



**American Water Works
Association**

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Government Affairs Office
1300 Eye Street NW
Suite 701W
Washington, DC 20005-3314
T 202.628.8303
F 202.628.2846

June 7, 2019

Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: Comments on “Interpretive statement on application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Ground Water” ([EPA-HQ-OW-2019-0166](#)).

Dear Mr. Wilson:

The American Water Works Association (AWWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s notice of availability titled “Interpretive statement on application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Ground Water.” AWWA’s comments expand on our May 21, 2018 comments¹ to the previous Federal Register notice on this issue ([EPA-HQ-OW-2018-0063](#)), and are meant to assist EPA develop a path forward on this matter.

Summary of Comments

AWWA continues to hold the concerns expressed previously.² EPA is not appropriately balancing environmental protection with regulatory certainty. Given the “One Water” nature of all water resources, an important balance must be reached to help protect all water resources. This proposed interpretative statement inappropriately eliminates a potentially beneficial tool that could be used to protect sources of drinking water without consideration for the impacts of this decision. Moreover, this action contravenes the basic science of hydrology and the interaction

¹ May 21, 2018 comments from the American Water Works Association on EPA-HQ-OW-2018-0062.
<https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0280>

² Ibid

between surface waters and groundwater. AWWA recommends that EPA not finalize this interpretive statement and instead proceed to rulemaking to clarify these issues in a balanced manner informed by science and state regulatory needs. Should EPA proceed with this interpretative statement, it should take a more balanced approach that weighs the benefits of source water protection against the benefits of eased permitting and regulatory certainty.

Retain current practice

EPA should retain the current practice of allowing NPDES authorities (EPA or delegated states and tribes) to regulate discharges from point sources with a direct hydrologic connection to Waters of the United States when it is appropriate and necessary to protect source waters used to create drinking water. EPA should not eliminate this regulatory tool.

EPA could reduce regulatory burden while protecting sources of drinking water, through minor clarifications rather than substantially altering current practice.

Continued need for NPDES permitting with direct hydrologic connections

There is an important role for NPDES permitting under the direct hydrologic connection theory, as has been practiced in some states for decades. Current practice has received considerable support from EPA and a number of states under several administrations, in the federal courts, and across a number of stakeholders. The 2018 *Federal Register* notice included a discussion of permitting when there's a direct hydrologic connection back to at least 1991. In recent Congressional testimony, at least 26 instances of precedent in relevant courts supporting the direct hydrologic connection methodology have been identified.³ Eliminating this permitting authority could allow added pollution of surface waters from which drinking water systems draw the majority of the nation's potable water supply.⁴ Under this proposed interpretive statement, some discharges that would otherwise be regulated under NPDES could avoid permitting requirements by discharging instead into an adjacent groundwater system. In one pivotal case, the Northern District of California said:

³ Southern Environmental Law Center testimony on April 18, 2018 to the Senate Committee on Environment and Public Works. <https://www.epw.senate.gov/public/index.cfm/2018/4/the-appropriate-role-of-states-and-the-federal-government-in-protecting-groundwater>

⁴ 2006, EPA, Community Water System Survey

“[I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.”⁵

The draft interpretive statement would create an inappropriate means of circumventing the NPDES program. Although existing groundwater protection standards (e.g., Underground Injection Control, state regulations) may generally be adequate for the protection of groundwater aquifers used as drinking water sources, they are not generally designed to prevent impacts to surface waters. The 2018 *Federal Register* notice specifically noted the need to address this concern, however, the current interpretative statement does not provide an adequate solution. Instead, the interpretative statement describes groundwater regulation as a state matter without addressing how inappropriate circumvention of federal laws will be prevented. Current policy and practice should be maintained so as to avoid creation of a regulatory loophole.

The following are examples of concerns expressed by state regulators in the 2018 comments where the absence of direct hydrologic connection theory would cause regulatory gaps under state and federal law. The proposed interpretive statement does not address these concerns:

- The Colorado Department of Public Health and Environment noted that they have permitted discharges to groundwater that reach surface waters for 25 years. Removal of this as an option would, in their words, remove “the best regulatory mechanism to address these types of discharges.”⁶
- The Ground Water Protection Council, which represents state groundwater protection programs, noted that “states employ various methods to regulate discharges of pollutants to groundwater” which include “the federal NPDES permitting authority to regulate discharges of pollutants into groundwater” The comments further reflect the cooperative federalism approach of letting states decide if they wish to or

⁵ *N. Cal. River Watch v. Mercer Fraser Co.*, No. C–04–4620 SC, 2005 WL 2122052, at *2 (N.D.Cal. Sept. 1, 2005)

⁶ May 21, 2018 comments from the Colorado Department of Public Health & Environment.

