WHAT'S THE POINT (SOURCE)? NEW DEVELOPMENTS IN THE ONGOING DEBATE CONCERNING CLEAN WATER ACT JURISDICTION OVER INDIRECT DISCHARGES VIA GROUNDWATER

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In response to a split in the federal circuit courts of appeals and after a long history of inconsistent guidance, the U.S. Environmental Protection Agency (EPA) recently announced that it is seeking comments by May 21, 2018 on whether a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit is required for discharges to groundwater that eventually reach surface waters. Every court that has examined this issue has noted the lack of clear guidance in the CWA's legislative history and a divergence of approaches between various courts of appeals and even within some circuits.

The resulting uncertainty has exposed a wide variety of private and public entities, including such diverse entities as pipelines, manufacturing facilities, municipalities, and dairy farms, to CWA citizen suit litigation and, for some defendants, to potentially significant penalties. In each case, planned activities (such as underground injection of wastes) or unplanned conditions (such as releases causing groundwater contamination) may lead to the migration of pollutants that reach rivers, streams or other surface "waters of the United States." The question is whether these indirect discharges are subject to the CWA's NPDES permit program and discharge regulatory regime. Expanding the NPDES permitting program to regulate these types of discharges would affect facilities that have not been subject to regulation under the CWA and it could expand the permitting burden and range of regulated discharges for facilities that currently hold NPDES permits.

BACKGROUND

The NPDES permitting program regulates the discharge of pollutants through "point sources" to "navigable waters" (also referred to as "waters of the United States"). Although the CWA addressed groundwater in a variety of contexts, the CWA and its implementing regulations did not clearly incorporate discharges to or via groundwater into the NPDES permitting program. In addition, EPA has never clearly and consistently expressed its position on the issue of whether (or under what circumstances) discharges to or via groundwater are subject to CWA jurisdiction.

EPA Has Issued Inconsistent Guidance with Respect to Whether the NPDES Program and "Waters of the United States" Encompass Discharges to Groundwater

The NPDES program regulates discharges of pollutants from "point sources" to "navigable waters," which the CWA defines in turn as "waters of the United States."[1] As described in our previous alerts on this topic,[2] significant rulemaking efforts and litigation have focused on what water bodies are encompassed within the

definition of "waters of the United States,"[3] the scope of which has ebbed and flowed over time. Most recently, the Supreme Court's decision in *Rapanos v. United States* led to substantial confusion.[4] While a plurality of the justices agreed that "waters of the United States" did not include the appellants' wetlands (which were near but did not abut navigable waters), they disagreed as to the proper test for determining what water bodies do qualify as "waters of the United States."[5] To resolve the uncertainty, EPA and the Army Corps of Engineers (Corps) issued a new rule in 2015 based on one of the two tests set out by the plurality in *Rapanos* (the "significant nexus" test in the Kennedy concurrence).

The regulatory definition of "waters of the United States" has never included groundwater in the list of water bodies regulated under the CWA.[6] In addition, in EPA's recent effort to revise its definition of "waters of the United States" and scope of CWA jurisdiction, the agency did not include groundwater.[7] The preamble to EPA's rulemaking in the 2015 rule plainly states: "The rule excludes for the first time certain waters and features over which the agencies have generally not asserted CWA jurisdiction, as well as *groundwater, which the agencies have never interpreted to be a 'water of the United States' under the CWA."*[8]

EPA's Office of General Counsel also issued an opinion in 1973 stating that:

> Section 402 [33 U.S.C. § 1342] authorizes the Administrator to issue a permit 'for the discharge of a pollutant.' Under § 502(12) the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters (or the contiguous zone of the ocean). *Discharges into ground waters are not included.* Accordingly, permits may not be issued, and no application is required, unless a discharge into navigable waters is proposed or is occurring.

But EPA statements in other contexts have hinted that groundwater may be included within the CWA's jurisdiction under certain circumstances. Numerous courts have noted that the Preamble to NPDES Permit Application Regulations for Storm Water Discharges provides that "[T]his rule-making only addresses discharges to waters of the United States, consequently *discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)."*

Because of EPA's Inconsistent Guidance, There is a Split in the Circuits on the CWA's Jurisdiction

The lack of clarity in the statute, legislative history, and EPA guidance has resulted in a wide array of inconsistent judicial decisions which conclude in some cases that the NPDES permitting program extends to discharges to groundwater, in other cases that it does not, and in yet other cases that the NPDES permitting requirement may extend to pollutants migrating via groundwater that is hydrologically connected to surface waters that constitute "waters of the United States" (also known as "tributary" groundwater) but not to "isolated" or "non-tributary" groundwater.

