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Submitted Electronically to Docket No: **EPA-HQ-OW-2018-0063**

Comments of the National Rural Electric Cooperative Association (NRECA)

RE: CWA Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water

The National Rural Electric Cooperative Association (NRECA) submits these comments in response to the U.S. Environmental Protection Agency (EPA) request for comment on the Agency’s previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation (the direct hydrologic connection theory).

NRECA is the national service organization for America’s more than 900 rural electric cooperatives which are responsible for keeping the lights on for more than 42 million people across 47 states. The nation’s member-owned, not-for-profit electric co-ops constitute a unique sector of the electric utility industry – and face a unique set of challenges. NRECA’s members have a vital interest in the prompt and statutorily faithful resolution of the issues raised in the notice. A statutorily faithful resolution will require EPA to repudiate promptly the statements set forth in the notice and to replace them with a clear statement *that pollutants that move via groundwater to navigable waters are nonpoint sources, regardless of their original source.*

Electric cooperatives are private, independent electric utilities, owned by the members they serve. Most are small businesses (as defined by the Small Business Administration) and don’t have investors or access to large cash surpluses to help defray the costs of regulations. The costs are borne directly by the farmers, ranchers, small businesses and other residents of the nation’s rural communities who write a check each month to their co-op to pay for their electric service – including those in 93 percent of the nation’s persistent poverty counties.

Our members serve large, sometimes sparsely populated areas meaning we have fewer connections – and significantly lower revenue per mile of line than our investor-owned and municipal brethren. Cooperatives serve an average of 7.4 consumers per mile of line and collect an annual revenue of approximately \$16,000 per mile of

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line, as compared to the industry average of 34 customers and annual revenue of between \$75,500 per mile of line for investor-owned and (48 consumers) \$113,000 per mile of line for publicly owned utilities or municipals. All share an obligation to serve their members by providing safe, reliable, and affordable electric service.

NRECA is a member of the Utility Water Act Group (UWAG) and endorses the comments submitted by that organization. We strongly urge EPA to consider and embrace UWAG's extensive analysis of the CWA's text and legislative history; the Agency's past statements; case law; administrative difficulties associated with trying to impose the NPDES program structure on groundwater; and other federal and state regulatory and permit programs explicitly designed to protect groundwater and to remediate groundwater contamination. UWAG concludes – and NRECA concurs – that:

- The plain text of the CWA and the legislative history of the Act and its amendments are clear that the CWA protects “waters of the US,” which are surface waters, not groundwater;
- EPA has never used the direct hydrologic connection theory as justification for a final action, and the full panoply of agency statements on the subject is not consistent and does not constitute a cohesive policy;
- Trying to apply the National Pollution Discharge Elimination System (NPDES) permitting program is impractical as the program was developed to apply to discrete discharges to surface water, not diffuse releases to or from groundwater;
- Other laws, regulations and programs have been created explicitly to protect groundwater and to remediate contaminated groundwater, including the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Safe Drinking Water Act/Underground Injection Control (SDWA/UIC), and state groundwater protection programs.

NRECA is also a member of the Utility Solid Waste Activities Group (USWAG) and also endorses the USWAG comments. The USWAG comments emphasize how RCRA, and especially the 2015 Coal Combustion Residuals (CCR) regulation, is explicitly written not only to address the potential release and remediation of contaminants from CCR units, but also to provide greater environmental protection to groundwater and the environment than reliance on NPDES permits. The USWAG comments also identify how the statutory definition of “solid waste” expressly excludes industrial discharges which are point sources subject to permits under the CWA Section 402 NPDES permitting program. A determination that a release from a CCR unit is a CWA point source would, effectively, prohibit regulation of such units under the CCR rule, a rule explicitly developed to address groundwater impacts of such units.

In response to the specific questions EPA posed in the notice, NRECA offers the following comments:

1. *Whether EPA should review and revise its previous statements?*

Yes, EPA should review, retract, and correct any statements that imply, or could be interpreted to imply, that a discharge of pollutants to surface water from groundwater is anything other than a *nonpoint* source and that nonpoint sources are not subject to NPDES permitting.

2. *Whether EPA's interpretation in its previous statements is consistent with the text, structure, and purposes of the CWA?*

No, EPA's previous statements that a discharge of pollutants to surface water from groundwater could be a point source, subject to NPDES permitting, are inconsistent with and not supported by the text, structure and purpose of the CWA; such statements are also unsupported by other agency statements and case law.

