June 7, 2019

Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Comments on Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, Docket ID No. EPA-HQ-OW-2019-0166

Dear Sir or Madam:

The National Association of Clean Water Agencies (NACWA) and the WateReuse Association appreciate the opportunity to file comments on the U.S. Environmental Protection Agency's (EPA or Agency) Interpretive Statement on application of the Clean Water Act (CWA) permitting program to the releases of pollutants from a point source to groundwater. EPA published its notice containing the Interpretive Statement, and requesting comments, in the Federal Register on April 23, 2019, 84 Fed. Reg. 16810 (Apr. 23, 2019).

NACWA is a not-for-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the country. NACWA's members include more than 320 municipal clean water agencies that own, operate, and manage publicly owned treatment works (POTWs), wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and disposal. NACWA members are focused on providing services and maintaining public infrastructure that is essential to protecting public health, the environment, and water quality.

The WateReuse Association is a not-for-profit trade association for water utilities, businesses, industrial and commercial enterprises, not-for-profit organizations, and research entities that engage in and on water recycling. WateReuse and its state and regional sections represent more than 200 water utilities serving over 60 million customers, and over 300 businesses and organizations across the country. WateReuse's mission is to engage our members in a movement for safe and sustainable water supplies, to promote acceptance and support of recycled water, and to advocate for policies and funding that increase water reuse.

Our collective members need regulatory certainty to allow for the effective and sustainable planning and investment of finite public resources. Recent conflicting federal court decisions add to the prior lack of clear agency guidance regarding whether National Pollutant Discharge Elimination System (NPDES) permits are required for releases of pollutants that originate from a point source but are

conveyed to navigable waters by a nonpoint source such as groundwater. NACWA and WateReuse appreciate that EPA recognizes this uncertainty and has taken steps to address it.

EPA began to address the need for clarity in February 2018 by requesting public comment on whether the Agency should revise or clarify its position on the issue. NACWA and WateReuse filed comments. After considering public comments, conducting a review of prior agency statements, and holistically analyzing the text, structure, and legislative history of the CWA, EPA concluded that "the best, if not the only, reading of the CWA is that Congress intentionally chose to exclude all releases of pollutants to groundwater from the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater."

NACWA and WateReuse support this bright-line position put forth by EPA. It is important to make clear that from our perspective the issue is not *whether* releases of pollutants into groundwater with a connection to surface waters should be addressed; the issue is *how* they should be addressed. Put another way, NACWA and WateReuse believe that releases of pollutants into groundwater should not be allowed to contaminate natural resources. Our organizations and members are committed to protection of public health and the environment regardless of specific statutory language.

Even so, this does not mean the CWA NPDES program is the appropriate solution. Furthermore, the CWA NPDES program was never intended, and has never been used by EPA in the past to regulate these kinds of discharges. There are other federal and state programs that are more appropriately designed to address these circumstances. This robust scheme of state and federal groundwater regulation leaves no regulatory "gap" that could justify expanding the NPDES program beyond its statutorily defined limits.

Categorical Exclusion Protects Essential Water Infrastructure Systems and Projects

Absent a bright-line exclusion, there is potential liability under the CWA for an indeterminable array of diffuse and indistinct sources including various types of environmentally beneficial infrastructure, much of which is specifically designed or intended to address other regulatory obligations. These sources could include public water distribution and sewer collection systems, retention ponds, municipal green infrastructure projects, and water recycling projects. For example, green infrastructure may be used to help address urban runoff as part of a municipal separate storm sewer (MS4) NPDES permit compliance. This green infrastructure is designed as part of a permit compliance program and could be subject to a separate NPDES permit. A bright-line exclusion avoids this illogical and unworkable application of the NPDES permit program and ensures that local governments and public water utilities are not subjected to citizen suits for a myriad of infrastructure that was never intended to be regulated under the NPDES permit program.

Wastewater and Stormwater Conveyance Systems

Public clean water utilities provide services that are essential to protecting public health and the environment. Working closely with state and federal regulators, public utilities have collectively achieved an astonishing level of pollution reduction under the CWA, both at their own facilities

and at thousands of industrial facilities regulated by utilities under the federal pretreatment program.

These public utilities own, operate, and manage the nation's most critical infrastructure systems for protecting public health and the environment, including POTWs that are subject to stringent NPDES permit requirements for discharges to surface waters. These permits include limits on the pollutants in those discharges to meet water quality standards in the receiving waters.

