

EPA Clean Water Act Actions:
Proposed WOTUS Definition and
“Groundwater Conduit” Guidance

April 24, 2019

Goals of Proposed WOTUS Rule

- Respond to Executive Order 13778, which calls for rescinding or revising the 2015 definition of Waters of the United States (WOTUS).
- Increase predictability, consistency, and regulatory certainty through a clearer definition of WOTUS.
- Restore and maintain water quality while respecting primary state and tribal authority over their land and water resources.
- Operate within legal limits established by Congress as clarified by the Supreme Court.

Overview of Proposed WOTUS

- Traditional navigable waters, including territorial seas
- Tributaries
- Certain ditches
- Certain lakes and ponds
- Impoundments
- Adjacent wetlands

Proposed Categories of WOTUS

Tributaries

- “Tributary” means river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a TNW in a typical year, either directly or indirectly through another WOTUS or through other water features identified in the proposal.
- Differs from 2015 Rule by excluding ephemeral flows.
- Pre-2015 practice required a case-specific assessment of non-relatively permanent waters (e.g., streams that do not flow at least seasonally) to determine jurisdiction.

Proposed Categories of WOTUS

Ditches

- Proposal defines ditch as “an artificial channel used to convey water.”
- Ditches are jurisdictional where they:
 - are a TNW, including subject to ebb and flow of the tide;
 - satisfy the conditions of the tributary definition, and are either:
 - constructed in a tributary, or relocate or alter a tributary; or are
 - constructed in an adjacent wetland.
- Differs from 2015 Rule, which did not define ditch and excluded fewer ditches. Pre-2015 practice excludes ditches excavated wholly in and draining only upland that have less than relatively permanent flow.

Proposed Categories of WOTUS

Lakes and Ponds

- A lake or pond is jurisdictional where it:
 - Is a TNW
 - Contributes perennial or intermittent flow to a TNW in a typical year, either directly or indirectly through another WOTUS or through other water features identified in the proposal; or
 - Is flooded by a WOTUS in a typical year.
- 2015 Rule text and pre-2015 practice did not explicitly address lakes and ponds as a separate category. Under the 2015 Rule, lakes and ponds could be jurisdictional as TNWs, adjacent waters, or tributaries. Pre-2015 practice is similar to 2015 Rule but did not treat lakes and ponds as adjacent waters.

Proposed Categories of WOTUS

Impoundments of WOTUS are jurisdictional.

- Alteration of a WOTUS by impounding would not change its jurisdictional status.
- Most impoundments do not cut off a connection between upstream tributaries and a downstream TNW. As a result, the upstream tributaries would remain jurisdictional under the proposal.
- No change from the 2015 Rule and pre-2015 practice.

Proposed Categories of WOTUS

Adjacent Wetlands

- Defined as wetlands that abut or have a direct hydrologic surface connection to a WOTUS in a typical year.
 - Direct hydrologic surface connection occurs as a result of inundation from a WOTUS to a wetland or via perennial or intermittent flow between a wetland and a WOTUS.
 - Wetlands physically separated by upland, dikes, etc., and lacking a direct surface hydrologic connection are not adjacent.
- Several differences; e.g., 2015 Rule relied in part on distance thresholds to determine adjacent waters; pre-2015 practice considered hydrology as well as ecologic factors.

Interstate Waters

Interstate waters are not a separate jurisdictional category in the Step 2 proposal.

- Interstate waters would need to meet one of the 6 categories of jurisdictional waters to be WOTUS.
- Change from 2015 Rule and pre-2015 practice, where interstate waters are a separate category of WOTUS.
- Agencies are soliciting comment on this issue.

Waters/Features Excluded from Proposed WOTUS Definition

- Waters not listed as WOTUS
- Groundwater
- Ephemeral features and diffuse stormwater run-off
- Ditches not identified as WOTUS
- Prior converted cropland (PCC)
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes and ponds constructed in upland
- Water-filled depressions created in upland incidental to mining or construction activity
- Stormwater control features constructed in upland
- Wastewater recycling structures constructed in upland
- Waste treatment systems

EPA's Interpretive Statement

- **April 15, 2019:** EPA issues long-awaited Interpretive Statement clarifying the application of Clean Water Act permitting requirements to groundwater:

Overview: The best, if not only, reading of the CWA is that releases from a point source to groundwater are not subject to section 301(a) prohibition nor section 402 permitting requirements because the statute does not cover such releases.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
WATER

INTERPRETIVE STATEMENT

SUBJECT: Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater

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TO: Regional Administrators, Regions I – X

Public Input & Need for Clarity

- **February 2018 Federal Register Notice:** EPA's Interpretive Statement follows Agency's request for public comment on whether the Agency should clarify its position on point source releases to groundwater:
 - More than 50,000 public comments
 - Many commenters asked for clarity, pointing to mixed record of prior Agency statements and confusing judicial decisions with potential to greatly expand scope of NPDES program

Prior EPA Statements

- Prior EPA statements addressing the applicability of CWA 301 and 402 to releases to groundwater were generally contained within broader rules or adjudications
 - February 2018 notice was first to focus solely on this issue
- Prior Agency statements were also mixed:
 - 1973 EPA Office of General Counsel memo
 - 1994 Clinton “Clean Water Initiative”

Prior EPA Statements, cont'd

- 1973 EPA Office of General Counsel memo:

the discharge of a pollutant." Under §502(12) the term "discharge of a pollutant" is defined so as to include only discharges into navigable waters (or the contiguous zone or the ocean). Discharges into ground waters are not included. Accordingly, permits may not be issued, and no application is required, unless a discharge into navigable waters is proposed or is occurring.

