

***Groundwater Conduit Theory: Discharges to Groundwater should not be Regulated by the CWA
Phone Call with Sarah Greenwalt, August 11, 2017***

Comment

The American Iron and Steel Association (AISI) requests clarification that the Clean Water Act (CWA) does not govern discharges to groundwater, even if there is a subsurface hydrologic connection between groundwater and surface water. The text and legislative history of the CWA indicate that it was never intended to regulate discharges to groundwater. EPA Headquarters has never adopted any formal position interpreting the CWA to require a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants to groundwater that is hydrologically connected to surface water.

Request: AISI requests that administrative guidance be issued, or rulemaking be undertaken, to clarify that the NPDES program does not regulate discharges to groundwater, even if the groundwater is hydrologically connected to surface water. Alternatively, clarification within the anticipated Waters of the United States (WOTUS) replacement rule could be provided.

Key Points

- NPDES permits are required for “the discharge of a pollutant” from a “point source.” See 33 U.S.C. § 1311, 1362; and a “point source” is any “discernible, confined and discrete conveyance”. See 33 U.S.C. § 1362. Groundwater cannot be a point source by definition.
- There is a growing body of conflicting case law which has caused significant confusion regarding whether discharges of pollutants to groundwater that is hydrologically connected to a surface water constitutes a “point source” and requires an NPDES permit.
- NGOs are using the “conduit theory” during litigation to attempt to expand the scope of the CWA
- EPA’s stance has not been consistent, and under the Obama administration the most recent public statement of a position was in *Hawai’i Wildlife Fund v. Cnty. of Maui* amicus brief:
 - “The Clean Water Act requires permits for discharges of pollutants that move to jurisdictional surface waters through groundwater with a direct hydrological connection.”
- Other sectors that have been impacted: Municipalities, farmers, stormwater systems, pipelines, legacy sites, power plants, and a multitude of other active industrial facilities.
- EPA already has programs through RCRA Correction Action, Superfund and other clean up authorities which are the historic and far more appropriate venues within which to address groundwater contamination.
- Wellhead Protection Programs and Underground Injection Control limitations are additional effective ways that agencies prevent groundwater contamination.
- The federal NPDES program was not designed to manage groundwater discharges, and several issues exist with trying to do so.
 - The discharge of pollutants to groundwater should be regulated by state programs, not by the federal government.
 - The requirements of the CWA for point sources and compliance schedules are impractical with the nature of addressing groundwater discharges, such as projecting a final effluent limit date with certainty.
 - The NPDES permit requires discharges to leave through an outfall and that effluent limits apply to a monitoring point. This is an impossible construct to apply directly to a groundwater discharges.
- Under the current CWA, in the majority of instances states are best situated to regulate pollutants in groundwater, and in limited cases other federal programs.

- The industrial facilities located in Tidal zones and/or have shallow water tables will not be able to discern when to apply the NPDES program to impoundments, ditches, pits and dewatering systems that are required for safe operations and to prevent damage to infrastructure. How does the regulated community determine the direction and flow of the water underground during different phases of tides, weather conditions, ground water consumption etc.

Other recent relevant developments:

- *Upstate Forever et al v. Kinder Morgan Energy Partners LP et al*, No. 16-cv-4003
 - Suit dismissed by judge for lack of evidence on claim of a discharge of a pollutant from a point source.
- *In re Town of Marion*, EPA Environmental Appeals Board petition filed May 15, 2017
 - In part, the appeal alleges that EPA is wrongly regulating sludge that does not directly impact surface waters under the NPDES program.