

ENVIRONMENTAL PROTECTION AGENCY

40 CFR § 122.2

[EPA-HQ-OW-2018-0063; FRL-XXXX-XX-OW]

Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice; Request for Comment.

SUMMARY: The Environmental Protection Agency (EPA) is requesting comment on the Agency’s previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation. EPA is requesting comment on whether the Agency should consider clarification or revision of those statements and if so, comment on how clarification or revision should be provided.

DATES: Comments must be received on or before [Insert date 90 days after publication date].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2018-0063, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION, CONTACT: Scott Wilson, Office of Wastewater Management, Water Permits Division (MC4203M), Environmental Protection Agency, 1200 Pennsylvania Ave, NW, Washington, DC, 20460; telephone number: (202) 564-6087; email address: wilson.js@epa.gov.

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I. General Information

- A. Does this Action Apply to Me?

Tribes, states, local governments, the regulated community, and citizens interested in federal jurisdiction over activities that may release pollutants to groundwater may wish to provide input. Entities releasing pollutants to groundwater or other subsurface flow that has a direct hydrologic connection to jurisdictional surface waters may be affected by whether and how EPA clarifies when or if direct hydrologically connected releases are subject to regulation under the CWA. Potentially affected entities include:

Category	Examples of potentially affected entities.
States, Tribes, and Territories	State, Tribal, and Territorial water quality agencies and NPDES permitting authorities that may need to determine whether sources of pollutants should be addressed by standards or permitting actions.
Federal Agencies	Federal agencies with projects or other activities near surface waters.
Industry	Industries that may have releases that affect groundwater with connections to surface waters.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by a potential clarification of EPA’s previous statements in response to comments received on this notice. Other types of entities not listed in the table could also be affected. If you have questions regarding the effect of this action on a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

- B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the

information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

A. The Clean Water Act's National Pollutant Discharge Elimination System Program

The CWA—initially enacted as the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92–500) and subsequent amendments—establishes the basic structure in place today for regulating discharges of pollutants to the waters of the United States. In the CWA, Congress established the national objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA Section 1251(a). Congress also expressly intended that states retain their traditional role in preventing, reducing and eliminating pollution: “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources” CWA Section 1251(b).

The CWA National Pollutant Discharge Elimination System (NPDES) permitting authority, whether implemented by EPA or an authorized State, is limited to regulating the discharge of pollutants from point sources to navigable waters. Congress prohibited any “discharge of any pollutant” to “navigable waters” unless it is authorized by statute, generally by a permit. CWA Sections 1311, 1342, 1344, 1362. The CWA defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” CWA Section 1362(12)(A). Pollutant means “dredged spoil, solid waste, incinerator, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat,

wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” CWA Section 1362(6). The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas”; and a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” CWA Sections 1362(7), (14).

The CWA authorizes EPA to issue NPDES permits under Section 402(a), but EPA may authorize a state to administer its own NPDES program if EPA determines that the program meets the statutory criteria. CWA Sections 1342(a), (b). When a state receives such authorization, EPA retains oversight and enforcement authorities. CWA Sections 1319, 1342(d).

B. EPA’s previous statements regarding the Clean Water Act’s “discharge of a pollutant” provision where there is a direct hydrologic connection

EPA has previously stated that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements. EPA has not stated that CWA permits are required for pollutant discharges to groundwater in all cases, but rather that pollutants discharged from point sources to jurisdictional surface waters that occur via groundwater or other subsurface flow that has a direct hydrologic connection to the surface water may require such permits. The Agency has made these statements in previous rulemaking, permitting, and guidance documents, although most of these statements were collateral to the central focus of a rulemaking or adjudication. *See* Final NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Dec. 2, 1990) (“[T]his rulemaking only addresses discharges to water of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.)”); 1991 Final Rule Addressing Water Quality Standards on Indian Lands, 56 Fed. Reg. 64,876, 64,892 (Dec 12, 1991) (“Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issues have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered ‘waters of the United States’ but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.”); Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000, 62 FR 20,178 (1997) (“the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater. . . . [T]he permit requirements . . . are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection.”). *See also* Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding

Operations (CAFOs), 66 Fed. Reg. 2,960, 3,017 (Jan. 12, 2001) (“As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act. The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry . . .”).

When taking final action on the proposed regulation of discharges from CAFOs, EPA rejected establishing nationally applicable effluent limitation requirements related to releases to groundwater with a direct hydrologic connection to jurisdictional water and recognized that “there are scientific uncertainties and site-specific considerations with respect to regulating discharges to surface water via groundwater with a direct hydrologic connection to surface water [and] conflicting legal precedents on this issue.” Final NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7,175, 7,216 (Feb. 12, 2003). EPA stated in the preamble to the final rule, in the context of ensuring proper closure of CAFOs, that the permitting authority may impose special permit terms and conditions addressing such circumstances on a case-by-case basis as appropriate. 68 Fed. Reg. at 7,229. The Agency further noted that “[n]othing in this rule shall be construed to expand, diminish, or otherwise affect the jurisdiction of the Clean Water Act over discharges to surface water via groundwater that has a direct hydrologic connection to surface water.” *Id.* at 7,216-17.

