Ninth Circuit Holds Discharging to Groundwater Wells Requires Clean Water Act Permit

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Introduction

A recent decision from the Ninth Circuit, Hawaii Wildlife Fund. v. County of Maui,[1] held that discharging sewage into groundwater wells requires a permit under the Clean Water Act (“CWA”), where those wells are hydrologically connected to the Pacific Ocean. The Ninth Circuit reached this ruling not because the groundwater was itself a regulated water body under the CWA, which has long been within the sole control of state regulators. Nor was there a dispute that the sewage indeed reached the Pacific Ocean via the groundwater injection wells. Rather, the issue turned on whether a discharge to wells that eventually migrates to the Pacific Ocean through groundwater constitutes a “point source” that requires a permit under the CWA. In holding that it does, the Ninth Circuit focused on the well at the point of discharge, concluding that it is a clear “discrete conveyance,” and held that the discharge need not be “directly” to navigable waters, where the discharge to the “discrete conveyance” is “fairly traceable” to the ocean.

The decision is a noteworthy ruling on what has been termed the “conduit theory”—that groundwater can act as a “conduit” of pollutants from facilities/operations to traditional navigable water (surface water) and trigger the need for a CWA permit. As described below, this theory has found its way into some recent district court decisions in different fact patterns, which are currently on appeal. The Hawaii Wildlife decision will be evaluated in these cases currently moving through the courts and has led the Environmental Protection Agency (“EPA”) to request public comment on the role of the conduit theory in the CWA.

Background

The County of Maui (“County”) owns and operates four groundwater injection wells at the Lahaina Wastewater Reclamation Facility (“Facility”), which is the primary municipal wastewater treatment plant for West Maui. The wells are the County’s primary means of effluent disposal, which the County has operated for decades under permits issued by federal and state programs. In 2012, environmental groups filed citizen suits under the CWA alleging that the County’s effluent discharges required a permit under the CWA National Pollutant Discharge Elimination System (“NPDES”).

The Facility receives sewage from a collection system serving approximately 40,000 people. The sewage is treated and either sold to customers for irrigation purposes or injected into the four wells
for disposal. Nearly all of the sewage is injected into groundwater wells. There is little dispute about whether the four wells reach the ocean. The County’s expert concluded that the flow of effluent reaching the ocean is “roughly the equivalent of installing a permanently-running garden hose at every meter along the 800 meters of coastline.”[2] Studies conducted by federal and state researchers placed tracer dye into three of the wells and monitored seeps in the ocean. The studies concluded that a hydrogeologic connection exists between the wells and the ocean.

The district court found the County liable for discharging effluent through groundwater and into the ocean without an NPDES permit. The district court reached this conclusion because: (1) the County indirectly discharged a pollutant to the ocean through a groundwater conduit; (2) the groundwater is a point source; and (3) the groundwater is a navigable water under the CWA.

The Ninth Circuit’s Decision

The County appealed the district court’s conclusion that the County was liable under the CWA. The Ninth Circuit upheld the district court, but differed in its reasoning. First, it concluded that all four wells were “point sources” under the CWA, because they were “discernible, confined and discrete conveyance[s] from which pollutants are discharged,” and the definition of “point sources” under the CWA includes wells.[3] The court held that “[a]s the pollutants here enter navigable waters and can be traced [back] to ... identifiable point[s] of discharge, [the wells] are subject to NPDES regulation, as are all point sources under the plain language of the CWA.”[4]

The court distinguished the groundwater wells from other “diffuse sources” held not to be point sources under the CWA in other cases. According to the court, the four wells were clearly “discrete conveyances” that could be regulated directly, as opposed to cars or utility poles discussed in other case law. The court observed that the County knew that the effluent injected into the wells would reach the ocean, as confirmed by the tracer dye study. These facts, according to the court, are different from “nonpoint source pollution caused primarily by rainfall around activities that employ or create pollutants, where the resulting runoff cannot be traced to any identifiable point of discharge.”[5]

The court rejected the County’s contention that the CWA covers only point sources that directly convey pollutants into navigable waters, and that the wells here do not qualify because they discharge into groundwater and then indirectly into the ocean. The court concluded that the effluent indeed comes from a discrete conveyance—the wells—as opposed to an unidentifiable point of discharge.

The court examined multiple cases from the Ninth Circuit and other circuit courts of appeal, addressing distinctions between point and nonpoint source pollution. For example, the court distinguished a 2010 Ninth Circuit decision, Greater Yellowstone Coalition v. Lewis,[6] that precipitation flowing into pits containing waste rock, which then filtered underground and eventually reached surface water, was not a point source under the CWA. The County’s wells, according to the
court, are unlike the pits in *Greater Yellowstone*, because they confine and contain the effluent before discharging it to the ground and eventually surface water. The court also relied on the Second Circuit’s conclusion in a 1994 case, *Concerned Area Residents for Environment v. Southview Farm*. [7] that tankers that collected liquid manure and discharged that manure onto fields, from which the manure directly flows into navigable waters, are point sources under the CWA.

Similarly, the court relied on another Second Circuit decision, *Peconic Baykeeper, Inc. v. Suffolk County*. [8] holding that trucks and helicopters discharging pesticides to the air were “point sources” and not indirect discharges. According to the court, this was consistent with an earlier 2002 decision from the Ninth Circuit, *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*. [9] The court explained that the County’s position—that the point source must directly discharge into a navigable water—is inconsistent with these decisions, because in those cases the pollutants traveled to navigable waters via the air, and not via the original point sources.

