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May 21, 2018

Mr. Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: 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 No. EPA-HQ-OW-2018-0063; FRL-9973-41-OW

Dear Mr. Wilson:

The Associated General Contractors of America (AGC) appreciates the opportunity to respond to the U.S. Environmental Protection Agency’s (EPA) request for comment on several topics related to the question of whether the federal government should use the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program to regulate discharges of pollutants to (or through) groundwater that hydrologically connects to a “Water of the United States” (WOTUS). Over the years, and in varied settings, EPA has stated that such pollutant discharges *may be* subject to CWA requirements. But in the absence of clear and consistent nationwide requirements, the agency has made fact-specific, case-by-case determinations.

As explained hereinafter, NPDES permits are meant to limit the discharge of pollutants *from a discernible, confined, discrete conveyance* into jurisdictional surface waters. These comments begin by highlighting AGC’s overarching concerns with any scenario under which EPA would require a federal CWA permit before “any person” could lawfully discharge to groundwater. AGC’s comments then provide EPA with additional detail on issues of greatest import to the commercial construction industry. AGC represents more than 26,000 members—the largest commercial construction trade association—through a network of chapters in all 50 states, the District of Columbia and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation’s public and private infrastructure.¹

AGC members are required to obtain and comply with NPDES permits and related state and local stormwater management requirements on nearly all projects disturbing one or more acres of land (and smaller sites part of a larger common plan of development or sale). Stormwater collection systems –

¹ AGC members are regularly engaged in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

such as detention or retention ponds and settling basins/ponds as well as “green” infiltration² practices – that are built to control point source surface runoff per EPA’s NPDES Stormwater Program could require separate, brand-new NPDES permits if EPA were to expand the program to cover releases to groundwater.

Summary of AGC’s Position

AGC strongly maintains that the CWA’s point source program does not regulate releases that reach jurisdictional surface waters via groundwater. Rather, several other federal and state environmental statutes, supporting regulations and permit programs already exist and adequately control discharges to groundwater. The U.S. Chamber has submitted a more comprehensive comment letter explaining how the CWA’s statutory text, structure, and legislative history support this assertion.³ As explained in detail below, it is particularly important to the construction industry that EPA clarify its previous statements and unequivocally state that it will not use the NPDES program to further regulate discharges to groundwater. The alternative of taking “no action” would, over time, upset the complex framework of federal, state, and local stormwater regulations; generate an unworkable permit backlog; undermine green infrastructure projects; exhaust government resources, and invite frivolous litigation.

Clean Water Act Framework Defines Scope of NPDES Permitting

The CWA allows a person to discharge a pollutant from a point source into WOTUS if they first obtain an NPDES permit. An NPDES permit is a license to discharge a specified amount of pollutants into a waterbody under certain conditions. Congress provided EPA with several definitions that the Agency should adhere to in delineating the precise scope of the NPDES permitting program – see directly below. Namely, the definition of “point source” does not include groundwater; the examples within the definition are point sources only if they are “discernable, confined, and discrete conveyances.” Unless a point source directly conveys the pollutant to navigable water, there is no discharge subject to NPDES permitting requirements regardless of the traceability or quantity of the pollutant.

The key terms of this provision are defined in Section 502, *General Definitions*, of the CWA:

- “**Person**” means “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”⁴
- “**Discharge of a pollutant**” and “**discharge of pollutants**” each means “any addition of any pollutant to navigable waters from any point source.”⁵
- The term “**pollutant**” means “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive

² “Infiltration” is the process by which water on the ground surface enters the soil.

³ AGC is a signatory to the Chamber’s comment letter in this docket and incorporates it herein by reference.

⁴ 33 U.S.C. § 1362(5). EPA’s implementing regulations follow this definition but also include “Federal agency [and] an agent or employee” of the entities on the aforementioned list. See 40 C.F.R. § 122.2.

