

**Texas Commission on Environmental Quality (TCEQ) Comments on the
Environmental Protection Agency's (EPA) Request for Comments on Clean Water
Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to
Surface Water**

Docket ID Number EPA-HQ-OW-2018-0063

Background

On February 20, 2018, the EPA published in the Federal Register a request for comment on previous EPA statements regarding Clean Water Act (CWA) jurisdiction over point source discharges of pollutants to groundwater that reach surface waters through a direct hydrologic connection. Previous EPA statements in various contexts have indicated that these types of discharges may be subject to CWA regulation. Comments are requested on whether the EPA should consider clarification of these statements and, if so, how clarifications should be provided. Specifically, EPA posed several questions within their request for comment, and responses to those questions are provided below.

The TCEQ offers the following comments:

1. Should EPA revise its previous statements concerning the applicability of the CWA NPDES permit program to pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to a jurisdictional surface water?

TCEQ disagrees with EPA's previous statements related to groundwater and CWA jurisdiction. EPA should refrain from making future statements that circumvent the States' jurisdictional authority. EPA's previous statements served to steer away from State oversight and protection of groundwater. Further, EPA did not address releases to groundwater with a hydrologic connection to jurisdictional 'waters of the U.S.' within the Clean Water Rule or Concentrated Animal Feeding Operation (CAFO) regulations, but instead appears to have sought to memorialize its opinion through other means in the absence of judicial consensus. Therefore, EPA should revise its previous statements to clarify that the CWA's NPDES permit program does not apply to discharges of pollutants from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow.

As adopted by the state legislature, Texas' state groundwater protection policy of non-degradation of groundwater: safeguards present and future groundwater supplies; protects and maintains usable and potentially usable groundwater; and keeps groundwater reasonably free of contaminants that interfere with present and potential uses. In order to accomplish this goal, Texas regulates potential impacts to groundwater under several programs designed to prevent discharges of pollutants to groundwater resources or protect other groundwater resources from allowable discharges to groundwater. Preventative measures such as liner specifications and operational requirements, in combination with monitoring and reporting, are effective controls under normal operating conditions. The types of releases that are the subject of the court decisions were unintentional releases (e.g., spills, leaks) that are most appropriately addressed by emergency response, clean up, remediation or enforcement mechanisms. For example, the appropriate response to a leaking wastewater treatment

unit, underground storage tank, etc., is to repair or replace the structure and stop the release. It would not be appropriate to allow a permittee with a damaged structure to seek authorization under the CWA to discharge via the damaged structure to groundwater regardless of groundwater connectivity to a surface waterbody.

Further, the Texas Pollutant Discharge Elimination System (TPDES) permit program does not authorize the discharge of waste or pollutants directly to groundwater. Unintentional releases from permitted facilities at locations not identified as permitted outfalls would be identified as unauthorized discharges and subject to enforcement and corrective action. EPA should recognize the States' authority to regulate such releases. Therefore, TCEQ requests that EPA recognize that states regulate pollutant discharges to groundwater and enable states to regulate such discharges at their discretion.

2. Would subjecting such releases to CWA permitting be consistent with the text, structure, and purposes of the CWA?

No, the CWA's jurisdiction, as it relates to wastewater permitting, only extends to discharges to Waters of the United States. Groundwater is not considered nor defined as Waters of the U.S. in the CWA. Congress' stated intent is that states retain their traditional role in preventing, reducing and eliminating pollution: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ..." CWA Section 1251(b).

3. If EPA has the authority to permit such releases, would those releases be better addressed through other federal authorities as opposed to the NPDES permit program? Would some or all such releases be adequately addressed through existing state statutory or regulatory programs, or through other existing federal regulations and permit programs (such as UIC - SDWA)?

TCEQ does not believe that EPA has authority over groundwater under the Clean Water Act. Texas employs a variety of programs to address groundwater discharges and releases.

One such program is the UIC program. The purpose of the state's UIC program is to maintain the quality of fresh water in the state and prevent underground injection that may pollute fresh water. Texas programs for municipal solid waste, industrial solid waste and hazardous waste, dry cleaner environmental response, and underground and aboveground storage tanks are implemented to safeguard health, welfare, and physical property, protect the environment and prohibit the discharge of solid waste and regulated substances into or adjacent to the waters in the state.

Another such program is the Superfund program. When a release or threatened release of hazardous substances may constitute an imminent and substantial endangerment to public health and safety or the environment, the release could be eligible for remediation under either the federal Superfund program pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the state Superfund program pursuant to the Texas Solid Waste Disposal Act. Note

that permitting releases of contaminants into the groundwater could complicate remediation programs in that the established cleanup standards could be undermined by the quantification of “allowed releases.”

4. Should EPA clarify its previous statements in order to provide additional certainty for the public and the regulated community?

EPA should revise its previous statements to clarify that the CWA's NPDES permit program does not apply to discharges of pollutants from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow. EPA should refrain from making future statements that do not take into consideration the States' jurisdictional authority. EPA should recognize that such releases are covered by other federal and state programs which are designed to protect water quality and prevent degradation.

5. What would be the consequences of asserting CWA jurisdiction over certain releases to groundwater or determining that no such jurisdiction exists?

Permitting releases of contaminants to groundwater could interfere with other state and federal regulatory programs and would conflict with Congress' intent for groundwater to be managed by states.

Permitting releases of contaminants into the groundwater could complicate remediation programs in that the established cleanup standards could be undermined by the quantification of “allowed releases.”

6. What form or process should EPA use to revise or clarify its previous statements (e.g., memoranda, guidance, rulemaking) if the Agency?

If EPA chooses to move forward with clarifying their position on this topic, TCEQ recommends a draft memorandum with the opportunity for State input throughout the development process.