SCOTT A. THOMPSON
Executive Director

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY

MARY FALLIN
Governor

May 21, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Re: Oklahoma Department of Environmental Quality's response to U.S. EPA's request for comment on "Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water" (83 Fed. Reg. 7126 (Feb. 20, 2018); Docket ID No. EPA-HQ-OW-2018-0063

Dear Administrator Pruitt:

On February 20, 2018, the United States Environmental Protection Agency ("U.S. EPA") requested comment regarding "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 water may be subject to CWA regulation." *See* 83 Fed. Reg. 7126 (Feb. 20, 2018). The State of Oklahoma is charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution, and to plan the development and use of water resources within its boundaries. The Oklahoma Department of Environmental Quality ("ODEQ") is the primary agency responsible for the protection of surface water and groundwater quality within the State of Oklahoma. *See* 27A Okla. Stat. § 1-3-101(B)(4). The ODEQ appreciates the opportunity to comment on this important State issue. As described in detail below, the primary authority to protect and management this critical resource should remain with the States. The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, was not intended and is not well-suited to regulated groundwater or releases of pollutants to groundwater. On the other hand, there is existing well-tailored State and Federal environmental authority that is already addressing this vary issue. On behalf of the ODEQ, please accept the following comments supporting a clarification by U.S. EPA that the CWA's permitting requirements do not extend to groundwater.

I. Critical Importance of Groundwater

There is no question that groundwater quality must be protected or that releases of pollutants to groundwater that ultimately reach surface waters should be regulated. The desire for clean water, and a clean, safe, and healthy environment is universal. High-quality groundwater is

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essential to the wellbeing of any State, especially for States similar to Oklahoma that have regions that are highly reliant on groundwater for public water supply, as well as agricultural, commercial, and industrial purposes. In addition, in Oklahoma and many other western States, groundwater is owned by the owner of the surface estate. Surface estate owners in Oklahoma are able to drill water wells and use untreated groundwater for domestic purposes without obtaining a water use permit from the State. As a result, the State has yet an additional interest in protecting groundwater from potential contamination. The question is simply whether the CWA's permitting requirements apply directly to groundwater or to releases of pollutants to groundwater that ultimately reach a surface water subject to CWA jurisdiction.

II. CWA Not Intended to Cover Groundwater

The jurisdictional reach of the CWA is established through the use of the term "discharge of any pollutant(s)." Congress purposefully chose to limit this term to mean "(A) any addition of any pollutant to *navigable waters* from any *point source*, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12) (emphasis added). In other words, the CWA grants limited authority to Federal agencies to regulate the discharge of pollutants that are both into "navigable waters" and from a "point source." *See* 33 U.S.C. § 1362(7). Obviously, groundwater is not "navigable." In fact, the CWA's definition of navigable waters (*i.e.*, "waters of the United States, including the territorial seas") purposefully does not include groundwater. *See* 33 U.S.C. § 1362(7). The relevant Federal regulations also exclude groundwater from the definition of navigable waters. *See* 40 C.F.R. §§ 122.2, 230.3(o), *and* 33 C.F.R. § 328.3(a); *see also* 79 Fed. Reg. 22188, 22218 (Apr. 21, 2014) ("The agencies have never interpreted 'waters of the United States' to include groundwater").

The addition of pollutants to groundwater is not equivalent to the addition of pollutants to navigable waters. Under the CWA, it is unlawful to discharge any pollutant without an NPDES permit. *See* 33 U.S.C. § 1311(a). Again, the CWA defines the term "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any *point source*." 33 U.S.C. § 1362(12) (emphasis added). A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). First, as mentioned above, groundwater is not navigable nor a water of the United States. Second, the CWA's permitting requirements only cover discharges of pollutants from point sources and groundwater does not constitute a discernible, confined and discrete conveyance.[1]

[1] Numerous courts have confirmed that even hydrologically connected groundwater is neither a "point source" nor a "navigable water" under the CWA. *See Kentucky Waterways Alliance, et al. v. Kentucky Utilities*, Civ. Action No. 5: 17-292-DCR, 2017 WL 6628917, (E.D. Ky. Dec. 28, 2017); *see also Village of Oconomowoc Lake*, 24 F.3d at 965 (CWA does not assert "authority over groundwaters, just because these may be hydrologically connected with surface waters"); *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) ("a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater" was outside the scope of the Oil Pollution Act in order "to respect Congress's decision to leave the regulation of groundwater to the States"); *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) ("Congress did not intend for the CWA to extend federal regulatory authority over

See 33 U.S.C. §§ 1362(12), (14). In other words, pollution emanating from a "point source" to "navigable waters" is regulated under the CWA and requires an NPDES permit, while pollution from nonpoint sources (such as groundwater) is not regulated under the CWA and does not require an NPDES permit. *See* 33 U.S.C. § 1362(12); *see also Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion). Adopting a theory that hydrologically connected groundwater is regulated under the CWA is inconsistent with the unambiguous language of the statute. *See Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). As discussed below, nonpoint sources of pollution are regulated through other statutory authority.

