Clean Water Act Point Source Liability for Discharges via Groundwater

Does the release of a pollutant that reaches groundwater and thereafter enters a Clean Water Act (CWA) jurisdictional surface water constitute a "point source" discharge triggering the requirement for a CWA National Pollutant Discharge Elimination System (NPDES) permit? With split circuit decisions, cert petitions filed with the US Supreme Court, and the potential for further EPA action, this promises to continue to be a significant, controversial, and rapidly evolving legal issue.

Litigation

Ninth Circuit

On August 27, 2018, Maui County Department of Environmental Management filed a petition for *writ of certiorari* with the US Supreme Court (Case No. 15-17447). The County is asking the Court to review a February 2018 Ninth Circuit decision that adopted a new indirect discharge theory to hold Maui County liable under the CWA because (1) the County discharged pollutants from a point source (i.e., its underground injection wells); (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*.

Maui filed a supplemental brief with the Supreme Court after the Sixth Circuit issued two decisions that deepen the conflict in authority—unequivocally rejecting the Ninth Circuit's (and the Fourth Circuit's) expansive view of point source pollution (See below). On November 6, Maui filed a reply brief to Hawai'i Wildlife Fund's opposition brief.

The Supreme Court scheduled the Maui petition as well as Kinder Morgan's petition (see below) for conference on November 30, 2018. On December 3, 2018, the Supreme Court invited the Solicitor General to file briefs in these cases expressing the views of the United States on or before 4 p.m., Friday, January 4, 2019.

The County of Maui produces tertiary-treated, disinfected recycled water that is sold for irrigation, with the excess disposed of into four Class V UIC wells located approximately half a mile from the Pacific Ocean. The wells are permitted by both the EPA and the State of Hawaii Department of Health (HDOH) under UIC permits, issued pursuant to the Safe Drinking Water Act and its state equivalent. The wells are long pipes that carry recycled water approximately 200 feet underground into a shallow groundwater aquifer. The groundwater flows to and enters the ocean in a broad and diffuse manner along a two-mile stretch of coastline, as well as through freshwater seeps or springs that change location over time.

A 2013 tracer dye study, conducted on behalf of EPA, the Army Corps of Engineers and the HDOH, confirmed that the recycled water from the County's UIC wells reached these ocean seeps. It took approximately 3 months for initial detection of the dye, with peak detection at 10 months, and total transit time estimated at 4 years. This and other studies found the recycled water also changes as it moves from the UIC wells to the ocean (decreases in dissolved oxygen, nitrate, and organic matter and increases in temperature and phosphorus levels). Once the groundwater enters the ocean, it mixes rapidly with ambient ocean water.

Citizen groups sued claiming the County of Maui needed an NPDES permit for its wells, in addition to the UIC permits. Since planning for the treatment plant began in the 1970s, regulators knew recycled water from the wells would move through unconfined groundwater and eventually reach the ocean. Public concerns about potential impacts were repeatedly raised during recent UIC permitting renewal processes, inducing demands that the state NPDES permitting authority and US EPA require an NPDES permit. Neither agency imposed such a requirement.

NACWA filed a brief on September 28, along with a coalition representing the clean water sector, supporting Maui's petition. NACWA's brief argues that the Ninth Circuit's decision is at odds with the statute's text, structure, and history; that the decision has the potential to substantially increase the number and type of sources subject to the NPDES requirement; and that the decision is at odds with decisions of other circuits on the issue such that whether or not an NPDES permit is required depends on the location of the discharge

rather than the text of the statute. The brief urges the Court to review the case in light of the regulatory uncertainty inherent in the Ninth Circuit's "fairly traceable" standard, and the need for municipal utilities to prioritize projects with the greatest environmental benefit.

Sixth Circuit

On September 24, 2018, the Sixth Circuit Court of Appeals issued two decisions - *Kentucky Waterways Alliance v. Kentucky Utilities* (*KWA* case) and *Tennessee Clean Water Network v. Tennessee Valley Authority* (*TVA* case) - soundly rejecting the "fairly traceable" and "direct hydrologic connection" (DHC) theories of liability.

The two cases both involve allegations by environmental groups concerning the seepage of pollutants from coal ash ponds through groundwater into hydrologically connected surface water, prompting the Sixth Circuit to conduct a joint oral argument before the same panel.

The *TVA* case involves a suit brought in April 2015 by two environmental advocacy organizations, alleging liability for contamination of groundwater with coal ash from the TVA's operation of its Gallatin Plant that eventually reaches the Cumberland River via groundwater. The lower court held that discharges to state-regulated groundwater require NPDES permits if the constituents end up in jurisdictional surface waters under the CWA, and following a trial, the court required the *elimination* of the source of pollutants by requiring that TVA fully excavate the site rather than complete a closure in place as permitted under the Resource Conservation and Recovery Act (RCRA). TVA appealed the decision to the Sixth Circuit.

The *KWA* case involved a decision by the lower court dismissing the environmentalists' claims arguing that discharges from a coal ash pond that eventually migrated to a nearby lake violated the CWA. The district court rejected the DHC theory, finding that adopting this theory would subject a variety of non-point source pollution to CWA regulation simply by going up the causal chain to find some initial point of discharge, and would effectively read the point source requirement out of the CWA. The environmental plaintiffs, KWA, appealed the decision to the Sixth Circuit.

