



## EPA Clarifies its Stance on the Regulation of Groundwater Under the Clean Water Act

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EPA recently issued an interpretive statement (“Interpretive Statement”) setting forth its position on the Clean Water Act’s (“Act”) regulation of discharges to groundwater, offering much-needed clarity on an issue subject to significant debate.

The Interpretive Statement lays out EPA’s interpretation of the Act’s National Pollutant Discharge Elimination System (NPDES) permitting requirements for the discharge of pollutants from a point source to groundwater. According to the Interpretive Statement, EPA interprets regulation under the NPDES program to *exclude* the release of pollutants from a point source to groundwater, regardless of any hydrological connection between the groundwater and jurisdictional surface waters.

The Interpretive Statement comes in the wake of controversial decisions from the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), and the Ninth Circuit in *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), where the courts determined the Act extended not just to discharges to surface waters, but also to discharges of pollutants to groundwater that migrate to surface waters. The United States Supreme Court has agreed to review *Hawai’i Wildlife Fund*, with a decision possible later this year that could be the final word on the Act’s regulation of groundwater.

Pending resolution of *Hawai’i Wildlife Fund* by the Supreme Court, the Interpretive Statement is an unequivocal disclaimer by EPA of the hydrological connection theory of Clean Water Act jurisdiction. Contrary to the decisions by the Fourth and Ninth Circuits and prior views expressed by EPA and other federal agencies, EPA makes clear in the Interpretive Statement that it does not interpret the NPDES program to apply to any point source discharges of pollutants to groundwater, regardless of any hydrological connection to surface waters. EPA finds support for this position in its analysis of the text, structure, and legislative history of the Act. Citing the lack of express language extending NPDES permitting requirements to groundwater when Congress could have readily included such language, EPA concludes that releases of pollutants to groundwater are categorically excluded from NPDES permitting requirements.

EPA’s position does not leave groundwater totally unregulated. In addition to state groundwater regulation, federal regulation of groundwater remains intact under the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.

The Interpretive Statement gives the regulated community a sense of certainty and uniformity when it comes to NPDES permitting requirements for discharges to groundwater, but a note of caution to those in the Fourth and Ninth Circuits: while awaiting a final outcome on the issue from the Supreme Court, EPA will not apply the Interpretive Statement in the Fourth and Ninth Circuits. In those jurisdictions, the *Kinder Morgan* and *Hawai'i Wildlife Fund* decisions, respectively, remain in effect pending resolution by the Supreme Court. Moreover, while the Interpretive Statement may be indicative of EPA's position in terms of agency enforcement actions, courts are not bound by the interpretation and may rule to the contrary if presented with an action brought under the Act's citizen suit provision.

[Memorandum from EPA General Counsel Matthew Z. Leopold and Assistant Administrator for Water David P. Ross to EPA Regional Administrators, Regions I–X: Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater \(Apr. 12, 2019\).](#)

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- Benjamin Mowczan – 803.567.4611 – [bmowczan@williamsmullen.com](mailto:bmowczan@williamsmullen.com)

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