MATTHEW G. BEVIN
GOVERNOR

CHARLES G. SNAVELY
SECRETARY

R. BRUCE SCOTT
DEPUTY SECRETARY

ENERGY AND ENVIRONMENT CABINET

300 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601
TELEPHONE: 502-564-3350
TELEFAX: 502-564-7484

May 18, 2018

United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov: Docket ID No. EPA-HQ-OW-2018-0063

Re: Comments on 40 CFR Part 122 [EPA–HQ–OW–2018–0063; FRL–9973–41–OW] Clean Water Act Coverage of ''Discharges of Pollutants'' via a Direct Hydrologic Connection to Surface Water

The Kentucky Energy and Environment Cabinet appreciates the opportunity to provide comments on 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 waters are subject to the Clean Water Act § 402 National Pollution Discharge Elimination System (NPDES) Program.

The Energy and Environment Cabinet is the Kentucky agency charged with administering and enforcing the statutes, regulations, and rules providing for the prevention, abatement, and control of all water, land, and air pollution in the Commonwealth. Since 1983, its powers and duties have included administering the Clean Water Act's NPDES program in Kentucky, pursuant to the authority delegated by the EPA (48 Fed. Reg. 45597 (Oct. 6, 1983).

Kentucky has implemented its delegated authority under § 402 of the CWA to require NPDES permits for point source dischargers of pollutants (from a discernable, discrete point source directly to a water of the Commonwealth). Kentucky has exercised its authority appropriately, as shown by the following examples:

> If there is a discrete discharge into a sinkhole, Kentucky may regulated that as a point source discharge to a water of the Commonwealth. A discrete point source is present, monitoring and effluent limits can be properly assigned and achieved, and a direct nexus to a water of the Commonwealth is readily established.
>
> On the other hand, if wastewater is applied to the land by some means (such as by land application, irrigation, onsite sewage system, or subsurface injection) where it is intended for the land to serve as a means of utilizing the wastewater for some

purpose such as for irrigation, nutrient uptake, or pathogen attenuation such as with the treatment of the wastewater (onsite system), a KPDES permit is not required. Requiring KPDES permits in these situations is not feasible because there is no discrete point source present, monitoring and compliance with effluent limits is not practical, and a direct nexus to a water of the Commonwealth is not readily established.

However, not all examples are so clear. With impoundments (ponds, wastewater treatment structures, ash ponds, etc.), there can be natural leakage or seepage from that impoundment (which leakage or seepage could be very slow such as 1x10-6 cm/sec or much faster such as 1x10-1 cm/sec.). In fact, as noted above, these impoundments are typically acceptably designed to leak in a slow diffuse manner. Nevertheless, it is possible that the fluid (in some potentially modified form) in the impoundment may eventually reach groundwater or surface water in some manner, and in some cases there can even be a discernable nexus to a water of the Commonwealth. What is the appropriate regulatory means by which these situations should be addressed?

First, note that under the CWA § 402 program, there are often not design standards for liners in treatment impoundments, but may be a requirement of other environmental programs.

Second, there is no practical way to monitor the seepage from the structure. Point sources can be (and are) monitored with effluent limits assigned that describe what the acceptable level of discharge can be in order to maintain applicable water quality standards (WQBELs) or effluent limit guidelines (ELGs). This is not feasible or practical for a leaking impoundment, regardless of whether the leakage is acceptable by design or not.

If EPA were to conclude that these situations should be subject to the NPDES program, this would contort the law to require a permit that serves no purpose and could in fact lead to perverse unintended consequences:

- For example, if <u>any</u> groundwater source of contamination that could be assumed or demonstrated to have a hydrologic connection to surface water is required to be subject to permitting under the KPDES program, this creates an absurd outcome. These releases may include seeps or springs of groundwater from septic systems, underground storage tanks, landfills, pipelines, or <u>any</u> other source of groundwater that may be affected by such a source. These releases could be proximal to the source of contamination or far afield, such as could occur in a karst landscape (widespread in the Commonwealth). If releases of contaminated groundwater occur to surface waters of the Commonwealth, including navigable waters, the Cabinet would not typically use its KPDES permitting authority; instead, it more appropriately uses its authority under KRS 224.1-400 (the Kentucky analog to CERLA/Superfund), or its delegated RCRA authority, to require the responsible party to cease the release and mitigate the source of the contamination as those programs were and are specifically intended and designed to do.

