KING & SPALDING

Client Alert

Environmental Health & Safety Practice Group

February 21, 2018

As Ninth Circuit Expands Clean Water Act Liability for Groundwater Discharges, EPA Seeks Comment on Clean Water Act Coverage

A recent Ninth Circuit decision has expanded Clean Water Act ("CWA" or the "Act") liability, holding that discharges to groundwater are actionable if there is a "fairly traceable" connection between the groundwater discharge and pollutants reaching other jurisdictional surface waters. *See Hawaii Wildlife Fund et al. v. County of Maui*, Slip Op. (Feb. 1, 2018). The case represents the first appellate decision to apply directly the "conduit" theory and impose CWA liability for discharges through groundwater. This decision will encourage and bolster citizen suits—and potentially other enforcement actions—seeking to impose liability for groundwater discharges.

Following the Ninth Circuit's decision, EPA formally requested comment on whether the agency should clarify its position regarding the regulation of discharges through groundwater and, if so, what form that clarification should take. *See EPA*, Clean Water Act Coverage of ''Discharges of Pollutants'' via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (Feb. 20, 2018). Comments are due by May 21, 2018.

The Ninth Circuit's Decision

Courts agree that the CWA does not regulate groundwater itself, and that an unpermitted discharge alone does not violate the Act. Courts have wrestled, however, with whether CWA liability may be imposed for discharges to groundwater with a connection to jurisdictional surface waters.

In *Hawaii Wildlife*, the county of Maui owns and operates four injection wells at its municipal wastewater treatment plant, which constitute the county's primary means of effluent disposal. Environmental groups sued the county, alleging that it violated the CWA because pollutants injected into the wells percolated through the groundwater and reached the Pacific Ocean.

The Ninth Circuit adopted a new standard of liability in holding that CWA permitting requirements apply to groundwater discharges from a point source (e.g., injection wells, treatment ponds, or any other discernible, confined, or discrete conveyance) if pollutants (1) "are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water," and (2) "the pollutant levels reaching navigable water are more than *de minimis*." Slip Op. at 19. Notably, the court rejected a more restrictive test advocated by EPA that would impose liability

For more information, contact:

Adam G. Sowatzka
+1 404 572 3508
asowatzka@kslaw.com

Lewis B. Jones
+1 404 572 2742
lbjones@kslaw.com

Ilana Saltzbart
+1 202 626 3745
isaltzbart@kslaw.com

John L. Fortuna
+1 404 572 2828
jfortuna@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

only if there is a "'direct hydrological connection' between the point source and the navigable water." *Id.* at 19 n.3. The Ninth Circuit has now joined a number lower courts holding that the CWA liability extends to discharges to groundwater serving as a conduit between a point source and waters of the United States.[1] The decision, however, leaves important questions unanswered. For example, the court does not explain what is required to demonstrate that pollutants passing through groundwater are "fairly traceable" to a point source. Nor does the court explain how much pollution is required for liability versus the "*de minimis*" level that is not.

EPA's Request for Comment

Following the Ninth Circuit's decision, EPA is requesting formal comment on whether it should clarify "the applicability of the CWA NPDES permit program to pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to jurisdictional surface waters." 83 Fed. Reg. at 7128. This includes:

- Whether "subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA";
- if EPA has authority to regulate discharges through groundwater, whether they "would be better addressed through other federal authorities as opposed to the NPDES permit program"; and
- whether "some or all such discharges are addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs." *Id.*

EPA also seeks comment on whether EPA should "clarify its previous statements concerning pollutant discharges to groundwater with a direct hydrologic connection to jurisdictional water in order to provide additional certainty for the public and the regulated community." *Id.* This could address the CWA's applicability to hydrologically connected groundwater; define activities that would be regulated beyond direct discharges to jurisdictional surface waters (i.e., placement on the land); and define which connections are sufficiently "direct" to be regulated. *Id.*

Clients with discharges to groundwater should consider whether the receiving groundwater body is isolated and confined, or whether it may be hydrologically connected to surface waters constituting waters of the United States. As this rule could greatly expand the CWA beyond its historical reach, clients should also consider submitting formal comments to EPA regarding the regulation of discharges from these potential sources.

King & Spalding has significant experience across the country in administrative and environmental matters, including the defense of citizen suits and enforcement actions under the CWA and other laws. We also have substantial experience developing comments for individual businesses and trade associations regarding proposed regulations. If you have questions about how this ruling or EPA's action may affect you or your business, please contact any of our lawyers noted in the contact section on the first page.

[1] *See, e.g.*, *Hernandez v. Esso Std. Oil Co.*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Sierra Club v. Colorado Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993).