



May 21, 2018

Mr. Scott Wilson, Office of Wastewater  
Management, Water Permits Division (MC4203M)  
Environmental Protection Agency  
1200 Pennsylvania Ave, NW, Washington, DC 20460

**RE: Docket ID No. EPA- HQ- OW- 2018-0063**

Request for comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water

Dear Mr. Wilson:

On behalf of the National Onsite Wastewater Recycling Association (NOWRA), we thank you for the opportunity to comment upon the EPA's Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water. NOWRA is the largest organization within the U.S. dedicated to educating and representing members within the onsite and decentralized wastewater industry. NOWRA's 5,500 professional members include educators, regulators, engineers, soil scientists, contractors, manufacturers, suppliers, service providers, and other parties involved in the protection of North America's water resources.

NOWRA is concerned about roughly 25 million households and small businesses that rely upon subsurface disposal. These decentralized systems have been effective at limiting disease in this country. The rural areas of the United States lack disease that is associated with poor disposal of human waste. The decentralized industry supporting subsurface discharging systems has evolved and has contributed a plethora of useful technologies to further mitigate public health and environmental concerns. These systems enhance surface water quality by serving as a viable alternative to NPDES surface discharge systems.

NOWRA recommends that the EPA provide clarification that subsurface disposal systems are not to be subjected to the Clean Water Act regulation. This conclusion is based upon the following and supporting documentation in the attached appendix:

1. The CWA NPDES Program is not applicable to Groundwater/Onsite Systems.

Per the US EPA's website entitled "Summary of the Clean Water Act"

<https://www.epa.gov/laws-regulations/summary-clean-water-act>

"The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained. EPA's National Pollutant Discharge Elimination System (NPDES) permit program controls discharges. Point sources are

discrete conveyances such as pipes or man-made ditches. Individual homes that are connected to a municipal system, use a septic system, or do not have a surface discharge do not need an NPDES permit; however, industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters.”

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- Point source defined within the Clean Water Act:

<https://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions>

(14) The term "point source" means 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

The point source definition does not include disperse discharges to groundwater or other subsurface flow.

- Decentralized dispersal systems are a Nonpoint Source per the definition of Nonpoint Source:

<https://www.epa.gov/nps/what-nonpoint-source>

The term "nonpoint source" is defined to mean any source of water pollution that does not meet the legal definition of "point source" in section 502(14) of the Clean Water Act.

The point source definition does not include “groundwater or other subsurface flow.” Therefore, it is a nonpoint source and does not fall under the CWA NPDES program.

2. There is no “direct hydrologic connection” between subsurface discharging systems and surface waters.

Subsurface systems do not discharge directly to groundwater. Decentralized systems disperse directly to the soil, not the groundwater. Decentralized systems disperse effluent into the “vadose” (unsaturated) soil zone, not directly to groundwater. The vadose zone is very beneficial; it allows for transformation and treatment prior to the dispersal replenishing groundwater. The soil dispersal is not a direct hydrologic connection to navigable waters.

3. Subsurface Discharges are currently regulated.

State Regulation: Each state has regulatory review, permitting and enforcement in place. The various state agencies have rules and regulations in place which require

treatment and effective dispersal. The treatment provided eliminates the “pollutant discharges” and therefore pollutants levels are substantially mitigated prior to reaching jurisdictional surface waters. On locations with increased environmental or public health concerns the state regulatory authorities have an increased treatment level to meet the permit standards.

National Regulation: EPA currently regulates subsurface systems as Class V wells via the Underground Injection Control (UIC) Program. This program covers larger subsurface dispersal systems (compared to single-family systems).

If EPA were to also require new, additional permitting, then there would be unnecessary redundancy. To require a further level of permitting to the roughly 25 million systems would be an unbearable expense not substantiated by the presence of disease.

In conclusion, NOWRA would offer the following recommendation on how clarification or revision should be provided by EPA:

“The Environmental Protection Agency has determined that the Clean Water Act does not give the EPA the authority to regulate subsurface discharges under the NPDES program.”

