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Ninth Circuit Holds Wastewater Discharge to Groundwater Requires Clean Water Act Permit in *Hawai'i Wildlife Fund v. County of Maui*

On Feb. 1, 2018, the U.S. Court of Appeals for the Ninth Circuit issued a highly anticipated decision in *Hawai'i Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. Feb. 1, 2018). At issue was whether the County of Maui ("County") required a Clean Water Act ("CWA") permit to dispose of wastewater through groundwater discharge wells where the discharge waters ultimately reach the Pacific Ocean. Although many states require permits for discharges to groundwater, the CWA does not cover groundwater. The holding increases federal permit requirements for a variety of entities, including those that discharge wastewater through groundwater disposal wells and those that detain stormwater and allow it to infiltrate to groundwater, which may eventually reach surface waters.

Since 1985, the County of Maui has operated a wastewater reclamation facility ("WRF") and four disposal wells that became the WRF's primary means of effluent disposal, injecting approximately 3 million to 5 million gallons per day ("MGD") of treated wastewater.¹ The County claimed that by discharging wastewater into groundwater, the wells only indirectly discharged pollutants into the Pacific Ocean and therefore did not require a permit under the CWA.²

The court rejected this argument relying on the plain language of the CWA, case law from the Ninth, Second, and Fifth Circuits, and Justice Scalia's plurality opinion in *Rapanos v. United States*, 47 U.S. 715 (2006). The court held that the discharge of pollutants from a point source to navigable waters is prohibited under the CWA, regardless of whether the pollutant enters navigable waters directly or whether it is indirectly conveyed to navigable waters through some other source, like groundwater.

The court held 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*.³

Importantly, it was undisputed that a significant portion of the County's wastewater discharge into its groundwater wells reached the Pacific Ocean. According to a tracer dye study performed by the Environmental Protection Agency ("EPA"), 64 percent of treated wastewater injected into two of the four wells emerged at the seafloor near the shore.⁴

The court viewed the case as "preventing the County from doing indirectly that which it cannot do directly."⁵ Under the CWA, the court held that the County could not build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit; nor could it do so indirectly to avoid CWA liability.⁶ "To hold otherwise would make a mockery of the CWA's prohibitions."⁷

The court's holding creates considerable uncertainty. First, the County was found liable for violating the CWA even though the State of Hawai'i had never determined that a discharge permit was required for the County's disposal

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wells.⁸ The court reasoned that a “reasonable person would [have] underst[oo]d the [CWA]” as prohibiting the discharges.⁹ In short, the County was held liable despite having no means of complying.

Second, the court declined to rule on whether groundwater can be considered a “navigable water” under the CWA, and left “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.”¹⁰ This creates significant uncertainty for entities operating surface or groundwater storage projects, groundwater recharge projects, or even stormwater detention facilities where the impounded water is subject to infiltration into groundwater.

Third, the new standard the Ninth Circuit has created—“fairly traceable from the point source to a navigable water”—will inevitably generate future litigation because it is not clear what this standard means, or whether it is even workable. In a footnote, the court wrote that its “fairly traceable” standard was designed to follow the CWA text and to be consistent with “Article III standing principles.”¹¹ Notably, the court rejected EPA’s *amicus curiae* proposal of requiring a “direct hydrological connection” between the point source and the navigable water, which is the standard EPA will likely propose after rescinding and recodifying the 2015 Waters of the U.S. (“WOTUS”) Rule. Therefore, until the EPA promulgates a new definition, the Ninth Circuit’s “fairly traceable” standard will continue to present uncertainty.

Finally, it is important to note that while the Ninth Circuit’s opinion is consistent with the Second and Fifth Circuit decisions cited in the opinion, the Fourth Circuit is considering a similar issue in the pending case, *Upstate Forever v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir. Dec. 7, 2017). There, the court is weighing whether discharges from an underground pipeline into groundwater that has a hydrologic connection to surface waters are subject to CWA jurisdiction and require a discharge permit. It remains to be seen whether the *Upstate Forever* court will join the Ninth Circuit, or will take a different view.

¹Slip op. at 4-5.

²Slip op. at 12-13.

³Slip op. at 19.

⁴Slip op. at 6-7.

⁵Slip op. at 25.

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹Slip op. at 23-25.

¹⁰Slip op. at 19.

¹¹Slip op. at 19 n.3.

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Ronda L. Sandquist
Shareholder
rsandquist@bhfs.com
303.223.1191

Christine A. Jochim
Of Counsel
cjochim@bhfs.com
303.223.1163

Ryan Waterman
Shareholder
rwaterman@bhfs.com
619.702.7569

Michael P. Smith
Associate
msmith@bhfs.com
303.223.1150

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