<https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0509>

not to use this permitting authority, rather than EPA making either a mandate or a prohibition.⁷

Appropriate clarifications for addressing water system concerns

The Safe Drinking Water Act (SDWA) regulates certain injections into groundwater through the Underground Injection Control Program, including certain hazardous wastes (Class I), oil and gas wastewaters (Class II), aquifer storage and recovery (Class V), geologic storage of carbon dioxide (Class VI), and others. To reduce regulatory uncertainty, AWWA recommends that EPA study whether or not it is appropriate to categorically exempt operations under the UIC program from regulation via NPDES permits under the “direct hydrologic connection” theory. We encourage EPA to undertake a thorough analysis and engage in stakeholder consultations prior to making such a determination. EPA should also consider whether other activities regulated under other federal laws could be treated in a similar fashion. EPA should develop a side-by-side comparison of how NPDES, UIC, and other programs (as mentioned in the *Federal Register* notice) currently operate to regulate discharges at the state and federal levels to determine which program is most effective in specific circumstances and provide that information in a subsequent public notice with opportunity for comment.

Clarification on current practice, which should be completed through a rulemaking, should exempt activities from NPDES under this direct hydrologic connection methodology that do not fit the NPDES framework, while retaining those that are within it. Exemptions could include, but not be limited to, leaks from water distribution systems and wastewater collection systems, aquifer storage and recovery and related other water infrastructure activities. These activities are correctly regulated under various portions of the Safe Drinking Water Act, other portions of the Clean Water Act, and state law. Portions of green infrastructure and storm water infiltration are already regulated under MS4 permit provisions within the NPDES program and similarly should not be considered part of the direct hydrologic connection theory.

Elimination of the direct hydrologic connection theory without conducting this scientific and regulatory analysis to assure there are adequate regulatory control is not appropriate.

⁷ May 21, 2018 comments from the Ground Water Protection Council.
<https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0460>

Additionally, it is important to recognize that the direct hydrologic connection theory is not designed for addressing water distribution system and wastewater collection system leaks, or accidental events connected with such systems such as basement backups. Although these events are reduced to the extent possible through infrastructure maintenance and upgrades, the complex, highly distributed nature of water distribution and wastewater collection systems makes them inappropriate for NPDES point source permitting under the direct hydrologic connection methodology.

CWA Actions Should Not be the Vehicle to Rectify the Failure of Other Federal Regulations

The two cases that led to the 2018 *Federal Register* notice initiating the proposed action both stem from implementation failures under other federal programs. Rather than modify regulatory paradigm under the CWA after many years of consistent interpretation, EPA should use this opportunity to identify and correct regulatory program shortcomings that led to the discharges at issue in these two lawsuits as well as in other areas of concern. Through an active stakeholder engagement program, EPA may identify a number of examples in improving RCRA, CERCLA, UIC, and other program regulations and guidance that would more effectively prevent contaminated groundwater from reaching surface water.

EPA's Pathway Forward

Retaining current practice of regulating discharges from point sources with a direct hydrologic connection to Waters of the United States is appropriate and necessary to provide the greatest protections to source waters used to create drinking water. EPA should not finalize the current proposed interpretive memo but should instead proceed to a rulemaking to address the above recommendations. The absence of statutory clarification from Congress indicates that EPA should continue current practice while working on any necessary clarifications.

Recognizing the opportunity to increase regulatory certainty, a series of clarifications can be made to simultaneously protect sources of drinking water while reducing regulatory burden. These clarifications should include:

- A robust list of factors and processes to be used in the fact-specific process necessary for identifying whether or not a direct hydrologic connection to Waters of the U.S. exists. This list would be designed to reduce the overall

burden of determining if a direct hydrologic connection exists and to increase consistency amongst said determinations.

- Appropriate exemptions for activities not intended for regulation under NPDES, such as water distribution systems, wastewater collection systems, and storm water systems already regulated under other federal mechanisms.

We appreciate the opportunity to provide comment on this matter. Please feel free to contact myself or Adam Carpenter at AWWA (202-628-8303, acarpenter@awwa.org) if you have any questions regarding these comments.

Respectfully,

A handwritten signature in black ink that reads "G. Tracy Mehan, III". The signature is written in a cursive style with a large, sweeping flourish at the end.

G. Tracy Mehan, III
Executive Director of Government Affairs
American Water Works Association

CC: David Ross, EPA OW
Jennifer McLain, EPA OGWDW
Andrew Sawyers, EPA OWM

About AWWA:

AWWA is an international, nonprofit, scientific and educational society dedicated to providing total water solutions assuring the effective management of water. Founding 1881, the Association is the largest organization of water supply professionals in the world. Our membership includes nearly 4,200 utilities that supply roughly 80 percent of the nation's drinking water and treat almost half of the nation's wastewater. Our over 50,000 total memberships represent the full spectrum of the water community: public water and wastewater systems, environmental advocates, scientists, academicians, and others who hold a genuine interest in water, our most important resource. AWWA unites the diverse water community to advance public health, safety, the economy, and the environment.