

EPA Issues Interpretive Statement on Groundwater Discharges and Permitting:

By Nathan E. Vassar

The interaction between surface water and groundwater has been the focus of both state and federal attention for many years, although a series of federal court decisions have generated a greater focus on the science and law of hydrologic connections, and when a discharge is required under the NPDES/TPDES programs. On April 12, 2019, EPA Headquarters issued an Interpretive Statement to the EPA Regions making clear the agency's position regarding the limits of the NPDES permitting program under federal law. The statement followed a comment period in Spring 2018, where EPA asked for input as to whether discharges to groundwater should require a discharge permit pursuant to the NPDES program, in light of litigation out of the federal Ninth Circuit where the appellate court held that wastewater discharges into groundwater (permitted under the Underground Injection Control program) also required a separate NPDES discharge permit because of migration of the effluent injected into surface water. WEAT provided comments during the request period a year ago, stating, among other things, that TPDES discharge permitting should not expand to groundwater injection.

Specifically, EPA's statement provides that "EPA concludes 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 CWA, *regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.*" (emphasis added). EPA continued and noted that the purpose of the statement is to provide clarity and also to inform future permitting decisions. The agency's rationale focuses on Congressional intent to carve out from discharge permitting the introduction of pollutants to groundwater, in light of state responsibility over groundwater supplies and water quality protections.

The agency's position is consistent with the Trump Administration's focus on Tenth Amendment/federalism principles. Although the agency does not dispute the hydrologic realities of surface water-groundwater migration/interaction, its position is founded on the statutory language of the Clean Water Act, and the limits of the discharge permitting reach that Congress intended with the law's passage in the 1970s.

Because the U.S. Supreme Court has taken up the Ninth Circuit case (*See* Petition for Writ of Certiorari, *Cty. of Maui v. Hawai'i Wildlife Fund, et al.*, No. 18-260 (Aug. 27, 2018) (the "Maui Case")), EPA's Interpretative statement does not currently apply in the circuits where the dispute is pending the High Court's decision (the Ninth Circuit, as well as the Fourth Circuit, where a parallel decision is at stake). However, for Texas utilities, the EPA position confirms the statutory and policy position many POTWs in Texas have advanced – namely, that existing discharge permitting regimes should not be expanded/replaced by courts in the absence of legislative direction. The U.S. Supreme Court is expected to rule next term (likely in Spring 2020) on the Maui Case.

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