3. *Whether releases into groundwater would be better addressed through other federal authorities as opposed to the CWA NPDES program?*

Yes, the NPDES program was envisioned, designed, and implemented to apply to discharges *from* a point source *through* a discernable, confined, discrete conveyance, *into* a water of the US. The protection of groundwater itself as well as the control of discharges via groundwater to surface water is better addressed through other means. Within the CWA itself, a Total Maximum Daily Load (TMDL) established as part of state Water Quality Standards (WQS) can consider and accommodate any loadings from groundwater to improve surface water quality while other statutes such as RCRA, SDWA, and CERCLA directly address groundwater protection and cleanup.

4. *Whether releases are adequately addressed through existing state statutory or regulatory programs or through other existing federal regulations and permit programs?*

Yes, releases to groundwater that subsequently discharge to surface water are better controlled through other existing federal and state programs. The CWA clearly differentiates between point sources and nonpoint sources with different regimes for controlling each. The CWA also creates a shared responsibility between the states and the federal government which gives the states jurisdiction over nonpoint sources including groundwater.

In addition, other federal statutes directly address the protection of groundwater, and remediation of groundwater contaminated, by specific sources including the RCRA waste management and corrective

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action; the CERCLA response and remediation; and SDWA/UIC wastewater disposal. With respect to RCRA, a finding that releases from waste management units – including CCR management units – are subject to CWA permitting would effectively eviscerate most of RCRA since such industrial discharges are statutorily exempted from being a “solid waste” subject to RCRA.

5. *Whether EPA should clarify its previous statements to provide additional certainty for the public and the regulated community?*

EPA should *replace* previous statements asserting the direct hydrologic connection theory with a clear statement that the introduction of pollutants into groundwater by any source, without regard to the potential for such pollutants to reach navigable waters, does not require an NPDES permit.

6. *Are there consequences if EPA clarifies its previous statements and what issues should EPA examine to address those consequences?*

Confirming that discharges of groundwater to surface water are not subject to NPDES permitting will resolve the current confusion and uncertainty that EPA’s previous conflicting statements have created. Such a confirmation will also allow the NPDES program to work with and complement other laws (e.g. RCRA) rather than conflicting with or excluding them.

7. *What format or process should EPA use to revise its previous statements?*

First, EPA should immediately retract any and all statements the Agency has made endorsing the direct hydrologic connection theory and replace them with a clear statement to the contrary.

Next EPA should initiate notice-and-comment rulemaking to exclude from NPDES permitting the introduction of pollutants into groundwater by any source, without regard to the potential for such pollutants to reach navigable waters.

In summary, the core statutory question raised by EPA’s notice is not *whether* pollutants released to groundwater are controlled, but *how* such releases are controlled. As described above and in the referenced UWAG and USWAG comments, NRECA firmly believes that such discharges can be and are appropriately controlled through existing federal and state statutes and programs explicitly designed to protect groundwater. We further believe the language of the CWA and its legislative history, previous Agency statements, and case law bolster this conclusion. As a result, there is no need for EPA to try and jury-rig the CWA to address a concern more appropriately and effectively addressed through other means.

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NRECA urges EPA to issue a clear statement that the introduction of pollutants into groundwater by any source, without regard to the potential for such pollutants to reach navigable waters, does not require an NPDES permit. EPA should then initiate notice-and-comment rulemaking to exclude from NPDES permitting the introduction of pollutants into groundwater by any source, without regard to the potential for such pollutants to reach navigable waters.

Rural cooperative members – like all Americans – value and deserve a clean, healthy environment. Cooperative-owned and operated coal-fired power plants are subject to the CCR rule and have invested significantly to monitor groundwater around regulated CCR surface impoundments and landfills. A determination that a release from a CCR unit was a CWA point source, and thus no longer subject to regulation as a solid waste under RCRA, would render those investments in compliance with the CCR rule for naught. America’s electric cooperatives can’t afford – our members can’t afford – to spend scarce resources in manners that do not provide a significant environmental bang for the regulatory compliance buck.

If you have any questions regarding these comments, please contact me at Dorothy.kellogg@nreca.coop .

Respectfully submitted,



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