

County of Maui v. Hawaii Wildlife Fund et al.
US Supreme Court (Case No. 18-260)

Groundwater Regulation

Nonpoint source pollution is subject to control under state nonpoint source management programs. All 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. In addition, CWA provisions on total maximum daily loads (TMDLs), grants, planning, and nonpoint source management programs under CWA Section 319 can be effectively used to address nonpoint source pollution. The SDWA (and/or state equivalent) is most commonly used to regulate water reuse projects.

Many other federal laws are responsible for helping to protect groundwater.

- Resource Conservation and Recovery Act (RCRA) - regulates the storage, transportation, treatment, and disposal of solid and hazardous wastes to prevent contaminants from leaching into groundwater and requires remedial action for releases.
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund) - authorizes the government to clean up contamination caused by chemical spills or hazardous waste that do or could pose threats to the environment and imposes liability on parties responsible for releases.
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) - authorizes EPA to control the availability of pesticides that have the ability to leach into groundwater.
- Toxic Substances Control Act (TSCA) - authorizes EPA to control the manufacture, use, storage, distribution, or disposal of toxic chemicals that have the potential to leach into groundwater.

Many of the cases attempting to expand NPDES liability to groundwater come up in the context of coal ash. The ponds and landfills used to store coal ash are frequently unlined, allowing toxins to leach into groundwater. In August 2018, the U.S. Court of Appeals for the DC Circuit vacated major parts of the Obama-era 2015 coal combustion residuals rule under RCRA holding that EPA did not go far enough to regulate sites that lack a composite liner to prevent groundwater leaks. The court suggested that EPA require that the ponds be lined citing government data showing that "a significant portion" of the 500- plus ponds covered under the rule "are likely to contaminate groundwater." EPA is currently going through rulemaking to revise the rule, which will undoubtedly be litigated. Congress clearly intended RCRA to be a mechanism to address this type of pollution.

If EPA and state regulators administer and enforce these other laws and regulations appropriately, it is not necessary to stretch the CWA NPDES program beyond what Congress intended. While the factual circumstances in certain cases may suggest a need to strengthen the regulation of discharges to groundwater, the CWA NPDES permitting program does not contemplate, and cannot logically accommodate, the regulation of such sources.