THOMSON REUTERS

Westlaw®

# Take me to the river: Does the Clean Water Act regulate indirect discharges to groundwater?

**By Kathy Robb, Esq., *Sive, Paget & Riesel****

**NOVEMBER 20, 2018**

The concept that indirect discharges of pollutants to navigable waters through groundwater — sometimes known as the "groundwater conduit" theory — are regulated under the Clean Water Act, 33 U.S.C.A. § 1251, is not new.

But the 9th U.S. Circuit Court of Appeals' opinion in *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), and subsequent recent circuit court decisions have sparked renewed controversy about the regulatory reach of the CWA when groundwater is part of the equation.

In County of Maui, the 9th Circuit affirmed a district court ruling that the county's discharge of treated effluent into its injection wells, through which pollutants were eventually carried by groundwater to the Pacific Ocean, violated the CWA.

The CWA prohibits the discharge of a pollutant into "navigable waters," defined under the act as "the waters of the United States, including the territorial seas," from a "point source" without a National Pollution Discharge Elimination System permit. A "discharge" is defined as "any addition of any pollutant into navigable waters from a point source."[1]

A "point source" is defined as "any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."[2]

The CWA defines "nonpoint" sources by exclusion — i.e., anything that is not a "point source" under the CWA definition. The Environmental Protection Agency describes nonpoint sources as caused by rain or snow runoff over or through the ground, including land runoff, precipitation, drainage, and seepage, coming from many diffuse sources.[3]

So where does this leave groundwater? Courts are grappling with this issue at a time when polling suggests that Americans' concern about water pollution is at its highest since 2001.[4]

## *COUNTY OF MAUI* OPINION

Maui County operates the Lahaina Wastewater Reclamation Facility. There, it injects 3 million to 5 million gallons of recycled, treated wastewater daily into four injection wells regulated by the state and located a half-mile inland from the Pacific Ocean. The injection wells are long pipes that carry effluent about 200 feet underground into a shallow groundwater aquifer.

A tracer dye study showed that 84 days after the dye was injected into two of the county's four wells, some dye emerged from the seafloor through points known as submarine springs. The injected wastewater made its way through groundwater to the ocean.

The plaintiff, a nonprofit conservation group, claimed that the county's effluent injections were discharges from a point source (the wells), carried through the groundwater to navigable water (the Pacific Ocean), causing damage to coral reefs and violating the CWA. The county argued that the discharge from a point source must be made *directly* to navigable water to come under the CWA.

The 9th Circuit held that the indirect discharge through groundwater to the Pacific was subject to regulation under the CWA and required a permit. The court rejected arguments that a point source must discharge directly into navigable water to trigger CWA regulation, holding instead that it is enough for the discharge to come from a point source (here, the wells.)

The court also stated, "We assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA."

The 9th Circuit emphasized that although there was no *direct* discharge to the Pacific, there was a "fairly traceable" connection established through the tracer dye studies, showing "the functional equivalent of a discharge into navigable waters" by the county.

In doing so, the 9th Circuit cited Justice Antonin Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which states that the CWA does not prohibit the '"addition of any pollutant *directly* to navigable waters from any point source' but rather the 'addition of any pollutant *to* navigable waters'" based on hydrologic connection.[5] Maui County has petitioned the U.S. Supreme Court to review the 9th Circuit's decision. *Cty. of Maui v. Haw. Wildlife Fund*, No. 18-260, *petition for cert. filed*, 2018 WL 4205010 (U.S. Aug. 27, 2018).

## REGULATORY RESPONSE

Only a few days after the *County of Maui* decision, on Feb. 20, the EPA requested comment on whether the agency "should review and potentially revise its previous statements" about "pollutant discharges from point sources that reach jurisdictional waters via groundwater or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water."[6]

The agency specifically sought comment on whether:

- Requiring CWA permits for indirect discharges to groundwater is consistent with the text, structure and purposes of the CWA.
- Those releases would be better addressed through other federal authorities than the CWA NPDES permitting program.
- Some or all of those types of releases are adequately addressed through existing state statutory or regulatory programs or federal programs.
- The EPA should clarify statements regarding the meaning and circumstances under which such discharges are "considered direct," to reduce regulatory uncertainty.

