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Discharge of Pollutants/Clean Water Act: U.S. Environmental Protection Agency Request for Comments Addressing Groundwater/Surface Water Interrelationship

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The United States Environmental Protection Agency (“EPA”) issued a February 20 Federal Register Notice requesting comments on the agency’s previous statements regarding the Clean Water Act and:

... whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation.

See 83 Fed. Reg. 7126.

The scope of the term “waters of the United States” is arguably one of the three critical jurisdictional terms in the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollution Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, whether, and to what extent, a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

The issue of whether pollutants discharging from a point source via groundwater into hydrologically connected waters of the United States invokes Clean Water Act jurisdiction was the focus of a February 1st United States Court of Appeals for the 9th Circuit decision. See *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 15-17447.

The Hawai'i Wildlife Fund and other organizations filed a Clean Water Act citizen suit against the County of Maui arguing that its discharge of pollutants from injection wells into the groundwater triggered Clean Water Act jurisdiction requiring the acquisition of a National Pollution Discharge Elimination System permit. The basis for the argument was the migration of the pollutants released into the groundwater to hydrologically connected surface water (i.e., the Pacific Ocean).

The Court in Maui held that the Clean Water Act does not require that the point source itself convey the pollutants directly to the navigable water (waters of the United States). It concluded in part:

At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions. Under the circumstances of this case, we therefore affirm the district court's summary judgment rulings finding the County discharged pollutants from its wells into the Pacific Ocean, in violation of the CWA, and further finding the County had fair notice of what was prohibited.

The February 20th Federal Register Notice addresses this groundwater/surface water relationship, noting:

. . . that pollutants discharged from point sources that reach jurisdictional surface water via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements. EPA has not stated that CWA permits are required for pollutant discharges to groundwater in all cases, but rather that pollutants discharged from point sources to jurisdictional surface waters that occur via groundwater or other subsurface flow that has a direct hydrologic connection to the surface water may require such permits.

EPA notes that such statements have been made in previous agency rulemaking, permitting, and guidance documents. However, it characterizes most of these statements as "collateral to the central focus of a rulemaking or adjudication."

The Federal Register Notice discusses some of the case law addressing the role of groundwater in jurisdictional determinations and characterizes it as "mixed." The agency also discusses the phrase "direct hydrologic connection." This phrase is stated to be a fact-specific determination, citing 66 Fed. Reg. at 3,017. It states that the relevant evidence in making such a determination includes:

- the time it takes for a pollutant to move to the surface waters;
- the distance it travels; and
- its traceability to the point source.

These factors are stated to be affected by other site-specific factors such as geology, flow, and slope.

EPA is requesting comment regarding:

- Should the agency 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 to a jurisdictional surface water
- Whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA
- Whether such releases would be better addressed through other federal authorities as opposed to the NPDES permit program
- Whether some or all such releases are addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations
- Whether the agency should clarify its previous statements on these issues to provide additional certainty for the public and the regulated community
- Suggestions are sought on what issues should be considered if further clarification is undertaken
- What format or process should be used to revise or clarify the agency's previous statements (e.g., through memoranda, guidance, or in the form of rulemaking)

A link to the [Federal Register Notice](#) and the [Maui case](#) can be found here.