Docket ID No. EPA-HQ-OW-2018-0063-0001

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

CLEAN WATER ACT COVERAGE OF DISCHARGES OF POLLUTANTS VIA A DIRECT HYDROLOGIC CONNECTION TO SURFACE WATER

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 83 FED. REG. 7,126 (February 20, 2018)

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Submitted Electronically (http://www.regulations.gov)
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Office of Wastewater Management
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EPA Docket Center
Docket ID No. EPA-HQ-OW-2018-0063-0001
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Re: Comments Concerning Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water; Docket ID No. EPA-HQ-OW-2018-0063-0001

Mr. Wilson:

On behalf of the Washington Legal Foundation (WLF), please consider this comment in response to the Environmental Protection Agency's (EPA) invitation for comments published at 83 Fed. Reg. 7,126 (Feb. 20, 2018). WLF appreciates the opportunity to weigh in on whether pollutant discharges from point sources that reach jurisdictional surface waters through groundwater (or other subsurface flow) with a direct hydrological connection to the jurisdictional surface water are subject to Clean Water Act (CWA) regulation. As shown below, EPA is not free to impose the CWA's regulatory costs and burdens on stakeholders whose indirect discharges are not explicitly within the agency's statutory jurisdiction.

WLF believes that requiring National Pollution Discharge Elimination System (NPDES) permits solely for groundwater-based discharges is inconsistent with the text, structure, and purpose of the CWA. Because groundwater is neither a navigable water nor a point source under the CWA, EPA lacks jurisdiction over indirect, groundwater (or subsurface flow) discharges. And because only Congress can rewrite the CWA, EPA's previous attempt to expand its jurisdictional reach to include purely groundwater discharges improperly exceeded the scope of the agency's statutory authority. To comport with the rule of law, any expansion of the CWA's jurisdiction must come from Congress, not EPA. At the same time, consistent with the CWA's spirit of cooperative

federalism, the States are better equipped to regulate discharges of pollutants to groundwater.

I. Interests of WLF

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes much of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal courts to urge that judicial interpretations of environmental laws strike a proper balance between environmental safety and economic well-being. *See, e.g.*, *Am. Mun. Power, Inc. v. EPA*, 137 S. Ct. 2296 (2017) (challenging EPA's Clean Air Act Boiler MACT Rule); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA's Clean Air Act "tailoring rule"); *Mingo Logan Coal Co. v. EPA*, 134 S. Ct. 1540 (2014) (challenging EPA's unilateral revocation of a discharge permit under § 404 of the Clean Water Act); *Am. Farm Bureau Found. v. EPA*, 792 F.3d 281 (3rd Cir. 2015) (challenging EPA's TMDL for the Chesapeake Bay watershed). Likewise, WLF regularly submits comments to federal regulatory agencies, including EPA, on proposed rulemaking. *See, e.g.*, WLF Comment, *In re Definition of "Waters of the United States"—Recodification of Pre-existing Rules* (Sep. 27, 2017); WLF Comment, *In re Source Determination for Certain Emission Units in the Oil & Natural Gas Sector* (Oct. 26, 2015); WLF Comment, *In re EPA Report on Hydraulic Fracturing* (Aug. 28, 2015).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, often produces and distributes articles on a wide array of legal issues related to EPA regulation. *See, e.g.*, Samuel B. Boxerman & Ben Tannen, *EPA Seeks Stakeholder Comments On Reforming Existing Regulations*, WLF COUNSEL'S ADVISORY (Apr. 21, 2017); Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF LEGAL BACKGROUNDER (June 6, 2014); Richard Alonso & Sandra Y. Snyder, *Source "Aggregation": Federal Appeals Court Reverses 30 Years of Faulty EPA Precedent*, WLF LEGAL BACKGROUNDER (Nov. 16, 2012).

II. The CWA Does Not Grant Federal Agencies NPDES-Permitting Jurisdiction Over Indirect, Groundwater Discharges

The CWA regulates pollutant discharges into "navigable waters" without a permit and defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311(a), 1342(a), 1362(7). Congress enacted the CWA "to

restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. In doing so, Congress narrowly focused the CWA's regulatory scheme on reducing point source pollution—the jurisdictional threshold for any CWA violation. Point source pollution is pollution from "any discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14). Examples of a point source include a "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.* All other sources of pollution under the CWA—those not "discernable, confined and discrete"—are nonpoint sources.

Based on the unambiguous statutory text, federal courts have consistently summarized the elements of a CWA violation as "(1) a *pollutant* … (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*." *Nat'l Wildlife Refuge v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *see also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005) (describing a CWA violation as "(1) discharg[ing] (2) a pollutant (3) into navigable waters (4) *from a point source* (5) without a[n] [NPDES] permit"). To constitute a CWA violation, a "point source must *introduce* the pollutant into navigable water from the outside world." *Gorsuch*, 693 F.2d at 165.

