



EPA Publishes Notice Requesting Public Comment on Whether to Regulate Discharges to Groundwater Under the CWA

Feb 22, 2018

Reading Time : **1 min**

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The CWA regulates discharges to navigable waters through (among other mechanisms) the National Permit Discharge Elimination System (NPDES). Dating back to the 1990s, through rulemakings, guidance documents and permits issued under the CWA, the EPA has stated that a pollutant discharged from a point source to groundwater that has a hydrologic connection to a jurisdictional surface water can constitute a regulated discharge requiring an NPDES permit.² The EPA has never taken steps to set out in the context of a rule under what circumstances such permits are required; rather, it has considered the question through only case-by-case, fact-specific determinations. This has led to inconsistent application in the courts, with courts split on the question of whether, and then what kind of, indirect discharges are subject to the CWA. Earlier this year, the 9th Circuit ruled that the County of Maui (Hawai'i) had been violating the CWA for more than 30 years by discharging its treated wastewater effluent into wells that had a hydrological connection to the Pacific Ocean, a jurisdictional surface water.³

Presumably, the request for comments is a reaction to what the administration may view as an expansive reading of the CWA, and it offers stakeholders the opportunity for input. This is an important opportunity to identify the impacts of CWA jurisdiction over certain releases to groundwater, including cost and regulatory burdens to industry and the states (which are, by and large, delegated to implement the CWA) to inform a potential future regulatory action. Comments are due to the EPA by May 21, 2018.

¹ Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, EPA-HQ-OW-2018-0063 (February 20, 2018).

² As the request for comment points out, most of these statements were collateral to the central focus of the rulemaking or adjudication p. 6.

³ *Hawai’i Wildlife Fund et. al v. County of Maui*, No. 15-17447 (February 1, 2018).

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