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Decisions Lead to Possible Expansion of CWA NPDES Permitting Requirements

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Special to the Legal

Most environmental law practitioners are familiar with the federal Clean Water Act's (CWA) National Pollutant Discharge Elimination System's (NPDES) permitting program and the types of discharges subject to the program. Put simply, the NPDES permit is required for the discharge of pollutants (broadly defined to even include "cellar dirt") from a point source (again, broadly defined) into a "navigable water," which is often referred to as a water of the United States, including the territorial seas. Most of the navigable waters regulated under the CWA, including lakes, rivers, streams and wetlands, have one important feature in common—they are all considered to be a surface water, as opposed to a groundwater (which is the water beneath the surface of the earth that flows slowly through



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geologic formations called aquifers, and which is often a source of recharge for many surface water bodies, including lakes and streams).

Historically, NPDES permits under the CWA have generally been issued for discharges of pollutants directly to surface water. However, a recent line of federal cases has reignited a debate as to whether discharges requiring a CWA NPDES permit should also include those discharges of pollutants to groundwater, where the pollutants ultimately come to be located in a navigable water (e.g., surface water) because the groundwater is hydrologically connected to the surface water.

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This scenario has often been referred to as the “groundwater conduit theory.”

The debate over whether the CWA regulates the discharge of pollutants to groundwater is critical because of the potential liability that can attach to such a discharge. The CWA has a number of compliance and enforcement provisions that could apply if a discharge requires, but is not the subject of, a CWA NPDES permit. Not only could a discharger be liable to the federal or state governments, but it may

also be subject to a citizen suit, which has always been a part of the CWA's enforcement scheme.

During the past several years, a number of federal courts have reviewed the issue of whether the aforementioned "groundwater conduit theory" triggers coverage under the CWA. Although cases addressing this or similar legal theories date back a number of years, the recent decisions have resulted in contrary rulings, which, unfortunately, provide conflicting guidance to those entities potentially subject to regulation under the CWA.

One such recent case is *Kentucky Waterways Alliance v. Kentucky Utilities*, 2017 WL6628917 (E.D. Ky. 2017), where the court addressed the "groundwater conduit theory" in the context of a CWA citizen suit. In this case, the plaintiffs alleged that pollutants from coal ash ponds were discharged into groundwater, and since the pollutants ultimately migrated to surface water, the discharge should have been subject to the CWA permit program. The defendant's response was predictable—the plaintiffs' CWA claim failed as a matter of law because the transport of pollutants from groundwater to surface water is not subject to regulation under the CWA. First, the court reviewed the definitional scheme of the CWA, including the key terms in the "groundwater conduit theory" line of cases:

"discharge," "point source" and "navigable waters," and rejected any notion that groundwater is a navigable water under the CWA or that groundwater itself could constitute a "point source" under the CWA. Then, in reviewing the seminal issue of whether a discharge of pollutants to hydrologically connected groundwater should be subject to the CWA's permitting requirement, the court found that "adopting this theory would be inconsistent with the text and structure of the Clean Water Act." The court reasoned that if the theory were adopted, then any non-point source pollution, such as surface run-off from land, could be recast as point-source pollution, by simply identifying the initial point source of the pollutants that ultimately were transported by nonpoint sources to their navigable waters destination. According to the court, this would "effectively read the point source requirement out of the Clean Water Act." In distinguishing its holding from those courts reaching a contrary conclusion, the court suggested that such courts rely "heavily on the purpose of the Clean Water Act" to find that the hydrologically connected groundwater is subject to the NPDES permit requirements, but noted that the U.S. Supreme Court "has often criticized relying on a statute's purpose to the doctrine of its text 'noting that no law pursues its purpose at all costs, and that

the textual limitations upon a law's scope are no less a part of its purpose than its substantive authorizations." The *Kentucky Waterways Alliance* case is now on appeal to the U.S. Court of Appeals for the Sixth Circuit.

Another recent case, which reached a fundamentally different result, is *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir., 2018). In this case, the Ninth Circuit addressed the "groundwater conduit theory" under a set of facts where wastewater injected into certain wells at a municipal wastewater treatment plant ultimately entered the Pacific Ocean. According to the record developed in the district court proceedings, the wells were initially constructed to serve as a backup disposal method for water reclamation, but had become the county's primary means of effluent disposal into groundwater and the Pacific Ocean. Therefore, each of the wells constituted a point source under the CWA, and the county discharged pollutants from these point sources into groundwater, which pollutants ultimately entered a navigable water as that term is defined in the CWA. Using the "groundwater conduit theory," the district court found the county liable for discharging pollutants into a navigable water without the NPDES permit required under the CWA.

On appeal, the county disputed its liability, asserting that a

point source itself (here, each of the wells) must convey pollutants directly into a navigable water for the CWA to apply. However, because the pollutants were first discharged into groundwater, and then indirectly into the Pacific Ocean, the county argued that such scenario does not come within the reach of the CWA.

However, the Ninth Circuit disagreed with the county, and noted that certain of its “sister circuits” have already held “that an indirect discharge from a point source to a navigable water suffices for Clean Water Act liability to attach.” Interestingly, the court also turned to the U.S. Supreme Court’s opinion in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006) for support, which decision has spawned the well known “Waters of the United States” debate. The court cited to a passage in the plurality opinion in *Rapanos*, in which the plurality noted that the CWA forbids the “addition of any pollutant to navigable waters,” not the “addition of any pollutant directly to navigable waters from any point source” (emphasis in original). The Ninth Circuit used this specific passage from *Rapanos* to support its position that the County was reading in to the CWA at least one critical term—that the pollutants must be discharged “directly” to navigable waters from a point source for the CWA to apply.

Notwithstanding the aforementioned court decisions, the U.S. Environmental Protection Agency (EPA), which oversees the CWA, has also weighed in on the “groundwater conduit theory.” The agency recently published a notice in the Federal Register, in which it requested comments on its previous statements about whether pollutant discharges from point sources that reach navigable waters via groundwater may be subject to CWA regulation.

The timing of the EPA’s Federal Register notice is interesting. Shortly after the EPA published the Federal Register notice, a divided panel of the U.S. Court of Appeals for the Fourth Circuit vacated the dismissal of a CWA citizen suit, where the lower court found that it lacked subject matter jurisdiction because “the CWA did not encompass the movement of pollutants through groundwater that is hydrologically connected to navigable waters,” see *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 645 (4th Cir. 2018). In addressing this issue of first impression in the Fourth Circuit, the court held that in order to state a claim under the CWA, a plaintiff must allege a direct hydrological connection between groundwater and navigable waters, and that such a query is fact-specific. Significantly, to support its view of the “groundwater conduit

theory,” the Fourth Circuit cited to a number of EPA documents and statements indicating that requirements under the CWA may be triggered if groundwater has a direct hydrologic connection to surface water. Certainly, the EPA’s position on the “groundwater conduit theory” issue will be closely monitored, as it reviews the comments submitted to it in response to the Feb. 20, Federal Register notice and, perhaps, releases further guidance on the issue.

In summary, the “groundwater conduit theory” cases should be closely monitored by the practitioners involved in CWA matters, including NPDES permitting. Specifically, the forthcoming decision by the Sixth Circuit in the *Kentucky Waterways Alliance* case could result in a clear conflict in recent cases among the circuit courts, which could lead to review of this issue by the U.S. Supreme Court. In addition, as discussed earlier, any future EPA initiative should be reviewed to determine whether, and to what extent, it may impact this issue and those regulated communities potentially impacted under the CWA. •