



## Fourth Circuit’s “Conduit Theory” Decision Extends CWA Liability for Migrating Groundwater Contamination

On April 12, 2018, the U.S. Court of Appeals for the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No 17-1640, held that the Clean Water Act (CWA) regulates point source discharges that reach “navigable waters” through groundwater with a “direct hydrologic connection” to the surface water. With this decision, the Fourth Circuit (which includes Maryland, North Carolina, South Carolina, Virginia and West Virginia) has joined the Ninth Circuit in recognizing the so-called groundwater “conduit theory” of liability under the CWA, a theory environmental groups are relying upon in several CWA citizen suits across the country. Under the groundwater “conduit theory,” separately regulated and permitted wastewater collection basins, impoundments, wells, and/or pipelines that result in groundwater contamination could be the targets for CWA liability, even though it is widely accepted that the CWA does not regulate discharges to groundwater itself. These cases have broad implications for many industries, including steelmaking, pipelines, mining, chemical manufacturing, oil and gas development, and utilities.

### Background and District Court Decision

The *Upstate Forever* case dates back to 2016, when two environmental organizations filed a lawsuit alleging CWA violations stemming from a 2014 pipeline leak. According to the complaint, 369,000 gallons of petroleum products leaked from an underground pipeline. The plaintiffs alleged that the pipeline contents seeped into groundwater and later into two nearby creeks and their adjacent wetlands downgradient from the leak. The leak was fixed within a few days of discovery and approximately 209,000 gallons of petroleum products were recovered through remediation efforts overseen by a state environmental regulatory agency. The plaintiffs, however, alleged that a plume of petroleum contaminants continued to migrate from groundwater to surface water several years after the leak was fixed.

The district court dismissed the case after finding that (1) there was no ongoing point source discharge because the pipeline leak was fixed within days of the leak’s discovery; (2) the migration of pollutants through soil and groundwater is nonpoint source pollution, which is not regulated by the CWA; and (3) the CWA does not apply to claims involving discharges to groundwater that is hydrologically connected to surface water. Because the district court dismissed the plaintiffs’ complaint at an early stage in the litigation, the allegations in the complaint are assumed by the courts to be true.

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## **Ongoing Pollutant Release from Groundwater to Surface Water Considered Sufficient to Bring Citizen Suit**

Before addressing the groundwater “conduit theory,” the Fourth Circuit first had to decide whether the plaintiffs’ allegations were sufficient to demonstrate an ongoing violation of the CWA. Citizen suits under the CWA are authorized only upon a showing that the alleged violations are ongoing; lawsuits for wholly past violations cannot be brought by citizens. According to the majority opinion, the CWA does not require the continued release of a pollutant from a point source for the alleged violation to be considered ongoing. Instead, the majority accepted the plaintiffs’ allegations that gasoline from the now fixed pipeline continued to be added to navigable waters from the groundwater and determined that this migration from groundwater to surface water was sufficient to clear the jurisdictional bar under the CWA’s citizen suit provision.

The lengthy dissent in the *Upstate Forever* decision centered on the argument that ongoing migration of contaminated groundwater from the site of the pipeline leak was not an ongoing violation of the CWA. Because the pipeline (i.e., the point source at issue) had been fixed and was no longer leaking, the dissent noted that the ongoing migration of contaminated groundwater should be considered nonpoint source pollution, which is not regulated by the CWA.

## **Pollutant Discharges to Groundwater Create CWA Liability if the Groundwater has a Direct Hydrologic Connection to Jurisdictional Surface Waters**

After deciding that the plaintiffs had alleged an ongoing violation, the Fourth Circuit turned to the groundwater “conduit theory.” Characterizing it as an issue of first impression for the court, the majority held that pollutants originating from a point source that migrate through groundwater with a “direct hydrologic connection” to the surface water are regulated by the CWA. The majority stated that a “discharge need not be channeled by a point source until it reaches navigable waters.” Rather, a more tenuous connection between the point source and jurisdictional surface water can now support CWA liability in the Fourth Circuit. The court stated that existence of a “direct hydrologic connection” is a fact-specific inquiry, and time, distance, geology, flow, and slope are factors in the analysis.

