



Closing the Door on EPA Jurisdiction over Groundwater

By Caitlin McCoy

The Environmental Protection Agency's [interpretive statement](#) on Clean Water Act (CWA) authority over groundwater is another installment in a series of actions where the agency has re-interpreted a federal environmental statute in order to limit its own regulatory authority. Prior to this, the agency re-interpreted its authority under the Clean Air Act as part of [its repeal](#) of the Clean Power Plan and replacement with the Affordable Clean Energy Rule. EPA has also proposed curtailing its authority as part of [its plan to withdraw](#) the appropriate and necessary finding in connection with the Mercury and Air Toxics Standards. These actions go against prior agency practice and the mission of the agency to protect human health and the environment.

These actions are steps in a deeply troubling agenda for the EPA under the Trump administration. We identified this agenda in our [EPA Mission Tracker](#) and explained that EPA is "...dismantling its very capacity to develop, implement, and enforce effective pollution reduction rules and programs and to carry out other vital public service functions, like advancing scientific research, sponsoring projects that promote community environmental health, and providing the general public complete and accessible information about public health and environmental issues."

EPA is an expert agency that can act dynamically to uphold the goals of the statutes it is responsible for. The statutes that EPA administers give it the authority to be flexible and responsive to the latest science, and EPA can create regulatory programs where it shares that authority with states or can choose not to exercise that authority in a given situation for practical or political reasons. However, the Trump administration appears determined to wipe out the agency's authority in certain areas.

In the Clean Water Act interpretive statement, the Trump EPA digs back into the legislative history to support the result it wants - cutting back its authority over groundwater. The agency narrowly reads CWA provisions, emphasizing certain words and phrases, to interpret the Act in a way that prevents the agency from making some types of discharges subject to the National Pollutant Discharge Elimination System (NPDES) permitting requirements.



I. The Interpretive Statement

In the statement, "...the Agency concludes that the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water."¹

In other words, EPA has determined that discharges of pollutants that flow through groundwater are categorically excluded from the CWA's permitting requirements even if that groundwater flows into surface waters within EPA's jurisdiction.

EPA argues that Congress entrusted regulation of discharges to groundwater to the states under the CWA and to EPA under other statutes. In order to keep the focus on the text, statutory scheme, and legislative history of the CWA, the agency largely ignores science. There are four paragraphs on hydrology that give a general description of the issues. For example: "Rain and snow fall to the earth, and the resulting water runs into surface waters, evaporates, is absorbed by plant roots, or infiltrates the ground's surface and moves downward to the saturated zone, 'the area in which all interconnected spaces in rocks and soil are filled with water,' also known as groundwater."

Despite acknowledgment that "[i]t is a fundamental principle of hydrology that many groundwaters and surface waters are linked through the hydrologic cycle", there is no discussion of how pollutants can move through groundwater to reach surface waters and the impact on this can have on water quality. There is not enough scientific information in the interpretive statement to determine if the science supports or refutes EPA's position.

II. Timing

The timing of the interpretive statement is interesting - EPA issued a [Request for Comment](#) on the issue of groundwater to surface water discharge jurisdiction under the CWA in February 2018, which served as notice that this would be a topic of interest for agency action. However, the Supreme Court recently agreed to hear a case presenting this exact issue, [County of Maui, Hawaii v. Hawaii Wildlife Fund](#) from the U.S. Court of Appeals for the Ninth Circuit.

¹ Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 1 (April 12, 2019) [hereinafter Interpretive Statement].



The Maui case is based on the county's wastewater treatment plant which discharges 3-5 million gallons per day of treated sewage into the groundwater beneath the facility. Pollutants remaining in the wastewater, like excess nutrients that can cause algae blooms and damage coral reefs, flow through the groundwater and enter the ocean via submarine springs. The CWA applies to territorial seas, meaning the ocean water from the low tide mark out three miles off the coast. The pollutants reach this part of the ocean where treatment plant discharges would normally require a NPDES permit. The Ninth Circuit ruled that under these circumstances, the discharge of the treated wastewater into the groundwater constitutes discharge of a pollutant through a "point source" for which a permit under the CWA is required.

The Supreme Court declined to hear a similar case, [*Upstate Forever v. Kinder Morgan Energy Partners, L.P.*](#), from the U.S. Court of Appeals for the Fourth Circuit. The Kinder Morgan case arose after the company's pipeline leaked nearly 400,000 gallons of gasoline into the surrounding soil and groundwater. Kinder Morgan worked to clean up the damage, but nearby waterways are still contaminated with gasoline. The Fourth Circuit ruled that the Clean Water Act applies to a discharge of a pollutant, like gasoline, that travels 1,000 feet or less by groundwater to reach waters covered by the CWA through a "direct hydrological connection."

The agency explains the status of its interpretive statement in light of the upcoming Supreme Court case by saying that it will only apply outside the Fourth and Ninth Circuits while the Court hears the case.² Yet, it also states that "The Agency's view ***is that the best, if not the only,*** reading of the statute is that all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater."³ EPA emphasizes that "this Interpretive Statement contains the Agency's most comprehensive analysis of the CWA's text, structure, legislative history and judicial decisions...."⁴

EPA repeats its refrain that its position is "reflected in the statute's text, structure, and legislative history" even though prior agency practice and judicial decisions go against its new reading of the CWA.⁵ Science is notably absent from EPA's list of items supporting its interpretation. EPA has never undertaken a rulemaking focused solely on groundwater jurisdiction, which may work to the agency's advantage now.

² Interpretive Statement at 4 n. 1 ("As explained herein, by not applying this interpretation in the Ninth and Fourth Circuits, the Agency is simply choosing to maintain the status quo pending further clarification by the Supreme Court, after which time the Agency intends to follow with notice and comment rulemaking.").

