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Does a Discharge to Groundwater Require an NPDES Permit?

Arkansas Environmental Federation Water Conference

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A current important Clean Water Act jurisdictional issue is whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger National Pollution Discharge Elimination (“NPDES”) permitting requirements.

Presentation Will Address:

- Recent Federal Appellate Court Decisions
- U.S. Supreme Court Review
- U.S. EPA Activity
 - Solicitation of view on the issue
 - Interpretive statement issued on April 15th
- Reminder about broader state jurisdiction (including Arkansas)

Arkansas Environmental, Energy and Water
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A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are met:

- a person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

Key Terms

Discharge of Pollutant –

Any addition of any *pollutant* to *navigable waters* from any *point source*

33 U.S.C. § 1362(12)

Key Terms

Pollutant –

Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water

Key Terms

Point Source –

Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged

Key Terms

Navigable Waters –

Waters of the United States (*i.e.* WOTUS)

33 U.S.C. § 1362(7)

Whether the Clean Water Act's permitting requirement is confined to discharges from a point source to navigable waters,, or whether it applies to discharges into soil or groundwater whenever there is a "direct hydrological connection" between the groundwater and nearby navigable waters.

The scope of the term “waters of the United States” from a Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact it is also relevant to non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Relations

As a result, whether, and to what extent, a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

Possible Impacts?

- Areas where close connection between groundwater and surface water
- Aquifer close to ground surface and some can be highly transmissive
- Some activities can lead to seepage into offsite surface waters
- Affect on improvements, ponds, etc.

Regardless of EPA/states' positions citizen suits by groups are a possibility

Why has this become a hot issue?

The 9th Circuit Court of Appeals in *Maui* ruled that discharges from a point source to groundwater can in certain circumstances be subject to the Clean Water Act.

- Courts had traditionally, with limited exceptions, never interpreted groundwater to be a “water of the United States” under the Clean Water Act.
- Separate permitting scheme for underground injection wells.

The basis for environmental groups arguing in *Maui* for triggering jurisdiction was the migration of the pollutants released into the groundwater to hydrologically connect to surface water (i.e., the Pacific Ocean).

The Court in *Maui* held that the Clean Water Act does not require that the point source convey the pollutants directly to the navigable waters (waters of the United States).

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Current Cases

- *Hawai'i Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir., Feb. 1, 2018), *petition for cert. filed*, No. _____ (U.S. Aug. 27, 2018)
- *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir., Apr. 12, 2018), *petition for cert. filed*, No. _____ (U.S. Aug. 28, 2018)
- *Sierra Club v. Virginia Electric and Power Co.*, *slip opinion*, No. 17-1952, (4th Cir., Sept. 12, 2018)
- *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 2017 WL 6628917 (E.D. Ky, Dec. 28, 2017), *appeal pending*, No. 18-5115 (6th Cir.)
- *Tennessee Clean Water Network v. TVA*, 273 F. Supp. 3d 775 (M.D. Tenn Aug. 4, 2017), *appeal pending*, No. 17-6155 (6th Cir.)
- *26 Crown Associates, LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506 (D. Conn, Jul. 11, 2017), *appeal pending*, No. 17-2426 (2nd Cir.)

Underground Injection Well?

Hawai'i Wildlife Fund v. Cnty. of Maui, 886 F.3d 737 (9th Cir., Feb. 1, 2018), *petition for cert. filed*, No. _____ (U.S. Aug. 27, 2018)

Issue – Does discharge of municipal wastewater via injection well to groundwater that ultimately affects navigable surface waters require an NPDES permit.

