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## Fourth Circuit Expands Citizen Suits Under the Clean Water Act; Finds Potential Liability for Discharges Through Groundwater

A recent 2-1 decision from the Fourth Circuit has expanded potential liability under the Clean Water Act (“CWA” or the “Act”):

— The Fourth Circuit became the second appellate court in as many months to adopt the “conduit” theory of liability, finding that the CWA covers discharges to groundwater with a “direct hydrological connection” to jurisdictional surface waters.

— The court also found that, despite repair of the pipeline that caused the spill, the citizen plaintiffs had standing to maintain the suit because the continued migration of pollutants from the spill site into jurisdictional waters is an “ongoing violation” of the CWA.

See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, Slip Op. (April 12, 2018). Both aspects of the Fourth Circuit’s decision will enhance the ability of environmental groups to bring citizen suits to enforce the Act.

### THE FOURTH CIRCUIT’S DECISION

In *Upstate Forever*, approximately 369,000 gallons of gasoline accidentally spilled from an underground pipeline near Belton, South Carolina. The pipeline operator repaired the pipeline shortly after the spill; implemented remediation and recovery measures required by state regulators; and recovered 209,000 gallons of gasoline from the spill site.

After the pipeline was repaired, environmental groups brought a citizen suit under the CWA. The groups alleged that actions taken by the pipeline operator were insufficient to abate the pollution, and that gasoline and other pollutants were continuing to seep from the spill site, through groundwater, into surface waters regulated under the Act. The district court dismissed the suit, finding that (1) the CWA does not regulate the movement of pollutants through groundwater, and (2) the plaintiffs could



not bring a citizen suit because the pipeline had been repaired and was no longer discharging pollutants “directly” into navigable waters. The Fourth Circuit reversed on both points and allowed the case to move forward.

### DISCHARGES THROUGH GROUNDWATER

The CWA does not regulate groundwater itself and an unpermitted groundwater discharge does not violate the Act. Courts have wrestled, however, with whether CWA liability may be imposed for discharges to groundwater with a connection to jurisdictional surface waters.

In *Upstate*, a divided panel of the Fourth Circuit held that the CWA regulates the pollutants discharged from a point source (e.g., a ruptured pipeline) through groundwater into jurisdictional surface waters. The majority found that the CWA regulates discharges from point sources that reach navigable waters—either directly or indirectly—so long as the discharges are “sufficiently connected to navigable waters” and “the connection between a point source and navigable waters” is “clear.” *Slip Op.* at 19-23.

Applying this standard, the majority held that pollutant discharges to groundwater with a “direct hydrological connection” to surface waters are subject to regulation under the CWA. The majority emphasized, however, that there must be a “traceable discharge” from the point source, and cautioned that “traceability in measurable quantities is an important factor in the determination of whether a particular discharge is covered by the CWA.” *Id.* at 23-25. This determination “is necessarily fact specific.” *Id.*

This is the first appellate decision in the Fourth Circuit on CWA liability for pollutants discharged into jurisdictional waterbodies like lakes and streams through groundwater, and follows a recent ruling from the Ninth Circuit in *County of Maui v. Hawaii Wildlife Fund*, 2018 WL 1569313 (9th Cir. Feb. 2018), which reached a similar conclusion. Further, these cases add to the growing trend among lower courts holding that the CWA regulates discharges to navigable waters through groundwater.<sup>1</sup>

The *Upstate* decision also comes at an important time. The EPA is current soliciting comments on the applicability of the CWA to discharges through groundwater.<sup>2</sup> At the same time, the Sixth Circuit is poised to address the issue as well, and a separate panel of the Fourth Circuit had previously expressed skepticism about whether discharges through groundwater are regulated.<sup>3</sup> Finally, the U.S. Senate Environment and Public Works Committee will also hold a hearing on April 18, 2018 concerning the role of states and the federal government in protecting groundwater, which is expected to address this issue.<sup>4</sup> It remains to be seen what effect the *Upstate* decision will have in these separate proceedings.

### THE “ONGOING VIOLATION” REQUIREMENT

In a second important aspect of the court’s decision, the Fourth Circuit rejected arguments by the pipeline operator that repairing the pipeline and thereby halting the flow of gasoline from the point source barred the environmental groups from bringing a citizen suit.

As the majority acknowledged, the CWA does not permit citizen suits for past violations, but rather allows such suits to be brought only for “prospective relief” in cases involving “ongoing violations.” The majority found, however, that repair of the pipeline that caused the spill did not “render the CWA violation wholly past.” *Slip Op.* at 18. Looking to the CWA’s definition of “discharge”—which means “any addition of pollutants to navigable waters from a point source”—the majority reasoned that ongoing seepage of gasoline was continuing to “add” pollutants to jurisdictional waters. And because those pollutants were “from a point source”—that is, they originated from the pipeline—there was a continuing and ongoing discharge in violation of the Act. *Id.* at 14-19.

Notably, the majority asserted inadequacies of the abatement undertaken, which was alleged to have resulted in the ongoing release of pollutants from the spill, underscoring the importance of a robust clean-up program in response to



spills. And the majority focused extensively on the role of citizen suits in the CWA enforcement scheme, which is “to abate pollution when the government cannot or will not command compliance.” *Id.* at 14 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987)). This suggests that a more thorough abatement program that effectively limited the flow of pollutants to jurisdictional waters might have led to a different result.

**CONCLUSION AND IMPLICATIONS**

Application of the CWA to indirect discharges through groundwater is an uncertain and rapidly evolving area of the law. Clients with potential indirect discharges should monitor this area closely and seek legal counsel if they have questions regarding the CWA’s applicability to their actions. They should consider submitting formal comments to EPA regarding the regulation of discharges from these potential sources.

King & Spalding has significant experience across the country in administrative and environmental matters, including the defense of citizen suits and enforcement actions under the CWA and other laws. We also have substantial experience developing comments for individual businesses and trade associations regarding proposed regulations. If you have questions about how this ruling or EPA’s action may affect you or your business, please contact any of our lawyers noted in the contact section on the first page.

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<sup>1</sup> See *Upstate*, Slip Op. at 26 n.13 (collecting cases).  
<sup>2</sup> For additional information of EPA’s request for public comments, see King and Spalding Client Alert, [As Ninth Circuit Expands Clean Water Act Liability for Groundwater Discharges, EPA Seeks Comment on Clean Water Act Coverage](#) (March 7, 2018).  
<sup>3</sup> See *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 17-6155(6<sup>th</sup> Cir. filed April 12, 2018); *Sierra Club v. Virginia Electric Power Co.*, No. 17-1895 (4<sup>th</sup> Cir. filed August 2, 2017).  
<sup>4</sup> See <https://www.epw.senate.gov/public/index.cfm/2018/4/the-appropriate-role-of-states-and-the-federal-government-in-protecting-groundwater>.