A. Clear Statement of Congressional Intent Required

Even if Federal regulation of groundwater could pass Constitutional muster, usurping a State's ability to determine how such a critical local resource should be managed is only allowed through explicit statutory language, and only after the States have had the opportunity to be represented through the legislative process. According to the Supreme Court, a clear statement of congressional intent to interfere with the States' "traditional and primary power of land and water use" is necessary for an expansion of Federal jurisdiction. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, *citing Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (historic police powers of the States are not to be superseded by a Federal Act absent the clear and manifest purpose of Congress). No such express or explicit language usurping the States' traditional and primary role of managing groundwater is contained in the text of the CWA. *See* 33 U.S.C. §§ 1311, 1362. Despite the CWA's clear applicability to surface water, the courts do not agree on the extent of applicability to hydrologically connected wetlands. *See Rapanos v. United States*, 547 U.S. 715 (2006). Applying the CWA's permitting requirements to groundwater (even if hydrologically connected) is even further removed from the unambiguous language used in the Act. The fact that there are numerous Federal District Courts and Circuit Courts of Appeals that disagree on the issue, as referenced in the Request for Comment (83 Fed. Reg. 7127-28), further demonstrates that Congress did not explicitly provide for the CWA's permitting requirements to replace the traditional and primary authority of the States to manage and regulate local land and water.

B. Congress Repeatedly Rejected Inclusion of Groundwater

Not only did Congress not explicitly provide for such an expansion of Federal agency jurisdiction, but it specifically rejected efforts to include jurisdiction over groundwater in the CWA during the legislative process. The CWA's legislative history confirms that Congress

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groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters"); *see generally Catskill Mountains v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) (point source "refers only to the proximate source from which the pollutant is directly introduced to the destination water body"); Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165, 175-76 (D.C. Cir. 1982) (affirming reasonableness of EPA interpretation that "the point source must introduce the pollutant into navigable water"); *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017) ("It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil," and "[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river," "passive migration of pollutants" through groundwater is not discharge from a point source.)

purposefully considered and repeatedly rejected amendments that would made groundwater subject to the CWA's permitting requirements. *See* S. Rep. No. 92-414, at 373 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739 ("Several bills pending before the [Senate] Committee provided authority to establish federally approved standards for groundwater . . . . Because the jurisdiction regarding groundwater is so complex and varies from State to State, the Committee did not adopt this recommendation."); *see also Village of Oconomowoc Lake*, 24 F.3d at 965; *and Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir.1977). Despite recognizing "the essential link between ground and surface waters" and being aware that pollutants in groundwater may enter navigable waters, the Senate Committee on Public Works expressly rejected amendments that would have included groundwater within the CWA's jurisdiction. *See Exxon Corp. v. Train*, 554 F.2d at 1325, 27-29 (*quoting* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971)). Instead, Congress recognized that groundwater regulation should be left to the States and based on authority other than the CWA. *See Exxon Corp. v. Train*, 554 F.2d at 1325-29; *see also Kelley ex rel. Mich. v. United States,* 618 F. Supp. 1103, 1107 (W.D. Mich. 1985).

C. Omission of Relevant Term Presumed Intentional

Even if Congress was not required to provide a clear statement of intent and had not repeatedly rejected the notion, the Supreme Court has repeatedly held that when Congress omits a relevant term from a statutory provision, the omission is presumed to have been done intentionally. *See Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004); *see also United States v. Vonn*, 535 U.S. 55, 64 (2002). Similarly, the Court has held that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). By purposefully omitting groundwater from the definition of a point source in 33 U.S.C. § 1362(12), Congress determined that the regulation of groundwater pollution should be left to the States. *See Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977).

