BICK LAW LLP
exclusively environmental

SUPREME COURT AGREES TO RESOLVE CIRCUIT SPLIT OVER THE CWA'S APPLICABILITY TO GROUNDWATER

Fri Feb 22nd, 2019 | Categories: Environmental Law |

On Tuesday, February 19th the United States Supreme Court agreed to resolve a circuit split between the Ninth and Sixth circuits over whether or not Clean Water Act (CWA) liability applies to facilities that pollute navigable waters of the United States via hydrologically connected groundwater.

In February 2018, the Ninth Circuit upheld a decision in the case *Hawai'i Wildlife Fund v. County of Maui*, that found the county of Maui had violated the Clean Water Act by allowing pollutants from four wastewater injection wells to seep into the Pacific Ocean via hydrologically connected groundwater. Noting that neither party in this case denies the connection between the wells and the Pacific Ocean, the court found that the fact that "the groundwater plays a role in delivering the pollutants from the wells to the navigable water does not preclude liability under the statute."

The Circuit Split arose in September 2018, when the Sixth Circuit ruled in two cases, *Tennessee Clean Water Network, et al* v. *TVA* and *Kentucky Waterways Alliance, et al v. Kentucky Utilities Company*, that Environmental Groups could not pursue their Clean Water Act claims that pollutants had entered navigable waterways via hydrologically connected coal ash settling ponds. The court tailored their ruling around the opinion that the coal ash settling ponds in question did not fit the definition of point source under the CWA. Noting that groundwater is, by its nature, "a diffuse medium" and not the kind of discernible, confined and discrete conveyance contemplated by the CWA's definition of "point source," the court held "the discharge of a pollutant from hydrologically connected groundwater to a navigable water does not constitute the discharge of a pollutant from a point source to a navigable water under the Clean Water Act."

For a more detailed explanation of the cases involved in the circuit split, refer to Bick Law LLP's earlier article fully outlining the courts' decisions.

After the Sixth Circuit denied the Environmental Groups' petition for en banc review and the County of Maui petitioned for a writ of certiorari, the U.S. Supreme Court asked the U.S. Solicitor General's Office to weigh in on the matter. In January 2019, the U.S. Solicitor General's Office released a brief in which they urged the Supreme Court to take up the matter. The office stated that "given the potential breadth of those provisions, and the ways in which groundwater may be connected to navigable waters, the question presented here has the potential to affect federal, state, and tribal regulatory efforts in innumerable circumstances nationwide. The implications for regulated parties are also significant, including because CWA violators may face serious civil penalties and, in certain cases, criminal punishment."

The Supreme Court agreed to take up the Maui case, but made it clear that they would not be discussing the question of whether or not the county of Maui was given fair notice that its underground injection wells required National Pollutant Discharge Elimination System (NPDES) permits.

The Environmental Attorneys at Bick Law LLP will continue to monitor the progression of high-profile water quality cases such as this, that have the potential to affect a variety of industries, agriculture, and property owners across the country.