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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: Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water – Request for Comment**

The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act (“CWA”).

As the primary entities responsible for carrying out CWA programs, states are uniquely positioned to provide input on the coverage of “discharges of pollutants” via direct hydrologic connection to surface water. Discharges to groundwater are often site-specific and complex, and defining a “direct” hydrologic connection can be challenging. Due to this complexity, as well as varying state legal frameworks, there is great diversity of state approaches on the appropriate manner of regulating and managing discharges of pollutants to groundwater. However, states are consistent in their desire to retain their current flexibilities to regulate and manage these discharges using their discretion to determine which laws and regulatory schemes apply, including the federal Safe Drinking Water Act (“SDWA”) Underground Injection Control (“UIC”) Program, the federal Resource Conservation and Recovery Act (“RCRA”), state laws, as well as the CWA.

### **Cooperative Federalism – State Input**

ACWA appreciates EPA seeking comment from stakeholders on this important issue. State regulators have significant experience dealing with discharges of pollutants to groundwater that eventually lead to surface water via direct hydrologic connection as well as technical expertise and particular knowledge of their own waters and regulatory structures that can help inform EPA’s deliberations. Because of states’ role under the CWA as co-regulators, ACWA encourages EPA to maintain regular contact, through forums, calls, and other communication, with ACWA

and its members throughout the life of this effort. In the spirit of cooperative federalism, ACWA looks forward to working with EPA on this important issue.

### **State Flexibility**

To improve understanding of states' approaches to this issue, ACWA released a survey to states asking about their authority to regulate and manage discharges to groundwater.

ACWA received thirty-three (33) responses to the survey (See the attached *Discharges to Groundwater Survey Summary*). The results show that there is significant diversity in the approaches states employ to regulate and manage discharges to groundwater, including those discharges that may ultimately lead to surface water via direct hydrologic connection. It is also clear that states are currently equipped with legal frameworks to regulate and manage these discharges. For example:

- Twenty-nine (29) states include groundwater under their definitions of “Waters of the State”, allowing for the regulation of direct discharges of pollutants to groundwater through state programs;
- Twenty-seven (27) states utilize the SDWA-UIC Program to regulate certain discharges of pollutants to groundwater;
- Eleven (11) states employ RCRA to address groundwater pollution; and
- Six (6) states use federal NPDES permitting authority to regulate discharges of pollutants into groundwater that may lead to surface waters via direct hydrologic connection.

Additionally, many states use variations and combinations of these regulatory controls as well as state laws.

The CWA reads, “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, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources[.]” 33 U.S.C. 1251(b). To continue to carry out this goal, it is critical that states retain maximum flexibility to regulate and manage discharges to groundwater, including those discharges that may ultimately lead to surface water via direct hydrologic connection, in ways that work for individual states, including using state laws, the SDWA-UIC Program, RCRA, *and* CWA permitting (which multiple states have determined is consistent with the text, structure, and purposes of the CWA). To retain this flexibility, states prefer that EPA neither demand nor prohibit the use of NPDES for discharges to groundwater that may lead to surface water via direct hydrologic connection.

States are in the best position to manage this issue for states are particularly situated to assess local environmental conditions, understand their own legal frameworks, have the expertise, and recognize how to appropriately implement the various federal and state laws that may cover a discharge of pollutants to groundwater that may impact surface water. ACWA supports the empowerment of states to retain their current flexibility to utilize their own laws, federal laws, and CWA protections at their own discretion to manage these discharges. Therefore, EPA should refrain from any action that would decrease this flexibility.

## **Uncertainty Due to Court Decisions**

States recognize that there are multiple federal courts currently addressing CWA citizen suits on this issue. The *Hawai'i Wildlife Fund v. County of Maui* decision in the Ninth Circuit established a specific test to determine when the CWA applies to discharges to groundwater. The Ninth Circuit explained that for a discharge of pollutants to groundwater to violate the CWA, (1) there must be a discharge of pollutants from a point source, (2) the pollutants must be “fairly traceable” from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into a navigable water, and (3) the pollutant levels reaching a navigable water are more than *de minimis*. In their decision in *Upstate Forever, et al., v. Kinder Morgan Energy Partners*, the Fourth Circuit ruled similarly to the Ninth Circuit in *Maui* stating, “We do not hold that the CWA covers discharges to groundwater itself. Instead, we hold only that an alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of groundwater with a direct hydrological connection to such navigable waters, falls within the scope of the CWA”. There are also cases pending in the Second (*26 Crown Associates v. Greater New Haven Regional Water Pollution Control Authority*), Fourth (*Sierra Club v. Dominion Energy*), and Sixth (*Kentucky Waterways Alliance v. Kentucky Utilities* and *Tennessee Clean Water Network v. TVA*) Circuits on the issue. It is unclear how these courts will rule. Therefore, EPA should withhold acting on this issue until these cases have concluded, as premature action could lead to confusion and additional legal challenges rather than providing clarity.

