BICKLAW LLP
exclusively environmental

EPA'S GROUNDWATER GUIDANCE IS VAGUE, NOT LIKELY TO BE FINALIZED

Tue Dec 15th, 2020 | Categories: Litigation |

This week the U.S. Environmental Protection Agency ("EPA") issued a draft guidance on compliance with the Supreme Court decision regarding Clean Water Act ("CWA") permits for groundwater pollution. The draft guidance narrowly interprets the permitting required by the April Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund.* In *Maui*, the Court ruled Clean Water Act permits can be required under certain circumstances when pollution hits groundwater before it travels to federally regulated waters. The EPA draft guidance, in contrast, suggests many facilities may be exempted from the requirement to obtain such permits.

The Court decided a permit is required for both direct discharges of pollutants into federally regulated waters, and for "functional equivalent" discharges of pollutants in groundwater that flows into federally regulated waters. The EPA says the *Maui* decision creates confusion around when permits will be required for groundwater discharge. The EPA suggests the determination of whether or not a pollution discharge into groundwater is considered a "functional equivalent" should take into account what happens to the pollutant over the time and distance it travels to reach regulated waters. Under these criteria, the EPA predicts the statusquo of Clean Water Act permitting is not likely to change dramatically because the procedure for issuing permits under these very specific circumstances represents such a small percentage of the total number of National Pollutant Discharge Elimination System ("NPDES") permits issued.

-SCOTUS' Seven-Factor Functional Equivalent Test

The *Maui* decision outlined a seven-factor test for determining when permits are required for discharges that travel through groundwater to federally regulated water. The two most significant determinants enabling permit requirements under the CWA are: (1) the time the discharge takes to travel to federally regulated water; and (2) the distance the discharge travels.

The EPA memo says aa regulator or regulated entity should determine whether the pollutant composition and concentration at the end point is different from what was initially discharged in order to determine whether or not an NDPES permit is required. If there is a difference, the EPA argues, the discharge may not in fact be the "functional equivalent" of a direct discharge to a federally regulated water. If the discharge is the same or nearly the same chemical composition and concentration when it reaches the federal water, it would then be considered a direct discharge, according to the EPA. Facilities may also be "less likely" to require a permit if it uses a waste storage/treatment system than if it discharges consistently and predictably into groundwater.

An immediately apparent problem with this guidance is that it potentially exempts facilities whose pollution is at all different by the time it reaches the waterway from how it was at the origin, even when the difference is just caused by dilution. Most substances/discharge would be diluted once put into water, and thus it would be unlikely to find discharge at the same concentration in the waterway as it was at its point of origin. In many cases, this provision would effectively nullify *Maui*.

The memo goes on to encourage regulators and potentially regulated entities to consider additional issues before even beginning the functional equivalency test—any of which may potentially exempt them from being required to get a NDPES permit. By way of example, the memo instructs entities to first determine a discharge actually enters a water of the United States in the first place, a question that

often does not present a clear cut answer. The memo also suggests determining that the discharge is from a “point source” as defined by the Clean Water Act. This is another issue that often lacks a clear cut answer in many cases.

Critics say the Trump EPA is trying to modify the functional equivalency test established in *Maui.* The guidance suggests only a very small set of discharges would result in a need for a Clean Water Act permit, and therefore, very little will change for most of the day-to-day functioning around groundwater discharge issues. Critics say this is incorrect, and that to suggest otherwise means ignoring the ruling in *Maui.* EPA’s guidance is an attempt to tightly control the circumstances in which an NDPES permit is required, and effectively makes the *Maui* seven-factor test an eight-factor test. This guidance represents another hurdle for regulators to sort through when determining whether or not they need an NDPES permit.

All of these suggestions signal the Trump EPA would rather encourage fewer instances of required NDPES permits being issued. This is not likely to continue with the EPA under Biden. In fact, critics suggest this memo seems to be written with the assumption there would be a second term for Donald Trump. The guidance must undergo a 30-day comment period before it is finalized, which does not leave much time to finalize it before Joe Biden’s inauguration. The Biden administration is not likely to endorse this policy, and may very well dispense with it shortly after taking office. Even in this unlikely event the administration does not prioritize retracting this policy, it’s not likely to have much effect, given its broad scope and lack of specificity.

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-

-