



DWR-NR-G-05-Waters of the State Exception Clause-11/3/2020

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2) SIGNATURES:


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3) GUIDANCE:

The purpose of this guidance is to provide the Department's interpretation of the exception clause in the definition of "waters" in the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 to -148 (the "TWQCA"). The TWQCA embodies a comprehensive regulatory program for the protection of Tennessee waters, and recognizes that the waters of Tennessee are the property of the state and are held in trust for the use of the people of the state. Tenn. Code Ann. § 69-3-102(a). A core purpose of the TWQCA is to ensure the public's right to unpolluted waters. *Id.*

The scope of the TWQCA, however, is limited by its definition of waters:

"Waters" means any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters.



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Tenn. Code Ann. § 69-3-103 (emphasis added). The exception clause includes the highlighted text starting with “except.”¹

This definition has been enacted since at least 1971, and reflects the role of the state in protecting all Tennessee waters that are not strictly private. Under the TWQCA definition, all waters in Tennessee are jurisdictional² unless they are both (1) held in single, private ownership, and (2) are not connected to natural surface water or groundwater. Either one of these conditions alone is not sufficient to satisfy the conditions of the exception clause.

Private Property in Single Ownership

Waters must be confined within private property in single ownership to fall within the exception clause. The TWQCA does not define “private property,” but the term is commonly understood to refer to ownership of property by non-governmental entities. Any non-governmental entity qualifies as private: individuals, associations, corporations, etc. Whether property is private is determined by ownership, rather than by use: private property can be made open to the public – for example as a grocery store, gym, or office building – and retain its private status.

Waters must also be confined within single ownership to fall within the exception clause. Therefore, if a body of water overlaps property boundaries, and not all of the properties are owned by the same private entity, then the exception clause does not apply. However, if waters cross lot lines, but all of the lots are owned by the same private entity, then this part of the exception is satisfied.

Junction with Natural Surface or Underground Waters

The second element of the exception clause is that the privately-owned waterbody must not effect a junction with natural surface waters or underground waters.

1. Natural Surface Waters

¹ This provision is often referred to as the “farm pond” exemption. This term is inapt because agricultural use is unrelated to the definition of waters. The TWQCA has a separate provision exempting agricultural or forestry activities. Tenn. Code Ann. § 69-3-120(g). Moreover, the exemption can apply to bodies of water other than ponds.

² This includes wet weather conveyances when water is present. However, in wet weather conveyances, aquatic alterations are authorized by statute under specific conditions and do not require a separate aquatic resource alteration permit. See Tenn. Code Ann. § 69-3-108(q).



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Natural surface waters come in many forms: rivers, streams, lakes, reservoirs, ponds, wetlands, springs, and wet weather conveyances. However, stormwater flowing over land is not a natural surface water feature.

The term “natural” includes existing waterbodies that have been altered by man. For example, Tennessee has many reservoirs and impoundments that were created by altering the flow of rivers and streams, as well as many streams that have been artificially channelized or ditched: these are natural waters for the purpose of applying the exception clause because they existed prior to the alteration. TVA’s construction of multiple dams on the Tennessee River, for example, does not remove that waterbody from jurisdiction. Similarly, a constructed wetland, including at mitigation sites, is natural if it is connected to groundwater or surface waters. Where an activity alters natural hydrology in a manner that indirectly creates new or expanded waterbodies, these waterbodies are also natural.

Conversely, if a constructed waterbody was not built in waters, it is not considered natural. Artificial lakes and ponds built in uplands and not connected to natural surface waters or groundwater are not waters of the state. Other artificial features that are not waters include stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff; water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and waste treatment systems that are not constructed in jurisdictional waters. If it is not reasonably clear whether a constructed waterbody was built in waters, it is assumed to be natural in the absence of a demonstration to the contrary.

There are many different ways to combine or effect a junction with natural surface waters. A stream flowing out of a wetland joins that wetland to natural surface waters. A pond built in a stream, is connected with that stream. A wetland in a flood plain that is formed by overbank flooding is connected to the river that formed it and maintains its hydrology. However, if a waterbody is only connected to natural surface waters by stormwater flow through a wet weather conveyance, then it does not form a junction with natural surface waters, although it may effect a junction to groundwater and therefore could still constitute waters of the state.

