

EPA RELEASES INTERPRETATIVE STATEMENT TO CLARIFY CWA NPDES PERMIT PROGRAM REGULATIONS

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On April 23, 2019, the United States Environmental Protection Agency (EPA) released an interpretative statement to clarify whether the permit program under the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) applies to pollutants released from point source to groundwater. The statement was created in response to the 50,000 comments received under the federal register notice posted on February 20, 2018. After careful consideration of the public comments and CWA's objective, EPA determined it would be best to exclude the release of pollutants that travel from a point source to groundwater from the permit program. EPA is seeking additional input until June 7, 2019, to further regulate the issue.

While analyzing the situation, EPA recognized that the Clean Water Act was established with the intent "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA has jurisdiction over the "Waters of the United States" or "WOTUS", which was defined in EPA's December 2018 rule. To accomplish their objective, the act outlines two goals: clean and eliminate discharge pollutants in navigable waters by 1895 and to provide protection for animals as well as recreation by 1983. In efforts to keep navigable waters pollutant-free, CWA details the NPDES program in section 301, declaring that it is against the law to "discharge any pollutant into the waters of the United States without authorization under specific provisions of CWA." The most common method to obtain authorization is by securing an NPDES permit issued by EPA or State agencies. After submitting the required reports and lab tests, the program analyzes "the water quality-based and technology-based standards." The issue that has been presented is the question of whether or not pollutants that enter navigable waters through a nonpoint source, groundwater, should be subject to the same regulations.

During the time that EPA was seeking public comments on the matter, several cases involving the question occurred. In the County of Maui v. Hawaii Wildlife Fund, the county introduced wastewater into the ground, which intercepted a lava tube, and was carried to navigable waters, the Pacific Ocean. This case highlighted the complexity of the situation and the applicability of CWA NPDES. The Ninth Circuit contended that CWA liability would apply in this case and the United States Supreme Court granted certiorari. In another case, the Kinder Morgan Energy Partners, L.P. v. Upstate Forever, the Fourth Circuit also argued that groundwater should be considered in the NPDES program. On the other hand, the sixth and seventh circuit ruled that CWA should not apply when pollutants travel to navigable waters through groundwater. Evidently, there has been a split in circuits concerning this issue.

Ultimately, EPA decided to exclude pollutants that reach jurisdictional surface water through groundwater from the NPDES permit program. EPA noted that CWA's definition of the discharge of pollutant includes "any addition of any pollutant to navigable waters from any point source." They reasoned that because groundwater is not considered navigable waters, it would be exempt from this rule. Further, CWA was created with the understanding that the "state and federal authorities are collectively available to provide protection for ground and surface water quality in those instances where direct CWA permitting authority is not applicable." Because of this, it is expected that the state and federal authorities would work towards protecting the Nation's water.

The states have been given the authority to adopt any laws or regulations that may prevent, reduce, or eliminate pollution. Meanwhile, federal statutes, such as "the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive

Environmental Response, Compensation, and Liability Act will continue to provide important protections for groundwater quality, and for surface waters impacted by releases to groundwater.”

The California Environmental Attorneys at Bick Law LLP will continue to monitor issues regarding groundwater and navigable water regulation.