The EPA is now sifting through the almost 60,000 comments it received.

The agency may rely on the results of any formal rulemaking to bolster a "*Chevron* deference" argument in future cases, giving deference to the agency and therefore supporting the position the EPA ultimately may take on the issue.[7] In the *County of Maui* case, the 9th Circuit declined to extend *Chevron* deference to the EPA's views on indirect discharges.

## 4TH CIRCUIT CONFLICTING RESULTS ON INDIRECT DISCHARGE

Circuit courts have split on the groundwater conduit theory.

In each of four recent circuit court decisions discussed below, two from the 4th Circuit and two from the 6th Circuit, both sides have relied on administrative, legislative, legal and policy arguments to support their positions. The cases have attracted amici briefs from environmental groups, industry associations and several states. What's at stake is the jurisdictional scope of the complex permitting programs under the CWA.

In *Upstate Forever v. Kinder Morgan Energy Partners LP*, 887 F.3d 637 (4th Cir. 2018), a split panel of the 4th Circuit ruled that a petroleum pipeline spill resulting in a discharge of pollutants reaching navigable waters through groundwater is regulated under the CWA.

The divided panel vacated the lower court decision, which had held migration of pollutants through soil and groundwater is unregulated "nonpoint source" pollution, and had dismissed the citizen suit for lack of subject matter jurisdiction and failure to state a claim. On appeal, the court remanded the case to the lower court for further proceedings.

Upstate Forever's 2016 lawsuit arose from a 2014 underground pipeline spill of an estimated 370,000 gallons of gasoline into soil and groundwater in South Carolina.

The pipeline, buried six to eight feet underground and located about 1,000 feet from surface water, was repaired within days, and remediation of the spill was begun under the oversight of the state agency authorized to issue NPDES permits and oversee water quality in South Carolina. Kinder Morgan has recovered about 210,000 gallons of gasoline, and remediation continues.

The plaintiffs alleged that Kinder Morgan did not fully comply with the remediation measures required and that the gasoline traveled after the spill through groundwater into two nearby creeks and adjacent wetlands. The plaintiffs also urged the court to prevent Kinder Morgan from sidestepping CWA regulation merely by burying a pipe close to hydrologically connected surface waters.

Kinder Morgan argued that the violation ceased when the pipeline was repaired, and that if pollutants are seeping into navigable waters it is from a nonpoint source, groundwater, which is not regulated under the CWA.

The U.S. District Court for the District of South Carolina held that the plaintiffs had not stated a claim under the CWA because the pipeline was not continuing to release gasoline and therefore the violation was not ongoing.

It also held that indirect discharges through groundwater to navigable waters were nonpoint sources that were not regulated under the CWA and dismissed the case.

In reversing the district court, the 4th Circuit ruled that continuous release of a pollutant from a point source — here, the pipeline — is not required to prove a violation. Instead, it said it was enough that the spilled gasoline continued to migrate through soil and groundwater and enter surface waters.

The court said any "delay between the time at which pollution leaves the point source and the time at which it is added to navigable waters" does not prohibit a citizen suit claim under the CWA.

While the court noted that citizen suits under the CWA are intended primarily to allow citizens "to abate pollution when the government cannot or will not command compliance," it reasoned that a violation could be continuing even if the conduct that caused the violation had ceased.

The court also held that "a plaintiff must allege a direct hydrological connection between groundwater and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through groundwater,"

reflecting the position taken by the EPA in its amicus brief in *County of Maui*.

This standard is a different articulation from the "fairly traceable" standard set by the 9th Circuit in *County of Maui*, although the 4th Circuit noted that in its view there was "no functional difference" between its standard and the 9th Circuit's "fairly traceable" standard.

