



NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

May 21, 2018

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RE: Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water; Docket ID No. EPA-HQ-OW-2018-0063

On behalf of the National Conference of State Legislatures (NCSL), the bipartisan organization representing the legislatures of our nation’s states, territories, and commonwealths, we appreciate the Environmental Protection Agency’s (EPA) formal request for comments concerning the agency’s previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach Waters of the United States (WOTUS) via groundwater, or other subsurface flow, with a direct hydrologic connection to such waters may be subject to CWA regulation.

Amended in 1972, the Clean Water Act (CWA) established the basic structure for regulating pollutant discharges into WOTUS, while ensuring that “primary rights and responsibilities of states, to prevent, reduce and eliminate pollution” were protected. Within the CWA, the National Pollutant Discharge Elimination System (NPDES) was established for those entities that sought discharge pollutants from point sources to “navigable waters,” or WOTUS. States have maintained regulatory authority over such discharges to groundwater, with 46 states operating their own NPDES program.

While NPDES permits have historically been issued to regulate point sources that discharge pollutants into WOTUS, they have also been issued when point source pollution enters groundwater that has an established “hydrologic connection” to a WOTUS. However, courts have recently expanded this additional scope of NPDES to groundwater by proposing their own tests. Specifically, the 9th Circuit’s decision creates a new test stating that discharges into groundwater that end up in WOTUS of “more than [a] de minimis” amount of pollutants which are “fairly traceable from the point source,” requires a NPDES permit as it is viewed as the “functional equivalent of a discharge into a navigable water.” Such legal decisions create a lack of regulatory certainty. Additionally, if fully implemented as federal policy, these new tests could vastly expand CWA authority to discharges to groundwater which, the court claims, serve as a “conduit” between a point source and WOTUS.

If EPA takes additional steps to revise its current, “hydrologic connection” test, NCSL urges the agency to do so in a way that provides regulatory certainty to all involved stakeholders. Any

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revisions must avoid potential conflicts, particularly with states that not only administer their own NPDES programs, but who also have vast authority over groundwater and water supply through laws and regulations related to state land use, waste disposal, water quality and more. Should the agency codify the need for entities to obtain NPDES permits for all discharges into groundwater where a hydrologic connection is present, we strongly urge EPA to remain within the confines of the CWA by adhering to state primacy of groundwater regulation.

We look forward to working with the agency to ensure that if it does choose to amend its requirements surrounding the CWA and requirements of NPDES permits, states maintain their current authorities as delegated by the act. If you have any questions please don't hesitate to contact NCSL Staff Kristen Hildreth, kristen.hildreth@ncsl.org or Ben Husch, ben.husch@ncsl.org.

Sincerely,



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