## **Agency Action**

This request for comment is an excellent opportunity for EPA to work with states in the spirit of cooperative federalism. However, there is the potential that EPA action could lead to a decrease in state flexibility to manage these discharges, confusion, and additional legal challenges. Therefore, EPA should refrain from acting at this time and continue to empower states to make decisions on regulation and management of discharges to groundwater, including those discharges that may ultimately lead to surface water via direct hydrologic connection, at their own discretion and continue to assert that “discharges of pollutants” via direct hydrologic connection to surface water are a fact-specific determination.

Further, because of states’ role under the CWA as co-regulators, the fact that states are in the best position to assess local environmental conditions, understand their own legal frameworks, and implement the various federal and state laws that may cover a discharge of pollutants to groundwater, we ask EPA to coordinate with state programs as it reviews public comments on this issue and determines what future actions to take.

## **Conclusion**

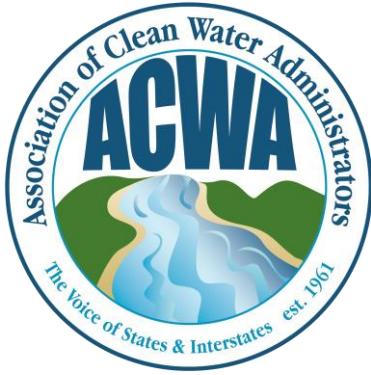
While ACWA’s process to develop comments is comprehensive and intended to capture the diverse perspectives of the states that implement these programs, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. Also, for more information on state approaches to regulating discharges to groundwater please see the attached *Discharges to Groundwater Survey Summary*. If you would like to discuss the data

behind this summary or have any other questions regarding ACWA's comments, please contact ACWA Executive Director Julia Anastasio at [janastasio@acwa-us.org](mailto:janastasio@acwa-us.org) or (202) 756-0600.

Sincerely,

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

Jennifer Wigal  
Water Quality Program Manager  
Oregon Department of Environmental Quality  
ACWA President



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## Discharges to Groundwater Survey Summary April 2018

On February 20, 2018, EPA issued a Request for Comment titled, *Clean Water Act Coverage of “Discharges of Pollutants” via Direct Hydrologic Connection to Surface Water*. In the Request for Comment, EPA sought comment on following questions:

- (1) Whether subjecting 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 to CWA permitting is consistent with the text, structure, and purposes of the CWA,
- (2) Whether those discharges would be better addressed through other federal authorities as opposed to the NPDES permit program, and
- (3) Whether some or all such discharges are addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs.

To assist in answering these questions, ACWA released a survey to states asking for responses to six questions:

- (1) Does your state regulate direct discharges of pollutants to groundwater using federal authority under the NPDES program?
- (2) Does your state rely on any other federal authority to regulate direct discharges of pollutants to groundwater (specifically, Underground Injection Control under the Safe Drinking Water Act (“UIC-SDWA”), Resource Conservation and Recovery Act (“RCRA”), and/or other federal authority)?
- (3) Does your state regulate direct discharges of pollutants to groundwater using state authority?
- (4) Are there any direct discharges of pollutants to groundwater in your state that are unregulated?
- (5) Is groundwater included in your state's definition of “Waters of the State”, and
- (6) Please provide any other pertinent information on your state's regulation of direct discharges of pollutants to groundwater.

ACWA received thirty-three (33) responses to the survey. The results show that there is significant diversity in the approaches states employ to regulate and manage discharges of pollutants to groundwater, including discharges that may lead to surface waters via direct hydrologic connection. For example, out of the thirty-three (33) responses received,

- Twenty-seven (27) states utilize the SDWA-UIC Program,
- Eleven (11) states employ RCRA,
- Six (6) states, use federal NPDES permitting authority,
- Twenty-eight (28) states have state laws in place, and
- Twenty-nine (29) states include groundwater under their definitions of “Waters of the State”.

The vast majority of states that responded use a combination of federal (SDWA-UIC, RCRA, CWA, etc.) and state law to regulate and manage discharges of pollutants to groundwater, including those discharges that may lead to surface waters.

Twenty (20) states indicated that there are no unregulated direct discharges of pollutants to groundwater in their state. The states that indicated that there are unregulated direct discharges to groundwater in their state explained that discharges like nonpoint source runoff, stormwater percolation, drilling fluids, and additives used in water supply development are unregulated.

ACWA purposely kept this survey simple. Therefore, there may be nuance to particular state programs and groundwater management efforts not reflected in the survey results or in this summary.

### **Contact**

For more information on this survey, contact ACWA's Mark Patrick McGuire at [mpmcguire@acwa-us.org](mailto:mpmcguire@acwa-us.org).