

Message

From: Paul Balserek [pbalserek@steel.org]
Sent: 8/30/2017 9:32:40 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]; Dominguez, Alexander [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5ced433b4ef54171864ed98a36cb7a5f-Dominguez,]
Subject: Follow-up regarding Conduit Theory
Attachments: Chart of Case Law on Discharges to Groundwater Hydrologically Connected to Navigable Waters (ELG. 8-22-2017).pdf

Dear Sarah and Alex,

Thank you again for the time and attention you have given us regarding groundwater discharges being treated as point sources under the Clean Water Act. Per our discussion with you on August 11th, we have attached a summary of the numerous cases where the courts decided whether hydraulically connected groundwater is subject to the CWA and NPDES permitting as a point source. You will note the courts are split on the treatment of groundwater discharges as a point source. The text and legislative history of the CWA clearly indicate the CWA was never intended to regulate discharges to groundwater. Some courts have determined that discharges to groundwater with a hydraulic connection to surface water is not a point source. However, over the past few years, we have observed renewed attempts to expand the definition of a point source through litigation to capture a hydraulic connection to surface water as a point source using the "conduit theory". In our opinion, courts have made determinations beyond the original intent of the CWA. We believe there is an opportunity for the Agency to clarify the intent of the CWA with respect to defining a point source.

We would like to reiterate that we are not advocating for no regulation of discharges to groundwater. Rather, we believe there are existing regulatory frameworks that are designed to regulate discharges to groundwater, and currently are being employed to just that end without reference to the NPDES point source regime (e.g., Minnesota's SDS program, Michigan's groundwater regulations, other state and federal regulations (such as RCRA Correction Action, etc)). It is our position that these existing programs are the most appropriate framework for regulating discharges to groundwater, not the CWA or the courts.

A recap of the recommended options to address emerging opportunities to provide clarity and consistency are outlined below:

- 1) We believe it would bring clarity to what is becoming a more confused area of permitting if EPA were to provide written clarification, with regards to both law and policy, that groundwater discharges or hydraulically connected groundwater to surface water are not point sources and do not require NPDES permits.
- 2) Although not directly on point with respect to the given rule, as we discussed, another possible avenue for clarification could be the preamble of the anticipated WOTUS rulemaking, since groundwater was addressed in the last iteration of this rule.
- 3) And finally, it is our sense that lasting clarity on this issue will require federal rulemaking.

Thanks again for your time, and please do not hesitate to ask if there is any way we can assist or offer further clarification of the items outlined above.

Thanks very much,

Paul

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