Like the 9th Circuit in *County of Maui*, the 4th Circuit looked to Justice Scalia's opinion in *Rapanos* for guidance. The 4th Circuit quoted the same sentence from *Rapanos* as the 9th Circuit did in *County of Maui*, emphasizing the act's broad prohibition on the "addition of any pollutant" to navigable waters.[8]

The dissenting judge stated that the majority's reading threatened to undermine the CWA distinction between "point source" and "nonpoint source" discharges.

The dissenting opinion emphasized that "close examination of the text, history and structure of the CWA reveals that not every addition of pollution amounts to a CWA violation — much less an ongoing CWA violation. Congress precisely defined a CWA violation as the addition of pollutants from a point source, and for there to be an ongoing CWA violation, there must be an ongoing addition of pollutants from a point source into navigable waters."

Focusing on "three central features" of the CWA — "point source" pollution, the NPDES program, and primary enforcement through state and federal regulators supplemented by citizen suits — the dissent stressed Congress' intent to limit federal jurisdiction under the CWA to point source pollution.

It also noted the statute's NPDES permitting program is "not only ill-equipped to address, but also inapplicable to, nonpoint source pollution."

The 4th Circuit decision in *Kinder Morgan* has raised further concerns that applying the NPDES program to indirect discharges via groundwater to waters of the United States would significantly expand the regulatory scope of the CWA and the number and scope of citizen suits, create regulatory uncertainty, and require an impractical case-by-case analysis.

Kinder Morgan has petitioned the U.S. Supreme Court for review of the 4th Circuit decision. *Kinder Morgan Energy Partners LP v. Upstate Forever*, No. 18-268, *petition for cert. filed*, 2018 WL 4216393 (U.S. Aug. 28, 2018).

Just a few months after *Kinder Morgan*, the 4th Circuit reached an opposite result in *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018), holding that indirect releases of arsenic through groundwater from closed coal-ash landfills to a nearby river and creek are not regulated under the CWA.

While the 4th Circuit noted as settled law that indirect discharges from point sources through groundwater hydrologically connected to surface water come within the CWA under *Kinder Morgan*, it concluded that the coal-ash landfills were not point sources and therefore the releases at issue in Virginia Electric & Power did not fall within the CWA.

This recent decision creates what some view as a conflict not only within the 4th Circuit but also between the 4th Circuit and 9th Circuit on the regulation of indirect groundwater discharges under the CWA.

## DIRECT SPLIT BETWEEN CIRCUITS

In *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), and *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018), two cases decided Sept. 24 also involving coal ash landfills, the 6th Circuit concluded in similarly worded opinions that discharges to surface water through groundwater do not require NPDES permits.

In *Kentucky Utilities*, the utility had a permit allowing regulated discharges from ash ponds through an external outfall. The plaintiffs alleged that the ash ponds also discharged to a nearby surface water through naturally flowing hydrologically connected groundwater that was infiltrating the settling ponds and flowing through springs to the surface water.

The utility argued that these indirect discharges were not regulated under the CWA, and the 6th Circuit agreed, affirming the district court.

The court said groundwater is "by its very nature ... a 'diffuse medium,'" that is not discrete, discernable or confined, and to decide otherwise would "upend the existing regulatory framework."

The plaintiffs also argued that the CWA does not contain the word "directly" and therefore "only prohibits the discharge of pollutants 'to navigable waters from any point source'" without reference to how "direct" the discharge is.

Referring to this "backbone" of the plaintiffs' argument, the 6th Circuit rejected the hydrological connection theory, holding that the interpretation contradicts other text in the CWA.

"Thus, for a point source to discharge into navigable waters, it must dump directly into those navigable waters — the phrase 'into' leaves no room for intermediary mediums to carry the pollutants."

In reaching this conclusion, the 6th Circuit noted expressly that "we disagree with the decisions from our sister circuits" in *Kinder Morgan* and *County of Maui*.

In *TVA*, the court applied a similar analysis and reached the same result.

