



# National Milk Producers Federation

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Agri-Mark, Inc.  
Associated Milk  
Producers Inc.  
Bongards' Creameries  
Cooperative Milk  
Producers Association  
Cortland Bulk Milk  
Producers Cooperative  
Dairy Farmers of  
America, Inc.  
Ellsworth  
Cooperative Creamery  
FarmFirst Dairy  
Cooperative  
First District Assoc.  
Foremost Farms USA  
Land O'Lakes, Inc.  
Lone Star Milk  
Producers  
Maryland & Virginia  
Milk Producers  
Cooperative Association  
Michigan Milk  
Producers Association  
Mid-West  
Dairymen's Company  
Mount Joy Farmers  
Cooperative Association  
Northwest Dairy Assoc.  
Oneida-Madison Milk  
Producers Cooperative  
Association  
Prairie Farms Dairy, Inc.  
Premier Milk Inc.  
Scioto County  
Cooperative Milk  
Producers' Association  
Select Milk  
Producers, Inc.  
Southeast Milk, Inc.  
St. Albans Cooperative  
Creamery, Inc.  
Tillamook County  
Creamery Association  
United Dairymen  
of Arizona  
Upstate Niagara  
Cooperative, Inc.  
Zia Milk  
Producers, Inc.

May 21, 2018

U.S. Environmental Protection Agency  
EPA Docket Center  
Mail Code 28221T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Docket ID No. EPA-HQ-OW-2018-0063; Clean Water Act Coverage of  
“Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water**

The National Milk Producers Federation (NMPF), established in 1916 and based in Arlington, VA, develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF’s cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of dairy producers on Capitol Hill and with government agencies.

NMPF appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) request for comment on the Agency’s 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 water may be subject to CWA regulation. *See* 83 Fed. Reg. 7,126 (Feb. 20, 2018).

NMPF has also joined with other agriculture organizations in filing more extensive comments in addition to these brief comments we are submitting here. The bottom line is that Congress did not include the regulation of groundwater in the CWA and neither the courts, nor EPA, should extend the CWA beyond what Congress intended. Further, EPA should retract its previous statements on the issue that indicate otherwise.

Our assertion is based in part on the wisdom expressed by the U.S. Court of Appeals for the Seventh Circuit in 1994 (see below), and the fact that groundwater hydrology is extremely complex and varies dramatically around the country.

“The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated, and the EPA evidently has decided not to wade in on its own. The most concerted effort in Congress occurred in 1972, and the

Senate Committee on Public Works explained why it had not accepted these proposals:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S.Rep. No. 414, 92d Cong., 1st Sess. 73 (1972). See also *Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977) (recounting this history). In other words, Congress elected to leave the subject to state law--and Wisconsin has elected to permit Target Stores to build a warehouse that will affect the local ground waters.

Decisions not to enact proposed legislation are not conclusive on the meaning of the text actually enacted. Laws sometimes surprise their authors. But we are confident that the statute Congress enacted excludes some waters, and ground waters are a logical candidate. Two courts have held that ground waters are not part of the (statutory) "waters of the United States." *Exxon*; *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985). The possibility of a hydrological connection cannot be denied, see *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Cheney*, 763 F. Supp. 431, 437 (E.D. Cal. 1989), but neither the statute nor the regulations makes such a possibility a sufficient ground of regulation. On several occasions the EPA has noted the potential connection between ground waters and surface waters, but it has left the regulatory definition alone. E.g., Preamble to NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (" [T]his rule-making only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.)) Collateral reference to a problem is not a satisfactory substitute for focused attention in rule-making or adjudication. By amending its regulations, the EPA could pose a harder question. As the statute and regulations stand, however, the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters.<sup>1</sup>"

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<sup>1</sup> *Village of Oconomowoc Lake, Plaintiff-appellant, v. Dayton Hudson Corporation, et al., Defendants-appellees*, 24 F.3d 962 (7th Cir. 1994)

In addition, we believe in many cases it is impossible or extremely difficult to ascertain whether a pollutant released from a point source is likely to reach a navigable water via groundwater. As indicated above, that fact is one reason that was cited for Congress choosing not to regulate groundwater in the CWA, rather it chose to defer to the states that would be more familiar with the topology and hydrology in their states. Our nation's farmers are likely, in many cases, lacking the necessary understanding of whether groundwater could pick up a pollutant from their land and deliver it via a direct hydrological connection to a navigable water. EPA itself stated that some "hydrological connections are too circuitous and attenuated to come under the CWA".<sup>2</sup> It is inherently unfair to potentially subject U.S. citizens to the criminal sanctions and financial penalties that come with the CWA under a regulatory scheme that as of today is uncertain at best.

