



June 7, 2019

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-2019-0166

RE: Interpretive Statement on Application of Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater

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 responsive to EPA’s *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater* (the “Statement”). However, states are disappointed with EPA’s insufficient engagement and outreach prior to the release of Statement. First, the Statement directly affects state permitting programs. Second, 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 and could have helped inform EPA’s deliberations. States are disappointed that EPA’s only engagement on the drafting of the Statement was through the EPA public comment process ending in May 2018. As EPA moves forward with the effort to clarify the application of the NPDES program to releases of pollutants to groundwater, ACWA requests that the Agency engage in meaningful collaboration with states.

EPA should also provide clarity as to how the Statement will be used by the Agency moving forward. Further, EPA should modify the Statement or offer detailed guidance for states in the Fourth and Ninth Circuits and for states currently using NPDES authority for discharges to groundwater as there is currently confusion as to how the Statement affects these states.

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Cooperative Federalism – State Input

Section 101 of the CWA expresses Congress' 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, and to consult with the Administrator in the exercise of his authority under this chapter.

This declaration demonstrates Congress' explicit recognition that states have the technical expertise and specific knowledge to manage their resources. Section 101 also recognizes that state management is preferable to a federally mandated one-size-fits-all approach to water management and protection that does not accommodate the practical realities of geographic and hydrologic diversity among states.

ACWA appreciates EPA seeking comment from stakeholders on this important issue. However, because of states' congressionally designated role under the CWA as co-regulators, ACWA again insists that EPA maintain regular contact, through forums, calls, and other communication, with ACWA and its members throughout the life of the Agency's effort to clarify the application of the NPDES program to releases of pollutants to groundwater. In the spirit of cooperative federalism, ACWA looks forward to working with EPA on this important issue.

State Flexibility

The Statement provides EPA's position regarding discharges of pollutants to groundwater for states outside of the Fourth and Ninth Circuits (pending the Supreme Court's decisions in *County of Maui v. Hawaii Wildlife Fund*). However, in doing so the Statement calls into question some of the flexibilities states previously held to manage their waters according to Section 101 of the Clean Water Act.

To improve understanding of states' approaches to this issue, prior to drafting its May 2018 comment letter to EPA on 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. 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.

States request that EPA clarify that states are free to continue to use variations and combinations of the available groundwater controls to protect their water resources.

Litigation Risk/Need for Clarity

As the Statement reflects a new EPA position, some state permits and approaches for dealing with discharges to groundwater are now at risk of legal challenge. While ACWA understands the Statement does not itself create a legal mandate and was drafted as an attempt to express EPA's position on the issue, the document could also be used by litigants in any number of the states that have used NPDES to manage these types of discharges. Therefore, EPA should provide clarity as to how the Statement will be used by the Agency moving forward and offer detailed guidance for the type of states detailed below.

Fourth and Ninth Circuit States

The Statement provides only limited guidance for states located in the Fourth and Ninth Circuits. EPA should provide clarity and detailed guidance for states located in those circuits on how they should manage permitting programs and respond to lawsuits regarding groundwater and hydrologic connection in light of the Statement and pending the Supreme Court decision in *Maui*.

States with NPDES Permits for Hydrologically Connected Groundwater

Some states (outside of the Fourth and Ninth Circuits) currently issue NPDES permits for discharges of pollutants to groundwater leading to surface water via hydrologic connection. EPA should modify the Statement or provide guidance to underscore that, regardless of EPA's current position on this matter, these NPDES permits continue to be legally valid and enforceable, especially where case law allows for such permits. *See, e.g. Sierra Club v. Colo. Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993) (holding that "the Clean Water Act's preclusion of the discharge of any pollutant into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater").

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. If you have any questions regarding ACWA's comments, please contact ACWA Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600.

Sincerely,

A handwritten signature in cursive script that reads "Allison Woodall".

Allison Woodall
ACWA President
Special Assistant
Texas Commission on Environmental Quality