Jurisdictional Creep: NPDES Permitting for Indirect Point Source Discharges

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I. Introduction

The Clean Water Act (CWA) regulates the discharge of pollutants to the navigable waters of the United States.[1] The CWA specifically forbids the "addition of any pollutant to navigable waters from any point source"[2] except as in compliance with certain provisions of the Act, such as the National Pollutant Discharge Elimination System (NPDES) permit program. An NPDES permit will contain limits on the type and quantity of pollutants you can discharge, monitoring and information collection requirements, reporting requirements, and other provisions that the Administrator deems appropriate.[3]

The scope of activities that are required to undergo NPDES permitting is growing. This jurisdictional creep means that even unintentional releases that later reach navigable waters could be subject to permitting after the fact, with liability retroactive to the date of the initial release. Two recent cases hold that these "indirect" point sources require NPDES permits. One case makes sense because the facility intentionally disposed of wastewater into groundwater that was in close proximity to navigable water. The other case makes no sense because it was an unintentional spill subject to and undergoing remediation under other statutes. Unless the Supreme Court overrules the latter case, Congress should limit the scope of NPDES program to only certain indirect point sources.

II. CWA Definitions

A party violates the CWA when it (1) discharges (2) a pollutant (3) to navigable waters (4) from a point source (5) without a (NPDES) permit.[4] The following definitions; therefore, are critical to understanding the CWA and the effect recent case law may have on its expansion and enforcement.

A. Discharge

The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[5]

B. Pollutant

The term pollutant is defined very broadly in the CWA. Pollutant means "dredged spoil, solid waste, incinerator, 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."[6]

But, EPA through rulemaking narrowed this definition to expressly exclude any "indirect discharges."[7] The cases discussed below fail to even mention this rule.

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[1] 33 U.S.C. § 1251.
[2] 33 U.S.C. § 1362(12).
[3] 33 U.S.C. § 1342(a)(2); see also S. Fla Water Mgmt. Dist. v. Miccsukee Tribe of Indians, 541 U.S. 95, 102 (2004).
[4] Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1142 (10th Cir. 2005); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1008 (11th Cir. 2004); Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993); Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988).
[5] 33 U.S.C. § 1362(12).
[6] 33 U.S.C. §1362(6).
[7] 40 CFR § 122.2. See, United States v. Plaza Health Lab., 3 F.3d 643, 648-49 (2d Cir. N.Y. 1993) cert denied 512 U.S. 1245 (1994)

C. Navigable Waters

"The term 'navigable waters' means the waters of the United States, including the territorial seas"[8] (i.e., surface waters).

D. Point Source

A point source is a "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."[9]

E. Nonpoint Source Pollution

Nonpoint source pollution encompasses pollution from any other means, most typically from naturally occurring processes like rainfall, wind dispersal, or groundwater migration that pick up and carry natural and man-made pollutants and deposit them into federally regulated waters.[10]

Nonpoint source pollution is ***not*** subject to the NPDES program. The control of nonpoint source pollution is provided by states and local governments through their own environmental management programs.

E. Indirect Point Sources Discharges

There is an emerging gray area between point sources and nonpoint sources where pollutants from a remote point source reach a navigable water after transport through soil or groundwater. Most point sources discharge directly into water: a submerged outfall, a pipe pouring effluent directly into the water from above, a ditch flowing into a stream or wetland, nozzles on a crop duster spraying pesticides over water, the bay on a military airplane dropping bombs into water, or rifles and shotguns firing into a wetland. These situations are relatively clear, and all have in common that the discharger is *intending* to dispose of pollutants into a navigable water. Indirect point source discharges originate from a discrete conveyance that does not directly discharge into navigable waters but whose pollutants nonetheless reach navigable waters only after migration through the ground or ground water.

III. CWA's Regulation of Indirect Point Source Discharges

A. Expansion of the Scope of the CWA's and NPDES Program's Regulation of Indirect Discharges

There is considerable ambiguity as to the extent the CWA and NPDES program regulates indirect discharges from point sources that reach navigable waters. EPA has previously stated on several occasions that pollutants discharged from point sources that reach navigable surface waters via groundwater or other subsurface flow that has a "direct hydrologic connection" to the jurisdictional water ***may*** be subject to CWA permitting requirements.[11]

Circuit Courts have struggled to define when pollutants discharged to groundwater that affect navigable waters can be regulated under the CWA and NPDES permit program. Two recent cases out of the Fourth and Ninth Circuits have expanded the scope of NPDES jurisdiction while injecting further ambiguity into the equation.

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[8] 33 U.S.C. § 1362(7).
[9] 33 U.S.C. § 1362(14).
[10] See, League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002) (defining nonpoint source pollution as "aris[ing] from many dispersed activities over large areas and is not traceable to any single discrete source.")
[11] See, e.g., Final NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Dec. 2, 1990) ("[T]his rulemaking only addresses discharges to water of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body).")

