

# Briefing Summary

**Issue Title from Federal Register:** Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water. February 20, 2018 *Federal Register* (83 Fed. Reg. 7126)

****Publication Information****

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****Initiative/Comments Information****

**Brief summary of initiative:**

The EPA is requesting comment on their previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional 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 they should consider clarification or revision of those statements, and if so, how the clarification or revision should be provided.

**Background information:**

EPA 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. The EPA previous statements include the following:

* Final NPDES Permit Application Regulations for Storm Water Discharges - Dec. 2, 1990 -...rulemaking addresses discharges to ground water when there is a hydrological connection between the groundwater and a nearby surface water body.
* 1991 Final Rule Addressing Water Quality Standards on Indian Lands - ...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 U.S.' 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 (CAFOs) in Idaho - ...the CWA 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.
* Proposed NPDES Permit Regulation and ELGs and Standards for CAFOs - ...collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the CWA...the determination whether this occurs through a direct hydrologic connection is a factual inquiry.
* ...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 CAFOs (Feb. 12, 2003) - EPA stated in the preamble to the final rule that the permitting authority may impose special permit terms and conditions addressing such circumstances on a case-by-case basis as appropriate.

**Comments recommendation:**

**Comments provided here take the position that EPA does not have authority under the CWA to regulate discharges to groundwater that may reach jurisdictional surface waters through a direct hydrologic connection. Groundwater regulation is the domain of the States, and each state should continue to be afforded freedom and flexibility to regulate this resource at its discretion. Texas uses a variety of legal authorities to protect groundwater in the context of both intentional and unintentional discharges of pollutants to groundwater. It is recommended that EPA revise its previous statements concerning this issue to acknowledge this important role and responsibility of the States.**

**Why this issue is of interest and how it applies to TCEQ:**

Applying CWA jurisdiction to groundwater discharges that may ultimately reach surface waters would needlessly complicate the regulatory arena in Texas. TCEQ has multiple programs, such as UIC, Superfund, Wastewater Permitting, and Compliance/Enforcement that sufficiently provide or address water quality protection in situations where pollutants are discharged or released to groundwater. An additional layer of regulation in this area is simply unnecessary and does not add environmental benefits.

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