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OCTOBER 16, 2018

Do discharges of pollutants to groundwater require a permit under the Clean Water Act? The answer is . . . it depends.

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Introduction

For years, different federal appeals courts have grappled with the question of whether discharges to groundwater are regulated under the Clean Water Act (CWA). While the question remains unanswered, recent cases have come down on both sides of the issue and the question is now poised to arrive at the Supreme Court.

Overview of the Clean Water Act

The CWA prohibits the "discharge of any pollutant" or "any addition of any pollutant to navigable waters from any point source." A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." A party who has discharged pollutants from a point source without a National Pollutant Discharge Elimination System (NPDES) permit may be found to have violated the CWA. However, the questions of what constitutes a "point source" and whether "navigable waters" could include groundwater are still being worked out by the courts, on a case-by-case basis, with recent decisions highlighting the split between different circuits.

Two Recent Cases

Hawai'i Wildlife Fund v. County of Maui

In *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (2018), the County of Maui, as the owner and operator of a municipal wastewater treatment plant, disposes approximately 4,000 million gallons per day of treated sewage primarily by injecting it into four wells. *Id.* at 742. From the wells, the treated sewage enters the groundwater, where it makes its way to the Pacific Ocean, as confirmed by tracer dye testing. *Id.* at 743. The district court held that the county violated the CWA by indirectly discharging effluent into the ocean without an NPDES permit. *Id.*

The Ninth Circuit affirmed, finding that the four wells constitute a "point source" because they are "discernible, confined and discrete conveyance[s] . . . from which pollutants are . . . discharged,"

notwithstanding that it was a not a direct discharge into the Pacific Ocean. *Id*. The county argued that it did not need an NPDES permit because the point source did not convey the effluent directly to navigable waters. *Id*. at 746.

The court reasoned that the effluent eventually reached the ocean, as confirmed by dye tests, by way of the groundwater. *Id*. The court parsed the wording of the statute, stating that the point source itself does not need to feed directly into a navigable water (e.g., via a pipe or a ditch). *Id*. at 748. Instead, the pollution must only come "from" and travel "through" a discrete conveyance, such as a well: "the effluent comes 'from' the four wells and travels 'through' them before entering navigable waters… [just because the treated wastewater] travels through groundwater before entering the Pacific Ocean" doesn't relieve this discharge from needing an NPDES permit. *Id*. at 746. The court drew upon Justice Scalia's plurality opinion in *Rapanos v. United States*, which stated that the CWA does not forbid the "addition of any pollutant directly to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters." *Id*. at 748 (quoting *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion)).

The court held that the county was liable under the CWA because "(1) the [c]ounty discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water[] and (3) the pollutant levels reaching navigable water are more than *de minimis*." *Id*. at 749. The Ninth Circuit decided to "leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." *Id*.

The county has petitioned the Supreme Court for a writ of certiorari.

Sierra Club v. Virginia Elec. & Power Co.

On the other side of the coin, however, in ***Sierra Club v. Virginia Elec. & Power Co., No. 17-1895 (4th Cir. Sept. 12, 2018)*** the Fourth Circuit found no liability under the CWA. Dominion Energy Virginia (Dominion) operated a coal-fired power plant that produced coal ash as a byproduct. Dominion stored the coal ash on site in a landfill and in settling ponds. Over time, arsenic from this ash seeped into the groundwater. The Sierra Club sued Dominion under the citizen-suit provision of the CWA, alleging that Dominion was "discharging" pollutants into groundwater, which eventually carried the arsenic to the navigable waters of the nearby Elizabeth River and Deep Creek. Id. The district court held that the settling ponds constituted "point sources" and that Dominion was liable for ongoing violations of the CWA. On appeal, the Fourth Circuit reversed the district court's ruling, holding that the landfill and settling ponds were not point sources, but instead "stationary feature[s] of the landscape through which rainwater or groundwater can move diffusely." Hence they were not the discernible, confined and discrete conveyances that bestowed CWA jurisdiction.

The Fourth Circuit concluded that "while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters—having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters—that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be from a point source." The court reasoned that the landfill and ponds are not a "discernible, confined and discrete conveyance" and were not created to convey anything. Instead, these features were determined to be "static

recipients of the precipitation and groundwater that flowed through them." The Fourth Circuit thus reversed the district court's ruling that Dominion violated CWA.

Certiorari has not yet been sought in this case, but is expected.

Outlook

The Ninth Circuit's new "fairly traceable" test for CWA jurisdiction over groundwater, if upheld, potentially significantly expands the jurisdiction of the CWA beyond how it has been interpreted for more than 40 years. With the ongoing controversy over the WOTUS rule under Obama, this expansion is unlikely to be looked at favorably by the Trump administration. Thus, EPA regulations contradicting the Ninth Circuit and upholding the Fourth Circuit seem likely, provided there is sufficient personnel there at EPA to get them through the rulemaking system. Otherwise, unless the Ninth Circuit ruling is overturned by the Supreme Court, many more companies and public entities may find themselves applying for NPDES permits for groundwater injection wells and other "conveyances."

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