Early in February 2018, the Ninth Circuit held in *Hawai'i Wildlife Federation v. County of Maui*, that the County's discharge of sewage effluent into four groundwater injection wells that indirectly discharged into the ocean via groundwater required the County to obtain an NPDES permit.[11] The County has ninety days to file a petition for certiorari with the U.S. Supreme Court.[12]

With the *Hawai'i Wildlife Federation* decision, the Ninth Circuit followed in the footsteps of the Seventh Circuit and several district court decisions in the Ninth, Tenth, and other Circuits finding that Congress intended to regulate the release of pollutants that reach waters of the United States even if the pollutants reach such surface waters through groundwater with a direct hydrologic connection.[13] For instance, in *Idaho Rural Council v. Bosma*, a district court in Idaho allowed plaintiffs (an organization representing downstream farmers) to pursue a CWA citizen suit claim that the defendant's dairy farm discharged pollutants via groundwater that reached waters of the United States.[14] The *Bosma* decision noted the split in the circuits and reasoned that the CWA's legislative history only led to one clear conclusion — that the CWA does not regulate "isolated/tributary groundwater" which has no effect on surface water. Thus, the Bosma court reasoned that this legislative history has no bearing on whether the CWA regulates groundwater that is hydrologically connected to waters of the United States.[15]

Until the most recent Ninth Circuit decision, not all district courts in the Ninth Circuit took this approach. For instance, prior to the *Hawai'i Wildlife Federation* decision, a district court judge in Oregon in *Umatilla Waterquality Protective Association v. Smith Frozen Foods Inc.,* concluded that Congress did not intend to regulate groundwater in any form, based primarily on the failure of the CWA to explicitly address groundwater and the lack of any "formal or consistent interpretation of the CWA [by EPA] that would subject discharges to groundwater to the NPDES permitting requirement."[16]

Courts in other circuits have shared the view that the NPDES program does not extend to discharges to or via groundwater. A 1994 decision by the Seventh Circuit, for instance, did not find sufficient basis for CWA regulation of discharges to groundwater based on allegations of a hydrologic connection with surface waters. In *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, the Seventh Circuit held that the CWA did not reach an artificial stormwater retention pond associated with a warehouse that was intended to retain oil, grease, and other pollutants.[17] The court based its decision on the text of the CWA, its legislative history, EPA's regulations, and EPA statements regarding regulation of groundwater and concluded that, even if a possible hydrological connection could not be denied, that neither the statute nor the regulations provided a sufficient basis for regulation.[18] The decision also noted that Congress rejected proposals to regulate groundwater under the CWA because (according to the Senate Committee on Public Works) "the jurisdiction regarding groundwaters is so complex and varied from State to State."[19]

The First Circuit has also addressed this issue and concluded that the CWA does not regulate groundwater through the NPDES program. In *Town of Norfolk v. United States Army Corps of Engineers*, the court upheld a determination made by the Corps to issue a permit under Section 404 of the CWA which allowed the placement of a landfill in an artificial wetland. In doing so, the court rejected plaintiffs' argument that groundwater resources are "waters of the United States."[20] Subsequent district court decisions in the First Circuit have, however, distinguished between "isolated/non-tributary groundwater" and "tributary groundwater" (i.e., groundwater with a hydrological connection to surface water) based on the following language in the *Town of Norfolk* decision: "[a]lthough other courts have questioned whether the term 'waters of the United States' should include groundwaters connected to surface waters—we agree with the Corps that since such a determination ultimately involves an ecological judgment about the relationship between surface waters and groundwaters, it should be left in the first instance to the discretion of the EPA and the Corps."[21]

Given the divergence between circuits (and even within circuits), definitive guidance on this issue will have to come from either the U.S. Supreme Court — which has not yet weighed in — but could also emerge from the EPA's current request for comments.

