



Debate Over Groundwater Pathway for Clean Water Act Jurisdiction Continues, But States Could Step In

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Various court decisions issued by mid-September 2018 indicated a potential consensus forming that groundwater, while not itself regulated navigable waters pursuant to the Clean Water Act (“CWA”), may serve as a pathway for regulated discharges of pollutants to such waters. However, these decisions – from the Ninth Circuit Court of Appeals in *Hawai’i Wildlife Fund v. City of Maui* and the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* – have been appealed to the U.S. Supreme Court. (As part of these appeals, the high court has now asked EPA for its view of the issue, bringing EPA directly into the debate.) The Sixth Circuit Court of Appeals has since disagreed with its sister courts, setting up a conflict among the federal circuit courts on this issue. As noted in our prior newsletters, the outcome of this issue is important for determining federal jurisdiction over discharges of pollutants to “navigable waters,” defined as waters of the United States (“WOTUS”) pursuant to the CWA’s National Pollutant Discharge Elimination System (“NPDES”) program. Compounding the uncertainty is whether state-level jurisdiction over pollutants entering groundwater and surface waters will fill any perceived gaps.

In *Kentucky Waterways Alliance v. Kentucky Utilities Company* and in *Tennessee Clean Water Network v. Tennessee Valley Authority*, the Sixth Circuit rejected plaintiff environmental groups’ claims of liability under the CWA against different power companies for contamination of surface waters near their coal-fired power plants. In so doing, the Sixth Circuit rejected the reasoning of the *Hawai’i Wildlife Fund* and *Upstate Forever* decisions on this issue. In *Kentucky Waterways Alliance*, the environmental groups’ first argument was that the groundwater, or the fractured bedrock aquifer system through which the groundwater moves, serves as a regulated “point source” as defined in the CWA from which or through which pollutants originating in a coal ash pond were discharged into the lake. The Sixth Circuit held otherwise, looking to the plain text of the CWA definition of “point source” as a “discernible, confined and discrete conveyance,” and finding that neither groundwater nor the fractured bedrock in question met this definition due to their inherently diffuse and uncertain directional nature.

The groups’ second, alternative theory in *Kentucky Waterways* was that the coal ash ponds were the point sources and the groundwater was an environmental medium providing a hydrological connection

that allowed the contamination to flow from the ponds to the lake waters. The Sixth Circuit refused to accept the groups' interpretation of the CWA allowing for such an indirect discharge pathway. It noted in particular that the CWA's prohibition against unpermitted discharges hinges on the addition of pollutants "to navigable water from any point source," indicating that, for the CWA's prohibition to apply, no intermediate medium between the point source and the navigable water can be present

In addition, and integral to the Sixth Circuit's refutation of the Ninth Circuit's and Fourth Circuit's rationales, the court opined in *Kentucky Waterways* that the environmental groups' and these courts' reliance on the U.S. Supreme Court plurality opinion in *Rapanos v. United States* was misplaced. The Sixth Circuit stated that the relevant portion of Justice Scalia's discussion in *Rapanos* – that a regulated discharge need not be directly from a point source – was, if even binding on this issue, referring to pollutants traveling through multiple and different types of *point source* conveyances before reaching navigable waters, rather than through a diffuse and unconfined groundwater medium. The Sixth Circuit also disputed these other courts' reliance on the CWA's broadly stated purposes to protect water quality, finding that the CWA also expressly reserves to the states authority to protect pollution of waters not fitting within WOTUS (such as groundwater) and to regulate discharges from non-point sources to enable comprehensive water quality protection. Finally, the court held that the interplay of the CWA with other federal environmental laws undermines the notion of a groundwater pathway as a basis for CWA coverage. For example, the court noted that the Resource Conservation and Recovery Act ("RCRA") specifically addresses coal ash storage in ponds, and that to extend the CWA's regulatory reach as the environmental groups sought would effectively gut much of RCRA's oversight of coal ash ponds.

Recognition that the CWA retains a critical role for states in water quality protection begs the question of whether the federal courts' decisions will ultimately determine the outcome of this groundwater pathway issue. States can and typically do regulate under state law discharges of pollutants to, and pollution in, groundwater and surface waters. State laws and regulations cannot conflict with the CWA, but they can be more stringent than CWA and NPDES program requirements, even when states are authorized by EPA to implement the NPDES program on a day-to-day basis in EPA's stead. Where states sense that either EPA's application of the NPDES program or a federal court's interpretation of NPDES program elements is not broad enough in its scope or otherwise not restrictive enough to meet state water quality objectives, the states can overlay their own additional or more expansive program requirements or discharge prohibitions for groundwater and surface waters within their own jurisdiction. In that scenario, oversight of these discharges may no longer hinge primarily on the CWA and federal NPDES regulation, but rather on state laws that potentially evolve in a more patch-work approach across the nation. At least one court has recognized the potential role of state law in this respect. While agreeing with the Sixth Circuit as to the extent of federal CWA jurisdiction concerning discharges into groundwater, the very recent U.S. District Court decision in *Prairie Rivers Network v. Dynegy Midwest Generation, LLC* also noted that state law may offer a different result.

With the ongoing uncertainty at the federal level, or if the Supreme Court should agree with the Sixth Circuit, states may evolve as the arbiters of regulatory control of discharges of pollutants to regulated surface waters that involve groundwater as an intermediate medium of transport. Therefore, how each state addresses this issue through its own water quality laws and regulations could in turn become as important and even more varied than how the federal courts and EPA may try to resolve it.

Kentucky Waterways Alliance v. Kentucky Utilities Company, 905 F.3d 925 (6th Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436, 438 (6th Cir. 2018); *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, Case No. 18-CV-2148 (C.D. Ill, November 14, 2018).

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