- As another example, if the Cabinet were required to regulate releases of pollutants from coal ash ponds to groundwater under the CWA's § 402 program (33 U.S.C. § 1342), the Cabinet would be *prevented* from regulating those releases under the program specifically tailored to address them: RCRA's CCR Rule, the very program EPA developed to address these concerns. Under its RCRA authority, the EPA developed the CCR rule to regulate groundwater contamination emanating from CCR disposal and storage sites (80 Fed. Reg. 21,302). As EPA stated in the CCR rule, it regulates "groundwater contamination from the improper management of CCR in landfills and surface impoundments" (*Id.*) and it specifically provides for groundwater monitoring (in 40 C.F.R. §§ 257.90-95) and groundwater remediation (in 40 C.F.R. §§ 257.96-98). But, RCRA *expressly excludes* from regulation "industrial discharges which are point sources subject to" permitting under NPDES programs (42 U.S.C. § 6903(27)). Therefore, if EPA were to clarify the language under consideration in a way that requires the Cabinet to impractically regulate the release of pollutants from coal ash ponds emanating from beneath the impoundment structure under the KPDES program, this would likely bar the Cabinet from addressing them under the very program EPA developed and promulgated for that purpose. Additionally, this would not be in keeping with Congress's reserving to the States the primary responsibility to protect water quality.

As EPA is aware, there is an important distinction between complying with water quality standards as established under the CWA and complying with § 402 of the CWA. Just because something is not permitted under the NPDES program does not mean it is exempt from complying with applicable state water quality standards. It is appropriate that a leaking impoundment – whether leaking by design or not – be required to comply with state groundwater and/or surface water quality standards. At the same time, just because a condition is not complying with state water quality standards does not require as a remedy that it must have an NPDES permit; rather, other programs are specifically designed to deal with situations like this, while, the NPDES program was never intended to address such situations and cannot practically do so.

Regarding whether EPA should attempt to clarify or revise its previous statements on the "hydrologic conduit" issue, the Cabinet recommends that EPA continue to allow states to use their discretion and, perhaps more important, to specifically indicate that states are not mandated to use their NPDES authority to regulate these types of discharges. As illustrated herein there are technical and legal reasons why a mandate is both impractical and inappropriate. States are in the better position to determine how to address such discharges, for a number of reasons. First, states have a better understanding of local environmental conditions. Second, states have multiple sources of program authority – and thus an extensive programmatic toolkit – to regulate releases of pollutants to groundwater that then may travel to surface water. Third, and as noted above, it is primarily the States' responsibility to protect water quality under the CWA.

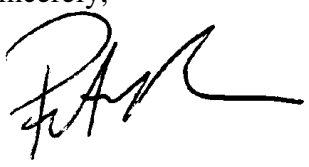
Again using impoundments as an example, the Cabinet has the following array of programmatic tools to address pollutant releases to groundwater:

- The Cabinet's special waste landfill permitting program (401 KAR 45:030), which contains specific surface and groundwater monitoring and corrective action requirements (401 KAR 45:160).
- RCRA's CCR Rule, which includes groundwater protection and remediation provisions specifically addressing the management and closure of coal ash ponds (42 U.S.C. § 6973(a) and 401 KAR 46:120).
- Kentucky's Superfund Program, which addresses releases of pollutants to the environment, the investigation and remediation of those releases, and the applicable cleanup standards (KRS 224.1-400). Specific remediation requirements, including evaluating human health and ecological risks, are contained in 401 KAR 100:030.
- Kentucky's general prohibition against water pollution (KRS 224.70-110), coupled with its Surface Water Quality Standards (contained in 401 KAR Chapter 10). These prohibitions and standards provide that no person shall unlawfully cause or contribute to the pollution of the waters of the Commonwealth, and those substances that have certain negative environmental effects shall not degrade surface waters, regardless of whether the discharge is from a point source or a nonpoint source.

For all these reasons, the Cabinet recommends that EPA not mandate that states exercise authority under the NPDES program to regulate 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 waters.

The Cabinet appreciates the opportunity to provide the agency with its perspective on this issue. If you have any questions, please contact me at (502) 782-6956 or at peter.goodmann@ky.gov.

Sincerely,



Peter T. Goodmann, Director
Division of Water