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Client Alert: USEPA Issues Interpretive Statement on NPDES Applicability to Releases of Pollutants from a Point Source to Groundwater

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On April 12, 2019, the U.S. Environmental Protection Agency (USEPA) issued an [interpretive statement](#) concluding that all releases of pollutants from a point source to groundwater are excluded from the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to Sections 301 and 402 of the Clean Water Act (Act). USEPA's interpretive statement clarified that such discharges are excluded from NPDES permit requirements even where pollutants are conveyed to jurisdictional surface waters via groundwater.

The rationale for USEPA's interpretive statement is grounded in the text of Section 301 of CWA which prohibits the "discharge of any pollutant" to "navigable waters"^[1], unless otherwise authorized by the statute – i.e. pursuant to an NPDES permit. 33 U.S.C. § 1311(a). The "discharge of a pollutant" means "any addition of any pollutant to navigable waters [and waters of the contiguous zone or ocean] from any point source." The CWA defines "navigable waters" as the "waters of the United States" (WOTUS). 33 U.S.C. § 1362(7). USEPA explains that, because groundwater is not a "WOTUS", discharges to groundwater are not regulated under the CWA NPDES permit program, regardless of a hydrologic connection or conveyance to a WOTUS.^[2] USEPA also notes that its interpretation is supported: (1) by the CWA's clear intent to leave the regulation of groundwater to the states, and (2) because, in addition to state regulation, groundwater is regulated under the Safe Drinking Water Act (42 U.S.C. § 300f et seq.), the Resource Conservation and Recovery Act (§ 6901, et seq.), and the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.).

USEPA's interpretive statement is particularly notable with respect to agricultural operations and facilities – i.e. dry wells, injection wells, dead animal pits, cesspools, manure management ponds, lagoons and large capacity septic systems – that infiltrate non-hazardous agricultural wastewater to groundwater to treat the wastewater, and that might have a hydraulic connection to a nearby surface water. The Agency's interpretive statement is also pertinent to a case pending before the

U.S. Supreme Court where the Court has been asked to resolve a split among the federal Circuit Courts regarding whether a “discharge of a pollutant” occurs when a pollutant is released from a point source into groundwater (a nonpoint source), which ultimately migrates to a WOTUS.^[3] The case is currently in the briefing stage. USEPA’s interpretative statement will not apply in the Fifth Circuit and Ninth Circuit pending the Court’s decision.

Contact your Vorys lawyer or visit vorys.com/aglaw if you have questions about USEPA’s interpretative statement.

[1] USEPA and Army Corps of Engineers issued a proposed rule revising the definition of WOTUS established in a 2015 rulemaking. See 84 Fed. Reg. 4154, February 14, 2019.

[2] It should be noted that, under Ohio law, the definition of “Waters of the State” includes groundwater. See ORC 6111.01(H). Nevertheless, USEPA’s interpretative statement may give Ohio EPA more reason to refrain from requiring an NPDES permit for discharges to groundwater.

[3] *County of Maui, Hawaii v. Hawaii Wildlife Fund*, Case No. 18-260 (August 30, 2018).