The 6th Circuit's decisions in these cases create a direct split with the 9th Circuit's *County of Maui* decision and the 4th Circuit's decision in *Kinder Morgan*.

## WHAT'S NEXT?

Both the *County of Maui* and *Kinder Morgan* decisions have drawn the attention of the regulated community. Regulated entities could face increased permitting costs and related liabilities if they fail to obtain CWA permits for indirect discharges of pollution to waters of the United States through groundwater.

The outcomes in *County of Maui* and *Kinder Morgan* also raise a host of policy details that must be addressed for indirect discharges to come within CWA regulation.

These questions include: How much time can it take for contaminants to reach surface waters through groundwater? How far away can the point source be from the navigable water? How would regulated entities identify the kind of permit they might need to avoid liability for a spill or leak? How would the rights of the states be impacted by federal regulation of hydrologically connected groundwater?

Many argue that cooperative federalism under the CWA could be affected, and the power of states to regulate water limited, if indirect discharges to groundwater come within the CWA permitting program. A similar concern regarding limiting states has been voiced in the ongoing multicourt litigation surrounding the "waters of the United States" rules.

These decisions set up the possibility of increased federal permit requirements for dischargers of wastewater that moves through groundwater and ultimately reaches navigable waters.

Federal permitting may turn on whether courts find that a release up the chain from a point source to hydrologically connected groundwater is sufficient for CWA jurisdiction, thus distinguishing the coal ash cases from the pipe discharges. If the groundwater conduit theory is rejected, CWA jurisdiction, and therefore permit requirements, will not be expanded.

Superfund site cleanups, municipalities, golf courses, recreation areas, agricultural operations, recreation areas, businesses that contain stormwater onsite in unlined ponds, cesspools, septic systems, underground storage tanks, surface impoundments, landfills, and pipelines all potentially become dischargers under the CWA if the groundwater conduit theory is universally accepted.

If the Supreme Court affirms the *County of Maui* and *Kinder Morgan* decisions, there also may be a significant increase in CWA citizen suits seeking to enforce permitting at these kinds of sites.

The regulatory uncertainty associated with the groundwater conduit theory could also negatively impact infrastructure investments needed to address water infrastructure in the United States.

Given what's at stake, the issue seems bound for further attention — either from the high court or EPA, or perhaps both.

## NOTES

[1] 33 U.S.C.A. §§ 1362(7), (12).

[2] 33 U.S.C.A. § 1362(14).

[3] *See* https://bit.ly/2QsWmOg and https://bit.ly/2OD44DS.

[4] *See* https://bit.ly/2JPgGXB.

[5] In *Rapanos*, the U.S. Supreme Court considered the question of whether wetlands adjacent to point source "ditches or man-made drains" intermittently flowing into navigable waters constitute "waters of the United States" under the CWA and concluded that the wetlands were jurisdictional waters.

[6] Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 F.R. 7126 (proposed Feb. 20, 2018) (to be codified at 40 C.F.R. pt. 122).

[7] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). The shorthand refers to the practice of a court deferring to an administrative agency's reasonable construction of a statute that the agency administers, where the statute is silent or ambiguous on the issue before the court.

[8] *Rapanos* at 743 (quoting 33 U.S.C.A. § 1362(12)(A)).

*This article first appeared on the Practitioner Insights Commentaries web page on November 20, 2018.*



## ABOUT THE AUTHOR

**Kathy Robb** is a partner in **Sive, Paget & Riesel**, a boutique environmental law firm established 55 years ago in New York City. She handles complex environmental cases in litigation before all levels of federal court across the country and counsels on environmental issues in transactions and regulatory matters for clients that include water districts, energy companies, investors, buyers, sellers, lenders, paper companies, and businesses. She writes and speaks frequently on environmental law issues. In addition, she is president of the Environmental Law Institute's Leadership Council, a former chair of the ABA's Annual Water Law Conference, and a member of the American College of Environmental Lawyers. She can be reached at krobb@sprlaw.com.