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Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement

04/17/2019

The United States Environmental Protection Agency (“EPA”) issued what it describes as an “Interpretive Statement” (“Statement”) addressing the application of the Clean Water Act permitting requirements to discharges to groundwater.

The question as to whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permitting requirements has been the subject of conflicting federal appellate court decisions for which the United States Supreme Court has granted a Petition for writ of cert.

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are met:

- a person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES requirements.

The scope of the term “waters of the United States” from the Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact it is also relevant to non-NPDES 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 Relations
- As a result, whether, and to what extent, a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

EPA stated it issued its April 15th Statement due to the uncertainty generated by conflicting federal court decisions and the “prior lack of clear agency guidance” regarding whether NPDES permits are required for releases of pollutants to groundwater.

EPA had issued a request for public comment in 2018 on whether the agency should revise or clarify its position on the issue. The agency states it received over 50,000 comments from a wide range of stakeholders. Further, the agency states that it undertook a comprehensive review of prior agency statements in the matter, “informed by those comments and based on a holistic analysis of the statute, text, structure, and legislative history of the Clean Water Act.”

EPA concluded in the Statement that the Clean Water Act is:

. . .best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under section 301 of the Clean Water Act, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.

EPA states that its conclusion differs from the direct hydrological connection theory expressed in United States amicus brief filed in the county of Maui proceeding. Further, it expresses disagreement with the environmental organizations’ and Ninth Circuit’s view that the Clean Water Act NPDES requirements can apply when a pollutant released from a point source migrates to navigable waters through groundwater.

Regardless, the agency notes that it will apply the decisions of the Ninth Circuit as well as the reasoning of the Fourth Circuit in the Kinder Morgan decision in their respective circuits until further clarification from the Supreme Court. (The Fourth Circuit held direct hydrological connection can trigger jurisdiction.) As a result, the Statement currently only applies outside of the Fourth and Ninth Circuit.

A copy the Statement can be downloaded [here](#).

https://www.epa.gov/sites/production/files/2019-04/documents/interpretive_statement_application_of_cwa_npdes_memo_-_signed.pdf