

INSIDEEPA.COM

an online news service from the publishers of Inside EPA

DAILY NEWS

EAB Case Sets Up Test For Trump EPA On CWA Groundwater Protections

May 16, 2017

A Massachusetts town is asking EPA's Environmental Appeals Board (EAB) to overturn a Trump agency-crafted Clean Water Act (CWA) permit that it claims restricts groundwater contamination based on a connection to protected surface waters -- setting up a legal test over whether the water law allows such limits in EPA-issued permits.

The town of Marion, MA, filed its EAB appeal May 15, asking the board to hold that EPA's National Pollutant Discharge Elimination System (NPDES) permit for the town's wastewater treatment plant goes beyond federal authority under the CWA, in part because it regulates groundwater contamination from sewage sludge lagoons.

EPA "has exceeded the scope of its CWA authority by impermissibly regulating sludge that lacks a direct impact on surface waters of the United States . . . the key is that the CWA does not govern groundwater, even if it is hydrologically connected to navigable waters," the filing says.

Marion's appeal means EPA will for the first time be directly involved in the ongoing legal fight over whether the CWA limits groundwater contamination when the pollutants will flow into surface waters. Until now, the only cases claiming the CWA applies to groundwater contamination have been citizen suits filed by environmentalists.

An EPA official as recently as last year said agency staff were divided over whether the water law applies to groundwater contamination, but the Trump EPA in the April 13 NPDES permit for Marion took the position that it does.

The CWA explicitly does not protect groundwater quality directly, but environmentalists have argued in other cases that when the groundwater flows into jurisdictional surface waters, it becomes a "point source" subject to CWA permitting.

In the Marion permit, the Trump EPA simply said that the town must limit nitrogen contamination in groundwater from sewage sludge without elaborating on a legal justification for such a requirement.

Marion counters that the groundwater requirements are not justified under the CWA. In other complaints raised in the suit, the town is also saying it did not receive proper notice of some of the limits EPA was considering for its permit, and that the agency is trying to dictate the "internal workings" of the wastewater plant despite the CWA limiting it to regulating pollution releases.

The Marion permit appears to be the first time EPA has moved on its own to invoke CWA authority over groundwater. The dispute has otherwise played out through citizen suits where environmentalist groups have sued private companies -- most often power plants -- over groundwater contamination they say has carried over to surface waters.

So far the groups have won a series of high-profile victories on the groundwater question in district court, but it is unclear when an appellate court might hand down a precedential decision since the only pending appeal faces procedural challenges before merits briefing can begin.

The latest such suit, filed by the Roanoke River Basin Association (RBBA) against Duke Energy, was filed May 16 in the U.S. District Court for the Middle District of North Carolina.

Groundwater Contamination

No Trump administration official appears to have weighed in directly on the issues of whether the CWA applies to groundwater contamination. Neither EPA nor the Department of Justice is involved with any of the pending suits, so how the agency responds to Marion's appeal could be a significant marker for how it will approach groundwater contamination through the CWA.

As recently as mid-2016, EPA staff seemed to be divided on whether to use the CWA to regulate groundwater pollution. Tom Lavery, who at the time worked in the EPA Office of Wastewater Management permit division, said the agency was "of two minds" on taking that step position during a May 20 at an American Legal Institute-Continuing Legal Education seminar in Washington, D.C.

During that event, Lavery said, "I think the hydrologists and the biologists see it as something -- they focus on the connectivity and the transmission [of pollutants], and because there is in some of these cases an identifiable source of pollution, they reason their way to 'well, you should permit the source.'"

But he noted that the agency's legal team did not appear to share that approach, saying, "However, I believe our good friends at [the EPA Office of General Counsel] take a more cautionary view."

RBBA's suit against Duke follows the power company filing its own case against the environmentalists in the southern district of Virginia. Duke sought a declaratory judgment on whether its power plant is violating the CWA, but RBBA and its attorneys at the Southern Environmental Law Center (SELC) countered that the company is trying to shift the case out of the North Carolina district, where other judges have already held that the water law extends to groundwater pollution that reaches surface waters.

In a May 16 press release announcing the North Carolina suit, SELC and RBBA say they "plan to file a motion to dismiss this Virginia suit."

The complaint says the environmentalists have traced pollution in the Roanoke and Dan River basins to coal ash lagoons at a Duke-run power plant in Person County, NC. But RBBA also claims that Duke is dumping waste directly into jurisdictional waters, meaning that even if the court rejects CWA authority over groundwater the case is likely to move forward in some capacity. -- *David LaRoss* (dlaross@iwpnews.com)

Related News | Transition 2016-2017 | Litigation | Water |
201821

SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or iepa@iwpnews.com.