

NPDES Permits for Discharges to Groundwater

WESTCAS Comments

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Hawaii Wildlife Fund v. County of Maui. Opinion of 9th Circuit Court of Appeals (filed 2/1/2018)

- The County's four wells are "point sources" discharging "pollutants" into groundwater that subsequently entered a "navigable water," the Pacific Ocean
- The wells therefore were subject to NPDES regulation
- County is liable under the CWA



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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA–HQ–OW–2018–0063; FRL–9973–41–OW]

Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water

ACTION: Request for comment.

DATES: Comments must be received on or before May
21, 2018.



EPA requests comments on 7 items:

1. 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

EPA should clearly state the following: 1) the CWA does not directly regulate nonpoint sources; 2) the CWA does not indirectly regulate nonpoint sources with a hydrologic connection to surface waters; 3) the CWA does not otherwise authorize EPA to regulate discharges of pollutants to groundwater that has a direct hydrologic connection to surface water; 4) "waters of the United States" includes neither isolated, nontributary groundwater nor tributary or hydrologically-connected groundwater; and 5) regulation of discharges to groundwater can be accomplished only by a legislative change, and not by Agency or judicial interpretation.

2. Whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA

Subjecting discharges to groundwater is patently inconsistent with the text, structure, and purposes of the CWA.

3. Whether those releases would be better addressed through other federal or state statutory or regulatory programs

States have the responsibility to protect groundwater and all 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater.

4. 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.

Considering the challenges re-making the NPDES program to regulate discharges to groundwater, WESTCAS believes that EPA should establish a rule that explicitly rejects the "hydrological connection" and "groundwater conduit" theories and leaves the regulation of groundwater to the States

5. 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.

Expanding the NPDES universe would have the unintended consequence of impeding beneficial and innovative public infrastructure projects

Green infrastructure could also be subject to NPDES regulation and enforcement

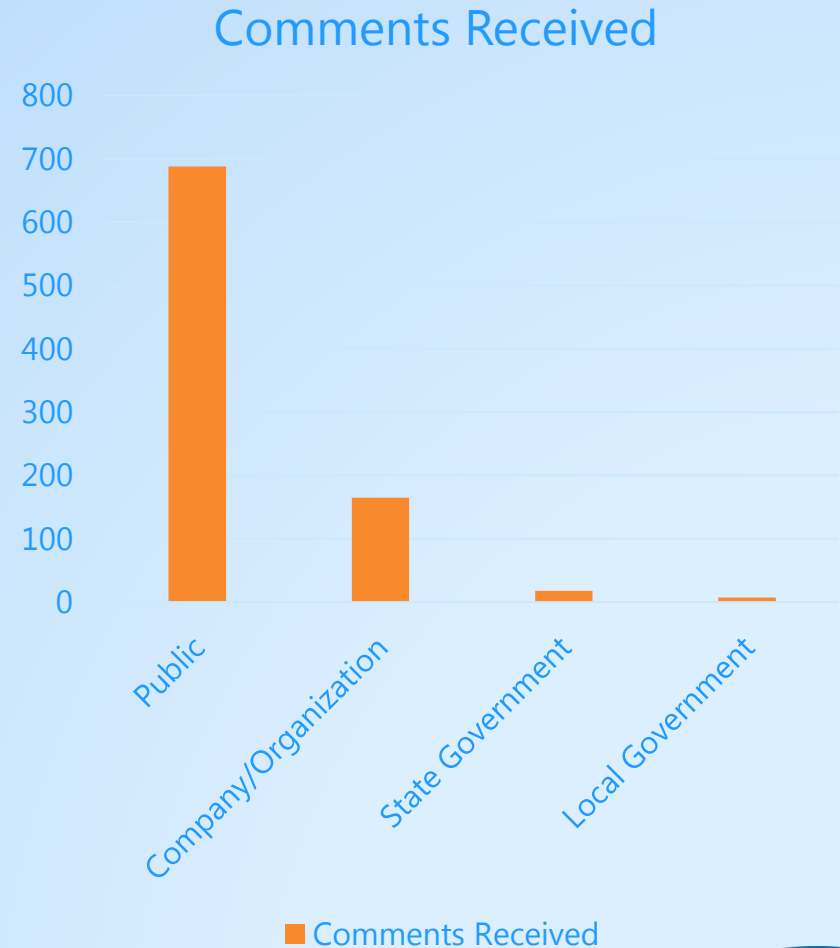
Considering that the current jurisdictional status of many ephemeral or intermittent streams is unclear, adding another test of connectivity will do very little to provide regulatory clarity or certainty—especially in the arid West.

5. What format or process EPA should use to revise or clarify its previous statements

EPA should issue an unequivocal position statement that the NPDES program does not apply to discharges to groundwater. This position statement should be followed by a formal notice-and-comment rulemaking to clarify and enact EPA's position.

899 comments received

- Public: 688
- Company/organization: 165
- Federal Government: 2
- State Government: 18
- Local Government: 7
- Tribal Government: 9
- Member of Congress: 1 (Barrasso)
- Mass Mail: 9



Absence can be interpreted in any way

The plain language of the CWA (does) (does not) authorize regulation of discharges to groundwater

- 75% said "does not"*
- 25% said "does"

* Based on random 30 comments from "Company/Organization" category