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Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: National Association of Clean Water Agencies and the WateReuse Association Comments on U.S. Environmental Protection Agency Interpretive Memorandum

06/14/2019

The National Association of Clean Water Agencies and the WateReuse Association (collectively “NACWA”) submitted June 7th comments to the United States Environmental Protection Agency (“EPA”) on its:

Interpretive Statement on Application of the Clean Water Act National Pollution Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater (Docket ID No. EPA HQ-OW-2019-0166.)

The primary focus of NACWA’s comments is its assertion that there is a need for regulatory certainty in order for utilities to plan prudently for the expenditure and investment of public funds.

The question as to whether, and to what extent a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permitting requirements has been the subject of conflicting Federal Appellate Court decisions for which the United States Supreme Court has granted a Petition for Writ of Cert.

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are met:

- A person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source.

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

EPA has previously stated it issued its April 15th Statement due to the uncertainty generated by conflicting federal court decisions and the “prior lack of clear agency guidance” regarding whether NPDES

permits are required for releases of pollutants to groundwater. The federal agency has issued a request for public comment on whether it should revise or clarify its position on the issue. It stated a comprehensive review of prior agency statements in the matter was taken, “informed by those comments and based on a holistic analysis of the statute, text, structure, and legislative history of the Clean Water Act.”

The federal agency previously concluded that the Clean Water Act 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 Clean Water Act, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.

NACWA states that it supports the “bright-line” position put forth by EPA. They further state:

It is important to make clear that from our perspective the issue is not whether releases of pollutants into groundwater with a connection to surface waters should be addressed; the issue is how they should be addressed. Put another way, NACWA and WaterReuse believe that releases of pollutants into groundwater should not be allowed to contaminate natural resources. Our organizations and members are committed to protection of public health and the environment regardless of specific statutory language.

The NACWA comments also address:

- Categorical Exclusion Protects Essential Water Infrastructure Systems and Projects
- Wastewater and Stormwater Conveyance Systems
- Green Infrastructure
- Water Reuse Projects
- Bright-Line Exclusion Needed for Regulatory Certainty
- Bright-Line Exclusion Needed to Avoid Permitting Impracticability

A copy of the comments can be downloaded [here](#).