In CWA citizen suits against regulated entities, courts have faced the question of whether regulation under the CWA of point source discharges of pollutants includes regulation of releases to groundwater with a direct hydrologic connection to jurisdictional surface waters. Some courts have determined that the statute does not explicitly answer this question, while others have held that the statute does not extend to releases to groundwater. Other courts have interpreted the CWA as covering not only discharges of pollutants to navigable waters, but also releases of pollutants that travel from a point source to navigable waters over the surface of the ground. *E.g.*, *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980). As one court noted, “the inclusion of groundwater with a hydrological connection to surface waters has troubled courts and generated a torrent of conflicting commentary.” *Potter v. ASARCO*, Civ. No. S:56-cv-555, slip op. at 19 (D. Neb. Mar. 3, 1998).

Certain courts have concluded that a hydrological connection between groundwater and surface waters is insufficient to justify CWA regulation. In *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, the Seventh Circuit concluded that “[n]either the Clean Water Act nor the EPA’s definition [of waters of the United States] asserts authority over ground waters, just because these may be hydrologically connected with surface waters.” 24 F.3d 962, 965 (7th Cir. 1994), *cert. denied*, 513 U.S. 930 (1994). The court cited EPA’s statement in the preamble to the 1990 Final NPDES Permit Application Regulations for Storm Water Discharges noting the potential for a hydrologic connection between groundwater and jurisdictional surface water, but concluded that the reference was “collateral” and “not a satisfactory substitute for focused attention in rulemaking or adjudication.” *Id.* at 966. In *Rice v. Harken Exploration Co.*, the Fifth Circuit held that “a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the

contaminated groundwater” was outside the scope of the Oil Pollution Act in order “to respect Congress’s decision to leave the regulation of groundwater to the States.” 250 F.3d 264, 272 (5th Cir. 2001). In *Cape Fear River Watch v. Duke Energy Progress*, the district court held that “Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow ‘hydrologically connected’ to navigable surface waters.” 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014).

A number of other district courts have taken the view that Congress intended to regulate the release of pollutants that reach waters of the United States, whether the pollutants reach the surface water directly, or through groundwater with a direct hydrologic connection. *E.g.*, *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001). Because these courts interpreted the term “discharge of a pollutant” to cover discharges that reach jurisdictional water over the ground and through other means, they concluded that exempting discharges through groundwater could lead to confusion and unintended results. One court noted that “it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.” *N. Cal. River Watch v. Mercer Fraser Co.*, No. 04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005). And the Ninth Circuit recently held that a point source discharge to groundwater of “more than [a] de minimis” amount of pollutants that is “fairly traceable from the point source . . . such that the discharge is the functional equivalent of a discharge into a navigable water” is regulated under the Act. *Haw. Wildlife Fund v. Cty. of Maui*, No. 15-17447, slip. op. at 19 (9th Cir. Feb. 1, 2018).

C. Direct hydrologic connection

In addition to the mixed case law on whether certain releases of pollutants to groundwater are within the jurisdictional reach of the CWA, ascertaining whether there is a direct hydrologic connection such that a particular release to groundwater could be considered a “discharge of a pollutant” to a “water of the United States” and therefore subject to the CWA has been characterized previously by EPA as a fact-specific determination. *See* 66 Fed. Reg. at 3,017. EPA has stated that relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. *Id.* These factors are affected by other site specific factors, such as geology, flow, and slope. *Id.*

III. Request for Comment

EPA is requesting comment from tribes, states, members of the public, and other interested stakeholders 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 or other subsurface flow that has a direct hydrologic connection to a jurisdictional surface water. Specifically, EPA seeks comment on whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA. If EPA has the

authority to permit such releases, EPA seeks comment on whether those releases would be better addressed through other federal authorities as opposed to the NPDES permit program. Furthermore, EPA seeks comment on whether some or all such releases are addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs, such as, for example, state programs that implement EPA's underground injection control regulations promulgated pursuant to the Safe Drinking Water Act.

EPA also seeks comment on whether EPA should clarify its previous statements concerning pollutant discharges to groundwater with a direct hydrologic connection to jurisdictional water in order to provide additional certainty for the public and the regulated community. Such a clarification could address the applicability of the CWA to groundwater with a direct hydrologic connection to jurisdictional water, or could define what activities would be regulated if not a discharge to a jurisdictional surface water (*i.e.*, placement on the land), or which connections are considered "direct" in order to reduce regulatory uncertainties associated with that term. EPA also seeks suggestions on what issues should be considered if further clarification is undertaken, including, for example, the consequences of asserting CWA jurisdiction over certain releases to groundwater or determining that no such jurisdiction exists. Finally, 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.

Dated: 2/12/18



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