Again, on behalf of NOWRA, we thank you for the opportunity to comment. NOWRA has been a long-standing partner with EPA to protect our nation’s health and resources.

Sincerely,

A handwritten signature in black ink that reads "Eric Casey". The signature is written in a cursive, flowing style.

Eric Casey  
Executive Director  
National Onsite Wastewater Recycling Association

## **Appendix A: Additional Supporting Information and References**

### **1) Waters of the United States**

Section 402 of the Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of “pollutants” from “point sources” into “navigable waters.”

According to 33 U.S. Code § 1362 – navigable waters means the Waters of the United States (WOTUS), including the territorial seas.

“Waters of the United States” has been debated and redefined several times since the inspection of the CWA. The current description is contained in 80 FR 37053

(<https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>)

The definition of WOTUS is:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;
- (vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

**Definition of significant nexus:** According to the EPA, the term significant nexus means more than speculative or insubstantial effect that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a) (1) through (3) of this section), has on the chemical, physical or biological integrity of a water identified in paragraphs (a) (1) through (3) of this section. "Other waters," including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a water of the United States so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical or biological integrity of a water an identified in paragraphs (a) (1) through (3) of this section.

## **2) EPA Study on Connectivity of Wetland and Streams to Downstream Waters**

The EPA prepared a report in 2013 that summarized the latest published documents of the connectivity of wetland and streams to downstream waters.

<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>

Based upon review of this report it appears that the burden of proof that a project does not have a significant impact to downstream waters rests with the applicant.

Under Conclusion 4: Degrees and Determinants of Connectivity, in section 6.1.4.1, it states:

“The surface-water and ground-water flowpaths (hereafter, hydrologic flowpaths), along which water and materials are transported and transformed, determine variations in the degree of physical and chemical connectivity. These flowpaths are controlled primarily by variations in climate, geology, and terrain within and among watersheds and over time. Climate, geology, and terrain are reflected locally in factors such as rainfall and snowfall intensity, soil infiltration rates, and the direction of ground-water flows. These local factors interact with the landscape positions of streams and wetlands relative to downstream waters, and with functions (such as the removal or transformation of pollutants) performed by those streams and wetlands to determine connectivity gradient.”

In summary, the subsurface flow regime is very complex in terms of flowpaths and transformations.

### **3) Definition of Point Source**

The argument has historically been about this defining the “waters of the United States” (WOTUS) to include groundwater, but in some court cases, it actually came down to the definition of the term “point source”.

According to 33 U.S.C. § 1362(14); 40 C.F.R. 6 § 122.2.

A “point source” is “any discernible, confined, and discrete conveyance,” which may include a discernible, confined and discrete “conduit.”

When writing the Clean Water Act in 1972, it was decided not to apply the NPDES program to non-point sources. Congress recognized that many non-point sources of pollution are “beyond present technology of control,” and those that are controllable are generally regulated by states through their land use controls.

Groundwater is not a “point source” because water traveling through the ground to a surface water is “not collected or channeled” even though the discharge may have originated from a point source.

Also, by requiring NPDES permits for indirect discharges through groundwater, the district court adds redundancy to an already extensive federal and state-administered program.

There are already several federal laws, such as the Safe Drinking Water Act and its Underground Injection Control (“UIC”) Program, 42 U.S.C. § 300f, et seq., 40 C.F.R. 144.1 et seq., the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901, et seq., the

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136, et seq., and EPA's Groundwater Rule, 40 C.F.R. Parts 9, 141, and 142, that establish nationwide standards applicable to the discharge of pollutants to groundwater, injection wells, underground storage tanks, and groundwater quality.