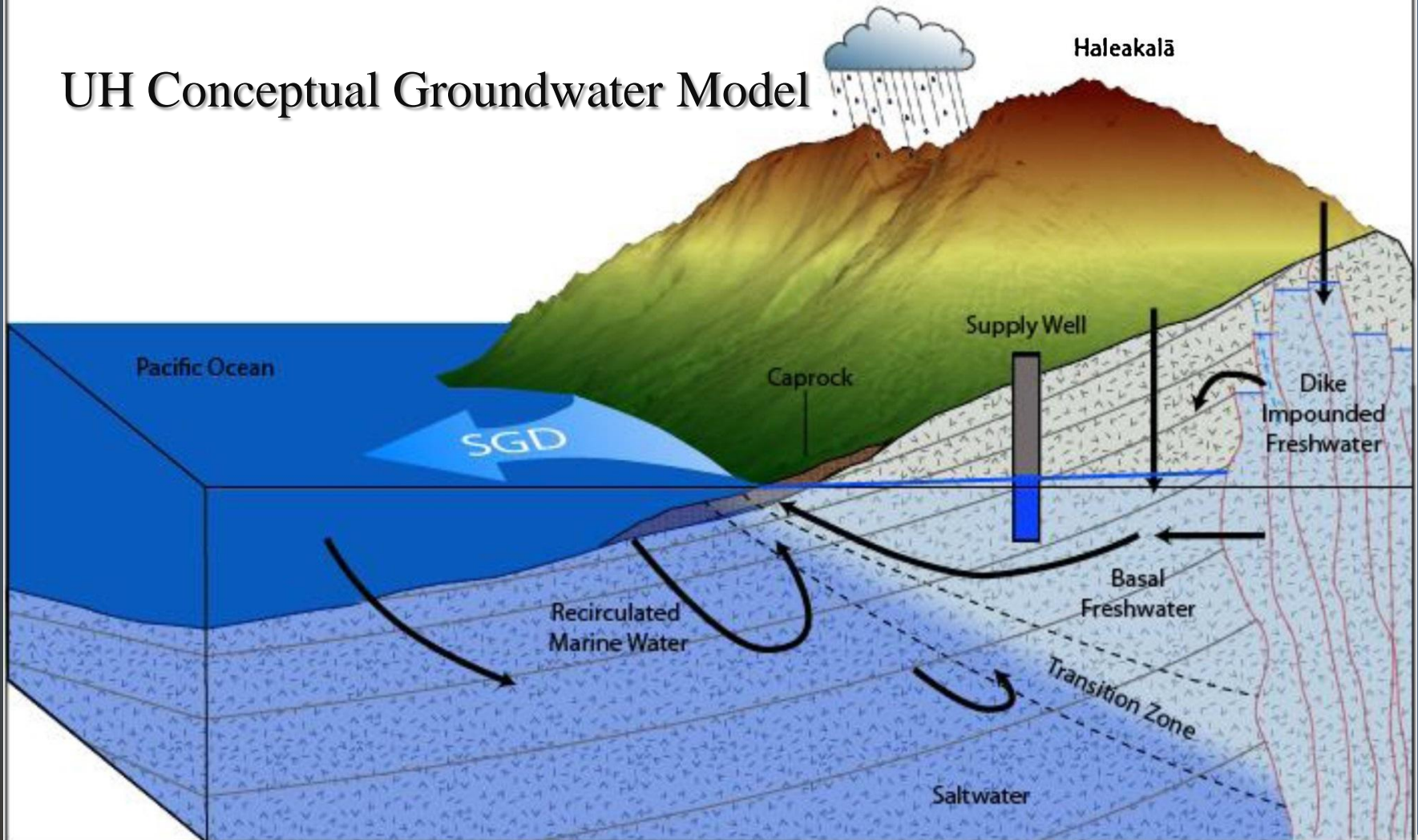
Application – NPDES permitting includes circumstances where pollutants reach navigable waters by means other than a point source, such as groundwater.

Test – (1) Discharge from a point source; (2) pollutants “fairly traceable” to a navigable water; (3) pollutants reach navigable water at “more than *de minimis*” levels

Groundwater Injection

(County of Maui)

UH Conceptual Groundwater Model



Underground Pipeline?

Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir., Apr. 12, 2018), *petition for cert. filed*, No. _____ (U.S. Aug. 28, 2018)

Issue – Does discharge of a pollutant from underground pipeline into soil and groundwater that ultimately affects navigable surface waters require an NPDES permit.

Application – CWA and NPDES permitting requirements do not require a discharge “directly” from a point source into navigable waters.

Test – Discharge from a point source into soil or groundwater is subject to permitting so long as it passes through ground water that has a “direct hydrological connection” to navigable waters

Ongoing Migration – Court also reached an interesting conclusion that discharge to soil/groundwater is “ongoing violation” for citizen purposes despite pipe repair and lack of continuing discharge from the “point source”

Pipeline Rupture

Plantation Pipeline – Belton, SC



Coal Ash Pond/Landfill?

Sierra Club v. Virginia Electric and Power Co., slip opinion, No. 17-1952, (4th Cir., Sept. 12, 2018)

Ken. Waterways Alliance v. Kentucky Utilities Co., 2017 WL 6628917 (E.D. Ky, Dec. 28, 2017), appeal pending, No. 18-5115 (6th Cir.)

Tenn. Clean Water Network v. TVA, 273 F. Supp. 3d 775 (M.D. Tenn, Aug. 4, 2017), appeal pending, No. 17-6155 (6th Cir.)

Issue – Does coal ash seeping through and into groundwater that ultimately affects navigable surface waters require an NPDES permit.

Application –

Sierra Club – No, landfill and settling ponds not point sources; but, approved *Upstate Forever*

Ken. Waterways Alliance – No, migration through soil/groundwater is “non-point” source pollution regardless of “hydrological connection”

Tenn. Clean Water Network – Yes, applied “direct hydrological connection” test*

Coal Ash Ponds & Landfills (TVA, VA Electric & Power, KY Utilities)



EPA Activity on Groundwater Issue

- EPA issued a :”request for comment” on the groundwater conduit issue (83 Fed. Reg. 71326) in 2018.
- Acknowledged it had made statements that discharges through groundwater are regulated if there is a hydrological connection to regulated surface waters.
- Asked for comment on whether it should clarify or issue guidance.

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement

EPA issued on Monday what it describes as an “Interpretive Statement” addressing the application of the Clean Water Act permitting requirements to discharges to groundwater.

EPA stated it issued its April 15th Statement due to the uncertainty generated by conflicting federal court decisions and the “prior lack of clear agency guidance” regarding whether NPDES permits are required for releases of pollutants to groundwater.

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement (cont.)

EPA states that it undertook a comprehensive review of prior agency statements in the matter, “informed by those comments and based on a holistic analysis of the statute, text, structure, and legislative history of the Clean Water Act.”

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement (cont.)

- EPA concluded in the Statement that the Clean Water Act is:
 - ...best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under section 301 of the Clean Water Act, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement (cont.)

EPA states that its conclusion differs from the direct hydrological connection theory expressed in United States amicus brief filed in the county of *Maui* proceeding. Further, it expresses disagreement with the environmental organizations' and Ninth Circuit's view that the Clean Water Act NPDES requirements can apply when a pollutant released from a point source migrates to navigable waters through groundwater.

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement (cont.)

Regardless, the agency notes that it will apply the decisions of the Ninth Circuit as well as the reasoning of the Fourth Circuit in the *Kinder Morgan* decision in their respective circuits until further clarification from the Supreme Court.

Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement (cont.)

Note: EPA'S view will be subject to a Supreme Court decision.

Interim – Environmental organizations and others will file actions based on their view of the issue.

The State Issue (including Arkansas)

- Arkansas Delegated NPDES Program
- Assume Arkansas Will Follow EPA Interpretation Until Definitive U.S. Supreme Court Ruling?
- However!

Arkansas has much broader state statutory jurisdiction under Arkansas Water and Air Pollution Act –

- “Waters of the State” much broader reach
- Used to authorize ADEQ regulation of various “no discharge” programs