

June 7, 2019

VIA ELECTRONIC FILING

Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019); Docket No. EPA-HQ-OW-2019-0166; FRL-9991-72-OW

Dear Mr. Wilson:

We, the undersigned organizations (collectively, the Associations), understand the importance of responsibly managing water resources and have been working to protect clean water for decades. Consequently, we submit these comments to the U.S. Environmental Protection Agency (EPA or Agency) in response to its “Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater” (Interpretive Statement).¹

Many of the Associations’ members own or operate facilities throughout the country that are subject to certain requirements under the National Pollutant Discharge Elimination System (NPDES) permitting program under the Clean Water Act (CWA or Act), as well as other state and federal environmental laws governing the releases of pollutants and other substances into the environment.²

The Associations strongly support EPA’s Interpretive Statement and the Agency’s efforts to address the issue thus far. EPA’s previous statements on the issue were inconsistent and contradictory. As a result, EPA solicited input from stakeholders last year as to whether the Agency should revise its previous statements regarding whether releases that reach jurisdictional surface waters via groundwater or some other subsurface migration should be subject to regulation under the CWA.³

¹ Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019); Docket No. EPA-HQ-OW-2019-0166; FRL-9991-72-OW.

² See 33 U.S.C. § 1342.

³ Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126 (Feb. 20, 2018); Docket No. EPA-HQ-OW-2018-0063; FRL-9973-41-OW.

The Associations submitted comments in response to that request, highlighting the Agency's previous statements both asserting and opposing the notion that releases that eventually reach surface waters via groundwater or some subsurface migration are regulated under the NPDES permitting program.⁴ The Associations' comments emphasized that the CWA point source program does not regulate discharges that reach surface waters via groundwater and that nonpoint source programs and other environmental statutes already regulate such discharges.⁵

The Associations applaud EPA for clarifying that the Act does not regulate discharges that reach surface waters via groundwater. Specifically, EPA's Interpretive Statement concludes that "Congress intentionally chose to exclude *all* releases of pollutants to groundwater from the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater."⁶

EPA also affirms that states are the "primary regulators of discharges to groundwater within their jurisdictions," recognizing the principles of cooperative federalism at the heart of the CWA, and notes that the Agency will continue to protect groundwater and hydrologically connected surface waters via other environmental statutes such as the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁷

This issue has worked its way through the federal court system in the time since the comment period closed last year. In February 2019, the Supreme Court granted a petition for writ of certiorari in *County of Maui v. Hawai'i Wildlife Fund*,⁸ and there is an additional petition pending before the Court in *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*.⁹ Given the status of these two cases, EPA is limiting application of the Interpretive Statement to those states that are *not* in the Fourth or Ninth Circuits, and will review the need for further action following a Supreme Court decision.¹⁰

⁴ See Comment Submitted by U.S. Chamber of Commerce, *et al.* (May 21, 2018), available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0258>.

⁵ *Id.*

⁶ 84 Fed. Reg. at 16,811 (emphasis added).

⁷ See U.S. ENVTL. PROT. AGENCY, *EPA Interpretive Statement on the Application of the NPDES Program to Releases of Pollutants from Point Sources to Groundwater (Fact Sheet)* (Apr. 15, 2019), available at https://www.epa.gov/sites/production/files/2019-04/documents/interpretative_statement_factsheet_41519.pdf.

⁸ See Petition for Writ of Certiorari, *Cty. Of Maui v. Hawai'i Wildlife Fund, et al.*, No. 18-260 (granted Feb. 19, 2019).

⁹ Petition for Writ of Certiorari, *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, No. 18-268 (Aug. 28, 2018).

¹⁰ The Interpretive Statement does not apply in: Washington, Oregon, Idaho, Montana, Nevada, California, Arizona, Alaska, and Hawaii (9th Circuit); West Virginia, Maryland, Virginia, North Carolina, and South Carolina (Fourth Circuit).

It is important to note that a third petition was recently filed in *Tennessee Clean Water Network, et al. v. Tennessee Valley Authority*.¹¹ This case was heard in the Sixth Circuit, as opposed to the Fourth or Ninth. Due to this additional petition, EPA should consider revising the Interpretative Statement to apply nationwide, in order to avoid further inconsistent enforcement, or alternatively engaging in a notice-and-comment rulemaking process to confirm the Agency's position as to the clear meaning of the CWA under the "clear statement doctrine," thereby providing the public with an opportunity to further engage the Agency on this issue.

The Associations appreciate EPA's efforts and look forward to working with you on this important issue.

Sincerely,

U.S. Chamber of Commerce
American Fuel & Petrochemical Manufacturers
American Iron and Steel Institute
American Road & Transportation Builders Association
Associated General Contractors of America
Corn Refiners Associations
Industrial Minerals Association – North America
National Association of Manufacturers

¹¹ Petition for Writ of Certiorari, *Tennessee Clean Water Network, et al. v. Tennessee Valley Authority*, No. 18-1307 (Apr. 15, 2019).

Appendix A

The **U.S. Chamber of Commerce** is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise nearly all U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make millions of products that make modern life possible.

The **American Iron and Steel Institute (AISI)** serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 120 associate members who are suppliers to or customers of the steel industry.

The **American Road & Transportation Builders Association (ARTBA)** represents private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, and rail and transit systems. The transportation construction industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA.

Associated General Contractors of America (AGC) is the nation's leading construction trade association. It dates back to 1918, and today, it represents more than 26,000 construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, DC and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

The **Corn Refiners Associations (CRA)** is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, starch, advanced bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Industrial Minerals Association – North America (IMA-NA)** is a nonprofit trade organization representing industrial minerals producers throughout the United States. IMA-NA

represents a diverse set of member companies engaged in mining and processing of ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, soda ash, talc, and wollastonite across North America.

The **National Association of Manufacturers (NAM)** is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.