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DAILY NEWS

EPA's Doubts On Minnesota Discharge Permit Highlight Groundwater Debate

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EPA's concerns over Minnesota's preliminary plans to craft a discharge permit for a tailings basin – which the agency says would unlawfully allow discharges for pollutants to surface water in excess of water quality standards (WQS) through groundwater seepage at the basin – illustrate ongoing debate over when such groundwater connections require permit limits.

Environmentalists say how the state decides to address EPA's concerns in the final permit is potentially precedent-setting because it could serve as a guide for how regulators can address seepage that leads through underground hydrology to surface waters.

"The real question here is if pollution from the mine's tailings basin seeps out and ends up in surface water, can regulators pretend that groundwater standards are the only ones that apply," one environmentalist says.

Environmentalists expect the Minnesota Pollution Control Agency (MPCA) to issue in mid-February a formal draft permit for public comment for the Minntac tailings basin in Mountain Iron, MN, which is managed by U.S. Steel.

EPA outlined its concerns to state regulators in a Dec. 19 letter from EPA Region 5 National Pollutant Discharge Elimination System (NPDES) program branch chief Kevin Pierard.

"We are concerned that this draft permit as written does not address, under MPCA's approved National Pollutant Discharge Elimination System program and in accordance with the Clean Water Act (CWA), all discharges to surface waters from this tailings basin," Pierard writes.

At the root of EPA's concerns is language in the state's preliminary draft permit and accompanying fact sheet indicating that runoff occurs through seepage at the basin, causing exceedances of WQS for surface water, which Pierard says in the letter means a NPDES permit must include extensive and specific controls and definitive timeframes for curbing such discharges.

"Based on this and facts supporting this conclusion, the CWA requires a NPDES permit for all such discharges to surface waters from the tailings basin," the letter says, noting that while the basin is operating under the original 1987 permit, that permit did not consider the full extent of the possible discharges to surface water.

"In the years between expiration of that permit and today the discharges to surface waters have continued and are better understood," Pierard writes.

Permitting Dispute

The permitting dispute follows a federal court ruling from last year finding that a Hawaii wastewater reclamation plant discharged pollutants into the Pacific Ocean via underground springs, largely seen as highlighting the need for courts to clarify how CWA jurisdictional claims via groundwater connections are decided – a key question emerging from EPA's proposed jurisdiction rule.

In that case, the U.S. District Court for the District of Hawaii in its May 30 ruling in *Hawaii Wildlife Fund v. County of Maui* says that while it granted the environmental plaintiffs' motion for partial summary judgment because a dye tracer test showed effluent migrating from the plant to the ocean, establishing CWA jurisdiction in similar cases absent such tests is a murkier issue.

Observers said the ruling is likely to shed more light on how jurisdictional determinations involving groundwater are made, given that EPA and the Army Corps of Engineers' proposed rule seeking to clarify the scope of the water law clearly exempts groundwater as being covered by the CWA but also acknowledge that waters with "shallow subsurface connections" to traditionally navigable waters may be jurisdictional.

The district court in *Hawaii Wildlife Fund* cited a 2006 U.S. Court of Appeals for the 9th Circuit ruling, *Northern California River Watch v. City of Healdsburg*, which is seen as upholding the possibility of regulating groundwater under the CWA when it serves as a medium through which pollutants are channeled into jurisdictional waters.

Minnesota's draft permit would supersede the previous permit, issued in September 1987 but still covering the facility because of a state law allowing an expired permit to continue to apply as long as the facility applies for a new permit, though a minor permit modification was done in 2010 to allow for construction of a seep collection and return system.

Preliminary Permit

The preliminary draft permit would cover the approximately 8,700-acre facility, which includes the basin, the drainage area contributing surface runoff to the basin, and wastewater disposal systems within the area, as well as part of the processing plant area.

But as EPA points out in the letter, MPCA's proposed approach would "establish a compliance schedule that does not set a date by which compliance with surface water quality standards will be achieved nor does it describe the steps necessary to achieve compliance with these standards."

In a Dec. 19 letter, the group Water Legacy has raised similar concerns to those of EPA, saying it appears the permit would take the position that seepage cannot be regulated under the CWA, despite what the groups says is years of hydrologic data showing a connection through which sulfates and other pollutants enter surface water.

Specifically, the group takes issue with the monitoring locations in the draft permit plans, saying they are not designed to ensure identification and control of pollutants at the nearest points where Minntac Tailings Basin discharges daylight to surface water.

"In the face of clear evidence of the hydrological connection between Minntac Tailings Basin pollutants and surface waters, regulation under the Clean Water Act NPDES program is required to protect beneficial uses in connected surface waters under applicable law," the group says, citing the *Hawaii Wildlife Fund* ruling. -- *Bridget DiCosmo* (bdicosmo@iwpnews.com)

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