The Ninth Circuit in Hawai'i Wildlife Fund, et al. v. County of Maui, 886 F.3d 737 (9th Cir. 2018) ("County of Maui") recently adopted a "Fairly Traceable Test" in holding that the CWA covers discharges via ground water that migrate to navigable waters. The Fourth Circuit, in Upstate Forever, et al. v. Kinder Morgan Energy Partners, L.P., et al, 887 F.3d 637 (4th Cir. 2018) ("Upstate Forever") instead adopted the "direct hydrologic connection theory" (a theory articulated by EPA) in holding that "a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through ground water." The EPA's standard of liability was central to the Fourth Circuit's reasoning in Upstate Forever, but was rejected in part by the Ninth Circuit in County of Maui in favor of the "fairly traceable" standard.

B. Recent Circuit Court Decisions

1. Hawai'i Wildlife Fund, et al. v. County of Maui, 886 F.3d 737 (9th Cir. 2018)

a. Case Background

In County of Maui, a municipal wastewater treatment plant disposed of sewage or "effluent" from a County owned municipal wastewater treatment plant by injecting it into four wells which released effluent into groundwater that eventually flowed to the Pacific Ocean. The facts are undisputed that effluent from at least two of the wells, if not all four wells, discharged into the Pacific Ocean and that there was a "hydrogeologic connection" between the wells and Pacific Ocean. It was also undisputed that the County knew that the effluent discharged in the groundwater from the wells eventually flowed to the Pacific Ocean. County of Maui, 886 F.3d at 741-43.

Based on these facts, the district court granted summary judgment finding the County liable for discharging effluent through the groundwater and into the ocean without a NPDES permit as required by the CWA. Id. at 743.

"The Court based its decision on three independent grounds: (1) the County 'indirectly discharge[d] a pollutant into the ocean through a groundwater conduit,' (2) the groundwater is a 'point source' under the CWA, and (3) the groundwater is a 'navigable water' under the [CWA]." Id. at 743.

b. Ninth Circuit Analysis

The case was appealed to the Ninth Circuit to determine whether the County's activities met the definition of "point source" discharge. The Ninth Circuit reasoned that the four wells were "discrete" and could be regulated through individual permits. Id. at 745. The Ninth Circuit further analyzed and affirmed that an indirect discharge from a point source requires a NPDES permit under the CWA. Id. at 747.

c. Holdings

The Ninth Circuit ultimately held that a CWA permit is required when pollutants in more than *de minimis*[12] amounts are ***"fairly traceable from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water."*** Id. at 749.

[12] While the Ninth Circuit implicitly recognizes a "de minimus" requirement for CWA liability, the EPA has never defined any de minimus permitting threshold. Rather, other decisions have held that CWA imposes strict liability for NPDES violations and neither the CWA nor its implementing regulations contain an exception for "de minimis" violations. See, U.S.C. § 1311(a) (without a permit "the discharge of any pollutant by any person shall be unlawful"); see also Hawaii's Thousand Friends v. City and Cnty. of Honolulu, 821 F.Supp. 1368, 1392 (D.Haw.1993) ("The Clean Water Act imposes strict liability for NPDES violations and does not excuse 'de minimis' or 'rare' violations. Courts throughout the country have held that NPDES compliance is a matter of strict liability, and a defendant's intent and good faith are irrelevant."); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir.1996) (stating that the "CWA imposes a 'zero discharge' standard in the absence of an NPDES permit").

As a result, the Ninth Circuit affirmed the district court's grant of summary judgment finding that the County discharged pollutants from its wells into the Pacific Ocean in violation of the CWA. Id. at 752.

2. Upstate Forever, et al. v. Kinder Morgan Energy Partners, L.P., et al, 887 F.3d 637 (4th Cir. 2018)

a. Case Background

The facts in Upstate Forever are relatively straightforward. In late 2014, an underground pipeline ruptured causing several hundred thousand gallons of gasoline to spill into soil and groundwater. The gasoline then seeped into groundwater that traveled a distance of less than 1000 feet to nearby creeks and wetlands. The plaintiffs specifically alleged "that a 'plume' of petroleum contaminants continues to migrate into these [navigable] waterways years later through ground water and various natural formations at the spill site, including 'seeps, flows, fissures, and channels.'" By the time suit was filed, Kinder Morgan had repaired the underground pipeline and was conducting remediation under state agency oversight. Upstate Forever, 887 F.3d at 641-44.

The plaintiffs alleged two interrelated violations of the CWA: "(1) that Kinder Morgan has caused discharges of pollutants from point sources to navigable waters without a permit; and (2) that Kinder Morgan has caused discharges of pollutants that continue to pass through ground water with a 'direct hydrological connection' to navigable waters." Id. at 644.