Finally, the court examined the Supreme Court’s decision in *Rapanos v. United States*. [10] The court concluded that the plurality opinion written by Justice Scalia recognized that the CWA forbids not only the addition of a pollutant “directly” to a navigable water, but the addition of a pollutant “to” a navigable water. This could occur via indirect means, such as the discharge of manure onto fields in *Concerned Area Residents*, which Justice Scalia cited. As the court explained, “[a]lthough the Court in *Rapanos* splintered on other issues, no Justice disagreed with the plurality opinion that the CWA holds liable those who discharge a pollutant from a defined point source to the ocean.” [11]

The court acknowledged that in previous opinions it has recognized Justice Kennedy’s concurrence in *Rapanos*, not Justice Scalia’s plurality, as controlling, but underscored that it did so in the context of cases involving wetlands. The court observed that this case is not about wetlands and emphasized that it was not deciding whether groundwater is a navigable water under the CWA. As a result, the court said its holding does not apply Justice Kennedy’s concurrence, and considered Justice Scalia’s plurality only “for its persuasive value.” In view of Justice Scalia’s plurality, the court concluded the County is “reading into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged ‘directly’ to navigable waters from a point source.” [12]

The court held the County liable under the CWA because: (1) the County discharged pollutants from a point source; (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. The court highlighted that the second portion of its holding is narrower than the district court’s conclusion that the CWA covers pollutants to navigable water “regardless of how they get there.” [13] The court declined to rule on “when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA,” because in this case the facts and the County’s concessions “clearly connect all four wells’ discharges to the consistently-emerging pollutants in the ocean.” [14]
On March 1, the County filed a petition for en banc rehearing. The County’s petition asserts that the Ninth Circuit panel’s “fairly traceable” test is inconsistent with the CWA and exposes governments and property owners to new CWA liability and “crippling” fines, where groundwater disposal and groundwater recharge has been historically viewed as outside the CWA. The petition also argues that the “fairly traceable” test is vague and fails to provide regulators and the public with sufficient clarity of whether an activity will require an NPDES permit.

**Impact**

The reach of the Ninth Circuit’s decision is unclear, as at least four other cases involving similar issues are currently before the Fourth and Sixth Circuits, creating the possibility of a circuit split. For example, in *Sierra Club v. Virginia Electric & Power Co.*,\(^{[15]}\) the Eastern District of Virginia allowed a case against a power company to go forward where power plant coal ash polluted surrounding surface waters via contaminated groundwater. That case is currently up on appeal before the Fourth Circuit. The Fourth Circuit is also evaluating an appeal of *Upstate Forever v. Kinder Morgan Energy Partners*,\(^{[16]}\) where the District of South Carolina rejected a claim that a pipeline leak violated the CWA where the contaminants migrated into groundwater and, eventually, streams and wetlands.

The Sixth Circuit has two pending cases where the district courts reached different conclusions. In *Tennessee Clean Water Network v. Tennessee Valley Authority*,\(^{[17]}\) the court held that the CWA covers discharges of pollutants from ash ponds that reach surface water through groundwater. And in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*,\(^{[18]}\) the district court dismissed a CWA citizen suit involving coal combustion pollutants from a coal-fired power plant that settled into ponds, migrated into groundwater, and eventually reached surface water. The district court determined that the CWA does not prohibit the discharge of a pollutant “through” groundwater, because “[a]dopting this theory would be inconsistent with the text and structure of the CWA,” where nonpoint source pollution could be “reformulated as point-source pollution by going up the causal chain” to identify the point source.\(^{[19]}\)

**EPA Requests Comment**

As courts continue to grapple with the conduit theory, EPA appears to be doing so as well. On February 20, 2018, shortly after the Ninth Circuit issued its decision in the *Hawaii Wildlife* case, EPA published a Federal Register notice seeking comments on its previous statements that a CWA permit is required where pollutant discharges from point sources reach jurisdictional waters via groundwater or other subsurface flow that has a direct hydrologic connection to jurisdictional waters.\(^{[20]}\) The comment period is open until May 21, 2018.

**Conclusion**
The Ninth Circuit’s decision is noteworthy to industry, regulators, the regulated community, and public interest groups who have examined the so-called conduit theory for some time. The **Hawaii Wildlife** case is most applicable to circumstances involving groundwater injection wells with clear hydrological connections to surface water. It is possible that the reasoning could be applied to other fact patterns, such as public sewer systems (beyond the discrete well discharges in the **Hawaii Wildlife** case), concentrated feeding operations (at issue in the Second Circuit case described above), retention ponds, surface impoundments, ash ponds, underground storage tanks, septic tanks, and injection wells that discharge pollutants to groundwater through various types of potentially “discrete conveyances.” If so, many entities could find themselves unwittingly subject to the CWA’s permitting program, with the risk of penalties for failure to comply.


[2] *Id.* at 758.

[3] *Id.* at 760.

[4] *Id.* (internal quotations and citation omitted).

[5] *Id.* at 761 (internal quotations and citation omitted).

[6] 628 F.3d 1143 (9th Cir. 2010),

[7] 34 F.3d 114 (2d Cir. 1994),

[8] 600 F.3d 180 (2d Cir. 2010),

[9] 309 F.3d 1181 (9th Cir. 2002)


[12] *Id.*


[14] *Id.*


[19] Id. at *11 (internal quotations and citations omitted).