

June 7, 2019

Mr. Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

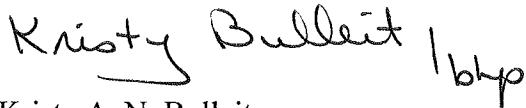
Re: **Comments in Response to the U.S. Environmental Protection Agency's
Interpretive Statement on Application of the Clean Water Act National Pollutant
Discharge Elimination System Program to Releases of Pollutants from a Point
Source to Groundwater, 84 Fed. Reg. 16,810 (April 23, 2019), EPA-HQ-OW-
2019-0166**

Dear Mr. Wilson:

Attached are the Utility Water Act Group's (UWAG's) comments in response to EPA's 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, 84 Fed. Reg. 16,810 (April 23, 2019), EPA-HQ-OW-2019-0166.

Please contact me at (202) 955-1547 if you have any questions. Thank you.

Sincerely,



Kristy A. N. Bulleit

Attachment



**Comments of the Utility Water Act Group in Response to the
U.S. Environmental Protection Agency's 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**

84 Fed. Reg. 16,810 (Apr. 23, 2019)

EPA-HQ-OW-2019-0166

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I. Introduction

By notice published in the *Federal Register* on April 23, 2019, the United States Environmental Protection Agency (“EPA” or “the Agency”) issued an Interpretive Statement (the “Statement”) on whether the Clean Water Act’s (“CWA’s”) National Pollutant Discharge Elimination System (“NPDES”) permitting program applies to releases from a point source to groundwater – a term defined in the Statement. 84 Fed. Reg. 16,810 (Apr. 23, 2019). The Statement comprehensively analyzes the CWA’s text, structure, and legislative history, the relevant case law, and relevant policy and practical factors. Based on that analysis, EPA concludes that such releases to groundwater are not subject to the NPDES permitting program, even if groundwater eventually delivers those pollutants to navigable waters. Accordingly, EPA properly concludes, such releases are not subject to liability under Section 301 of the CWA. *Id.* at 16,811. In the *Federal Register* notice, EPA also requested public input on what may be needed to provide further clarity and regulatory certainty on this issue. The Utility Water Act Group (“UWAG”) submits these comments in response to EPA’s request.

UWAG is a voluntary, non-profit, unincorporated group representing 132 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. One of UWAG’s purposes is to participate on behalf of its members in CWA proceedings involving issues of importance to them, as is the case here. UWAG’s member companies, and those of its member trade associations, have a vital interest in the scope of the NPDES program and federal regulatory authority under the CWA.

UWAG supports EPA’s Statement as a positive step to providing more regulatory certainty and clarity for the regulated community and the public generally. UWAG also agrees that the Agency should conduct notice-and-comment rulemaking to amend the NPDES

regulations to reflect EPA's interpretation, and recommends that the Agency initiate this process within an appropriate timeframe, taking into account the Supreme Court proceedings.

II. UWAG's Interest in EPA's Interpretive Statement

UWAG's members, and those of its trade association members, operate power plants and other facilities that generate, transmit, and distribute electricity and other energy resources to residential, commercial, industrial, and institutional customers across the nation. Generating, transmitting, and distributing electric power, steam, and other energy products require the use and storage of a variety of materials and products ranging from fuel to cleaning products to utility poles. Member activities also produce wastewater and other waste products that must be treated, managed, and properly disposed. Surface impoundments, tanks, ditches, landfills, green infrastructure, and a host of other features are used to transport, store, recycle, treat, and dispose of wastes and wastewaters ranging from process wastewater to stormwater. Many local, state, and federal requirements govern, directly and indirectly, the design, construction, and operation of many, if not all, of those features, both to ensure the integrity of the activities they support and to ensure that environmental effects are avoided or minimized.

Accordingly, UWAG members have decades of experience complying with the regulatory requirements of the CWA generally, and the NPDES program in particular. UWAG members, who have worked closely with state and federal regulators to understand and comply with the CWA since its passage, have understood the statute to exclude from the NPDES program all releases of pollutants to groundwater, even where groundwater subsequently delivers such pollutants to jurisdictional surface waters.

III. UWAG Supports the Agency's Interpretive Statement.

UWAG supports EPA's Statement, which comports with the language, structure, and legislative history of the CWA. UWAG also appreciates the opportunity for comment that EPA

provided before issuing the Statement and EPA’s thoughtful consideration of the many comments received, including UWAG’s.¹ Although many of UWAG’s comments advanced arguments relevant to the broader distinction between “point sources” and “nonpoint sources,” UWAG respects EPA’s choice to address in the Statement only the regulatory status of releases from any sources into groundwater, including situations in which groundwater delivers pollutants to navigable waters. Although UWAG believes that the “means of delivery” test endorsed in UWAG’s comments is the correct approach for distinguishing between point and nonpoint source discharges where releases do not occur via groundwater, we agree that Congress also intended to categorically exempt from the NPDES program releases to and from groundwater.

