



*State of New Mexico*  
**ENVIRONMENT DEPARTMENT**  
*Office of the Secretary*



SUSANA MARTINEZ  
Governor

JOHN A. SANCHEZ  
Lieutenant Governor

Harold Runnels Building  
1190 Saint Francis Drive, PO Box 5469  
Santa Fe, NM 87502-5469  
Telephone (505) 827-2855 Fax (505) 827-2836  
www.env.nm.gov

BUTCH TONGATE  
Cabinet Secretary

J. C. BORREGO  
Deputy Secretary

May 21, 2018

Environmental Protection Agency  
Office of Wastewater Management  
Water Permits Division (MC4203M)  
12 Pennsylvania Ave. NW  
Washington, D.C. 20460

Submitted via <http://www.regulations.gov>

**RE: Clean Water Act Coverage of "Discharged of Pollutants" via a Direct Hydrologic Connection to Surface Water – Docket ID No. EPA-HQ-OW-2018-0063**

To Whom It May Concern:

The New Mexico Environment Department (NMED) submits the following in response to the United States Environmental Protection Agency (EPA) request for comment on whether pollutant discharges from point sources that reach jurisdictional surface water via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to Clean Water Act (CWA) regulation. Specifically, the EPA requested comment on whether the EPA's previous statements regarding this issue should be clarified or revised, and if so, how such comment or clarification should be provided.

The NMED does not support the EPA taking any steps to clarify or revise its previous statements on this issue at this time.

The current EPA guidance on this question has allowed states, such as New Mexico, to approach questions regarding these types of discharges with proficiency and flexibility. New Mexico does not have primacy over the National Pollutant Discharge Elimination System program. Accordingly, the NMED coordinates its efforts to protect surface and groundwater resources utilizing both state and federal law. The ability to utilize both these mechanisms provides the NMED with the flexibility to determine how best to address such discharges, using the CWA or state permitting program, or both. Creating a bright-line rule on this question at this point would interfere with a state's ability to determine for itself how to manage such discharges, which can be very technically complex and require the use of multiple regulatory tools to adequately resolve.

Environmental Protection Agency

May 21, 2018

Page 2 of 2

Additionally, several circuit courts have addressed this question recently and in other circuits the question is still pending. While the two circuits having ruled on the issue agree, there is a chance other circuits could split with these decisions or that the Supreme Court could take up the matter. The current litigation path does not support the EPA changing or revising its policy at this point. To do so would only create additional legal challenges to the EPA's action leading to confusion rather than clarity.

The NMED appreciates the opportunity to provide comments on this issue.

Sincerely,



Butch Tongate, Secretary

New Mexico Environment Department

*BT:kmb*

CC: Bruce Yurdin, NMED Water Protection Division (electronic copy)  
Shelly Lemon, NMED Surface Water Quality Bureau (electronic copy)  
Michelle Hunter, NMED Groundwater Quality Bureau (electronic copy)  
Kim Bannerman, NMED OGC (electronic copy)