 1) the CWA does not directly regulate nonpoint sources; 2) the CWA does not indirectly regulate nonpoint sources with a hydrologic connection to surface waters; 3) the CWA does not otherwise authorize EPA to regulate discharges of pollutants to groundwater that has a direct hydrologic connection to surface water; 4) "waters of the United States" includes neither isolated, nontributary groundwater nor tributary or hydrologically-connected groundwater; and 5) regulation of discharges to groundwater can be accomplished only by a legislative change, and not by Agency or judicial interpretation.

Whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA

Subjecting discharges to groundwater is patently inconsistent with the text, structure, and purposes of the CWA. The plain language of the CWA does not authorize regulation of discharges to groundwater. The CWA prohibits the "discharge of any pollutant" except discharges that comply with the permitting, water quality, and technology-based standards provisions of the statute. 33 U.S.C. § 1311(a). As used in the CWA, the phrase "discharge of a pollutant" refers to both "any addition of any pollutant to navigable waters from any point source" and "any addition of any pollutant to the waters of the contiguous zone of the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362 (12). The CWA defines "navigable waters," in turn, as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). The definition of "waters of the United States" is lengthy but does not reference groundwater at all. 40 C.F.R. § 122.2. As to the term point source, that is defined in the statute: "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1367 (14).

Whether those releases would be better addressed through other federal or state statutory or regulatory programs

States have the responsibility to protect groundwater, see 33 U.S.C. §1370 (preserves states' ability to adopt any requirement to control pollution), and all 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. In cases where there may be an absence of state action on groundwater protection, there are other federal environmental laws that are better designed and are currently utilized to address releases of pollutants into groundwater including the Safe

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Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

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

The NPDES program does not fit within the context of hydrologic conditions in groundwater. Factors that influence pollutants in groundwater, but not surface water, include subsurface geology; multiple and diffuse points of discharge; other sources of pollution such as pollutant plumes; chemical reactions related to the groundwater geology that may alter the nature of a pollutant once it enters a groundwater formation; saltwater intrusion; and “naturally occurring” elements that qualify as “pollutants” under the Clean Water Act (e.g., selenium or arsenic).

Considering the challenges re-making the NPDES program to regulate discharges to groundwater, WESTCAS believes that EPA to should establish a rule that explicitly rejects the “hydrological connection” and “groundwater conduit” theories and leaves the regulation of groundwater to the States, which have actual jurisdiction to regulate groundwater and can do so in ways that are appropriate to their specific groundwater situations and to the unique challenges posed by regulation of groundwater and discharges to those waters.

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

Expanding the NPDES universe would have the unintended consequence of impeding beneficial and innovative public infrastructure projects such as groundwater recharge systems that are used to convey surface water, stormwater or recycled wastewater into aquifers to augment public water supplies, create seawater intrusion barriers, prevent land subsidence, and eliminate surface outfalls to protect water quality. Green infrastructure, a wet weather management tool used to retain and infiltrate stormwater into the ground to minimize discharges of municipal stormwater and combined sewer overflows, could also be subject to NPDES regulation and enforcement despite the inclusion of green infrastructure requirements in NPDES permits for municipal separate storm sewer systems (MS₄).

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WESTCAS is also concerned that the possible NPDES regulation of discharges to groundwater that is hydrologically connected to a surface water would be further complicated by uncertainty of the Act's jurisdiction over ephemeral water features. Considering that the current jurisdictional status of many ephemeral or intermittent streams is unclear, adding another test of connectivity—in this case groundwater—to determine if a discharge requires a NPDES permit will do very little to provide regulatory clarity or certainly—especially in the arid West.

What format or process EPA should use to revise or clarify its previous statements

EPA should issue an unequivocal position statement that the NPDES program does not apply to discharges to groundwater. This position statement should be followed by a formal notice-and-comment rulemaking to clarify and enact EPA's position.

WESTCAS appreciates the opportunity to submit these comments concerning whether or not the CWA covers "discharges of pollutants" to groundwater. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

Sincerely,



Steve Bigley
President

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