Comments May Also Raise Issues Regarding the Definition of "Point Source"

Any guidance document or rulemaking may also raise issues regarding whether a discharge to "waters of the United States" via groundwater is conveyed via a "point source" within the meaning of the CWA. EPA regulations implementing the NPDES program generally define "point source" as "any discernible, confined, and discrete conveyance… from which pollutants are or may be discharged."[22]

Courts reviewing the scope of CWA jurisdiction with respect to discharges to or via groundwater have approached the issue differently. For instance, the Ninth Circuit's 2018 decision in *Hawai'i Wildlife Federation* focused on whether the pollutant is discharged from the point source directly into the "navigable waters" at issue and ultimately held that the text of the CWA does not require that the point source itself convey the pollutants directly into the navigable waters.[23]

In contrast, the Fourth Circuit is currently considering a similar issue in a pending case, *Upstate Forever v. Kinder Morgan Energy Partners*.[24] In this litigation, the District of South Carolina decided that, even though it was undisputed that the defendant's underground pipeline leaked petroleum into the ground which led to contamination of soil and groundwater, the migration of petroleum through groundwater to surface water is outside the reach of the CWA's NPDES permitting program because the "seeps, flows, and fissures" at the spill site are not "discernible, confined, and discrete" conveyances as is necessary to establish a point source.[25]

SCOPE OF EPA REQUEST FOR COMMENTS

On February 20, 2018, EPA published a notice in the Federal Register asking for public comment on whether and to what extent it should regulate discharges via groundwater that have a hydrologic connection to surface waters of the United States. EPA is specifically seeking comment on:

1. whether regulation of pollutant discharges from point sources that reach groundwater or other subsurface flow that has a direct hydrologic connection to a jurisdictional surface water is consistent with the text, structure, and purposes of the CWA;
2. whether such releases are better addressed through federal authorities other than the NPDES permit program;
3. whether some or all of such releases are addressed adequately through existing state or federal statutory or regulatory programs, such as the underground injection control program under the Safe Drinking Water Act;
4. whether EPA should clarify its previous statements in order to reduce regulatory and public uncertainties; and
5. whether EPA should proceed via memoranda, guidance or rule making if the agency pursues further action on this issue.

CONCLUSION

The issuance of an EPA guidance document or rule addressing this issue has the potential to raise a variety of questions and uncertainties. For instance, it is unclear whether the permitting agency or the discharger would make the determination of hydrological connectivity to surface waters that constitute "waters of the United States," or how anyone can make that determination given the ongoing ebb and flow regarding the definition of the "waters of the United States." Will facilities that currently do not require NPDES permits (e.g., because they infiltrate all of their stormwater) need to reevaluate their permitting strategy?

The issuance of a rule or guidance document would also need to address the interaction between EPA's position and other federal environmental statutes such as the Safe Drinking Water Act (which regulates groundwater that serves as drinking water), Comprehensive Environmental Response, Compensation, and Liability Act (which addresses cleanups of hazardous substances in soil and groundwater), the Resource Conservation and Recovery Act (which governs management of hazardous waste at various facilities, including landfills).

Clarification of the federal-state regime governing the quality of groundwater may be welcome to some, but there is a risk that this request for comments may result in a significant increase in permitting burdens and litigation risk for regulated entities. In the wake of recent EPA action, some states have stepped up their own efforts related to environmental regulation. Thus, even if EPA issues statements disclaiming authority to regulate discharges to groundwater that is hydrologically connected to surface water under the CWA, these states may decide they need to address a regulatory gap. Either way, any rule or guidance document that results from this proceeding may have significant impacts for the regulated community. Hence, members of the regulated community should seriously consider sharing their views with EPA on this important set of issues.

NOTES

[1] 33 U.S.C. § 1362(7).
[2] *See the following.*
http://www.klgates.com/epa-and-the-army-corps-propose-rules-expanding-clean-water-act-jurisdiction-potentially-affecting-everyone-who-uses-lands-where-water-might-be-present-04-03-2014/
http://www.klgates.com/epa-and-the-army-corps-issue-final-clean-water-rule-but-does-this-new-line-in-the-water-clarify-expand-or-narrow-clean-water-act-jurisdiction-06-19-2015/
http://www.klgates.com/clean-water-rule-stayed-nationwide-10-14-2015/
[3] In 1985, the Supreme Court concluded that "waters of the United States" extends to wetlands actually abutting navigable waters. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 (1985). Subsequently, the EPA and Army Corps of Engineers (which implements the CWA Section 404 dredge and fill program, which similarly relies on the phrase "waters of the United States" to define its jurisdiction) promulgated new rules that included any intrastate waters that are or could be used by migratory birds. In a challenge to these regulations, the Supreme Court held in 2001 that "waters of the United States" does not extend to nonnavigable, isolated, intrastate waters that are not adjacent to or abutting navigable waters. *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 167, 171 (2001).
[4] *Rapanos v. United States*, 547 U.S. 715 (2006).
[5] *Id.* at 756 (Scalia, J.) (requiring a "relatively permanent flow" and a "continuous surface connection" between