The district court granted Kinder Morgan's motion to dismiss the complaint holding that plaintiffs had failed to state a claim because the pipeline had been repaired and was no longer polluting directly into navigable waters meaning that plaintiffs could not allege an ongoing violation of the CWA necessary to sustain a citizen suit under Gwaltney v. Chesapeake Bay Found., 484 U.S. 49 (1987). The district court also found that it lacked subject matter jurisdiction because "the CWA did not encompass the movement of pollutants through ground water that is hydrologically connected to navigable waters." Id. at 645.

b. Fourth Circuit Analysis

On appeal, the Fourth Circuit first determined that plaintiffs had standing to file a citizen suit because plaintiffs had sufficiently alleged an ongoing CWA violation by pleading that gasoline originating from the pipeline (which was the "point source" in this case) continued to be "added" to bodies of water despite the fact that the pipeline had been repaired. Id. at 646-48.

Next, the Fourth Circuit analyzed "whether a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA." The Court determined that the CWA does not require a pipeline point source to directly deliver pollutants to navigable waters, but that the "starting point or cause of discharge" must be a point source. The Court also reasoned that indirect discharges "must be sufficiently connected to navigable waters to be covered under the [CWA]." Id. at 649-51.

c. Holding

Ultimately, the Fourth Circuit in Upstate Forever held that while ***"a discharge through groundwater does not always support liability under the [CWA]," it will when there is "a direct hydrological connection between ground water and navigable waters" and the discharge is traceable from the point source, through groundwater, to navigable waters.*** Id. at 651.

The Court stated that courts can use a fact-specific inquiry to assess whether any discharges are "sufficiently connected to navigable waters to be covered . . ." Id. at 651.

The Court therefore vacated the district court's decision and remanded the case for further proceedings.

d. Dissent

Judge Floyd prepared a dissent arguing that the majority holding blurred the distinction between "point source" and "nonpoint source" and was contrary to the Congressional intent to limit the jurisdiction of the CWA to point source discharges. Judge Floyd therefore states that there must be an active release from a point source (in this case the pipeline) and that the CWA does not apply here because Kinder Morgan repaired the pipeline eliminating the point source. The dissent ultimately reaches the conclusion that groundwater migration is not a point source within the purview of the CWA. Id. at 651, 654-60.

While the dissent is not binding, it is in line with the viewpoint of many industry groups who have submitted comments to the EPA about application of the CWA and NPDES program to indirect discharges.

C. EPA Response to the Ambiguity in Applying the CWA and NPDES Program to Indirect Discharges

Shortly after the February 1, 2018 Ninth Circuit decision in County of Maui, EPA announced it would be taking public comments for 90 days on the CWA's "coverage of 'discharge of pollutants' via a direct hydraulic connection to surface water."[13] The open ended nature of the notice signals that EPA will consider a broad range of ideas and solutions to the potential expansion of the CWA presented in cases like County of Maui. A number of industry groups submitted comments arguing against the expansion of the CWA to the regulation of groundwater.[14]

EPA's comment period closed on May 21, 2018 and the public comments are now under review. There is no guarantee that EPA will take any action, but if it chooses to do so, it will likely be many months before we see any substantive memoranda, guidance, or rule addressing the indirect discharge issue.

D. Further Review and Future Case Precedent

As set forth above, the application of the CWA to indirect discharges is an unsettled point of law. There are also two additional cases pending in the Second[15] and Sixth[16] Circuits likely to result in holdings further analyzing the scope of the CWA as it relates to indirect discharges.

IV. Potential Implications Of The Recent Fourth and Ninth Circuit Precedent

A. Expansion of the Scope of the CWA and NPDES Program

Together, the two recent decisions from the Fourth and Ninth Circuits signal the potential for expansion of the scope of CWA liability and the NPDES program, potentially incorporating an array of discharges (from all manner of industry) that did not previously require NPDES permits.

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[13] See, https://www.epa.gov/sites/production/files/2018-02/documents/direct_hydrologic_connection_frn_signed_20180212.pdf.

[14] See, e.g., http://www.nmpf.org/files/files/Final%20Ag-For%20Comments%20CWA%20and%20Groundwater%20Connection%20to%20Surface%20Water%20May%2021%202018.pdf.

[15] 26 Crown Street Assocs. v. Greater New Haven Water Pollution Control Authority, No. 17-2426 (2d Cir.).

[16] Tenn. Clean Waters Network v. TVA, No. 17-6155 (6th Cir.).

B. Application to Oil and Gas Industry

The move towards expanding the CWA and NPDES permit program to the regulation of groundwater and subsurface discharges from point sources may have far reaching effects on the oil and gas industry.

For instance, it leaves the question open of whether a NPDES permit is required for an oil spill (Upstate Forever suggests that it could be) or for unlined ponds used for wastewater treatment.

Unless Upstate Forever is overruled in the Supreme Court, Congress should amend the CWA to define "indirect point source discharge" as the intentional introduction of a pollutant from a point source either (1) to soil where it is reasonably foreseeable that the pollutants will migrate, seep or otherwise leach through the soil and enter a navigable water; or (2) to groundwater that has a direct hydraulic connection to navigable water. Congress should articulate that it intends to eliminate strict liability for indirect point source discharges.