Specifically, UWAG agrees with EPA’s conclusion that Congress did not intend to classify groundwater as either “navigable water” or a “point source,” even if groundwater ultimately connects to surface waters classified as waters of the United States. As EPA’s Interpretive Statement explains, Congress made plain throughout the statute, and through unambiguous legislative history, its intention to reserve to the states sole control over groundwater, despite fully appreciating the often intimate connection between ground and surface waters. 84 Fed. Reg. at 16,813-17. If groundwater is neither a “navigable water” nor a “point source” and if groundwater serves as the means of conveying pollutants to navigable waters, it follows that no addition of pollutants from a point source to navigable waters has occurred, even if some of the pollutants conveyed by the groundwater originate from one or more point sources on land. If that were not the case, the only way to address situations in which groundwater conveys pollutants to navigable waters would be to subject the groundwater itself to

¹ UWAG Comments on Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126 (Feb. 20, 2018), Docket ID No. EPA-HQ-OW-2018-0063-0667 (“UWAG Comments”).

the NPDES program. And that, as EPA correctly concludes, would violate Congress's clear intent.

The key question addressed in EPA's Statement is not *whether* pollutants released from a point source to groundwater are controlled, but *how* such releases are controlled. UWAG believes that Congress clearly addressed that question in the CWA, choosing the nonpoint source management program as the tool by which states, with substantial support from the federal government, will address pollution of and by groundwater for CWA purposes. Understanding that state nonpoint source control would not be uniform, Congress subsequently established federal regulatory programs targeted at certain types of activities potentially contributing pollutants to groundwater and via groundwater to connected surface waters (*e.g.*, the Resource Conservation and Recovery Act, *see* 42 U.S.C. §§ 6901, *et seq.*, and the Safe Drinking Water Act's Underground Injection Control program, *see* 42 U.S.C. §§ 300h, *et seq.*). EPA's Statement embraces and reflects Congress's choice – the only practical, workable choice that preserves the state/federal relationship Congress envisioned under the CWA. That interpretation avoids duplication of or inconsistency with other federal programs and allows states to tailor their nonpoint source programs to protect groundwater and connected surface waters without imposing the enormous and often environmentally unproductive bureaucracy that applying the NPDES program would entail.

EPA properly acknowledges the long line of Agency opinions and declarations that support its Statement, many of which UWAG presented in its comments. 84 Fed. Reg. at 16,817-18; UWAG Comments at 43-52. EPA also acknowledges that a handful of previous Agency statements are inconsistent with the definitive interpretation set forth in the Statement. UWAG agrees that those inconsistent interpretations, which EPA describes in some detail (84

Fed. Reg. at 16,818-19), are often accompanied by little or no analysis. *Id.* at 16,819-20; UWAG Comments at 9-15. To the extent some analysis accompanies those inconsistent statements, that analysis relies on reading the statute broadly to serve a single statutory objective, rather than grappling with all of the statute's objectives, text, structure, and legislative history. 84 Fed. Reg. at 16,819; UWAG Comments at 15.

Also, unlike the Interpretive Statement, EPA's prior inconsistent statements either appeared without notice or any opportunity to comment on the specific issue at hand, or were never finalized. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 8, *Cnty. of Maui v. Hawai'i Wildlife Fund et al.*, No. 18-260 (U.S. May 16, 2019); *see also* UWAG Comments 12-15. Here, by contrast, EPA provided ample notice of the issues in question, considered thousands of comments submitted, and explained why it rejected other interpretations. Equally important, none of the prior statements dealt with the very real practical difficulties that regulating groundwater discharges would raise.

The Interpretive Statement also provides a thorough and balanced analysis of case law, properly concluding that many well-reasoned cases accord with EPA's conclusion that Congress intended to categorically exclude groundwater from the NPDES program. 84 Fed. Reg. at 16,821-23. As EPA notes, neither the Ninth Circuit's decision in *Hawai'i Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018), nor the Fourth Circuit's in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), prohibits application of the Interpretive Statement in those circuits. 84 Fed. Reg. at 16,812, n.1.

EPA nevertheless has exercised its discretion to apply the Interpretive Statement only *outside* the Ninth and Fourth Circuits for the time being, to maintain the *status quo* pending further clarification by the Supreme Court, which is now reviewing the *Cnty. of Maui* decision.

UWAG recommends that EPA make it clear to state regulators that, so long as the Interpretive Statement does not apply in states within those circuits, EPA does not intend to enforce, or to require states to enforce, the *Cnty. of Maui* and *Upstate Forever* decisions while the Supreme Court is considering the issue.

IV. UWAG Recommends that EPA Engage in Rulemaking Within an Appropriate Timeframe.

To ensure future interpretations of the CWA reflect the conclusions in the Statement, EPA should engage in notice-and-comment rulemaking to revise its NPDES regulations to codify the Interpretive Statement, as EPA has indicated it will do once the Supreme Court has provided further clarification. *Id.* at 16,812 n.1. UWAG agrees that the Agency should engage in rulemaking within an appropriate timeframe, taking into account the Supreme Court proceedings. If and when EPA pursues further rulemaking, it should consider the proposed revisions to 40 C.F.R. §§ 122.2 and 122.3 that UWAG offered in its comments. *See* UWAG Comments at 115-16.

V. Conclusion

UWAG appreciates the careful, complete, and detailed analysis reflected in EPA's Interpretive Statement and the clear effort EPA has made to consider and respond to different viewpoints. UWAG supports the conclusion EPA has reached based on that analysis. UWAG recommends that EPA proceed with any amendments to its NPDES Rules, including changes of the kind UWAG proposed in its prior comments, within an appropriate timeframe, taking into consideration the Supreme Court's proceedings.