



NEVADA DIVISION OF  
**ENVIRONMENTAL  
PROTECTION**

**STATE OF NEVADA**  
Department of Conservation & Natural Resources  
Brian Sandoval, Governor  
Bradley Crowell, Director  
Greg Lovato, Administrator

May 21, 2018

Mr. David Ross  
Assistant Administrator  
Office of Water  
US Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

Submitted electronically  
via regulations.gov

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

Dear Assistant Administrator Ross:

The Nevada Division of Environmental Protection (NDEP) appreciates the opportunity to provide comment to the US Environmental Protection Agency (US EPA) via docket No EPA-HQ-OW-2018-0063 regarding “Clean Water Act Coverage of ‘Discharges of Pollutants’ via a Direct Hydrologic connection to Surface Water”. The NDEP is focusing this response to provide input to the US EPA on: 1) review and revision of prior statements; 2) involvement of States in the process of change; and 3) the question on state authority to protect all waters.

- 1. EPA is requesting comment ... regarding whether EPA should review and potentially revise 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 ... that has a direct hydrologic connection to a jurisdictional surface water.*

The NDEP recognizes the difficulty facing US EPA in light of conflicting outcomes of numerous court cases. These cases appear to have highlighted prior statements by the US EPA that conflict with a plain reading of the Clean Water Act (CWA). As US EPA staff continue to review the myriad of instances wherein statements or practices have led to “regulatory creep” beyond the scope of defined terms such as “discharge of a pollutant”, “navigable waters” and “point source” in 33 USC §1362, NDEP would encourage thoughtful revisiting of such conflicts.

It is important for there to be an identification of instances where clear criteria or implementation parameters for the National Pollution Discharge Elimination System (NPDES) are now clouded, and for these instances to be addressed in an open and transparent process involving the States as co-regulators. NDEP recommendations for such process are addressed elsewhere herein.

Groundwater is recognized as within jurisdiction of the States; as analyzed by several State’s Attorneys General and presented to this Docket by letter dated May 21, 2018. NDEP would recommend that any prior statements or practices that have led US EPA down the path of hydrologic connectivity be revisited holistically. Nevada provided previous correspondence related to the scope of the Clean Water Act (CWA) when commenting on the definition of Waters of the United States.<sup>1</sup> Specifically in the November 14, 2014 letter to US EPA and the

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<sup>1</sup> November 14, 2014 DCNR Letter re. Definition of “Waters of the United States” Under the Clean Water Act Proposed Rule: Docket ID No. EPA-HQ-OW-2011-0880; and June 17, 2017 NDEP Letter re. Clean Water Rule: Definition of “Waters of the United States” in response to request for input from US EPA and the Corps of Engineers to Governor Sandoval.

US Army Corps of Engineers, Nevada clearly stated that, “the CWA was not intended to be applied to the management of ground water. While we applaud the Proposed Rule’s exclusion of ground water, the issue becomes blurred when shallow subsurface hydrologic connections are used to establish jurisdiction between surface waters. This opens the door to interpretation and argument for extension of CWA jurisdiction to groundwater resources. Ground water should not be part of the CWA, and EPA should follow a more legally defensible path... where a clear surface connection is required rather than a link through ground water.”

Further reinforcing this position, and more recently, the State of Nevada has joined the Brief of Amici Curiae filed in the Hawaii Wildlife Fund v. County of Maui case, which seeks en banc reconsideration of the Ninth Circuit panel decision. (Case No. 1:12-cv-00198-SOM-BMK) As stated therein, “the panel decision, which threatens to deny state and local governments their traditional primary authority to regulate and manage intrastate land and water uses, is bad for the Amici States, wrong for the environment, and contrary to the principles of our ‘compound republic.’ ... The Amici States have a significant interest in en banc rehearing because of their sovereign status and long history of responsible governance over intrastate lands and waters, including groundwaters.”

- 2. EPA Seeks comment on what format or process EPA should use to revise or clarify its previous statements (e.g., through memoranda, guidance, or in the form of rulemaking) if the Agency pursues further action in response to this request for comment.*

The NDEP would like to first thank US EPA staff in the Office of Water for continuing to increase State involvement in federal rulemaking workgroups and other outreach activities that seek input and communicate federal direction and policy. The role of the US EPA to set national rules for environmental protection is enhanced by involving State co-regulators who most often implement the rules once enacted. Unintended implementation challenges can occur when the state experts who intimately understand the local environment are not consulted. The NDEP encourages the US EPA to continue efforts to involve States early and often in rulemaking workgroups, or other intentional efforts to engage co-regulators in the process of change. The ability to provide substantive input and local expertise is essential.

For these reasons, NDEP requests the rulemaking approach for any action the US EPA takes to revise or clarify previous statements, or when formulating policy regarding applicability and implementation of the NPDES program. NDEP believes such an approach is most transparent and inclusive. With that said, however, we acknowledge that it may be prudent for US EPA to provide a more short-term memorandum or guidance document (in concert with a process for state input) in order to ensure consistent NPDES program implementation across US EPA Regions. The NDEP’s view of the content of such rulemaking, memoranda, or guidance is addressed elsewhere herein.

- 3. EPA seeks comment on whether some or all such releases are addressed adequately through existing state statutory or regulatory programs.*

Pursuant to the Nevada Water Pollution Control Law, the Nevada Division of Environmental Protection issues discharge permits that define the quality of a permitted discharge deemed necessary to protect the waters of the State. (See NRS 445A.300-700) Nevada’s definition of waters of the State is broad and includes:

*“all waters situated wholly or partly within or bordering upon [the] State, including but not limited to: (1) [a]ll streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and (2) [a]ll bodies or accumulations of water, surface and underground, natural or artificial.” (NRS 445A.415)*

Further, NRS 445A.465 specifically prohibits the discharge of a pollutant without a permit. The NDEP has a long history of successfully overseeing this program. Accordingly, the Nevada Water Pollution Control Law would address the types of discharges contemplated while being protective of all waters of the State.

The NDEP values our partnership as a co-regulator with the US EPA in protecting and enhancing the quality of Waters of the United States. Nevada also supports the partnership of western states and, likewise, the positions expressed by the Western Governors’ Association in their May 14, 2018 letter to this Docket.

Should you have any questions or desire further discussion, please do not hesitate to contact me.

Sincerely,

  
Jennifer L. Carr, PE, CPM, CEM  
Deputy Administrator