2. Groundwater

Hydrologic features may be connected to groundwater through discrete conduits (*e.g.*, sinkhole “throats,” sinking streams, caves, etc.) as concentrated flow or may be connected through more diffuse mechanisms such as infiltration through soils or epikarst.



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Based on the nature of waterbodies in Tennessee, these hydrologic features are presumed to be connected to groundwater unless a permit applicant can demonstrate there is a barrier such as a liner or a continuous clay layer that minimizes infiltration or otherwise document that the waterbody is physically separated from groundwater. Because precipitation exceeds evaporation in Tennessee, surface water features typically drain to groundwater, even if they also are connected to other surface waters. This presumption of a groundwater connection is rebuttable, and will depend in part on the specific geology of the location in question.

In karst areas, surface water and groundwater are inextricably connected. Preferential pathways are abundant in karst landscapes and the reoccurring geologic sequence of limestone and confining layers results in water transitioning back and forth from the surface and subsurface (*i.e.*, sinking streams and springs). Therefore, in karst areas, nearly all surface waters would constitute waters of the state.

Examples:

1. A constructed fishpond:
 - a. A property owner builds a fishpond in an upland area of her property and installs a liner. The pond is filled with stormwater, including from a rain barrel at her house, and is stocked with Koi. The pond is surrounded by native vegetation and looks natural. The pond does not constitute waters because it is not connected to natural surface waters or to groundwater. The presence of fish does not, in itself, render the pond jurisdictional.
 - b. A property owner builds a fishpond by diverting and impounding part of a stream on his property. This pond constitutes waters because it is connected to natural surface waters and, lacking a liner, may also be connected to groundwater.
 - c. Two property owners build a pond in uplands overlapping their property boundary. This pond constitutes waters of the state because it is not held in single ownership.
2. Lagoons as part of wastewater management systems
 - a. A dairy farmer constructs a lagoon on her property to store manure and milking parlor wastewater prior to land application. The lagoon is constructed with a liner, above the local water table, protected from flooding, and is maintained with an appropriate freeboard. This lagoon does not constitute waters because it is in private ownership, does not span multiple property boundaries, and does not effect a junction with natural surface waters or underground waters.
 - b. A private utility constructs and maintains a lagoon for the purpose of treating domestic wastewater prior to land application. The lagoon is constructed with a liner, above the local water table, protected from flooding, and is maintained



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with an appropriate freeboard. This lagoon does not constitute waters because it is in private ownership, does not span multiple property boundaries, and does not effect a junction with surface waters or underground waters.

3. Storage of reuse water – A wastewater utility constructs and operates a pond in upland to store treated wastewater to accommodate customer use of the reclaimed water for irrigation. The pond is constructed with a liner, above the local water table, protected from flooding, and is maintained with an appropriate freeboard. This lagoon does not constitute waters because it is in private ownership, does not span multiple property boundaries, and does not effect a junction with surface waters or underground waters.
4. An “isolated” wetland – Some wetlands types (such as Riverine or Fringe wetlands) are either directly abutting or are adjacent to, and affect a surface water junction with, other waters through annual overbank flooding. However, many wetland types in Tennessee may appear “isolated” from other surface waters, but develop and maintain their wetland hydrology, soil saturation regime, and hydrophytic vegetation through a permeable connection to groundwater. These include Depression, Slope, and Flat wetland types, which are also considered jurisdictional waters due to this junction with groundwater.
5. A treatment pond is built in uplands at a surface coal mine. It is not connected to surface waters and there is a natural clay liner. After mining is complete and the pond is no longer used for treatment, it starts to fill in and, over time, forms wetland characteristics. Even if this meets the definition of wetlands in the rules, it does not constitute waters because it is not connected to natural surface or underground waters.
6. A farmer builds a pond by impounding a stream. The pond is necessary for livestock watering. This pond constitutes waters of the state, although the agricultural exemption likely applies to any permitting requirements.

Revision Number	Date	Brief Summary of Change
0	November 3, 2020	Initial Issuance