

EPA INTERPRETATIVE STATEMENT ON THE APPLICATION OF THE NPDES PROGRAM TO RELEASES OF POLLUTANTS FROM POINT SOURCES TO GROUNDWATER

On April 15, 2019, the U.S. Environmental Protection Agency (EPA) issued an Interpretative Statement clarifying the application of Clean Water Act (CWA or the Act) permitting requirements to groundwater. EPA concluded that releases of pollutants to groundwater are categorically excluded from the Act's permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities.

Recent conflicting federal court decisions and the prior lack of clear agency guidance regarding whether National Pollutant Discharge Elimination System (NPDES) permits are required for releases of pollutants to groundwater caused uncertainty regarding how to implement and enforce the NPDES permitting program. EPA began to address this uncertainty in February 2018 by requesting public comment on whether the agency should revise or clarify its position on the issue. EPA received over 50,000 comments from a wide range of stakeholders, many of which affirmed that additional clarity from EPA was necessary. At the same time, the agency also undertook a comprehensive review of prior agency statements on the matter and performed a holistic analysis of the text, structure, and legislative history of the CWA.

Based on this analysis and careful consideration of public input, EPA concluded that releases of pollutants to groundwater are excluded from the Act's permitting requirements, regardless of whether that groundwater is hydrologically connected to surface water. States are the primary regulators of discharges to groundwater within their jurisdictions, as provided in state law and envisioned under the CWA. EPA will continue fulfilling its role in protecting groundwater and hydrologically connected surface waters as authorized by Congress through the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.

EPA's Interpretative Statement should guide states and EPA regions with future NPDES permitting and enforcement decisions in portions of the country outside the Fourth and Ninth Circuit Courts of Appeal. EPA recognizes that the Fourth and Ninth Circuit Court interpretations of how the CWA applies to discharges to groundwater are different than the agency's interpretation. The U.S. Supreme Court recently granted a petition for writ of certiorari in the Ninth Circuit case (*Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d. 737 (9th Cir. 2018)). Below is a map showing the states within the Fourth and Ninth Circuits where EPA's Interpretative Statement does not apply. Once the U.S. Supreme Court has issued its decision, the agency may take further action if necessary.

