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## Rejecting “Conduit” Theory, EPA Concludes the Clean Water Act Does Not Regulate Point Source Discharges to Groundwater

More than a year after seeking public comment on the extent of federal jurisdiction under the Clean Water Act (CWA or the Act), U.S. Environmental Protection Agency (EPA) has concluded that discharges of pollutants to groundwater are “categorically excluded” from the Act’s permitting requirements.

In an interpretive statement released yesterday, EPA rejects the so-called “conduit” or “hydrologic connection” theory of CWA jurisdiction. The CWA provides for direct federal regulation of discharges of pollutants from point sources to “navigable waters,” which the Act defines as the “waters of the United States.” The CWA requires such discharges to be authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by EPA or an authorized state program.

Because groundwaters are not “waters of United States,” the CWA’s permitting requirements have traditionally been understood to exclude point source discharges to groundwater. Proponents of the so-called “conduit” or “direct hydrological connection” theory argue that the CWA’s permitting authority can reach these discharges where the pollutant uses groundwater as a conduit to a surface water or wetland subject to federal jurisdiction—i.e., a water of the United States.

Under this view, a person’s obligation to obtain an NPDES permit or face liability for violating the CWA could attach whenever a pollutant reaches a jurisdictional surface water via groundwater. Given the Act’s broad definition of “pollutant” and “point source,” embrace of the conduit theory would represent a monumental expansion of federal authority to regulate groundwater and activities on the landscape that may impact it.

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The extent of the CWA's reach has long been controversial—and the conduit theory is no exception. In its interpretive statement, EPA acknowledged that the agency itself has contributed to the confusion, releasing “a mixed record of statements” relating to the conduit issue. This uncertainty has been compounded by conflicting decisions from federal appeals courts issued in recent years. EPA's interpretive statement is intended to provide the public and state and federal regulators clarity as to EPA's position.

“Informed by [public] comments and based on a holistic analysis of the statute, its text, structure, and legislative history, the Agency concludes that the best, if not the only, reading of the CWA is that Congress intentionally chose to exclude *all* releases of pollutants to groundwaters from the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater,” EPA wrote. “Congress purposely structured the CWA to give states the responsibility to regulate such releases under state authorities.”

EPA also notes that it can continue to protect groundwater and hydrologically connected surface waters under other federal environmental laws, including the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.

As referenced by EPA in its announcement, the decision also does not impact the ability of states to regulate point source discharges to groundwater under state-enacted permitting schemes.

### **Interpretation Could Factor into Pending Supreme Court Case**

EPA's interpretive statement does not apply within two federal appellate circuits where courts have adopted a different interpretation of the CWA as it relates to discharges to groundwater. Specifically, EPA's statement does not apply within the Fourth Circuit (West Virginia, Maryland, Virginia, North Carolina, and South Carolina) or Ninth Circuit (Washington, Oregon, California, Idaho, Montana, Nevada, Arizona, Alaska, and Hawaii).

Earlier this year, the U.S. Supreme Court granted a petition to review the Ninth Circuit's contrary decision in *Hawai'i Wildlife Fund v. County of Maui*, placing the “conduit” or “direct hydrological connection” theory on the Court's docket for the term beginning this fall. In *County of Maui*, the Ninth Circuit concluded that discharges of pollutants to groundwater (via an injection well) which later migrated to a navigable water were subject to the Act's permitting requirements. A petition seeking review of another “indirect discharge” case from the Fourth Circuit, *Upstate Forever v. Kinder Morgan Energy Partners*, is also pending before the Supreme Court. Because a federal agency's reasonable interpretation of an ambiguous statute that it administers is generally entitled to deference from the courts, EPA's interpretive statement could factor into the Supreme Court's review of one or both of these cases.

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