Can Discharges to Groundwater Trigger Clean Water Act Liability

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It's a bad day when you find out that your facility has been leaking wastewater, wastes, petroleum product or chemicals. But if the leak went into the soil and the groundwater first, rather than a nearby creek, are you liable for an unpermitted discharge under the Clean Water Act ("CWA")? While the issue is not a new one, two very recent federal district court decisions from Virginia and South Carolina have explored this issue and continue the trend of mixed results in the federal Fourth Circuit, which includes Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

The CWA states in relevant part that, except as authorized by the CWA, no person may discharge a pollutant from a point source into navigable waters. "Navigable waters" are defined in the CWA merely as "waters of the United States," a term further defined by regulations issued by EPA to include a variety of types of surface waters and wetlands, but which do not mention groundwater. Under the CWA, a "point source" is a "discernable, confined, and discrete conveyance" and includes such features as pipes, ditches, channels, conduits, wells, discrete fissures, containers, and rolling stock. The primary means under the CWA to authorize such discharges from industrial operations, construction activities and municipal separate storm sewer systems is by issuance of a National Pollutant Discharge Elimination System ("NPDES") permit. For an enforcement action or citizen suit alleging a violation of this prohibition, each element of the prohibited activity must be proved. While EPA has most recently stated in its Clean Water Rule (now in litigation) that groundwater is itself not a "waters of the United States," EPA has in the past indicated that a person who discharges contaminants that reach groundwater with a hydrological connection to surface waters can have liability even if the person discharges nothing directly into surface waters. Courts have issued a variety of opinions on this issue.

The January 2016 edition of *Environmental Notes* reported that a Virginia federal district court in *Sierra Club v. Virginia Electric & Power Co.* had recently denied Dominion Virginia Power's motion to dismiss a CWA citizen suit brought by the Sierra Club alleging that Dominion was discharging wastewater in violation of its VPDES permit and the CWA. (A VPDES permit is issued by the Virginia State Water Control Board pursuant to authority from EPA to administer the NPDES program in Virginia.) On March 23, 2017, the court issued its final decision and found that coal storage units at a Dominion power plant have been and are leaching arsenic into the groundwater, that the groundwater and surrounding surface waters are hydrologically connected, and that arsenic enters the surface waters via that connection. The court also concluded that, even with only minimal deference to EPA's interpretation of the CWA's NPDES prohibition against unpermitted discharges, "discharges to groundwater that is hydrologically connected to surface water are covered by the CWA." However, in a twist, the court found that the discharge was not actually in violation of Dominion's VPDES permit, because the Board does not consider groundwater to be within the scope of waters intended to be regulated under its VPDES program and permits. In addition, the court held that the evidence showed "the discharge poses no

threat to health or the environment," and its lack of assessed civil penalties and monitoring-based injunctive order reflected this finding.

The other recent CWA citizen suit case is *Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners, L.P.*, a case decided by a federal district court in South Carolina on April 20. It reached a different result than the court in the *Sierra Club* case. In *Upstate Forever*, the court sided with a pipeline company and dismissed the case where an underground pipeline rupture caused a large release of gasoline directly into the soil and groundwater. The plaintiffs alleged that the released gasoline was migrating toward nearby creeks and wetlands via a presumed hydrological connection between the groundwater and those creek beds and wetlands. However, the court held that, even though the pipeline may be a point source, the plaintiffs failed to demonstrate that the discharge had reached navigable waters (defined as waters of the United States and, here, the creeks and wetlands). The court further required there to be a direct discharge to the surface waters, saying "migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA." The court likewise rejected plaintiff's related arguments that the point source did not need to be the pollutant's original source and that soil and groundwater themselves constitute "point sources" due to their ability to serve as conduits for movement of pollutants. Interestingly, the court contrasted the coal ash piles in the *Sierra Club* case as true point sources that collect, channel and convey pollutants, even if directly into the groundwater. In the end, failure to identify "a discrete conveyance [constituting a point source] of pollutants into navigable waters" proved fatal to the plaintiffs' case.

These cases build on a growing body of conflicting caselaw within the federal Fourth Circuit addressing whether groundwater hydrologically connected to surface waters is within the scope of "waters of the United States" and therefore "navigable waters," and whether discharges into groundwater hydrologically connected to regulated surface waters are regulated discharges within the scope of CWA's prohibition against unpermitted discharges. The Fourth Circuit has yet to render a decision on this issue, but appeals of these two cases are likely to cause that to change.

The Fourth Circuit is the battleground for these important CWA jurisdictional issues. How they play out will affect CWA legal liability for accidental spills and even routine discharges that enter groundwater first before ultimately reaching nearby surface waters.

33 U.S.C. §§ 1311(a) & 1362; Sierra Club v. Virginia Electric & Power Co., C.A. No. 2:15-CV-112, 2017 WL 1095039 (E.D. Va. March 23, 2017)*; Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners, L.P.*, C.A. No. 8:16-4003-HMH (D. S.C. April 20, 2017).

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