Clean water utilities also operate collection systems that convey wastewater to the POTWs, ranging in size from a few hundred miles to several thousands of miles of buried pipe throughout their communities. NPDES permits generally require utilities to properly operate and maintain these collection systems, and utilities implement several methods to locate and address issues, including collection system inspection using CCTV on a regular schedule and rehabilitation and repair of any leaks. Some states, such as California, also have separate requirements for collection systems that are specifically designed to ensure proper system maintenance and repair, but that are not part of the NPDES permit program.

Regardless of diligent and rigorous maintenance and repair, these facilities and systems can leak. While clean water utilities work to prevent any leak into the environment, leaks can and do happen because they are difficult to predict and locate, and impossible to eliminate. In the absence of a bright-line exclusion, each leak could potentially be regulated as a distinct discharge under the CWA, which would be logistically challenging and create unnecessary duplication with existing rules and requirements. And—particularly considering the potential for citizen suits—this could undermine the ability of utilities to plan and prioritize investments to maximize overall benefits to the environment.

Green Infrastructure

The lack of a bright-line exclusion could also put green infrastructure—intended to treat stormwater to further the water quality protection goals of the CWA—at risk of being regulated as point sources of pollutants subject to CWA jurisdiction. Every instance where stormwater runoff drains into green infrastructure—for the very purpose of preventing the pollutants carried in such runoff from entering surface waters—could result in a discharge to groundwater that might have a connection to surface water. This type of approach is inconsistent with how states have categorized stormwater and the infiltration of stormwater. *See, e.g.*, Oyster Pond Embayment System Total Maximum Daily Load (TMDL) at 4, 14 (Feb. 7, 2008) (Massachusetts assigned load allocations to stormwater runoff as nonpoint source pollution, knowing that "the vast majority of storm water percolates into the ground and aquifer and proceeds into the embayment systems *through groundwater migration*.") (emphasis added).

Clean water utilities are increasingly relying on green infrastructure to retain, percolate and infiltrate stormwater into the ground to reduce discharges of municipal stormwater and combined sewer overflows to surface water, as well as to recharge depleted drinking water aquifers.

Use of green infrastructure can be better for water quality than traditional approaches to managing these sources of pollutants. In fact, green infrastructure is recognized as one of the most effective solutions to the water quantity and quality problems associated with polluted stormwater runoff. EPA has determined that green infrastructure provides a "cost-effective, resilient approach to managing wet weather impacts that provides many community benefits."[1]

Water Reuse Projects

Water reuse is the process of treating wastewater, saltwater, stormwater, or gray water for designated beneficial purposes such as industrial processes, irrigation, surface or ground water replenishment, watershed restoration, and agricultural or irrigation use. If water reuse projects are subject to CWA regulation, municipalities will face additional hurdles that may inhibit the implementation of these projects.

Communities across the country are incorporating water reuse into their water management strategies as a proven method for ensuring a safe, reliable, locally controlled water supply—essential for livable communities with healthy environments, robust economies and a high quality of life. As the pressure on our fresh water supply grows, particularly in the arid west, water reuse is increasingly a necessary component of many communities' water supply portfolio. By 2027, the volume of recycled water produced in the United States is projected to increase 37% from 4.8 billion gallons per day to 6.6 billion gallons per day.[2]

Lack of regulatory certainty could impede the implementation of these beneficial reuse projects by requiring NPDES permits in cases where the recycled water may be connected to jurisdictional surface waters via groundwater. For example, groundwater recharge systems are used to convey stormwater or recycled wastewater (which contain pollutants) into shallow subsurface aquifers to augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls. Recycled water reaching groundwater is inherent as is the potential for that groundwater to reach surface water.

These and other water reuse projects are permitted under the federal Safe Drinking Water Act and/or state reuse regulations that account for environmental impacts. Without an exclusion, these beneficial projects could face additional costly and unnecessarily burdensome regulatory requirements. Furthermore, the demand for recycled water by end users may also decrease due to customers' concern regarding the potential regulatory costs and legal exposure they may face if using or impounding recycled water. This could cause a significant setback to water reuse policies and public support, which have gained important momentum in recent years.

EPA has never required NPDES permits for these types of activities; the Agency recognizes water reuse as playing "a critical role in helping states, tribes, and communities meet their future drinking water needs."[3] Even if federal agencies do not target reuse projects, the

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[1] U.S. Environmental Protection Agency, What Is Green Infrastructure?, https://www.epa.gov/green-infrastructure/what-green-infrastructure (last visited May 17, 2018).
[2] Bluefield Research, U.S. Municipal Water Reuse: Opportunities, Outlook, & Competitive Landscape 2017–2027 (2017).
[3] U.S. Environmental Protection Agencies, 2017 Potable Reuse Compendium (2017).

uncertainty surrounding whether an NPDES permit may be needed and the potential for citizen suits could be a barrier to further implementation of reuse projects.

