The Clean (Ground)Water Act?

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The Clean Water Act (CWA or Act) prohibits the discharge of a pollutant from a point source to a water of the United States, unless otherwise permitted under the Act. Under the National Pollution Discharge Elimination System (NPDES), the U.S. Environmental Protection Agency (EPA) or authorized states, tribes, and territories may issue permits for discharges that would otherwise be prohibited. In the decades since the establishment of the NPDES program in 1972, litigants have debated the meaning of "discharge," "pollutant," "point source," and "water of the United States." And although EPA has taken the position that the CWA leaves groundwater regulation and nonpoint-source pollution control to the states, that has not stopped litigants from arguing that the federal CWA regulates discharges of pollutants to groundwater that ultimately reach waters of the United States. Indeed, EPA has also taken the position that in some circumstances federal permits may be required for such discharges when a direct hydrological connection between subsurface and surface waters is present. Cases involving such claims have considerably increased in recent years. In 2018, the Fourth, Sixth, and Ninth U.S. Circuit Courts of Appeals reached different conclusions on this issue. Not surprisingly, the issue is now the subject of pending petitions for certiorari in the U.S. Supreme Court.

In *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), the plaintiffs argued that the county was injecting treated wastewater into wells without an NPDES permit in violation of the CWA. The Ninth Circuit agreed, ruling that discharges of more than de minimis amounts of pollutants that are "fairly traceable from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water" require a NPDES permit. Notably, and consistently with several prior statements, EPA filed an amicus brief in that case contending that if a pollutant reaches jurisdictional surface waters through groundwater with a direct hydrological connection to that surface water, a permit would be required.

Around the time of the Ninth Circuit's *Maui* decision, EPA expressed some ambivalence about the positions articulated in its amicus brief in *Maui* and elsewhere, and EPA requested comments on the proposed rule Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (Feb. 20, 2018). Specifically, EPA questioned whether including in the NPDES program point-source discharges that reach jurisdictional waters via groundwater with a direct hydrologic connection "is consistent with the text, structure, and purposes of the CWA." EPA also sought comment "on whether EPA should clarify its previous statements" about these types of discharges, including whether EPA should continue to hold its position and, if so, how to further explain activities or connections that would

suffice to invoke permitting requirements. The comment period closed in May 2018; EPA has not acted further.

Meanwhile, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), addressed the issue in a slightly different factual context—a prior pipeline spill that was no longer discharging, but where an amount of extant gasoline continued to migrate through groundwater and natural formations into nearby waterways. The Fourth Circuit held that "a plaintiff must allege a direct hydrological connection between ground water and navigable waters" to state a claim under the CWA. This holding tracks the language of EPA's amicus brief in *Maui*, though EPA did not file a brief in the Fourth Circuit. The court also ruled that as long as the discharge came from a point source (here the pipeline), and "as long as pollutants continue to be added to navigable waters," a citizen suit may be brought to abate an ongoing violation of the CWA. Moreover, a "discharge need not be channeled by a point source until it reaches navigable waters" to be covered by the CWA.

Together, these decisions could significantly expand the scope of the Act's NPDES program, potentially encompassing an array of discharges—from all manner of industry and landowners—that historically have not required CWA permits. Power plants, mines, farms, septic tanks, municipal storm and sewer systems, and waste storage facilities, among others, could all be subject to expanded or new liabilities, and the NPDES program could balloon to unworkable proportions. That said, demonstrating the fluid nature of this evolving case law, a different panel in the Fourth Circuit has since narrowed the potential universe of allegedly unlawful discharges by holding that landfills and lagoons that passively collect pollutants are not point sources because they are not "discernable, confined and discrete conveyance[s]" as the CWA requires. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (addressing coal ash impoundments).

Most recently, the Sixth Circuit held, contrary to both the Ninth and Fourth Circuits, that the CWA does not regulate discharges via hydrologically connected groundwater. In two cases involving the alleged seepage of contaminants from coal ash ponds into groundwater that ultimately reached jurisdictional waters, the Sixth Circuit held that "[t]he CWA does not impose liability on surface water pollution that comes by way of groundwater." *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018); *accord Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018). The Sixth Circuit explained why, in its view, the text and statutory context of the CWA clearly do not extend to discharges via groundwater, and it pointedly disagreed with the decisions from its sister circuits in *Maui* and *Upstate Forever.* And in footnotes, the court cited approvingly the Fourth Circuit's holding in *Sierra Club* that coal ash ponds are not point sources.

It comes as no surprise that the issue of whether the CWA regulates discharges via groundwater is now before the Supreme Court in petitions for certiorari in both *Maui* and *Upstate Forever*. On December 3, 2018, the Supreme Court called for the views of the Solicitor General on both

petitions by January 4, 2019. Given EPA's recent litigation position and request for comment, what exactly the Solicitor General will say is uncertain. One thing is fairly certain, though: unless the Supreme Court takes the case and resolves the issue, litigation is unlikely to abate anytime soon.