⁵ *Id.* § 1362(12). EPA’s implementing regulations follow this definition. See 40 C.F.R. § 122.2.

materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”⁶

- The term “**navigable waters**” means “the waters of the United States, including the territorial seas.”⁷ The term “**waters of the United States**” (WOTUS) is further defined in EPA’s regulations at 40 C.F.R. §§ 122.2 and 230.3(s).
- “**Point sources**,” generally speaking, are “discernable, confined, and discrete conveyances including but not limited to any pipe, ditch, channel, tunnel, [or] conduit... from which pollutants are or may be discharged.”⁸

EPA’s prior interpretation(s) that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater – or other subsurface flow – having a direct hydrologic connection to the jurisdictional water, may be subject to CWA permitting requirements, finds no support in the text of the Act and are outside the scope of the NPDES program. EPA’s “direct hydrological connection” interpretation is impermissible. Where an interpretation of the CWA “invokes the outer limits of Congress’ power,” it must be supported by “a clear indication that Congress intended that result,” especially where the “interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”⁹

Duplication with Numerous Other Regulatory Programs

Several other federal and state environmental statutes, supporting regulations, and permit programs already exist and adequately control discharges to groundwater. Indeed, requiring NPDES permitting for releases to groundwater would greatly expand EPA’s regulatory authority – without clear congressional authorization – and this would intrude into numerous regulatory programs that Congress assigned to other environmental statutes. The net result would be to increase (not decrease) uncertainty, confusion, compliance costs, regulatory burden, and resulting litigation.

Under an increasingly expansive interpretation of the CWA, countless additional sources would be subject to NPDES requirements so long as pollutants that reach navigable waters are “fairly traceable” to those sources, “directly connected” to those sources, or present in navigable water in “measurable quantities.” And under the recent *Kinder Morgan*¹⁰ and *Maui*¹¹ decisions, this expansion of permitting requirements could occur regardless of how distant geographically or temporally the source may be.

⁶ *Id.* § 1362(6). EPA’s implementing regulations follow this definition. See 40 C.F.R. § 122.2.

⁷ *Id.* § 1362(7).

⁸ *Id.* § 1362(14). EPA’s implementing regulations follow this definition. See 40 C.F.R. § 122.2.

⁹ *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172-73 (2001); cf. *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014).

¹⁰ *Upstate Forever v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir. Apr. 12, 2018) (that a point source does not need to directly feed into navigable waters in order to require a NPDES permit).

¹¹ *Haw. Wildlife Fund v. Cty. of Maui*, No. 15-17447, slip. Op. at 19 (9th Cir. Feb. 1, 2018) (holding that a point source discharge to groundwater of “more than a *de minimis*” amount of pollution that is “fairly traceable from the point source... such that the discharge is the functional equivalent of a discharge into a navigable water” should be regulated by the CWA).

The CWA does not specifically address contamination of groundwater resources. This subject is addressed by provisions in other laws including *but not limited to* the Safe Drinking Water Act; the Resource Conservation and Recovery Act; and the Oil Pollution Act's Spill Prevention Control and Countermeasure Program. AGC mentions these examples, and briefly discusses below how federal EPA already regulates groundwater via these programs, because they are applicable to many commercial construction jobsites and related operations.

Federal EPA Already Regulates Groundwater via Control of Stormwater Drainage (Infiltration) Wells.

Per the Safe Drinking Water Act (SDWA), EPA's Underground Injection Control (UIC) program¹² consists of six classes of injection wells. Each well class is based on the type and depth of the injection activity, and the potential for that injection activity to result in endangerment of underground sources of drinking water (USDW). Class V stormwater drainage wells¹³ use subsurface infiltration to manage surface water runoff (rainwater or snow melt). Under current federal law, if an infiltration BMP is deeper than its widest surface dimension, or has a subsurface fluid distribution system, then it will likely be considered a Class V stormwater drainage well that is regulated under EPA's UIC program, as required by the SDWA.