#### **4) Court Cases which support that CWA is not applicable in cases of groundwater:**

##### **A) *Tri-Realty Co. v. Ursinus Coll.***

Link: [https://www.gpo.gov/fdsys/pkg/USCOURTS-paed-2\\_11-cv-05885](https://www.gpo.gov/fdsys/pkg/USCOURTS-paed-2_11-cv-05885)

Plaintiff Tri-Realty alleged that releases from Ursinus College underground storage tanks ("USTs") resulted in CWA violations. The court's findings include the following statement:

A discharge of pollutants into navigable waters occurring only through migration of groundwater and uncontrolled soil runoff represents "nonpoint source" pollution. See *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1141 n.4 (10th Cir. 2005) ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting."); *Northwest Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011) ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source . . ."); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (holding that seeps of shallow subsurface water emerging through the soil are non-point source carriers of pollutants); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 220-21 (2d Cir. 2009) ("In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.") (quoting EPA Office of Water, *Nonpoint Source Guidance 3* (1987)); *PennEnvironment v. PPG Indus., Inc.*, No. 12-0342, 2013 WL 4045794, at \*20 (W.D. Pa. Aug. 8, 2013) (collecting cases). But see *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-4117, 2013 WL 103880, at \*15 (D.N.J. Jan. 8, 2013) (holding that plaintiffs adequately alleged that groundwater itself was a point source); see also Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 *Harv. Env'tl. L. Rev.* 569, 575-85, 620 (1988) (arguing that subsurface waters running in defined channels, such as underground streams, meet the definition of "point source," but acknowledging that "percolating" groundwater does not). This Court disagrees that, given its natural physical attributes, groundwater could fairly be described as a "discernible, confined and discrete conveyance" (definition of point source). Accordingly, the Court concludes that the diffuse downgradient migration of pollutants on top of or through soil and groundwater alleged here is nonpoint source pollution outside the purview of the CWA.

**B) *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.***

Link: <https://casetext.com/case/cape-fear-river-watch-inc-v-duke-energy-progress-inc>

In the court's ruling, it states:

"After close review of the competing analyses, this court finds the reasoning of the Court of Appeals for the Seventh Circuit persuasive, and holds 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."

**C) *Kentucky Waterways Alliance v. Kentucky Utilities Co.***

Link: <https://cases.justia.com/federal/district-courts/kentucky/kyedce/5:2017cv00292/83583/31/0.pdf?ts=1514540542>

A coal-fired power plant in Kentucky is located near Herrington Lake. The plant generates coal combustion residuals of fly ash and bottom ash as a result of its coal-burning processes. Historically, the residuals were disposed of by transport through a sluice system to settling ponds. The Sierra Club claims that the plant's settling ponds are contaminating groundwater in the area and that the contaminated groundwater was discharging via spring into Herrington Lake. They filed a citizen suit against the plant based, in part, on an alleged violation of the Clean Water Act, claiming that the plant is discharging pollutants, which have seeped from the ponds into the groundwater which emerges from springs and discharges into Herrington Lake, a Water of the United States, without a permit.

The plant filed a Motion to Dismiss the Clean Water Act claims because the Sierra Club did not allege that "pollutants are conveyed directly" from the ponds to the navigable waters and that the pollution is non-point source, which is not governed by the Clean Water Act. The plaintiffs responded that their allegation that the groundwater is hydrologically connected to the Water of the United States was sufficient to state a claim.

The US Court of Appeals for the Eastern District of Kentucky sided with the plaintiff and dismissed the case. In analyzing the issue, the Court noted that the Plaintiffs do not argue the groundwater itself is a WOTUS and the Court said that was "with good reason" as the vast majority of courts to consider this issue have rejected that argument. However, courts are divided over whether hydrologically connected groundwater qualifies as a point source under the Clean Water Act. This court found that it does not and stated that "adopting this theory would be inconsistent with the text and structure of the Clean Water Act."

**D) *Greater Yellowstone Coalition v. 632***

Link: <https://caselaw.findlaw.com/us-9th-circuit/1549721.html>

In Greater Yellowstone Coalition, for example, this Court determined that a discharge to surface water from a pit through the ground did not require a Section 401 certification, because “[t]he § 401 certification requirement applies only to discharges from point sources.”

Ruling states: “The district court correctly concluded that Simplot did not fail to acquire a § 401 certification as required under the CWA. The § 401 certification requirement applies only to discharges from point sources.”

**Conclusion:**

Based on the cited court cases and information references, it is concluded that CWA regulations should not apply based on the definition of point source. This should be clarified by the EPA.