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*Dedicated to protecting our nation's ground water*

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**To:** US Environmental Protection Agency  
Docket ID No. EPA-HQ-OW-2018-0063, at <http://www.regulations.gov>.

**Subject:** 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 Ground Water Protection Council ([www.gwpc.org](http://www.gwpc.org)) appreciates the opportunity to provide comments and feedback to the EPA regarding the Agency review and potential revisions or clarification to its previous statements concerning the applicability of the CWA NPDES permit program to 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. The following comments are intended to broadly address this request, but they do not necessarily reflect all of the concerns of individual states.

The GWPC's membership consists of representatives of state groundwater and underground injection control (UIC) regulatory agencies that mutually work toward the protection of groundwater nationwide. Our focus is specifically on protecting groundwater supplies, conserving groundwater resources for all beneficial uses, and recognizing groundwater as a critical component of the ecosystem. The GWPC is unique among state associations in that its members are the state officials who set and enforce regulations on groundwater protection and underground injection control.

GWPC supports EPA's position that groundwater is not and has never been a jurisdictional water under the definition of waters of the United States, consistent with the section of EPA's regulations which excludes "groundwater, including groundwater drained through subsurface drainage systems" from the definition of waters of the United States.

Many of our member agencies protect groundwater quality and resources utilizing both federal and state authorities that are outside the regulatory jurisdiction of the CWA. States employ various methods to regulate discharges of pollutants to groundwater, including discharges that may lead to surface waters via direct hydrologic connection. A survey conducted by the Association of Clean Water Administrators documented that some states include groundwater under their definitions of "Waters of the State", which allows for the regulation of direct discharges of pollutants to groundwater by the state programs; some utilize their authority under the SDWA-UIC Program to regulate certain discharges of pollutants to groundwater; other states utilize their authority under RCRA to address releases to groundwater which result in pollution; and some states use the federal NPDES permitting authority to

regulate discharges of pollutants into groundwater that may lead to surface waters via direct hydrologic connection. Many states use a combination of authorities granted to them by their state laws and federal program delegations to protect groundwater quality and the surface waters that are in direct hydrologic connections to groundwater.

EPA should neither demand nor prohibit the use of NPDES for discharges to groundwater that may lead to surface water via direct hydrologic connection. Because of the jurisdictional differences and the variations between states, and the uniquely local and often complicated process to determine direct hydrologic connection due to site-specific hydrogeology, we feel that the regulation of pollutant discharges from point sources that reach surface water via groundwater flow paths should be left to the states. States are in the best position to manage this issue because they have the expertise to assess local environmental conditions to determine on a case-by-case, site-specific basis, whether there is a direct hydrologic connection to jurisdictional surface water.

As EPA reviews its options, we urge the Agency to ensure that nothing they propose will limit or impede any state or tribal effort to protect state or tribal waters. States must retain their current jurisdictional flexibilities to regulate potential and actual discharges to groundwater and to address impacts to water resources. States are in the best position to understand their own legal frameworks 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. Individual states are best able to determine which laws and regulatory schemes apply, whether it be under their state-specific jurisdiction granted by individual state laws or jurisdiction provided through the delegation of federal programs under the CWA NPDES program, other federal programs, state laws, or other authorities.

EPA has requested comment on whether releases are adequately addressed through other federal programs such as the Underground Injection Control Program (UIC) authorized under the Safe Drinking Water Act (SDWA). Our organization's membership consists of representatives of state groundwater and UIC regulatory agencies and the following comments are intended to broadly address this request, but they do not necessarily reflect all of the concerns of individual states.

Because the UIC program is contained within the SDWA, its authority is focused on preventing contamination of underground sources of drinking water. However, the intent of the program is not to assess whether pollutant discharges from point sources under the NPDES program can reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to a jurisdictional surface water. To rely on the UIC program may require a dual review and permitting process to identify those facilities that are conducting injection subject to regulation under the UIC program and to determine whether such injection may also be subject to regulation under the NPDES program. At the very least, there will need to be communication between the NPDES and UIC programs to pass the water quality protection baton without a slip-up or complete drop of the baton.

Some injection wells are "high tech" in their construction and inject below the base of underground sources of drinking water (10,000 milligrams per liter total dissolved solids) while others are relatively simple in construction and include shallow wells and shallow subsurface distribution systems and inject into or above underground sources of drinking water. All injection is authorized either by rule or by individual permit under the state delegated programs. These authorizations require the safe injection of fluids. It is a violation of state delegated and federal direct implementation programs for an owner or operator of an injection well to construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into

underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation pursuant to 40 CFR part 142 or may otherwise adversely affect the health of persons (40 CFR §144.12). The applicant for a permit has the burden of demonstrating that these requirements are met.

