The U.S. Environmental Protection Agency’s (EPA) Water Polluter Loophole

EPA has issued an “Interpretative Statement” indicating the agency will no longer require Clean Water Act permits for polluters that discharge to surface waters through groundwater. To exclude these discharges from the Clean Water Act would open a gaping loophole to benefit polluters at the expense of public health and water quality.

EPA’s Interpretive Statement is Unlawful

On April 15, 2019, EPA released an Interpretive Statement exempting point source pollution discharges through groundwater to surface water from Clean Water Act (CWA) protections. EPA’s decision is a complete reversal from how it has applied the CWA in the past and will create a dangerous new loophole in the Act. The plain language of the CWA prohibits the “discharge of a pollutant” without a permit. That term means “any addition of any pollutant to navigable waters from any point source.” In other words, the Act clearly prohibits unpermitted discharges and contains no exclusions for polluters that route their discharge through groundwater. No such exclusions exist because when Congress passed the Act in 1972 it recognized the need for robust protections in order to ensure our nation’s water quality.

EPA’s Action Creates Confusion and Leaves Water at Risk

EPA’s abrupt reversal of longstanding regulatory practice will cause unnecessary confusion and leave water resources at risk. Its Interpretive Statement ignores the fact there are existing permits across the country that require limits on pollution that travels through groundwater before reaching surface waters. EPA fails to address how exempting these types of discharges from CWA protections will impact existing permits for hog lagoons, mines, and other polluting industries. Nor does the agency address how this new exemption will impact the environment or the health of communities living near these polluting facilities. Instead the agency problematically asserts it will protect these surface waters from pollution through other environmental statutes such as the Safe Drinking Water Act (SDWA) or the Resource Conservation and Recovery Act (RCRA), but these other statutes alone are insufficient to protect communities from water pollution.

Congress Must Call on EPA to Withdraw Its Interpretative Statement

Communities across the country are already burdened with too much water pollution — from toxic coal ash ponds to hog lagoons to mining waste to bursting oil pipelines — and EPA’s decision to create a new loophole in the Clean Water Act will burden these communities with even more pollution. Instead of giving polluters a free pass to discharge pollution without a permit, EPA should enforce the law’s protections for our nation’s rivers, streams, lakes, and bays, as required by the plain text of the CWA. EPA must abandon its confusing and dangerous Interpretive Statement and instead reaffirm strong clean water protections across the country.
What people are saying about the Water Polluter Loophole

American Water Works Association: “...this action contravenes the basic science of hydrology and the interaction between surface waters and groundwater...The draft interpretive statement would create an inappropriate means of circumventing the NPDES program....Current policy and practice should be maintained so as to avoid creation of a regulatory loophole.”

Colorado Department of Public Health and the Environment: “If federal law does not allow protections of surface water from a discharge to groundwater, this could compromise CDPHE’s ability to protect federal and state surface waters in accordance with CDPHE’s responsibilities under the federal CWA and the Colorado Water Quality Control Act.”

National Tribal Water Council: “It is unfathomable to the Council how this change in CWA policy will protect the environment or human health; neither the Safe Drinking Water Act nor the Resource Conservation and Recovery Act provide the same broad-ranging safeguards for the multiple beneficial uses that our lakes, streams, and wetlands support....the new interpretive statement violates the clear requirements of the CWA, and fails on every level to protect the nation’s water resources.”

Attorneys General of Maryland, California, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Michigan, Oregon, Rhode Island, and Vermont: “...under the erroneous exception to Clean Water Act jurisdiction set forth in the Statement, it would appear that the operator of a point source that otherwise would discharge directly into navigable waters could avoid the obligation to obtain an NPDES permit simply by directing pollutants into groundwater immediately adjacent to navigable waters — even if the pollutants are certain to reach those waters. It flouts the Clean Water Act’s goals for EPA to give polluters a road map to skirt the Act’s application in this fashion.”

Pima County, Arizona: “The EPA offers no reasoned explanation for this dramatic and reversal of its longstanding position, which completely upends current agency practice and contradicts the agency’s own statements dating back almost 30 years. It also enjoys little if any support in case law, the vast majority of which explicitly supports the position that pollutants discharged from point sources to Waters of the United States (WOTUS) via hydrologically-connected groundwater are subject to CWA permitting requirements.”

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