Based on the facts alleged in the complaint, the court held that the navigable waters at issue were allegedly 1,000 feet or less from the release site and that this “extremely short distance” was sufficient to support an allegation of a “direct hydrologic connection” between the groundwater and surface water. The court also noted that there was no dispute that the pipeline leak caused the contamination at issue and that “measurable quantities” of contaminants had been detected near the leak. Unless the defendant seeks rehearing in the Fourth Circuit or review in the Supreme Court, the *Upstate Forever* case will be sent back to the federal district court where the parties will engage in discovery and perhaps a trial on the merits.

## **Fourth and Ninth Circuits Aligned on Groundwater “Conduit Theory”**

The Fourth Circuit’s *Upstate Forever* decision follows a February 2018 decision by the Ninth Circuit on the groundwater “conduit theory.” In *Hawai’i Wildlife Fund v. County of Maui*, a divided panel from the Ninth Circuit became the first federal appellate court to hold that point source discharges traveling to jurisdictional surface waters indirectly through groundwater could be regulated by the CWA. The Ninth Circuit noted that the path from point source to surface water must be “fairly traceable.” The Fourth Circuit in *Upstate Forever* noted that its “direct hydrologic connection” test was not functionally different than the Ninth Circuit’s “fairly traceable” test.

As compared with *Upstate Forever*, the facts, evidence, and procedural posture in *County of Maui* were vastly different. The facts in the *County of Maui* case involved the injection of treated sanitary effluent into four permitted injection wells. Relying heavily on the results of a dye tracer test, showing that dye emerged in submarine seeps in the Pacific Ocean 84 days after being injected into the wells, the Ninth Circuit concluded that the treated sanitary wastewater reaching the Pacific Ocean was “fairly traceable” to the county’s injection wells. Like the Fourth Circuit, the Ninth Circuit in *County of Maui* refused to limit the CWA’s reach to direct discharges from a point source to jurisdictional surface waters and left 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.”

The defendant in the *County of Mani* case has signaled that it will ask the U.S. Supreme Court to review the Ninth Circuit’s decision.

### **EPA Provides Opportunity to Comment on the “Direct Hydrologic Connection” Concept**

The “direct hydrologic connection” concept adopted by the Fourth Circuit in *Upstate Forever* was based on statements by the U.S. Environmental Protection Agency (EPA) in its past rulemakings. The majority in *Upstate Forever* used EPA’s statements to support its adoption of the concept, even though on February 20, 2018, EPA questioned the validity of such past statements when it issued a *Federal Register* notice requesting comments on whether it should clarify the “direct hydrologic connection” concept. EPA is also seeking input regarding whether point source discharges traveling through groundwater before reaching a navigable water should be covered by the CWA or whether such discharges would be better addressed under other federal or state authorities or permit programs. The public comment period on this notice closes on May 21, 2018.

### **Potential Implications of the *Upstate Forever* Decision**

The *Upstate Forever* decision has the potential to significantly expand the scope of the CWA to cover a wide range of unplanned and unintentional discharges that reach surface waters through complex underground pathways. Under the current regulatory scheme, it would be impossible to obtain an NPDES permit, or other discharge permit, to address unanticipated leaks from a pipeline, like that at issue in *Upstate Forever*, and other unintentional releases to groundwater. Furthermore, allowing CWA citizen suits to continue after the source of the discharge has been stopped will increase exposure for entities that have taken actions to correct a leak or to address residual groundwater contamination through remediation.

More litigation over the legitimacy of groundwater “conduit theory” is likely, and environmental groups in the Fourth and Ninth Circuits, and beyond, are likely to expand application of the theory to other scenarios. One of the most common applications, to date, has been use of the argument to assert CWA liability regarding coal ash disposal sites. A different panel of Fourth Circuit judges and the Sixth Circuit are expected to soon issue decisions on the groundwater “conduit theory” in other cases involving coal ash disposal sites. Babst Calland’s Environmental attorneys continue to track these developments. Should you have any questions, please contact Lisa M. Bruderly at (412) 394-6495 or [lbruderly@babstcalland.com](mailto:lbruderly@babstcalland.com), or Gary E. Steinbauer at (412) 394-6590 or [gsteinbauer@babstcalland.com](mailto:gsteinbauer@babstcalland.com).

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