Due to the very broad scope of activities potentially covered under this request for comment, GWPC is concerned that some may interpret the specific exclusion of groundwater from the definition of waters of the United States to affect EPA's support of important existing provisions contained within 40 CFR Sections 106, 305, and 319 which can financially support state and tribal programs in their protection of groundwater quality. The ability of states and tribes to request funding for groundwater protection programs from EPA under these sections should not be impeded by EPA decisions regarding permitting under the NPDES program.

The recognition that groundwater is not a jurisdictional water under the CWA should not prevent the continued commitment by EPA to support the integration of groundwater into the planning approaches for municipal stormwater management. GWPC points out that there should be a common purpose for protecting drinking water sources under both the CWA and the SDWA. The practice of infiltration of stormwater runoff to groundwater should also be protective of groundwater quality. If polluted stormwater runoff is redirected to groundwater for either disposal or shallow recharge, GWPC recommends that the two Acts be implemented to prevent rather than redirect contamination from surface water resources to the detriment of groundwater resources.

States recognize that there are multiple federal court cases that are currently addressing CWA citizen suits on the issues that are the subject of this Federal Register request. It is unclear how these various judicial reviews will be resolved. Therefore, GWPC recommends that EPA withhold action on this issue until these cases have concluded, as premature action could lead to confusion and additional legal challenges rather than providing clarity.

If EPA chooses to disregard recommendations that it does not need to issue new regulations or guidance, the agency should allow for maximum flexibility and discretion by the states in addressing point source pollutant discharges to groundwater with a direct hydrologic connection to jurisdictional surface water. We suggest that if EPA wishes to clarify its previous statements on discharges to groundwater (either through guidance, or in the form of rulemaking) that EPA explicitly allow states to make decisions based upon their own discretion. Any decision that is made by EPA should be consistent with information found in *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, January 2015. In this document, EPA recognizes the relative importance of groundwater travel times and natural attenuation of pollutants provided by shallow subsurface groundwater and deeper groundwater flow paths. As such, where a clear connectivity to a navigable water exists (demonstrated through tracer studies or other appropriate methods) the states should be allowed to address these circumstances appropriately as their jurisdiction allows, rather than creating an entirely new requirement for groundwater permitting.

GWPC recommends that EPA use caution in issuing guidance and memoranda to interpret or reinterpret existing rules. It has been the experience of many of our member agencies that when EPA issues guidance documents, that these documents have a long history of being interpreted as *de facto* rules and are used to impose additional oversight or operational demands on state regulatory agencies. New interpretations of regulations had not necessarily been contemplated in an underlying rule or authorizing legislation. In fact, new interpretations commonly overreach the intent of the authorizing

legislation and the delegation agreements between EPA and the states. Guidance is only guidance--and not the only way to achieve the intent of the underlying rule and legislation. The impact of EPA's use of guidance as a process for imposing additional requirements is compounded by the fact that the interpretations contained within the documents have not gone through the vetting that occurs in a rulemaking process (including cost-benefit analysis) and often overreach the intent of the authorizing legislation.

In the spirit of cooperative federalism, the GWPC recommends that prior to issuing any contemplated new guidance and interpretative memoranda, that the concepts be communicated to and proposed text be provided for review by the delegated program state agencies to minimize or eliminate provisions that inhibit rather than support state flexibility and allow for cost-effective and state appropriate regulatory strategies. EPA should make it clear that states are not required to follow guidance and issue a clarification statement that EPA recognizes that guidance is not itself regulation, and should, therefore, not be regarded as binding on the states. In addition, states should be given the flexibility to address this issue in a manner that meets the states' needs and is at least as protective as the EPA regulations.

Part of GWPC's mission is to provide a forum for stakeholder communication and research to improve the role of government in the protection and conservation of groundwater. GWPC feels that collaboration and cooperation with the States is necessary for EPA to effectively address the groundwater conduit and direct hydrological connections issues posed by this request for comments. Communication between the NPDES and UIC programs at both the Federal and State levels is essential to protecting both surface water and groundwater quality. We would be pleased to convene a workgroup of state water quality and UIC agencies and federal and non-governmental experts in hydrogeology to assess the potential for NPDES-UIC regulatory coordination that will allow the goals of both the CWA and SDWA to be met.

The GWPC appreciates the opportunity to provide the agency input on this matter. We look forward to working with EPA to continue to implement the groundwater protection provisions contained within the SDWA, CWA and other EPA programs. If you have questions or would like to follow-up on any of these items, please contact Mike Paque, GWPC Executive Director, at (405)516-4972 or [mpaque@gwpc.org](mailto:mpaque@gwpc.org).

Thank you,



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