Class V stormwater drainage wells are "authorized by rule," which means they may be operated without an individual permit so long as the owner/operator of the well meets the following *minimum* EPA requirements: (1) Operate the injection well in a way that will not endanger USDW; (2) Register the injection well by submitting basic inventory information about the well to their permitting authority; and (3) abandoned Class V wells should be properly destroyed, with notification to EPA, to prevent movement of contaminated fluids into USDW.

Inventory submission requirements vary by state.¹⁴ The required inventory information typically includes:

- Facility name and location,
- Name and address of a legal contact,
- Ownership of property,
- Nature and type of injection well(s), and
- Operating status of the well(s).

Some states have applied for and been granted authority to implement the Class V UIC Program in their state, including oversight of stormwater drainage wells, and often have more stringent requirements.¹⁵

¹² See [40 C.F.R. §§ 144 – 147](#).

¹³ "Stormwater drainage wells" are defined in UIC program regulations at 40 C.F.R. § 144.3: "A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system."

¹⁴ See 40 C.F.R. § 144.83 - Do I need to notify anyone about my Class V injection well?

¹⁵ "Primacy" states (where the state runs the Class V UIC program): Alabama, Arkansas, Commonwealth of Northern Mariana Islands, Connecticut, Delaware, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, or Wyoming.

More broadly, EPA has published much guidance outlining broad categories of BMPs for stormwater drainage wells that site operators can implement alone or in combination: (1) siting, (2) design, (3) operation and maintenance; (4) education and outreach; and (5) proper closure.

Federal EPA Already Regulates Groundwater Via Control of Hazardous Waste Facilities. The Resource Conservation and Recovery Act (RCRA) plays a key role in preventing groundwater contamination.¹⁶ The Act aims to “promote the protection of health and the environment and to conserve valuable material and energy resources.” EPA makes this happen by regulating the generation, transport and treatment, storage, and disposal of hazardous waste. Generators must determine if their waste is hazardous. Both generators and transporters must track hazardous waste and its movement to a treatment, storage, or disposal facility. In order to operate, such a facility must have a permit from EPA or an authorized state agency.

Facility permits include design standards, operating requirements, closure and post-closure requirements, and groundwater monitoring requirements.¹⁷ If waste from the facility is contaminating groundwater, the owner or operator must take corrective action and monitor those efforts.

Federal EPA Already Regulates Groundwater Via Control of Oil Spill Containment and Cleanup. Section 311 of the CWA imposes liability on owners or operators of vessels and facilities that discharge harmful quantities of oil into the navigable waters of the United States, adjoining shorelines.¹⁸ EPA’s Spill Prevention, Control and Countermeasure (SPCC) regulations¹⁹ apply to owners or operators of non-transportation-related facilities that:

- Have an aboveground oil storage capacity greater than 1,320 U.S. gallons, or completely buried oil storage capacity greater than 42,000 U.S. gallons;
- Drill, produce, store, process, refine, transfer, distribute, use, or consume oil or oil products; and
- Could reasonably be expected to discharge oil to U.S. navigable waters or adjoining shorelines.

One of the requirements of the SPCC rule is that storage tanks be equipped with secondary containment systems to prevent oil spills from migrating into soil, groundwater, or surface water or adjoining shorelines. Per the procedures and sample language outlined in EPA’s SPCC Guidance for Regional Inspectors,²⁰ properly written and executed SPCC plans protect groundwater by reducing the number and extent of oil spills.

Impacts to Commercial Construction if EPA Were to Assert CWA Jurisdiction Over Releases to Groundwater

Any EPA action to regulate discharges to groundwater under the CWA permit program would have significant implications for contractors that own or operate stormwater infrastructure that “stores” or

¹⁶ See 42 U.S.C. § 6902(a) (2012).

¹⁷ See generally 40 C.F.R. § 264 (2014); *id.* §§ 264.97–264.99 (groundwater monitoring requirements).

¹⁸ 40 C.F.R. § 110.

¹⁹ 40 C.F.R. § 112.

²⁰ USEPA, *SPCC Guidance for Regional Inspectors*, EPA 550-B-13-002, Dec. 16, 2013.