In the Hawaii case recently decided by the U.S. Court of Appeals for the Ninth Circuit, 84 days after injecting tracer dye into the wells, the dye began to emerge from very nearshore seafloor along North Kaanapali Beach about a half-mile from the wastewater treatment facility. No one truly know what happened to the dye during those 84 days nor the journey it took. Can we really say it did not take a circuitous and attenuated journey? Perhaps it did or perhaps it didn't, but given the uncertainty extending the CWA to these situations is not a sound concept. The matter should be addressed by state law or the problem should be presented to Congress so that they may act.

NMPF has concerns about slippery-slope regulation through reinterpretation especially since we have experienced it in the past. Several decades ago, food industry executives and EPA staff were trying to understand how the Spill Prevention Control and Countermeasures rule applied to our industries. When discussions began two critical issues quickly arose, the first was "What is oil?" and second, "How are mixtures of oil and non-oils regulated?" Unfortunately, Congress failed to define "oil" and also did not provide any guidance on how to treat mixtures containing oil. Initially, everyone thought the rule only applied to petroleum oils but then someone decided that animal fats and vegetable oils were also "oil" subject to the rule and further that oil was not limited to liquids, solid oils (fats) were covered as well.

As it applied to dairy, we were informed that the rule would apply to butter, which must contain not less than 80 percent milkfat, but that it definitely would not apply to fluid milk with a fat content of 3.25% or less, and that anything in between, in terms of fat content, was an unknown. There was discussion about a fat percent threshold which EPA, at the time, thought would be around 30%, below which a product would not be "oil" and would not be regulated. Many in industry felt a 51% threshold was more appropriate. After literally decades of discussions, EPA managed to ultimately conclude that even fat-free milk was oil under the SPCC rule because fat-free milk contains trace amounts of fat. The dairy industry did not concur with that thinking and

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<sup>2</sup> 66 Fed. Reg. 2959, 3017 (Jan. 12, 2001)

protested the overly broad interpretation. That ultimately led to a proposal by the Bush Administration to limit the rule's applicability to dairy. Unfortunately, that proposal was nullified when the Obama Administration came into office and rescinded all regulatory actions that took place ninety days prior to President Obama being inaugurated as is standard practice when administrations turn over.

Several years later though, the Obama Administration proposed and wisely finalized an exemption for dairy and in President Obama's 2012 State of the Union address he remarked:

“There's no question that some regulations are outdated, unnecessary, or too costly. In fact, I've approved fewer regulations in the first three years of my presidency than my Republican predecessor did in his. (Applause.) I've ordered every federal agency to eliminate rules that don't make sense. We've already announced over 500 reforms, and just a fraction of them will save business and citizens more than \$10 billion over the next five years. We got rid of one rule from 40 years ago that could have forced some dairy farmers to spend \$10,000 a year proving that they could contain a spill -- because milk was somehow classified as an oil. With a rule like that, I guess it was worth crying over spilled milk. (Laughter and applause.)

Now, I'm confident a farmer can contain a milk spill without a federal agency looking over his shoulder. (Applause.) Absolutely. But I will not back down from making sure an oil company can contain the kind of oil spill we saw in the Gulf two years ago. (Applause.)”<sup>3</sup>

Congress did not include the regulation of milk spills in the Clean Water Act - the statute that granted EPA the authority to regulate oil spills. Instead, some in EPA reinterpreted the term “oil” to mean any substance containing traces of oil, no matter how little. That was wrong, two administrations ultimately understood that and President Obama rightfully derided that decision.

We do not disagree that Congressional intent frequently needs to be communicated more clearly. However, when it is not, neither EPA nor the courts should seize congressional power and start legislating. In fact, in this situation the record is clear and no additional interpretation is necessary at all. Congress discussed the inclusion of groundwater in the CWA Act and chose not to include it. EPA should make it clear via a regulation, that groundwater directly, indirectly, hydrologically connected or not is not subject to regulation under the CWA and should retract any and all past statements to the contrary. The dairy industry (and others) should not have to relive the frustration and confusion we experienced with the oil spill rule.

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<sup>3</sup> <https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address>

NMPF greatly appreciates EPA bringing this matter to the attention of its stakeholders and we appreciate the opportunity to share our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Clay Detlefsen". The signature is fluid and cursive, with the first name "Clay" being more prominent.

Clay Detlefsen  
Senior Vice President, Regulatory and Environmental Affairs & Staff Counsel