- 1994 Clinton "Clean Water Initiative":

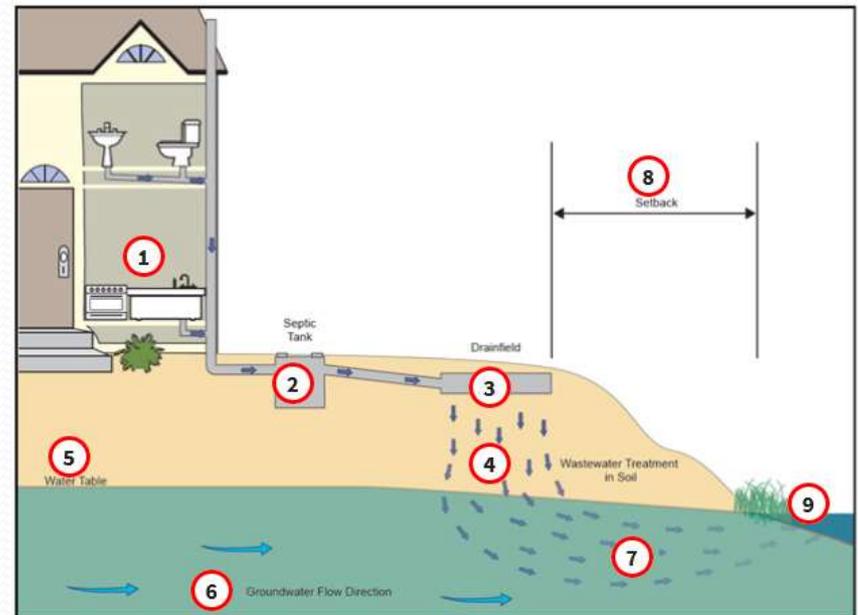
It is **presently unclear** whether a discharge to the ground or to ground water that rapidly moves into surface water through a "direct hydrological connection" between the point of discharge and the surface water is subject to NPDES regulation. **On occasion, EPA has asserted NPDES jurisdiction over such discharges.** Case law, however, is divided on whether the CWA permits such jurisdiction.

Conflicting Court Decisions

- The backdrop to EPA's consideration of this issue is also numerous and conflicting appeals court decisions interpreting the Act in different ways:
 - *County of Maui v. Hawai'i Wildlife Fund* (9th Cir. 2018): Broad "fairly traceable" standard
 - *Upstate Forever v. Kinder Morgan* (4th Cir. 2018): Direct hydrologic connection standard plus 1,000 foot distance presumption
 - *Kentucky Waterways & Tennessee Clean Water Action* (6th Cir. 2018): Groundwater is a nonpoint source and thus no permit required

Fourth and Ninth Circuit Decisions

These decisions have potential to expand the scope of the NPDES program to reach commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems that enter jurisdictional surface waters through groundwater.



<https://www.epa.gov/septic/septic-systems-and-surface-water>

Supreme Court Enters the Fray

- In late summer 2018, cert petitions were filed seeking review of the *County of Maui* and *Kinder Morgan* decisions.
- The Supreme Court asked for the federal government's views on the petitions, and the U.S. filed a brief urging the Court to grant review in *County of Maui*, which the Court did in February.
- Briefs are due next month, and the Court will hold oral argument next term.

Support for EPA's Interpretation

- Analysis of the CWA as a whole:
 - Operative, enforceable provisions neither reference nor contemplate releases to groundwater . . . solely focus on the three other categories of waters in the Act: navigable waters, the contiguous zone, and the ocean
 - In contrast, Congress explicitly referenced groundwater in the sections re: providing information, guidance, assistance, or funding to **states**, akin to nonpoint source pollution

Support for EPA's Interpretation

- Strong legislative history:
 - Failed House amendment (Rep. Aspin amendment) to add the term groundwater to the operative sections of the Act:
 - “The amendment brings ground water into the subject of the bill, into the enforcement of the bill If we do not stop pollution of ground waters through seepage and other means, *ground water gets into navigable waters*, and to control only the navigable water and not the ground water makes no sense at all.”

Support for EPA's Interpretation

- Strong legislative history:
 - EPA Administrator Ruckelshaus recognized the potential for polluted groundwater to impact surface waters, and similarly requested the scope of the Act be expanded to directly regulate groundwater (rather than assuming such releases could be covered under the existing text):
 - “The only reason for the request for Federal authority over ground waters was to assure that we have control over the water table in such a way as to insure that our authority over interstate and navigable streams cannot be circumvented, so we can obtain water quality by maintaining a control over all the sources of pollution, be they discharged directly into any stream or *through the ground water table.*”

Other Sources of Protection

- Three other federal statutes include additional safeguards to protect groundwater and hydrologically connected surface waters that may be impacted by releases to groundwater:
 - **SDWA:** Underground Injection Control provisions specifically aimed at preventing certain types of groundwater contamination
 - **RCRA:** Explicit provisions to protect groundwater from the discharge of solid and hazardous wastes
 - **CERCLA:** Provides EPA with clear authority to address releases to groundwater that migrate to surface water
- Many states have laws and regulations, and states are free to enact new legal protections
 - For example, Minnesota Pollution Control Agency: it “believes Minnesota has adequate authority under state law to address discharges outside the scope of the NPDES or UIC programs.”
 - Attorney Generals of 15 states described state laws that protect intrastate water, including groundwater, independent from the CWA.