“treats” water runoff. This would include features that infiltrate stormwater or process water underground such as injection wells, underground tanks, surface water impoundments, retention or detention ponds, artificially constructed wetlands, treatment lagoons, or groundwater recharge and reuse systems.

Most notably, detention or retention ponds and settling basins/ponds that are built to control point source surface runoff per EPA’s NPDES Construction General Permit (CGP) for active construction sites (which serves as a model for the nation) could require separate, brand-new NPDES permits, if EPA were to expand the program to cover releases to groundwater. Specifically, EPA’s CGP requires contractors to “design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities.” Per the federal CGP and “Effluent Limitations Guidelines and Standards for Construction and Development” contractors are required to “control stormwater volume and velocity” to minimize pollutant runoff and streambank/channel erosion.²¹ On a large majority of regulated construction sites, these requirements have led contractors to build temporary basins to hold rainwater that has “run off” the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage systems. (Prior to 2012, the federal CGP mandated sediment basins on all construction sites where the total disturbed drainage area at any given time was 10 acres or more.)

The purpose, design, and intention of these ponds and basins is *not* to discharge via “infiltration” – but rather to capture pollutants and remove them prior to “surface” discharge. However, because these BMPs are excavations, it would not be a very large stretch to argue that some minor portion of the captured water could “infiltrate.”

As explained above, EPA must take note that if these ponds/basins release to groundwater, they are already regulated by the SDWA if they pose any threat to underground drinking water sources. What is more, the federal CGP directs the site operator to contact the state agency or EPA regional office if he/she is using any of the following stormwater drainage wells (see bullets), to ensure compliance with the requirements in the SDWA and EPA’s implementing UIC regulations:²²

- **Infiltration trenches** (if stormwater is directed to any bored, drilled, driven shaft or dug hole that is deeper than its widest surface dimension, or has a subsurface fluid distribution system)
- Commercially manufactured pre-cast or pre-built proprietary **subsurface detention vaults, chambers**, or other devices designed to capture and infiltrate stormwater flow
- **Drywells, seepage pits, or improved sinkholes** (if stormwater is directed to any bored, drilled, driven shaft or dug hole that is deeper than its widest surface dimension, or has a subsurface fluid distribution system)

Indeed, EPA has set minimum standards to address the threats posed by stormwater drainage wells that use infiltration and other “classes” of injection wells. It is not necessary to expand the federal NPDES regulations to further regulate stormwater BMP discharges to groundwater.²³

²¹ On December 1, 2009, EPA promulgated ELGs and NSPSs to control the discharge of pollutants from construction sites. See 74 *Fed. Reg.* 62996, and 40 C.F.R. § 450.21.

²² See 40 C.F.R. §§ 144 – 147.

²³ Some NPDES-authorized state programs also regulate discharges to groundwater.

In addition, if EPA were to assert CWA jurisdiction over releases to groundwater, it would undermine green construction projects across the nation. There are many state and local post-construction stormwater standards for discharges from newly developed and redeveloped sites that include volume-based or retention standards. These standards typically require the use of infiltration, evapotranspiration or harvest practices to control a specified volume of stormwater on-site and are usually expressed as a volume of rainfall, a percentile storm event or a groundwater recharge volume.²⁴ Municipalities (MS4s) are more commonly using “green” infrastructure requirements as part of their stormwater management programs, per the in state/local permitting procedures and regulations administered under the NPDES Stormwater Program. EPA widely supports stormwater infiltration practices that reduce pollutant discharges, by controlling (reducing and delaying) stormwater runoff volumes, and offset the effects of urbanization on groundwater recharge.

Construction-Specific Concerns and Questions

AGC members are concerned about the scope of any potential groundwater program under the CWA as well as practical issues concerning the interplay with existing stormwater management practices. As indicated above, the construction industry relies on BMPs to control stormwater runoff from both active projects and completed sites. Overlaying another groundwater-stormwater hybrid regulatory program on top of existing requirements that address groundwater as well as stormwater would have a negative impact on the construction industry and the owners that pay for the projects.