D. Impracticality of Using CWA to Regulate Groundwater

Drafting enforceable limits for NPDES permits is extremely complex and requires a high degree of precision. Achieving that high degree of precision is difficult enough when it comes to surface water and would be practically impossible when it comes to regulating releases into groundwater that may be hydrologically connected to a navigable water. "Whether and how pollutants seep through groundwaters into navigable waters from a point source is exceedingly difficult to observe and measure, much less predict, due to numerous factors including difficulty of access, temperature changes, chemical interactions, movement of the earth, tides, transpiration, evaporation, groundwater withdrawals, vegetative conditions, atmospheric conditions, and surrounding surface and below-ground land uses." *See* T.C. Winter, et al, Ground Water and Surface Water: A Single Resource, U.S. Geological Survey Circular 1139 (1998). The existence of a hydrologic connection between groundwater and navigable waters would be a site-specific and fact-specific determination, and would be highly dependent on many possible site-specific factors, such as: the factors listed above; the distance between the groundwater and the navigable waters; and many other geologic factors. Not only would establishing precise, enforceable, and defendable discharge limits be impracticable, but so would

establishing the corresponding monitoring and compliance requirements. There is also a whole host of policy and regulatory determinations that would need to be considered and possibly changed (for example, mixing zone and antidegradation policies).

In addition to the technical impracticality of the notion, the sheer numbers of potential new permit applications would create an enormous and unnecessary burden on the States (which would ultimately bear the burden of implementing such an interpretation). Regulated entities have expressed concerned with the increased legal exposure related to ---additional civil penalties of up to $52,414 per day, injunctive relief, citizen-suit enforcement, and potential criminal liability. The dramatic increase in the number of entities regulated under such an expansion of CWA jurisdiction would greatly increase the administrative costs related to implementation and the costs of compliance to regulated entities. The States and regulated entities would still need to expend the costs necessary to implement and comply with the existing environmental programs that are better tailored to address the environmental concerns which would purportedly be addressed through an expansion of CWA jurisdiction.

III. Cooperative Federalism

The Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251 *et seq.*, has long recognized the importance of a partnership between local, State, and Federal governments going back to its inception in 1948 and continuing through various amendments that have brought us to the version of the CWA that exists today. The CWA's cooperative federalism framework was solidified in the 1972 reauthorization process, when Congress gave explicit authority for the States to act as co-regulators when implementing the CWA. As discussed in detail below, the CWA directly prohibits discharges from "point sources" into "waters of the United States," but reserves regulation of nonpoint source discharges to the States. This recognition and delineation of CWA authority between the States and the Federal government is a textbook example of cooperative federalism.

Congress recognized the States' traditional and primary authority over local lands and water resources (*see* 33 U.S.C. §§ 1251(b), (g); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2nd Cir. 2017)("[The CWA] largely preserves states' traditional authority over water allocation and use.")), and limited the Federal government's enforcement authority to "waters of the United States." *See* 33 U.S.C. § 1362(7), (12). The Supreme Court's plurality opinion in *Rapanos v. United States* specifically recognized "the CWA's stated 'policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use of . . . water resources." *Rapanos v. United States*, 547 U.S. 715, 737, 126 S.Ct. 2208, 2223 (2006); *see* 33 U.S.C. §1251(b) ("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 . . . ."), *and* 33 U.S.C. §1251(g) ("Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."). This interpretation is consistent with the U.S. EPA's recent recognition that the CWA "commands the [EPA] to pursue two policy goals simultaneously: (a) To restore and maintain the nation's

waters; and (b) *to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution*." 82 Fed. Reg. at 34900 (emphasis added).

The recognition of the principles of cooperative federalism embodied within the CWA is of particular importance when it comes to groundwater. No Federal agency or entity has more at stake than the States and their citizens when it comes to protecting such a precious local resource. As compared to any Federal agency, States are closer to potential problems that may arise, generally have a more thorough and intimate understanding of the area, and are more responsive to the people. Simply stated, the States have more of a personal interest and are in the best position to protect and manage their own groundwater.

Due to the ubiquitous nature of groundwater, interpreting CWA jurisdiction to include groundwater would result in a limitless expansion of Federal government jurisdiction, which would include immense stretches of intrastate land, by significantly expanding the universe of sources that would be subject to the CWA's permitting requirements. Applying the CWA's permitting requirements to groundwater would be contradictory to both the unambiguous language in the statute and the principles of cooperative federalism principles incorporated within its structure.

