
Ninth Circuit Holds Indirect Discharge of Pollutants Requires Clean Water Act Permit

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Last week, the US Court of Appeals for the Ninth Circuit ruled that the Clean Water Act (CWA) does not require that pollutants be discharged directly from a point source into navigable waters for liability to attach. In *Hawai'i Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. Feb. 1, 2018), the court found that wastewater injections that flowed through groundwater—which is not subject to CWA jurisdiction—but eventually reached the Pacific Ocean are subject to the National Pollutant Discharge Elimination System (NPDES) permitting requirements of the CWA.

The decision potentially expands the scope of the CWA to require permitting for discharges ranging from coal ash and pipeline spills to agricultural runoff, among others. However, one key factor in this decision was the indisputable connection between the wells and navigable waters; in the court's words, the discharge could be "fairly traced" from the wells to the ocean. Because of this, courts may be less likely to hold dischargers liable in circumstances in which the connection is more attenuated and less scientifically certain.

Background

For decades, Maui County injected wastewater into four wells at its wastewater reclamation facility as its primary means of effluent disposal. According to the Ninth Circuit, the county was aware that the effluent disposal eventually reached the Pacific Ocean, but failed to obtain NPDES permits for the operation. The connection between the wells and the ocean was confirmed by a 2013 Environmental Protection Agency (EPA) tracer dye study, which concluded that "a hydrogeologic connection exists between . . . [the wells] and the nearby coastal waters of West Maui." Slip op. at 6. Reasoning that the disposal wells "collected and injected" pollutants into groundwater which was connected to the ocean, the court held that the county had violated the CWA's prohibition on discharging a pollutant from a point source into navigable waters without a permit. Slip op. at 11.

In affirming the district court, the Ninth Circuit rejected the county's argument that pollutants must be conveyed directly from a point source to navigable waters in order for the CWA's permitting requirements to attach. Because the effluent flowed into the Pacific Ocean through groundwater

after it left the point source (the wells), the county argued that it was not required to obtain a NPDES permit as the discharges were not directly from a point source. Relying on Ninth Circuit precedent, case law from two other courts of appeals, and Justice Scalia's opinion in *United States v. Rapanos*, 547 U.S. 715, 743 (2006), the court rejected this argument. Instead, the court concluded that the CWA prohibits the discharge of pollutants from a point source regardless of whether the discharge is conveyed directly into navigable waters: "[t]hat groundwater play[ed] a role in delivering pollutants from the wells to the navigable water does not preclude liability under the [CWA]." Slip op. at 15-16. Thus, because the county discharged more than de minimis levels of pollutants from a point source which were fairly traceable from the point source to navigable waters "such that the discharge [was] the functional equivalent of a discharge into the navigable waters," it was liable under the CWA. Slip op. at 19.

This decision follows a series of decisions from federal courts of appeals concluding that a point source does not need to convey pollutants directly into navigable waters in order to fall under the CWA. See, e.g., *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1152-53 (9th Cir. 2010); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). However, the court left "for another day" the question of whether, and under what circumstances, a connection between a point source and navigable waters may be too attenuated to support liability under the CWA. Thus, to the extent that the connection between the discharge from a point source and navigable waters is less certain, liability for discharging without a permit under the CWA may also be less clear.

Other Recent CWA Activity

The decision comes in the midst of an abundance of judicial and administrative activity surrounding the CWA, particularly concerning the 2015 Waters of the United States (WOTUS) rule defining navigable waters and the reach of the CWA. In late January, the US Supreme Court determined that federal courts of appeals do not have original jurisdiction to hear challenges to the WOTUS rule, and any challenges must be filed initially in federal district courts. See *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299 (Jan. 22, 2018). In light of this decision, and due to the uncertainty surrounding litigation in multiple district courts over the WOTUS rule, EPA decided to delay the applicability of the rule for two years, until January 31, 2020. The agency has stated that during this time period, it will reconsider the rule with input from state, local, and tribal governments as well as other stakeholders.