The Sixth Circuit rejected the theory that an NPDES permit is required where pollutants are discharged through groundwater that conveys them to navigable waters, explaining that in that instance "[the pollutants] are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance." As the court explained, groundwater itself cannot be a point source because of its diffuse nature, and as a result "[t]he CWA has no say over that conduct."

The court went on to emphasize Congress' clear intent to reserve power over discharges to groundwater to the states, focusing on the Act's specific purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources." On October 22, the environmental advocacy organizations filed a petition for rehearing *en banc*, which is pending before the Sixth Circuit.

Fourth Circuit

In April 2018, a divided panel of the Fourth Circuit reversed a district court's dismissal of the CWA citizen suit in *Upstate Forever v. Kinder Morgan*. This case is based on a leak from a petroleum pipeline into groundwater. Plaintiffs allege that petroleum migrate subsurface into various creeks and wetlands and thus constitutes an ongoing discharge of pollutants without an NPDES permit, in violation of the CWA.

Deferring to EPA statements from 1991 and 2001, the majority found that CWA liability may be triggered based upon release of pollutants to groundwater that has a "direct hydrologic connection" (DHC) to surface water. Although the majority did not define the term "direct," it found that the allegations in the complaint were sufficient to state a claim under the CWA: "an alleged discharge of pollutants … reaching navigable waters located 1000 feet or less from the point source by means of ground water … falls within the scope of the CWA."

In so holding, the majority found that a point source need not *convey* the pollutants to navigable waters to trigger NPDES permitting requirements: "to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters." Rather, a discharge to groundwater may trigger liability so long as the groundwater is "sufficiently connected" to navigable waters.

In August 2018, Kinder Morgan filed a *cert* petition with the Supreme Court, which is pending. On November 6, Kinder Morgan filed a reply brief to Upstate Forever's opposition brief (Case No. 17-1640).

Second Circuit

The Second Circuit has not yet issued a decision in *26 Crown Associates, LLC v. Greater New Haven Water Pollution Control Authority*.

The appeal involves a claim against NACWA Member Agency, the Greater New Haven Regional Water Pollution Control Authority, alleging that the city's sewer system resulted in continuing and chronic backflows of sewage into the basement of a local property, which in turn resulted in releases of untreated sewage directly into the Long Island Sound. The plaintiff argues that wastewater seeps from basements into groundwater that then migrates into hydrologically connected navigable waters resulting in a violation of the CWA.

At oral argument on April 18, 2018, the Second Circuit seemed disinclined to reach the merits of the conduit theory, focusing instead on the plaintiff's lack of standing to bring the claims at all. In August, the court, at the parties' request, stayed a decision in this matter to allow for continuing settlement discussions. Parties must provide a status report by January 24, 2019.

In November 2017, NACWA and 25 other entities joined a brief filed by the City of New York in the appeal, urging the Second Circuit to uphold the lower court's decision dismissing the suit and rejecting the CWA liability arguments.

EPA Regulatory Position

On May 21, NACWA, along with a coalition of water organizations including the WateReuse Association, the National League of Cities, the National Association of Counties, the California Association of Sanitation Agencies, and the Central Valley Clean Water Association, submitted comments to EPA's Office of Water regarding how discharges of pollutants to groundwater should be regulated under federal and state environmental laws.

The comments were submitted in response to a February 20, 2018 Federal Register notice requesting comments on EPA's previous statements regarding whether point source discharges through groundwater that has a direct hydrologic connection to jurisdictional surface water may be subject to regulation under the CWA. The Agency requested comments on whether it should clarify previous statements on the issue, and if so, how this clarification should be accomplished (e.g., rulemaking or through other means).

While EPA has not taken a consistent position on the issue, the Agency has made statements in recent years, including in an amicus brief submitted to the Ninth Circuit in the *Maui* litigation in May 2016, that point source discharges that travel to surface water via groundwater with a DHC are subject to the CWA under the NPDES regulations.

NACWA's comments focus on not *whether*, but *how* these discharges should be regulated, arguing that the DHC theory is not supported by the text or history of the CWA, and that discharges to groundwater are regulated under other federal and state environmental statutes better suited to address the issue. The comments point out the impracticability of applying the end-of-pipe NPDES program to the diffuse and innumerable sources that would fall within the DHC theory. The comments also provide a critical perspective on the potential implications for NACWA members, including citizen suit liability for discharges and infrastructure that has never previously required an NPDES permit.

Congressional Oversight

The Senate Committee on Environment and Public Works held a hearing on April 18, 2018 entitled, "The Appropriate Role of States and the Federal Government in Protecting Groundwater" to inform Committee members on the issue in light of conflicting regulatory interpretations and federal judicial decisions, and EPA's recent request for comment on the "direct hydrologic connection" interpretation. NACWA was invited to testify at the hearing as a key stakeholder due to the potential implications on clean water agencies and the fact that two NACWA members have already been sued under this theory of liability (See NACWA's Written Testimony).