



EPA Concludes No CWA Liability for Discharges Via Groundwater; WVMWQA Submits Comments in Support June 2019

On April 23, EPA published an Interpretative Statement clarifying the application of CWA permitting requirements to groundwater. EPA concluded that releases of pollutants to groundwater are categorically *excluded* from the CWA's permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities. Conflicting federal court decisions and the prior lack of clear agency guidance regarding whether discharge permits are required for releases of pollutants to groundwater have caused uncertainty regarding how to implement and enforce the NPDES permitting program. To address this uncertainty, EPA requested public comment last year on whether it should revise or clarify its position on the issue. At the same time, EPA also undertook a comprehensive review of prior agency statements on the matter and performed a holistic analysis of the CWA. Based on this analysis and consideration of public input, EPA concluded that releases of pollutants to groundwater are excluded from the Act's permitting requirements, regardless of whether that groundwater is hydrologically connected to surface water.

On June 7, the WVMWQA submitted comments in support of EPA's Interpretive Statement. Our comments highlight possible extreme outcomes of extending NPDES coverage, such as triggering permit requirements for activities not traditionally regulated by those permits (such as leaks from sewage collection systems). Secondly, as EPA has already acknowledged that releases to groundwater sometimes occur with green infrastructure, our comments noted that green infrastructure projects that constitute best management practices should not trigger unnecessary regulation under separate NPDES permits. EPA is currently reviewing the public comments and we will report back to the membership with any updates.

Meanwhile, the U.S. Supreme Court will hear oral arguments this fall, as it reviews the Ninth Circuit's 2018 decision in *Hawai'i Wildlife Fund, et al., v. County of Maui*. That ruling held that the county violated the CWA by injecting wastewater into a groundwater channel with a direct link to the Pacific Ocean. The Fourth Circuit made a similar finding in *Upstate Forever, et al., v. Kinder Morgan Energy Partners*, while the Sixth Circuit rejected CWA-groundwater liability in a pair of linked 2018 decisions. Based on those rulings, EPA's new guidance only applies outside of the Fourth and Ninth Circuits, though it notes that it could have applied the new finding nationwide as a fresh interpretation of ambiguous statutory text. In addition, the agency may take further action if necessary, once the Supreme Court has issued its decision.