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The Underground Reach of the Clean Water Act: It's Not Just for Surface Water

Since its enactment in 1972, the federal agencies who administer the Clean Water Act (the Act), the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (the Corps), have taken the position that the definition of "waters of the United States" governed by the Act (also known as "jurisdictional waters") does not include groundwater. Regulation of groundwater therefore falls outside the scope of the Act.

In 2014, the Obama administration proposed the Clean Water Rule to clarify the definition of jurisdictional waters.[1] Both the proposed and final versions of the Clean Water Rule, which was issued in 2015 and is currently suspended, note that EPA and the Corps "have never interpreted the 'waters of the United States' to include groundwater."[2] In fact, the Clean Water Rule clearly states "groundwater, including groundwater drained through subsurface drainage systems" does not qualify as "waters of the United States."[3] Nothing in the Clean Water Act precludes state governments from regulating groundwater under their own programs as a "water of the state," which many states have done.

Since the Clean Water Act does not apply to groundwater, a federal Clean Water Act discharge permit (known as an NPDES permit[4]) should not be required to discharge into groundwater, right? Not necessarily. What happens when materials discharged into groundwater later reach a jurisdictional water such as a stream or ocean? Federal district courts that have wrestled with this issue disagree. Certain district courts have concluded that an NPDES permit is not required under these circumstances.[5] Other district courts have ruled that the Act does apply, and therefore pollutants discharged into groundwater without an NPDES permit violate the Act if those pollutants reach a jurisdictional water.[6]

On February 1, 2018, the Ninth Circuit Court of Appeals became the first federal appeals court to squarely address the issue (*Hawai'i Wildlife Fund v. County of Maui*). The Court ruled that Maui County, Hawaii violated the Act by discharging sanitary wastewater collected at a treatment facility into four permitted underground injection wells without obtaining an NPDES permit. The wells did not lead directly to a jurisdictional water. Rather, a portion of the wastewater eventually entered the Pacific Ocean through the ocean floor some distance from shore after traveling through natural geologic features. The County had operated the injection wells since 1979 with the full knowledge of the Hawaii Department of Health and the EPA – neither of which ever advised the County that an NPDES permit was required to inject wastewater into the wells. This case arose after a coalition of environmental organizations filed a citizen suit against the County under the Act.

In reaching its decision, the Ninth Circuit did not address whether groundwater falls within the definition of "waters of the United States" that are regulated by the Act. Rather, the Court focused its analysis on whether the wastewater discharged into the wells actually reached the ocean. In the Ninth Circuit's view, the groundwater was merely a conduit through which the pollutants travel into the ocean after being injected into a well. The fact that the pollutants reached the ocean was determined by the Court to be sufficient to create Clean Water Act liability. "That the groundwater plays a role in delivering the pollutants from the wells to the navigable water does not

1 79 Fed. Reg. 22188 (April 21, 2014).

2 79 Fed. Reg. 22188, 22218 (April 21, 2014); 80 Fed. Reg. 37054, 37099 - 37100 (June 29, 2015).

3 40 C.F.R. 230.3(o)(2)(v).

4 NPDES is an abbreviation for National Pollutant Discharge Elimination System.

5 *Patterson Farm, Inc. v. City of Britton*, 22 F. Supp.2d 1085 (D. S.D. 1998); *Kelly for & on Behalf of People of the State of Michigan v. United States*, 618 F. Supp. 1103 (W. D. Mich. 1985).

6 *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 434 (M.D.N.C. 2015); *Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601, 603 (E.D. Va. 2015).

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preclude liability under the statute." This is an important point because the Act requires an NDPES permit only for discharges into "waters of the United States" from a "point source" – for example, a pipe or ditch. By contrast, an NPDES permit is not required for "non-point source" discharges, meaning discharges that consist of sheet flow, rather than a discreet conveyance (e.g., storm water runoff from roads or agricultural areas that flows into a regulated water without first entering a pipe or ditch). According to the Ninth Circuit, those non-point sources do not "collect and convey" pollutants to a navigable water in the same way as the County's injection wells.

The Ninth Circuit stopped short, however, of adopting what essentially amounts to a strict liability standard endorsed by the district court that would create Clean Water Act liability whenever a pollutant reaches "waters of the United States." "We . . . disagree with the district court that 'liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of how they get there.'" Instead, the Ninth Circuit noted that Clean Water Act liability is appropriate in this case because "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." (emphasis added) "We 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 Clean Water Act.

The Ninth Circuit's decision has potentially far reaching implications. The Ninth Circuit's "functional equivalent" standard appears to support a theory of expanded Clean Water Act liability for any discharge that may arguably be hydrologically connected through groundwater movement to a water of the United States. This interpretation has broad implications for many industries including those that operate landfills, coal ash or coal refuse impoundments, underground pipelines or storage tanks, or any other activity that potentially impacts groundwater.

Beyond groundwater, the functional equivalent standard could be used by environmental organizations to challenge the permitting exemption for non-industrial storm water discharges to jurisdictional waters. EPA regulations generally exempt non-industrial storm water discharges from parking lots, buildings, and other commercial structures from obtaining an NPDES permit. Certain environmental organizations have previously pressured EPA, and even threatened to sue the agency, over the absence of regulations that require NDPES permits for such discharges. Maui's reasoning could also potentially support a challenge to EPA regulations that exempt certain agricultural operations from obtaining an NPDES permit.

While the case sets a circuit-wide precedent for imposing Clean Water Act liability for indirect discharges to jurisdictional waters via groundwater for nine western states and Guam, the case also has broader implications for the rest of the country. Other circuit courts of appeal have pending cases involving Clean Water Act liability for groundwater discharges, such as those resulting from leaks from coal ash storage impoundments or pipelines. Those courts are likely to examine the Ninth Circuit's approach when reaching decisions on pending appeals. Although Maui is not binding precedent on any other circuit court of appeal, Maui would be considered persuasive authority that the courts would likely feel obligated to address in their decisions. If one or more of those courts reaches a decision that is inconsistent with the Ninth Circuit's approach, it would create a "circuit split." Disagreement among the circuit courts of appeal increases the likelihood that the United States Supreme Court will agree to review one of the decisions and resolve the issue on a nationwide basis. One thing is for sure, there is certainly more to come soon.

For questions about the Ninth Circuit's decision or the Clean Water Act in general, please contact Robert M. Stonestreet at 681.265.1364 or rstonestreet@babstcalland.com or Lisa M. Bruderly at 412.394.6495 or lbruderly@babstcalland.com.