³ *Id.* at 17 (emphasis supplied). *See also id.* at 31, 43.

⁴ *Id.* at 2.

⁵ *See e.g. id.* at 6, 8, 15, 17, 18, 24, 30, 38, 39, 40, 41, 42, 43, 44, 45.



There is a limited record of science and information that could support a different position and pose a problem during a court's reasonableness inquiry into the agency's interpretation during a legal challenge. However, one of agency's most comprehensive statements on the issue was the [amicus brief](#) that EPA filed in May 2016 in the *County of Maui* case at the Ninth Circuit. In that brief, EPA supported requiring a permit for the treatment plant discharges, stating that "EPA's longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements." EPA is now taking the opposite position in the case before the Supreme Court.⁶

III. History

To understand the departure from prior agency practice and interpretations of the CWA, it helps to look back. In its Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations in 2001, the agency explained,

EPA does not argue that the CWA directly regulates ground water quality. In the Agency's view, however, the CWA does regulate discharges to surface water which occur via ground water because of a direct hydrologic connection between the contaminated ground water and nearby surface water. EPA repeatedly has taken the position that the CWA can regulate discharges to surface water via ground water that is hydrologically connected to surface waters.⁷

The agency noted that it had "made consistent statements on at least five other occasions."⁸ It reviewed instances from 1990-1997 when it had asserted jurisdiction over discharges that flow through groundwater to reach navigable waters, requiring NPDES permits for such discharges.⁹

⁶ Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *County of Maui, Hawaii v. Hawaii Wildlife Fund, et. al.*, (2019) (No. 18-260) ("The NPDES program does not apply to groundwater pollution. The CWA's definition of "discharge of a pollutant" applies only where pollutants are added to one of three categories of water: navigable waters, waters of the contiguous zone, and the ocean."). Available at:

https://www.supremecourt.gov/DocketPDF/18/18-260/100079/20190516161951453_18-260tsacUnitedStates.pdf

⁷ Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 66 Fed. Reg. 3,017 (Jan. 12, 2001). Available at:

<https://www3.epa.gov/npdes/pubs/cafo.pdf>.

⁸ Id.

⁹ NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,997 (Nov. 16, 1990) ("this rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body."); Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,892 (Dec. 12, 1991) ("...for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits



The agency concluded,

As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via groundwater can constitute a discharge subject to the Clean Water Act. The determination of whether a particular discharge to surface waters via groundwater which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations.¹⁰

In 2006, the Supreme Court recognized the broad reach of EPA's authority in *Rapanos v. United States*. The Court found, "The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters."¹¹ The Court went on to say, "Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates §1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.¹²

The 2015 [Clean Water Rule](#), defining the term "Waters of the U.S.," excluded groundwater from the definition, stating that "[t]he rule also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use...."¹³

However, in its response to comments for the Clean Water Rule, the agency said,

for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters ... because such discharges are effectively discharges to the directly connected surface waters. Second, it is EPA's long-established position that water quality standards are required for certain underground segments of surface waters."); 60 Fed. Reg. 44,493 (Aug. 28, 1995) (in promulgating proposed draft CAFO permit, EPA stated: "[D]ischarges that enter surface waters indirectly through groundwater are prohibited"); EPA, "Guide Manual On NPDES Regulations For Concentrated Animal Feeding Operations" at 3 (Dec. 1995) ("Many discharges of pollutants from a point source to surface water through groundwater (that constitutes a direct hydrologic connection) also may be a point source discharge to waters of the United States."); Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000, 62 Fed. Reg. 20,178 (April 25, 1997) ("The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater. . . . [T]he permit requirements . . . are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection."). See also Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities, 63 Fed. Reg. 7,881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection ('hydrologically connected') between the groundwater and the surface water.").

¹⁰ Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 66 Fed. Reg. 3,017 (Jan. 12, 2001). <https://www3.epa.gov/npdes/pubs/cafo.pdf>.

¹¹ *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (internal citations omitted).

¹² *Id.* (internal citations omitted, emphasis in original).

¹³ Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,055 (June 29, 2015).



EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of 'waters of the United States.'¹⁴

Conclusion

EPA addressed its past determinations in its [request for comment](#) on groundwater jurisdiction in February 2018 and characterized these statements as "collateral to the central focus of a rulemaking or adjudication."¹⁵ The agency was also careful to highlight the nuance of its prior practice: "EPA has not stated that CWA permits are required for pollutant discharges to groundwater in all cases, but rather that pollutants discharged from point sources to jurisdictional surface waters that occur via groundwater or other subsurface flow that has a direct hydrologic connection to the surface water may require such permits."

This begs the question, why doesn't the agency stick with the current interpretation that allows it to assert jurisdiction and require a NPDES permit in limited circumstances, using the direct hydrologic connection as its guiding principle?

EPA can always choose not to exercise this authority during the Trump administration. Rather than looking to the higher purpose in the CWA (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters") the agency has oriented itself around a different purpose: cutting off its own authority to *ever* require a permit for discharges that pass through groundwater.

If providing consistency and predictability for regulated entities was its goal, the agency could have put out a statement or initiated a rulemaking to elaborate on the meaning of a "direct hydrologic connection" and defined when it would require permits for discharges that pass through groundwater. Instead, the agency has issued a statement that side-steps science and strips EPA of authority under the CWA.

¹⁴ Environmental Protection Agency, Clean Water Rule Response to Comments – Topic 10: Legal Analysis, 383. Available at: https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

¹⁵ Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. at 7,127 (Feb. 20, 2018) ("EPA has previously stated that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements.").