
May 14, 2018

David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Docket ID No. EPA-HQ-OW-2018-0063, Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water

Dear Deputy Administrator Ross:

The Western Governors’ Association (WGA) submits the following comments to the U.S. Environmental Protection Agency (EPA) in response to the February 20, 2018 Federal Register (83 FR 7126, Feb. 20, 2018) request for comment on whether EPA should consider clarification or revision of its 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 with a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation.

STATEMENT OF INTEREST

WGA is an independent organization representing the Governors of 19 western states and three U.S. territories in the Pacific. The Association is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. Western Governors recognize that clean water is essential to strong economies and quality of life. In most of the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage and protect their water resources.

As sovereigns, states have reserved their primary authority for managing and allocating water resources and are primarily responsible for water supply planning within their boundaries. The U.S. Supreme Court has clearly recognized a, “consistent thread of purposeful and contained deference to state water law by Congress,” and that states have exclusive authority over non-navigable waters, including groundwater resources, after the passage of the Desert Land Act of 1877. *California v. United States*, 438 U.S. 645 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Section 101 of the CWA expressly states that, “the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act.”

33 U.S.C. § 1251(g). It is imperative that any policies developed by EPA to define or clarify the jurisdictional scope of the CWA and its programs be consistent with, and respectful of, state laws and authority over water resources.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS

Consultation with States: As stated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, federal agencies should:

have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications.

Due to states' vast authorities, both sovereign and delegated, over water resources, any EPA policies concerning the scope and implementation of the CWA will likely have federalism implications and should be developed through consultation with Governors (or their designees). Western Governors have been encouraged by EPA's recent outreach to states in its current Waters of the United States, and Lead and Copper Rule rulemaking processes and urge EPA to afford states similar opportunities throughout the full range of its regulatory processes.

Limits on Federal Regulatory Authority and Discretion: Congress has clearly expressed that the scope of federal authority under the CWA is not without limit and that it was Congress's intent 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..." 33 U.S.C. § 1251(b). In WGA Policy Resolution 2017-04, *Water Quality in the West*, Western Governors cite the well-established legal principle that the, "regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources." Any changes to, or clarifications of, EPA policy concerning the Agency's authority to require National Pollutant Discharge Elimination System (NPDES) permitting over any discharges to groundwater must acknowledge, and in no way impair, states' exclusive authority to manage and allocate groundwater resources within their boundaries. EPA policy should also recognize that there are other protective measures outside of the NPDES permitting system – under federal, as well as state, law – to ensure that discharges to groundwater do not impair water quality.

Inclusion and Utilization of State Science and Expertise: If EPA determines that it will continue to analyze, on a case-by-case basis, discharges of pollutants to groundwater that has a "direct hydrologic connection" to jurisdictional surface waters to determine whether NPDES permitting requirements will be triggered, EPA should include the expertise and data of state officials when making determinations of "connectivity." Both hydrology and laws vary from state to state. The best policy when considering the intersection of science and law is one that allows for regional flexibility and acknowledges the role of state experts who live with – and intimately understand – the issue at hand.

Clear Standards for Case-by-Case Analyses: If EPA determines that it will continue to analyze, on a case-by-case basis, discharges of pollutants to groundwater that has a "direct hydrologic connection" to jurisdictional surface waters to determine whether NPDES permitting requirements

will be triggered, EPA's policy should establish – in consultation with states – clear criteria, processes, and parameters for such case-by-case determinations.

CONCLUSION

States possess primary jurisdiction over water resource allocation decisions and are responsible for balancing state water resource needs within the objectives of the CWA. EPA's rules and policies affecting water resource management and protection should recognize, and not interfere with, this historic and well-established authority. Such recognition is even more critical in the context of groundwater, where Congress and the Supreme Court have consistently taken the position that state authority is exclusive.

Western Governors support early, meaningful, and substantive involvement with EPA throughout the development, prioritization, and implementation of any policy or rule intended to define or clarify the scope of the CWA. Because of the clear and significant federalism implications of any potential changes to the state-federal roles in implementing the CWA, the agency should engage with Governors in the earliest possible stages of any such efforts.

Western Governors recognize the essential role of partnerships between the states and EPA and the role of cooperative federalism in protecting our nation's waters. We request that you pursue future state consultation with diligence and carefully consider the comments submitted in this letter, as well as those submitted by individual states. Furthermore, we appreciate your recognition of the authority and unique role of states in the implementation of the CWA and the NPDES permitting program for the protection of water resources.

Sincerely,


Dennis Daugaard
Governor of South Dakota
Chair, WGA


David Ige
Governor of Hawaii
Vice Chair, WGA