

US EPA Clean Water Act Guidance:

Discharges To Groundwater That Affect Surface Water Are Excluded From NPDES Program

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On April 12, 2019, the U.S. Environmental Protection Agency issued a guidance memorandum stating that point source discharges to groundwater, which subsequently migrate or are conveyed to surface water, are excluded from the Clean Water Act's NPDES program. The "interpretive statement" stated that "the best, if not the only, reading of the CWA is that Congress intentionally chose to exclude *all* releases of pollutants to groundwater from the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater." (Emphasis in original.)

In doing so, the EPA expressly departed from rulings by the Fourth Circuit and Ninth Circuit courts that the NPDES program covers pollutants discharged to groundwater which then migrate to surface water. (See *Upstate Forever v. Kinder Morgan Energy Partners, LP*, 887 F.3d 637 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018).) The EPA stated that while it would not apply its interpretation in the Fourth or Ninth Circuits pending clarification from the U.S. Supreme Court, neither ruling prohibited others from applying the new interpretation in those circuits.

A copy of the US EPA's memorandum can be found at the following link:

https://www.epa.gov/sites/production/files/2019-04/documents/interpretive_statement_application_of_cwa_npdes_memo_-_signed.pdf

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