Congress's intention to single out point source pollution (to the exclusion of other sources) is also readily apparent from the structure of the CWA. Throughout the CWA, Congress refers to "navigable waters" and "ground waters" as distinct concepts. *See, e.g.*, 33 U.S.C. § 1252(a); *id*. § 1254(a)(5); § 1256(e)(1) (referring to "navigable waters *and* ground waters") (emphasis added). Thus, groundwater does not fall within "navigable waters of the United States." Likewise, § 1311(a) provides that "[e]xcept as in compliance with [the CWA], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Yet Congress carefully defined "discharge of a pollutant" as "any addition of any pollutant to navigable waters *from any point source*." *Id.* § 1362(12) (emphasis added).[1]

And because a discharge of pollutants into navigable waters occurring only through migration of groundwater is by definition nonpoint source pollution, such a discharge falls outside the jurisdiction of the CWA. In other words, nonpoint source pollution "is defined by exclusion and includes all water quality problems" not from a

[1] Section 1344(f) of the CWA provides a non-exhaustive list of categories of actions that are neither prohibited nor require permits, including normal farming, ranching, and forestry practices; maintenance of existing structures; and construction and maintenance of stock ponds and irrigation ditches, among others. *Id.* § 1344(f). (Despite the CWA's broad exemptions for these categories, EPA's own regulations and practices have far narrowed their application.)

point source. *Gorsuch*, 693 F.2d at 166. Indeed, EPA and the Army Corps of Engineers "have never interpreted 'waters of the United States' to include groundwater." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,099 (June 29, 2015). As the EPA's guidance on nonpoint source pollution explains, "[i]n practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." EPA Office of Water, *Nonpoint Source Guidance* 3 (1987).

When Congress deliberated the CWA, EPA expressly asked Congress for authority over groundwater on the theory that pollutants in groundwater can sometimes enter surface waters. Although Congress acknowledged that pollutants in groundwater may enter navigable waters, both the Senate and the House rejected proposals to extend the CWA's jurisdictional reach "[b]ecause the jurisdiction regarding groundwaters is so complex and varie[s] from State to State." S. Rep. No. 92-414, at 73 (1971). Thus, "the legislative history of the CWA belie[s] any attempt to impose federal control over any phase of pollution of subsurface waters." *Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (Fifth Cir. 2001). As Judge Frank Easterbook has explained, the CWA's "omission of ground waters from the regulations is not an oversight." *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).

The CWA makes clear that the release of pollutants into groundwater that then flows to navigable waters is not an addition to "navigable waters from a point source." 33 U.S.C. § 1362(12). Sweeping nonpoint sources such as groundwater into the scope of the CWA would improperly expand EPA's permitting and regulatory authority. Because Congress understood with great clarity that an NPDES permit is not the solution to *every* pollutant that reaches navigable waters *regardless* of the source, EPA's earlier direct-hydrologic-connection theory is contrary to the text, structure, and purpose of the CWA. If groundwater is ever to become part of the CWA's jurisdictional reach, Congress, not EPA, must undertake that change.

III. States Are Fully Capable of Addressing Nonpoint Sources of Pollution Such as Groundwater

As the Supreme Court has recognized, the CWA "anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Consistent with the unambiguous statutory text, the States bear the sole regulatory responsibility under the CWA of addressing nonpoint source pollution, including groundwater. Indeed, groundwater is adequately protected under various state programs and the Safe Drinking Water Act, 42 U.S.C. § 300f. Recognizing that the States bear the primary responsibilities and rights to manage land and water resources, the CWA

establishes a scheme of cooperative federalism with States having original jurisdiction over nonpoint sources of pollution. Expanding the CWA to regulate discharges into groundwater would transform all of this by taking authority away from those who can best manage groundwater quality.

Snatching that responsibility away from the States would not only contravene the CWA's text, structure, and purpose, it would also drastically undermine the CWA's venerable policy of cooperative federalism. Apart from the CWA's explicit recognition that the States should regulate nonpoint sources, the CWA begins by stating that it is the "policy of Congress to recognize, preserve, and protect the primary rights of States to prevent, reduce, and eliminate pollution" and to "plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). Simply put, sweeping nonpoint sources such as groundwater into the CWA's federal regulatory scope cannot be squared with that explicit statutory aim.

At all events, state and local authorities are best equipped to decide how to allocate the burdens and responsibilities of mitigating groundwater pollution among the various stakeholders. Indeed, it is quintessentially the responsibility of state and local governments to balance the competing interests of farmers, foresters, landowners, homeowners, municipalities, builders, and developers. Such local control also increases efficiency, which ultimately results in better water quality. In contrast, groundwater regulation under the CWA would require unnecessarily duplicative permitting and enforcement mechanisms, upending state authority. Above all, economic inefficiencies inevitably result when many layers of federal, state, and local government seek to regulate the same activity.

Only States have the flexibility to regulate groundwater discharges in a way that adequately balances competing local and regional interests. But EPA's previous direct-hydrologic-connection theory eviscerates the CWA's federal-state partnership by effectively declaring that *all* waters are federal waters. EPA should not rob the States of the unique role they enjoy under the CWA to adapt their own plans based on new technologies, changing circumstances, or economic efficiencies. Doing so would not only usurp States' traditional authority over economic development and land-use management decisions, but it would deprive the affected States the flexibility to adopt and adapt their own restoration plans. That approach is especially problematic given EPA's lack of accountability to state and local voters, who will be most directly affected by onerous NPDES permitting requirements.

Conclusion

WLF appreciates the opportunity to provide EPA with these comments. We trust that EPA will give them serious consideration as the agency strives to balance the onerous economic burdens that often result from federal environmental regulation.

Because groundwater is neither a "navigable water" nor a "point source" subject to CWA jurisdiction, EPA should explicitly clarify that the statute may not be construed in a way that eviscerates those jurisdictional limits. Likewise, EPA's properly affirming the limits of its own CWA jurisdiction will avoid improperly preempting preexisting state groundwater regulations. Doing so will also safeguard (rather than undercut) the CWA's model of cooperative federalism, which is premised on an understanding that the States are better equipped to regulate discharges of pollutants to groundwater.

Respectfully submitted,

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