A. Connection to jurisdictional waters

As stated by the Agency in their solicitation for comment...

“...whether the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit program should be used to regulate discharges of pollutants to groundwater that have a hydrologic connection to jurisdictional waters.”

EPA has been grappling, unsuccessfully, with the effort to define terms such as “Waters of the U.S.” or “jurisdictional waters” or “connectivity” within the scope and limitations of the federal CWA. Above and beyond the CWA Section 404 (dredge and fill/wetlands permits), this type of regulation would and could force developers to leave a significant setback distance from wetland areas. This would create millions of acres of land that could not be developed. Furthermore, it may result in requiring a Section 404 permit in order to operate a stormwater BMP that may happen to infiltrate groundwater miles from any jurisdictional surface water. It would be an immediate and catastrophic economic impact to the affected landowners. Such a regulation would constitute a taking and property owners should be eligible for restitution at fair market value *prior* to the regulation going into effect.

²⁴ EPA compiled a full summary of each state’s post-construction program (July 2016) available online here: https://www.epa.gov/sites/production/files/2016-08/documents/swstdsummary_7-13-16_508.pdf.

B. Calls into question common BMPs used for surface runoff

As explained above, the construction industry uses BMPs where the purpose, design, and intent are to capture pollutants and remove them prior to “surface” discharge – not to discharge via “infiltration.” These BMPs are normally referred to as detention/retention ponds or settling basins/ponds or pits. They consist of excavations to control surface runoff volume and velocity; this reduces sedimentation by slowing down velocity to allow for settlement. Because these BMPs are excavations, it would not be a very large stretch to argue that some minor portion of the captured water could “infiltrate.”

The same BMPs are used to capture and control process waters at concrete plants, quarries, aggregate processing operations, etc.

- Should EPA or others allege “infiltration” occurs, this would virtually eliminate a suite of BMPs that have been extremely effective in surface runoff management. It would require every BMPs currently installed to have a liner placed to prevent “infiltration.” This would add cost to these temporary BMPs that is NOT warranted.
- Other potential added costs could consist of but not limited to testing, engineering, plan development, labor, materials, and equipment.
- There would also be increased cost to maintain more complex BMPs.

C. Other concerns or questions

- How is the hydrological connection between the groundwater and a nearby surface water body determined?
- Does the EPA automatically assume a hydrologic connection leaving it up to the permittee to disprove?
- The uncertainties of the science and potential investigation of an alleged source without positive proof of violation(s) can result in false allegations, violations, fines and litigation.
- The potential of biased regulatory control over the highway sector.
- The cost associated with the proposed regulation is not a one-time event. Construction locations change as projects move across the country side with time. Mobilization to a new project will incur the cost of the proposed regulation each and every move.

Conclusion

AGC is very concerned that EPA and courts²⁵ have departed from the constrained approach that Congress crafted in the CWA. There must be a clear limit to the number or type of releases that require an NPDES permit. Otherwise, millions of additional sources would require NPDES permitting, without logical limit to the types of releases implicated. NPDES permitting could be required for all “excavations” used for surface runoff control even though significant threats are already covered under other statutes or regulations. In addition to the increased volume of permits, expanding the NPDES

²⁵ EPA’s *Federal Register* notice points out that the courts have approached the groundwater question in varying ways. [83 Fed. Reg. 7,126 \(Feb. 20, 2018\)](#).

program would create new governmental challenges – including writing, monitoring, and enforcing these permits – that would increase uncertainty for construction industry stakeholders.

AGC appreciates EPA's consideration of these comments. If you have questions regarding these comments, please contact me at pilconisl@agc.org or (703) 837-5332.

Respectfully,

A handwritten signature in black ink that reads "Leah Pilconis". The signature is written in a cursive, flowing style.

Leah Pilconis
Senior Counsel, Environmental Law & Policy