

CALL FOR AGC MEMBER INPUT:
SHOULD U.S. EPA'S NPDES PROGRAM REGULATE DISCHARGES TO (OR THROUGH) GROUNDWATER THAT HYDROLOGICALLY CONNECTS TO SURFACE WATER?

The U.S. Environmental Protection Agency (EPA) is [accepting public comment](#) until May 21, 2018, on a host of issues related to whether the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit program should be used to regulate discharges of pollutants to groundwater that have a hydrologic connection to jurisdictional waters. The *Federal Register* notice points out that the courts have approached the question in varying ways. 83 Fed. Reg. 7,126 (Feb. 20, 2018). Over the years, and in varied settings, EPA has stated that such pollutant discharges may be subject to CWA requirements. But in the absence of clear and consistent nationwide requirements, the agency has made fact-specific, case-by-case determinations.

Federal EPA Already Regulates Stormwater Drainage (Infiltration) Wells:

Per the Safe Drinking Water Act, EPA's Underground Injection Control (UIC) program at [40 CFR Parts 144 – 147](#) consists of six classes of injection wells. Each well class is based on the type and depth of the injection activity, and the potential for that injection activity to result in endangerment of underground sources of drinking water (USDW). Class V stormwater drainage wells¹ use subsurface infiltration to manage surface water runoff (rainwater or snow melt). EPA Region 9 states that "Class V wells ... are among the greatest threats to groundwater quality."²

Q&A to determine if you have a Class V stormwater drainage well:

Questions:	If Your Answer Is Yes...	If Your Answer Is No...
1. Do you operate a stormwater collection system that relies on infiltration to collect and dispose of storm water runoff?	Go to question 2.	You do not have a Class V stormwater drainage well. Stop here.
2. Does your infiltration system discharge to the subsurface?	Go to question 3.	You do not have a Class V stormwater drainage well. Stop here.
3. Does your stormwater infiltration system consist of a drilled or driven shaft, or dug hole that is deeper than it is wide? Does it rely on a naturally occurring sinkhole? Does it include any subsurface piping?	You have a Class V stormwater drainage well and are subject to Class V requirements.	You do not have a Class V stormwater drainage well. Stop here.

¹ "Stormwater drainage wells" are defined in UIC program regulations at 40 CFR 144.3: "A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system."

² <https://archive.epa.gov/region9/water/archive/web/html/uic-classv.html>.

Minimum Federal Requirements:

Class V stormwater drainage wells are “authorized by rule,” which means they may be operated without an individual permit so long as the owner/operator of the well meets the following *minimum* EPA requirements: (1) Operate the injection well in a way that **will not endanger USDW**; (2) Register the injection well by **submitting basic inventory information** about the well to their permitting authority; and (3) **abandoned Class V wells should be properly destroyed**, with notification to the US EPA, to prevent movement of contaminated fluids into USDW.

Inventory submission requirements vary by state.³ The required inventory information typically includes:

- Facility name and location
- Name and address of a legal contact
- Ownership of property
- Nature and type of injection well(s)
- Operating status of the well(s)

Some states have applied for and been granted authority to implement the Class V UIC Program in their state, including oversight of stormwater drainage wells, and may have more stringent requirements.⁴

EPA’s Construction General Permit (CGP):

If using any of the following stormwater drainage wells (see bullets), EPA CGP directs the site operator to contact the state agency or EPA Region to ensure compliance with the requirements in the Safe Drinking Water Act and EPA’s implementing UIC regulations at [40 CFR Parts 144 – 147](#) –

- **Infiltration trenches** (if stormwater is directed to any bored, drilled, driven shaft or dug hole that is deeper than its widest surface dimension, or has a subsurface fluid distribution system)
- Commercially manufactured pre-cast or pre-built proprietary **subsurface detention vaults, chambers**, or other devices designed to capture and infiltrate stormwater flow
- **Drywells, seepage pits, or improved sinkholes** (if stormwater is directed to any bored, drilled, driven shaft or dug hole that is deep

Why Regulate/EPA Concerns:

Stormwater injection is a concern to EPA because stormwater may contain petroleum or other organic compounds that could harm USDWs. Other potential harmful contaminants include: Sediment – Nutrients – Metals – Salts – Microorganisms – Fertilizers – Pesticides.⁵

Best Management Practices:

EPA suggests five broad categories of BMPs for stormwater drainage wells that site operators can implement alone or in combination: (1) siting, (2) design, (3) operation and maintenance; (4) education and outreach; and (5) proper closure (plugging and abandonment).

³ See 40 CFR 144.83 - Do I need to notify anyone about my Class V injection well?

⁴“Primacy” states (where the state runs the Class V UIC program): Alabama, Arkansas, Commonwealth of Northern Mariana Islands, Connecticut, Delaware, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, or Wyoming.

⁵ https://www.epa.gov/sites/production/files/2015-08/documents/fs_storm.pdf.

AGC Member Input NEEDED:

As stated above, if an infiltration BMP is deeper than its widest surface dimension, or has a subsurface fluid distribution system, then it will likely be considered a Class V stormwater drainage well that is regulated under EPA's Safe Drinking Water Act UIC program. What EPA is wrestling with now is whether the agency should also apply the CWA NPDES permit program to discharges to groundwater where there is a direct hydrologic connection to jurisdictional water. EPA has asked for feedback on which connections are considered "direct," recognizing the uncertainties associated with that term.

1. How would your company be impacted if EPA were to assert CWA jurisdiction over releases to groundwater?
2. If EPA has the authority to permit such releases, are they already addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs?

Please direct your comments and any questions to AGC's Leah Pilconis, senior environmental counsel, at pilconisl@agc.org or (703) 837-5332. Thank you.