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

May 21, 2018

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.
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,

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Secretary
New Mexico Environment Department

BT:kmb

CC: Bruce Yurdin, NMED Water Protection Division (electronic copy)
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