the wetlands and navigable waters), 757–58 (Roberts, J., concurring), and 758–86 (Kennedy, K., concurring) (requiring a "significant nexus" between the wetlands and navigable waters).
[6] *See, e.g.,* 40 C.F.R. § 122.2 (EPA definition for purposes of NPDES program). *See also* EPA, *"Definition of Waters of the United States under the Clean Water Act* (February 27, 2018, 10:46 AM), https://www.epa.gov/cwa-404/definition-waters-united-states-under-clean-water-act (providing a summary of the history of the definition of "waters of the United States").
[7] 80 Fed. Reg. 37,054. 37,055 (June 29, 2015). Note that the 2015 rule does not take effect until February 6, 2020, 83 Fed. Reg. 5200 (Feb. 6, 2018), and is currently subject to rulemaking which proposes to rescind the 2015 version and replace it with a recodification of the regulatory text that governed prior to the 2015 rulemaking. 82 Fed. Reg. 34,899 (July 27, 2017).
[8] *See id.* at 37,073 (emphasis added).
[9] *Id.* (citing Opinion, Office of General Counsel (December 13, 1973), *as reprinted in Exxon Corp. v. Train*, 554 F.2d 1310, 1321 n. 21 (5th Cir. 1977) (emphasis added)). Note, however, that this decision did not address the remainder of the provision:

> Section 125.26(a) of the NPDES regulations requires the Regional Administrator to formulate and apply permit conditions to prevent pollution of surface and underground water resources whenever disposal into wells is contemplated as part of a program to comply with effluent limitations and other requirements in an NPDES permit. *This provision cannot, of course, extend EPA's jurisdiction to cover disposal into wells not in connection with discharges into navigable waters.* However, whenever a permit is issued for a discharge into navigable waters, Section 125.26(a) requires controls to be applied to associated discharges into wells.

[10] 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added).
[11] *Hawai'i Wildlife Fed'n v. Cty. of Maui*, No. 15-17447 (9th Cir. Feb. 1, 2018).
[12] Sup. Ct. R. 13(1).
[13] *See, e.g., Sierra Club v. Colorado Refining Co.,* 838 F.Supp. 1428, 1434 (D. Colo. 1993) (also noting the conflict in the case law but relying on the Tenth Circuit's expansive interpretation of the CWA to give full effect to Congress' declared goal of restoring and maintaining waters of the United States); *Hernandez v. Esso Standard Oil Co. (Puerto Rico),* 599 F. Supp. 2d 175, 178–81 (D.P.R. 2009) (concluding that the CWA extended federal jurisdiction over groundwater that was hydrologically connected to surface waters that were waters of the United States in a case involving the release of hazardous substances from underground storage tanks).
[14] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179–81 (D. Idaho 2001).
[15] *Id.* at 1180–81.
[16] *Umatilla Waterquality Protective Association*, 962 F. Supp. at 1318–20.
[17] *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F. 3d 962, 964–65 (7th Cir. 1994).
[18] For instance, as of the Seventh Circuit's 1994 decision, "waters of the United States" was defined to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect

interstate or foreign commerce." *Id.* at 965.
[19] *Id.* Note, however, that the Seventh Circuit in an early CWA decision from 1977 upheld EPA's authority to regulate discharges of pollutants into a deep well by a steel company in Gary, Indiana. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977).
[20] *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1450–51 (1st Cir. 1992).
[21] *Hernandez,* 599 F. Supp. 2d at 179 (distinguishing between the evidence showing a lack of hydrological connection in the *Town of Norfolk* case and the facts at hand indicating potential migration of contamination through groundwater to an adjacent river).
[22] 40 C.F.R. § 122.2.
[23] *Hawai'i Wildlife Fed'n v. Cty. of Maui*, No. 15-17447 (9th Cir. Feb. 1, 2018).
[24] *Upstate Forever v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir. Dec. 7, 2017).
[25] *Upstate Forever v. Kinder Morgan Energy Partners*, 252 F. Supp. 3d 488, 494–96 (D.S.C. 2017).

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