Bright-Line Exclusion Needed for Regulatory Certainty

Determining whether an NPDES permit should be sought absent a bright-line exclusion will require fact-intensive, site-specific, case-by-case determinations. There is no guidance for determining when to seek NPDES permit coverage when the situation involves a diffuse and indistinct source. What is the minimum distance to navigable water, or the necessary time for pollutants to travel through groundwater, for a connection to be covered? This uncertainty would create disincentives for critical private and public infrastructure.

Additionally, in the arid west there is the complex water rights framework of prior appropriation that in many circumstances requires the use of stormwater or effluent to recharge groundwater aquifers. Without the bright-line exclusion, the federal CWA could conflict with state laws; this could affect how state water quality programs are construed, enforced, or applied in a way that causes or results in material injury to water rights.

Regulatory agencies might not target NACWA members' operations for permitting or enforcement, but any releases into groundwater would be subject to citizen suit enforcement. Just one CWA violation can result in a civil penalty of $52,414 per day, in addition to injunctive relief and attorneys' fees awards. Regulatory certainty would help utilities avoid the costs of noncompliance and litigation and focus those resources instead on protection of public health and the environment.

Bright-Line Exclusion Needed to Avoid Permitting Impracticability

The "end-of-pipe" NPDES permitting program is not the appropriate regulatory tool from a practicality standpoint. The analysis required to issue a permit will be costly and resource intensive not only for the regulated community, but also for the regulators. The permitting authority must calculate effluent limits, determine the potential to exceed water quality standards, ensure consistency with antidegradation policies, allocate load and waste loads as part of TMDLs, assess the need for mixing zones, and determine appropriate monitoring, among other critical functions.

If these types of discharges are not categorically excluded, where should the discharge be measured to determine compliance with effluent limitations? At the point of release into groundwater or where the pollutants eventually enter navigable waters? The pollutant levels may vary significantly after effluent leaves the original source and interacts with groundwater. If monitoring is to occur where the pollutants eventually enter navigable waters, what is to be done if a consistent and discrete point of discharge is not known? Changes in quality and pollutant content as effluent traverses a nonpoint source would test the limits of regulators' ability to establish the effluent limitations and monitoring requirements that are hallmarks of NPDES permits.

Permit backlogs - already an issue in many states – could be exacerbated. Delayed permits could slow or prevent beneficial projects. The permitting process itself will impose additional permit application fees, compliance costs, and other financial and logistical impacts. In addition, a duplicative and conflicting overlay of regulations may be added on top of other federal and state programs that are specifically designed to address these circumstances.

Again, extending CWA liability to these discharges has the potential of diverting limited public resources away from projects and programs that do far more to improve water quality and protect human health.

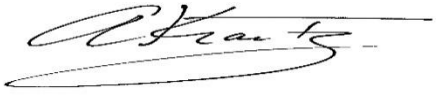
Conclusion

NACWA and WateReuse members have a vested interest in protecting the Nation's water quality. It is a part of our core mission and we are dedicated to ensuring our activities are protective of human health and the environment. At the same time, our organizations and members have a compelling public interest in ensuring that the NPDES permitting program, and attendant CWA liability, remains predictable and lawfully within the scope of the Act.

We fully support a strong regulatory framework to protect water resources. But such regulations must be grounded in the statute and consistent with congressional intent under the CWA. Regulatory certainty is necessary to allow utilities to plan prudently for the expenditure and investment of public funds to protect public health and the environment, while operating responsibly under the law.

The CWA NPDES permitting program does not contemplate, and cannot logically accommodate, the regulation of such discharges. Moreover, using the ill-suited NPDES permitting program to regulate discharges that are better addressed by other federal regulatory programs or state law will impede our and EPA's shared water quality goals.

NACWA and WateReuse applaud EPA for recognizing the importance of regulatory certainty and for taking steps to address the need for clarity on this issue. We also support EPA's decision to wait until the Supreme Court issues a decision before deciding what additional action, if any, is necessary. Please feel free to contact Amanda Waters, General Counsel, NACWA, at 202-530-2758 or awaters@nacwa.org, or Greg Fogel, Policy Director, WateReuse Association, at 571-445-5506 or gfogel@watereuse.org if you any questions, or if you would like additional information concerning the issues raised in these comments.



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