CLEAN WATER ACT JURISDICTION EXTENDED TO COVER GROUNDWATER IN NINTH CIRCUIT

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The Ninth Circuit Court of Appeals issued an opinion on February 1, 2018, in Hawai'i Wildlife Fund v. Co of Maui requiring NPDES discharge permits for discharges to groundwater that connects to surface water. This case has potentially significant ramifications for Superfund site cleanups involving reinjection or spreading grounds for treated contaminated groundwater, as well as municipalities, golf and recreation areas, agriculture, and businesses that contain stormwater onsite in unlined ponds that may seep into aquifers connected in some way to navigable waters of the United States. Of particular note, this has the potential to significantly increase the number of CWA citizen suits.

Under the Clean Water Act, the Army Corps of Engineers and the U.S. Environmental Protection Agency have jurisdiction over "navigable waters of the United States." In the past, groundwater has not been included in the definition of "navigable waters." However, the definition appears to be expanding to include groundwater according to the Maui case, which involved permitted waste injection wells. Similarly, several cases have recently extended CWA jurisdiction to groundwater in the context of coal ash storage ponds. District courts in Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, Sierra Club v. Virginia Elec. & Power Co, and Tennessee Clean Water Network v. TVA found that when contaminated groundwater discharges to surface water, a discharge permit under the CWA is required.

In the Maui case, tertiary-treated and disinfected municipal wastewater was discharged via Class V underground injection control wells into groundwater that subsequently flowed to the ocean. The discharges were permitted under the state and federal Safe Drinking Water Act. The discharger did not apply to be covered by the General National Pollutant Discharge Elimination System Permit under the CWA because the discharges were not to surface water connected to "navigable waters of the U.S." The Department of Health in Hawaii and the EPA determined a NPDES permit was not required for the discharge.

The wells were drilled to a depth that intersected with groundwater in the area and the groundwater flowed to the ocean. In 2012, the Sierra Club, the Surfrider Foundation, and the West Maui Preservation Association, filed citizen suits under CWA, alleging the County's discharges of treated effluent to the wells required a NPDES permit. In 2013, a tracer study found that the wastewater injected into the wells would reach the Pacific Ocean within one year of discharge. The wells, some of which were installed as early as 1979, are located at the Lahaina Wastewater Reclamation Facility, which is the principal municipal wastewater treatment plant for West Maui. The wells are the County's primary means of effluent disposal after treating approximately 4 million gallons of sewage per day from a collection system serving approximately 40,000 people. The County injects approximately 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells. The County did not dispute that some of the treated effluent injected into the wells reaches the Pacific Ocean.

The District Court ruled against the County on summary judgment, finding the County liable because it indirectly discharged a pollutant into the ocean through a groundwater conduit, which was "functionally [a discharge] into navigable water" without a NPDES permit. The District Court found that the County was "discharging effluent through groundwater and into the ocean without the National Pollutant Discharge Elimination System ("NPDES") permit required by the CWA." (Haw. Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980, 1005 (D. Haw. 2014)). The court based its decision on three independent grounds: (1) the County "indirectly discharg[ed] a pollutant into the ocean
through a groundwater conduit," (2) the groundwater is a "point source" under the CWA, and (3) the groundwater is a "navigable water" under the Act. (Id. at 993, 999, 1005). In addition, the District Court held that the County could not claim a due process violation because it had fair notice under the plain language of the CWA that it could not discharge effluent via groundwater into the ocean.

The Ninth Circuit conducted de novo review of the District Court's decision. On February 1, 2018, the Ninth Circuit issued an opinion affirming the District Court. The Ninth Circuit found that the County was "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 Ninth Circuit allowed some room for factual distinction in determining if a NPDES permit is required for a discharge via injection well, stating "well disposals do not always constitute nonpoint source pollution. If pollutants from those wells are discharged into a navigable water from a discrete source, that is point source pollution, and the polluter must obtain an NPDES permit if it wants to avoid liability under the CWA."

The Ninth Circuit held, "at bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability." (Hawai'i Wildlife Fund v. Co of Maui, No. 15-17447, Decided: February 01, 2018).

The Ninth Circuit left open factual determinations when it stated, "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 CWA." In other words, the question of "nexus" was not addressed in the Maui case because it was clear that the wastewater injected into the wells ultimately reached the ocean. It is likely that more cases will work their way up to the Ninth Circuit, and eventually perhaps the U.S. Supreme Court, to address the question of necessary nexus between the groundwater and a navigable water of the U.S. The Ninth Circuit is the first circuit court to reach an opinion concerning groundwater and the CWA. The Fourth Circuit has been asked to review the district court’s finding in Sierra Club v. Virginia Elec. & Power Co, and the Sixth Circuit has been asked to review findings in Tennessee Clean Water Network v. TVA. A potential split in the circuits could send this issue to the Supreme Court.

Until then, property owners of all kinds, including industry, agricultural, municipalities, waste management companies, should expect to be sued by third parties in CWA citizens’ suits, even if there is no clear conduit from the alleged point source to a navigable water. Applying for NPDES permits is not necessarily an easy or inexpensive proposition. This new Ninth Circuit holding, expanding the CWA NPDES permit jurisdiction broadly to include any activity that may connect to groundwater, if that groundwater is connected to navigable waters of the U.S., will result in a significant increase in discharge permits, creating an increased burden on the regulators who oversee the permit programs for each state. Now, after Maui, NPDES permits appear to be required for any discharges to surface impoundments, ash ponds, underground storage tanks, septic tanks, injection wells, restoration projects, and other sources that have not previously required NPDES permits. Businesses and municipalities that engage in these types of discharges should anticipate third party citizens’ suits if NPDES permits are not obtained. In California, in order to be in compliance with a NPDES permit, the discharger must upload samples of discharges to the SMARTS system. Failure to do so can result in a citizens’ suit under the CWA. In addition, samples that exceed the permit limits can also result in citizens’ suits. The environmental lawyers at Bick Law have experience assisting with compliance and litigating citizens’ suits filed pursuant to the CWA.

From a practical standpoint, it may be difficult to sample from certain sources that have not previously required NPDES permits. For that reason, it is possible the Ninth Circuit may refine its holding over time based on different fact patterns. The environmental lawyers at Bick Law LLP will continue to follow the developments in this area of the law closely and will post updates as they become available.

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