

EPA Considering Updating Position on Discharges to Groundwater:

By Nathan E. Vassar

The familiar dialogue about the interplay between surface water and groundwater is once again front and center in the water quality arena. EPA requested comments this spring as to whether the agency should revisit its prior statements about discharges to groundwater sources, and specifically, whether EPA should regulate such discharges under the existing NPDES (TPDES) program. WEAT and TACWA weighed in with comments earlier this month. The importance of this issue is significant in light of groundwater exemptions and existing injection programs that have been free from NPDES program regulation.

The issue has been revived in light of a federal court decision in the Ninth Circuit, *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), under which that court held that groundwater injection disposal of treated effluent in Maui County, Hawaii should be regulated under EPA's NPDES program because the effluent eventually reached the Pacific Ocean. Although the court's decision is not binding in Texas, EPA's response to the case and to comments received will have far-reaching consequences. At risk are Congressionally mandated limitations, where the NPDES program only targets "point source" discharges, where only discrete, end-of-pipe conveyances to jurisdictional waters require discharge permits. Utilities and state agencies that implement the NPDES program benefit from a level of certainty, where discharges to groundwater are not deemed "point source" discharges, even though there may be hydrologic connections in certain instances.

The question also implicates other important water quality questions, as a connect-the-dot "conduit theory" (as advanced in the Maui case) drives permitting and enforcement considerations. On the one hand, can utilities that employ underground injection methods for certain wastes, rely

upon those regulatory programs exclusively, or is there overlap with discharge requirements. In the enforcement context, if a discharge is deemed unauthorized because wastes could eventually be traced down to receiving jurisdictional waters, liability exposure could increase.

The nature of the WEAT/TACWA comments focused upon the distinctions between the NPDES program, as it was created, and other injection regulatory approaches, as well as concerns about the inconsistent application across the country. For example, would a NPDES permit only be necessary if EPA could prove a surface water connection, or would the default approach require an entity to show that underground discharges would not implicate jurisdictional waters? Additionally, our comments pointed out that even the controversial 2015 “Waters of the United States” definition rule included a carve-out for groundwater, acknowledging the limits of federal jurisdiction in this area.

EPA will now consider comments received and decide whether to move forward with a formal rulemaking, or if it should issue additional guidance on groundwater discharges and the NPDES program. Meanwhile, other courts are considering similar questions regarding liability under a “fairly traceable”/hydrologic connection theory. These may ultimately result in the U.S. Supreme Court taking up the issue, to the extent that the matter is one of conflicting court opinions from the Circuit Courts. Depending upon the Administration’s next steps on the matter, further input and comments may be warranted from membership of WEAT/TACWA and other entities across the state.

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