Moreover, the Supreme Court has recognized that regulating and managing local lands and waters "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982). The Court has also recognized that the States' traditional and primary power to manage local land and water use requires a precise reading of the CWA. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001). As the Supreme Court recognized, expanding the scope of the CWA beyond the specific language of the statute would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power" and raise "significant constitutional questions." *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001). This type of "an unprecedented intrusion into traditional state authority" requires a "clear and manifest statement from Congress." *See Rapanos*, 547 U.S. at 738. Congress did not provide a clear and manifest statement that the traditional and primary authority of the States to regulate groundwater should be transferred to the Federal government. Such an interpretation would effectively obliterate the cooperative federalism woven into the structure of the CWA.

IV. Groundwater Already Properly Protected

It is unnecessary to usurp the States' traditional and primary authority over groundwater in order to protect the quality of resource. The suggestion that there is some "loophole" in environmental regulation that allows for unregulated pollution of groundwater (or surface water through groundwater) is incorrect. As a general matter, the States have broad authority to protect public health, safety, and welfare. *See, generally, Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 371 (1975). There are also numerous existing Federal and State laws that provide sufficient authority and are better tailored to protect the quality of groundwater, and make an extension of CWA jurisdiction to hydrologically connected groundwater unnecessary. *See Catskill Mountains v. Ch. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529 (2d Cir. 2017).

Examples of some of the existing Federal and State statutes that already protect the quality of groundwater include:

A. Public Nuisance Statutes/ Definitions of "Waters of the State"

The CWA recognizes the authority of the States to establish requirements necessary to protect water quality. *See* 33 U.S.C. § 1370. Oklahoma statute provides "[i]t shall be *unlawful* for any person to cause pollution of any *waters of the state* or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or *waters of the state*. Any such action is hereby declared to be a public nuisance." 27A O.S. § 2-6-105(a) (emphasis added). Oklahoma statute defines "waters of the state" to "mean[] all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and *all other bodies or accumulations of water, surface and underground*, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof. . . ." 27A O.S. § 1-1-201(20) (emphasis added). This statutory authority is routinely used by the ODEQ to protect existing groundwater quality and to require previously contaminated groundwater to be remediated.

All 50 States have enacted statutes and/or promulgated regulations that address the release of pollutants into groundwater. Most other States have statutes that provide similar authority to that of Oklahoma to protect groundwater within their boundaries, for example: South Carolina (S.C. Code §§ 48-1-90(A)(1), 48-1-240); West Virginia (W. Va. Code Ann. § 22-11-8(b)); Maryland (Md. Code Ann., Envir. §§ 9-101(b), 9-322); Virginia (Va. Code § 62.1-44.5(A)(1), (3), 62.1-10(a)); North Carolina (N.C. Gen. Stat. Ann. §§ 143-215.1(a)(6), 143-212(6)); Nevada (NRS §§ 445A.415, 445A.465); Tennessee (T.C. §§ 69-3-114(a), 69-3-103); Kentucky (KRS §§ 224.70-110, 224.1-010); Michigan (M.C.L. §§ 324.3109(1), 324.3101(aa)); Ohio (R.C. §§ 6111.04(A)(1), 6111.01).

B. Resource Conservation and Recovery Act ("RCRA")

RCRA establishes a complex set of environmental requirements designed to prevent and address releases and/or disposal of solid and hazardous waste, and require corrective action when such releases and/or disposal has occurred. *See* 42 U.S.C. §§ 6901 *et seq*. Through RCRA, Congress "expressly intended that . . . the Act [would] close loopholes in environmental protection." *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984).

- "[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal *to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. . . .*" 42 U.S.C. § 6973(a) (emphasis added).

- "Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an *order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment* or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction." 42 U.S.C. § 6928(h) (emphasis added).

- "If the Administrator determines, upon receipt of any information, that— (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or (2) the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, he may *issue an order requiring the owner or operator of such facility or site to conduct such monitoring, testing, analysis, and reporting with respect to such facility or site as the Administrator deems reasonable to ascertain the nature and extent of such hazard.*" 42 U.S.C. § 6934(a) (emphasis added).

