



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Does a Discharge to Groundwater Require an NPDES Permit? Arkansas Environmental Federation Water Conference Presentation (Walter Wright)

04/26/2019

I undertook a presentation at the April 18th Arkansas Environmental Federation Water Conference ("Conference") titled:

Does a Discharge to Groundwater Require an NPDES Permit? ("Presentation")

The *Presentation* focused on a key pending Clean Water Act jurisdictional issue.

The issue is whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination ("NPDES") permitting requirements.

Many of the slides from the *Presentation* were obtained from a presentation previously undertaken by my law firm colleagues Allan Gates and Jordan Wimpy.

The *Presentation* focused on four related issues:

- Recent federal appellate court decisions which are split on the question
- Pending United States Supreme Court review
- United States Environmental Protection Agency activity on the question
- 2018 agency solicitation of views on the question
- April 15th agency Interpretive Statement on the question
- Reminder about broader state jurisdiction (including Arkansas)

The *Presentation* initially noted that 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 permitting requirements.

The breadth of terms such as “discharge of pollutant,” “pollutant,” and “point source” were addressed .

As to the definitional term “waters of the United States” the issue was described as:

Whether the Clean Water Act permitting requirement is confined to discharges from a point source to navigable waters, or whether it applies to discharges into soil or groundwater whenever there is a direct hydrological connection between groundwater in nearby navigable waters.

As noted, this issue does not only affect NPDES permits. In addition it is 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 Regulations

The issue was more recently addressed because of the Ninth Circuit Court of Appeals decision in the Maui case that held discharges from a point source into groundwater can in certain circumstances be subject to the Clean Water Act. Courts had arguably, with limited exceptions, never interpreted groundwater to be a water of the U.S. under the Clean Water Act.

The basis for environmental groups arguing in Maui for triggering jurisdiction was the migration of the pollutants released into the groundwater to hydrologically connect to surface water (i.e., the Pacific Ocean).

The court in *Maui* held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters.

The remainder of the *Presentation* addressed other federal appellate court cases which included:

- *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir., Apr. 12, 2018), petition for cert. filed, No. _____ (U.S. Aug. 28, 2018)
- *Sierra Club v. Virginia Electric and Power Co.*, slip opinion, No. 17-1952, (4th Cir., Sept. 12, 2018)
- *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 2017 WL 6628917 (E.D. Ky, Dec. 28, 2017), appeal pending, No. 18-5115 (6th Cir.)
- *Tennessee Clean Water Network v. TVA*, 273 F. Supp. 3d 775 (M.D. Tenn Aug. 4, 2017), appeal pending, No. 17-6155 (6th Cir.)
- *26 Crown Associates, LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506 (D. Conn, Jul. 11, 2017), appeal pending, No. 17-2426 (2nd Cir.)

EPA activity on the groundwater issue was also noted which included:

- 2018 Request for Comment on the groundwater conduit issue
- EPA acknowledged it had made statements that discharges through groundwater were regulated if there was a hydrological connection to regulated surface waters.
- The agency received 50 comments on the issue

On April 15th EPA issued on what it described as an “Interpretive Statement” addressing the application of the Clean Water Act permits to discharges us to groundwater. The federal agency concluded 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 notes that its interpretation is not applicable to decisions in the Ninth and Fourth Circuit because of the federal appellate decisions that are contrary to this interpretation.

The pending United States Supreme Court review of the issue was discussed and it was noted that in the interim environmental organizations and others we're presumably continue to file actions based on their view of the issue.

Finally, it was noted that Arkansas , as a delegated state, will presumably follow EPA's interpretation until a definitive United States Supreme Court ruling. Regardless, it was also noted that the Arkansas Water and Air Pollution Control Act utilizes the term "waters of the state." Waters of the state has a much broader reach. While it is not utilized for purposes of the NPDES permitting program, it ,nevertheless, authorizes a number of regulatory activities that address potential impacts on groundwater (sometimes referred to as "no discharge" programs).

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