

National Ground Water Association
Comments on
Revised Definition of “Waters of The United States”

Docket ID EPA-HW-OW-2021-0328
FRL-6027.4-03-OW

On December 7, 2021, the U.S. Environmental Protection Agency and the Department of the Army (“the agencies”) announced a proposed rule to revise the definition of “waters of the United States.” The agencies proposed a return to the pre-2015 definition of “waters of the United States,” updated to reflect consideration of recent Supreme Court decisions. Public comments for the “new” rule were requested with a deadline of February 7, 2022.

Basis for the Interest of the National Ground Water Association (NGWA) in the revised definition of “waters of the United States.”

NGWA is the largest trade association of groundwater professionals in the world, representing more than 10,000 groundwater professionals. NGWA membership includes groundwater scientists and engineers, water well contractors, and suppliers and manufacturers of groundwater technology. NGWA members are employed by private sector companies; academic institutions; advocacy groups; and local, state, and federal government agencies.

NGWA’s goal is to promote smart and responsible groundwater management and ensure groundwater remains clean, safe, and accessible to all who need it.

Comments of the National Ground Water Association

General Comments

- (1) NGWA believes that groundwater, including groundwater drained through subsurface drainage systems, should not be included in the definition of “waters of the United States” (WOTUS) and should continue to be regulated and managed by states, tribes, and local authorities. Because groundwater quality and supply issues vary dramatically across the United States, NGWA believes state and local authorities are best positioned to regulate and manage their groundwater supply.

Clarification of federal and state jurisdiction is important to commerce and decisions involving economic and environmental trade-offs.

- (2) The Environmental Protection Agency and the Department of the Army should consider a temporary adjustment to their work schedule and postpone a new WOTUS definition until after a decision has been issued in the U.S. Supreme Court case *Sackett v. EPA*. Because a decision in *Sackett v. EPA* could fundamentally alter the regulatory landscape in the enforcement of the

Clean Water Act, it could also impact major aspects of WOTUS. By postponing a new definition of WOTUS, the EPA would be working towards the creation of a more durable and long-lasting definition.

Specific Comments

Exclusion of Groundwater

- The exclusion of groundwater should not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow of a stream. The proposed regulation should clarify that waters transmitted through a stream, lake or coastal bed and effluent to surface water are included in the definition of “waters of the United States.” The essence of the proposed rule is to distinguish federal and state jurisdictional control over waters for regulatory purposes and should be as explicit as possible.

Exclusion of wetlands not adjacent or touching jurisdictional waters

- Most wetlands are locations of groundwater discharge.¹
- Isolated wetlands (wetlands not adjacent to jurisdictional waters) not receiving surface or subsurface flow from jurisdictional waters should be regulated by states as points of groundwater discharge affecting local water supply. However, wetlands not adjacent to or not touching jurisdictional waters that contribute to flood control management as floodwater storage should continue under federal regulation.

Exclusion of wastewater recycling structures

- Wastewater recycling structures, such as upland detention, retention and infiltration basins and ponds and groundwater recharge basins, should be under state control as the water recycling contributes to local water supply.
- Impacts of emerging contaminants such as PFAS should be considered in the exclusion of wastewater recycling structures. The extent to which contaminants survive treatment techniques in a particular case should be determined by appropriate testing before allowing wastewater recycling structures to not be regulated as ‘waters of the United States’ under the Clean Water Act. Otherwise, unintended adverse impacts may occur affecting local and interstate water supply.

Exclusion of surface expression of groundwater

- Zones where groundwater emerges on the ground surface or discharges through stream channel or lake beds to provide baseflow to intermittent or perennial streams are the interfacing planes or surfaces that define the jurisdictional boundaries or limits of federal surface water control and state groundwater control. It is in the interest of both federal and

¹ Winter, T. 1989. Hydrologic function of wetlands. US Geologic Survey Yearbook. Reston, VA.

state jurisdictions to collaborate in the management of the respective resources over which they exercise control, particularly at the interfaces of groundwater and surface water.

Exclusion of artificially irrigated areas including fields flooded to support the production of wetland crop species

- Flooding and discharge from fields used for wetland crop species is regulated by states and does not need further federal regulation. Federal regulation should focus on the control and use of pesticides that may be used in this production.

Exclusion of stormwater control features

- Generally, stormwater control features should be excluded in the definition if they apply to detention, retention and infiltration basins and ponds and groundwater recharge basins but are structures at the interface of surface water and groundwater. As such, the specific type of stormwater control structure should be regulated to ensure that groundwater under state jurisdiction is protected for safe local use and may in some cases involve the application of the Underground Injection Control requirements for the quality of water to be injected underground under the Safe Drinking Water Act that could lead to different results than application of the Clean Water Act for surface water quality protection. Many states do not have delegation to control discharges to groundwater under the UIC/SDWA program. Federally regulated stormwater controls under the Clean Water Act to prevent surface water degradation should ensure that groundwater is protected and contamination is not being moved from one water source to another.

For more information or questions, please contact Ben Frech (bfrech@ngwa.org) or Chuck Job (cjob@ngwa.org) at the National Ground Water Association.