- The State-Administered RCRA program for Oklahoma was initially approved by the U.S. EPA almost 30 years ago. *See* 40 C.F.R. § 272.1851. Moreover, the Oklahoma Hazardous Waste Management Act, 27A O.S. §§ 2-7-101 *et seq.*, provides ODEQ with the power and duty to: "approve or disapprove methods of disposal of hazardous waste" (§ 2-7-105(10)); "develop rules with respect to any surface impoundment or landfill . . . which the Department determines hazardous waste may migrate into groundwater . . . as may be necessary to protect human health and the environment" (§ 2-7-105(16): "prohibit or restrict the use of any specific disposal methods or practices for specific hazardous waste material, substances or classes, as may be necessary to protect human health and the environment" (§ 2-7-105(17)); "[r]equire groundwater monitoring for any landfill, surface impoundment, land treatment site or pile" (§ 2-7-105(25)). The Oklahoma Hazardous Waste Management Act also provides that "[a] hazardous waste facility for on-site treatment, recycling or storage shall not be sited in or over a principal groundwater resource or recharge area as determined in writing by the Oklahoma Geological Survey, except pursuant to a plan approved by the Department. The plan shall contain such design criteria and groundwater monitoring provisions as deemed necessary by the Department to protect the quality of said principal groundwater resource or recharge area." 27A O.S. § 2-7-111(B).

C. Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")

CERCLA provides authority to order removal of pollutants or other remedial action whenever any "hazardous substance is *released* or there is a substantial threat of such a release into the *environment.*" *See* 42 U.S.C. § 9604(a)(1) (emphases added). CERCLA broadly defines the "release of hazardous substances" to mean "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment

. . . ." 42 U.S.C. § 9601(22). CERCLA also broadly defines the "environment" to include "navigable waters" and "any other surface water, *ground water*, drinking water supply, land surface, or *subsurface strata*, or ambient air within the United States." 42 U.S.C. § 9601(8) (emphases added)." Unlike the CWA, CERCLA specifically includes groundwater. The inclusion of groundwater in this definition is further evidence that the CWA would have specifically included groundwater if Congress had intended for it to be subject to the CWA's permitting requirements.

D. Safe Drinking Water Act ("SDWA")/Underground Injection Control ("UIC") Program/State Wellhead Protection Programs

SDWA protects groundwater quality through the UIC and State Wellhead Protection Programs.

- UIC Programs under SDWA protect groundwater by regulating underground injection of waste. "Regulations under subsection (a) for State underground injection programs shall contain *minimum requirements for effective programs to prevent underground injection which endangers drinking water sources* within the meaning of subsection (d)(2). Such regulations shall require that a State program, in order to be approved under section 300h–1 of this title— (A) shall *prohibit*, effective on the date on which the applicable underground injection control program takes effect, *any underground injection in such State which is not authorized by a permit* issued by the State (except that the regulations may permit a State to authorize underground injection by rule); (B) shall require (i) in the case of a program which provides for authorization of underground injection by permit, that the applicant for the permit to inject *must satisfy the State that the underground injection will not endanger drinking water sources*, and (ii) in the case of a program which provides for such an authorization by rule, that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources; (C) *shall include inspection, monitoring, recordkeeping, and reporting requirements* . . . ." 42 U.S.C. §§ 300h(b) (emphasis added).

- State Wellhead Protection Programs under SDWA protect groundwater through additional regulation of potential sources of pollution located within public water supply recharge areas. "[E]ach State shall . . . adopt and submit to the Administrator a State program to protect wellhead areas within their jurisdiction from contaminants which may have *any adverse effect on the health of persons*. Each State program under this section shall, at a minimum . . . contain[], as appropriate, technical assistance, financial assistance, *implementation of control measures*, education, training, and demonstration projects to protect the water supply within wellhead protection areas from such contaminants . . . ." 42 U.S.C. § 300h-7(a)(4) (emphasis added).

In summary, the purpose of the ODEQ is to protect human health and the environment, and the agency is dedicated to ensuring that there is a strong regulatory framework to protect water resources in Oklahoma; however, this framework must be grounded in law. In this instance, the rule of law and the environment are best protected by respecting the unambiguous language contained in the CWA, the intent of Congress, and the principles of cooperative federalism that are embodied within the CWA. Consequently, EPA should revise the agency's previous

statements to clarify that the release of pollutants into or otherwise reaching groundwater (whether or not such groundwater is hydrologically connected to a jurisdictional surface water) is not subject to CWA jurisdiction. Furthermore, the clarification should recognize that such releases are addressed under State law, and through the implementation of other environmental statutes such as RCRA, CERLA, and SDWA. At a minimum, this clarification should be made through formal policy or guidance documents, and preferably through the promulgation of an administrative regulation. We appreciate your consideration of these comments and look forward to working with the U.S. EPA in our efforts to protect the State of Oklahoma's water resources.

Sincerely,

for Scott A. Thompson, Executive Director
Oklahoma Department of Environmental Quality