

The Water Report™

Water Rights, Water Quality & Water Solutions in the West

In This Issue:

Groundwater & the CWA 1

Klamath Settlement Update 8

Sustaining Groundwater 18

Water Briefs 27

Errata 28

Calendar 30

Upcoming Stories:

- Alternative Transfers**
- Stream Restoration in New Mexico**
- Aquifer Storage & Water Banks**
- & More!**

GROUNDWATER & THE CLEAN WATER ACT

MURKY WATERS — ARE INDIRECT DISCHARGES TO GROUNDWATER REGULATED UNDER THE CWA?

Hawai'i Wildlife Fund, et al. v. County of Maui

by Kathy Robb & Christine Leas, Sive, Paget & Riesel (New York, NY)

Introduction

The bundle commonly referred to as the Clean Water Act (CWA or “the Act”) is made up of a statute first passed in 1972 and last amended in 1987, with antecedents as far back as the Rivers and Harbors Act of 1899. It is well to remember that in the beginning, US rivers were literally on fire. The Cuyahoga River had fires every decade between 1868 and 1972. Iconic photos from 1952 published on the cover of Life magazine at the time of a 1969 fire on the Cuyahoga River horrified the nation, galvanizing political support for passage of the Act three years later. Congress overrode a presidential veto to the initially-named “Federal Water Pollution Control Act Amendments of 1972” by 52 to 12 in the Senate and 247 to 23 in the House, with members of both parties casting votes on each side, in a bipartisan atmosphere at which we now can only marvel.

Congress set audacious goals in 1972: “To restore and maintain the chemical, physical, and biological integrity of the nation’s waters,” to make waters fishable and swimmable by 1983, and to eliminate the discharge of pollutants by 1985. Unsurprisingly, these target dates were not met. But by 1998, the United States had doubled the waters clean enough for fishing and swimming; more than doubled the number of people served by modern sewage treatment plants; and drastically reduced wetlands losses. In 1972, less than a third of the nation’s waters met the CWA’s goals; by 2016, it was estimated that over 65 percent did.



Cuyahoga River, Cleveland, June 1952

Groundwater Regulation

CWA Issues

CWA Provisions

Point Source

Groundwater Conduit Theory

Tensions inherent in the CWA from the beginning remain over 45 years later. Three jurisdictional aspects of the Act are still the subject of litigation and debate: 1) what are “navigable waters” (which defines the jurisdictional waters under the Act); 2) what does the “cooperative federalism” that is a hallmark of the Act mean for jurisdiction between the federal government and the states; and 3) what is the regulatory scope of the Act for groundwater?

While out of sight, groundwater is certainly no longer out of mind. More than 28 trillion gallons of water a year is pumped from underground in the US. About 78% is used for irrigation; 14% used for public supply systems; and 4% is applied to rural domestic/livestock uses. The recent increase in litigation involving groundwater mirrors a 2017 Gallup poll report that Americans are more concerned about water pollution than they have been since 2001.

Groundwater is not generally regulated under the CWA. The Act prohibits a discharge of a pollutant to “navigable waters,” from a point source without a National Pollution Discharge Elimination System (NPDES) permit. “Navigable waters” are defined under the Act as “the waters of the United States, including the territorial seas.” A “discharge” is defined as “any addition of any pollutant into navigable waters from a point source.” A “point source” is defined as “any discernable, 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.” CWA § 1362(7), (14). Specifically excluded from the definition of “point source” are agricultural stormwater discharges, irrigation return flows, and other “nonpoint” sources.

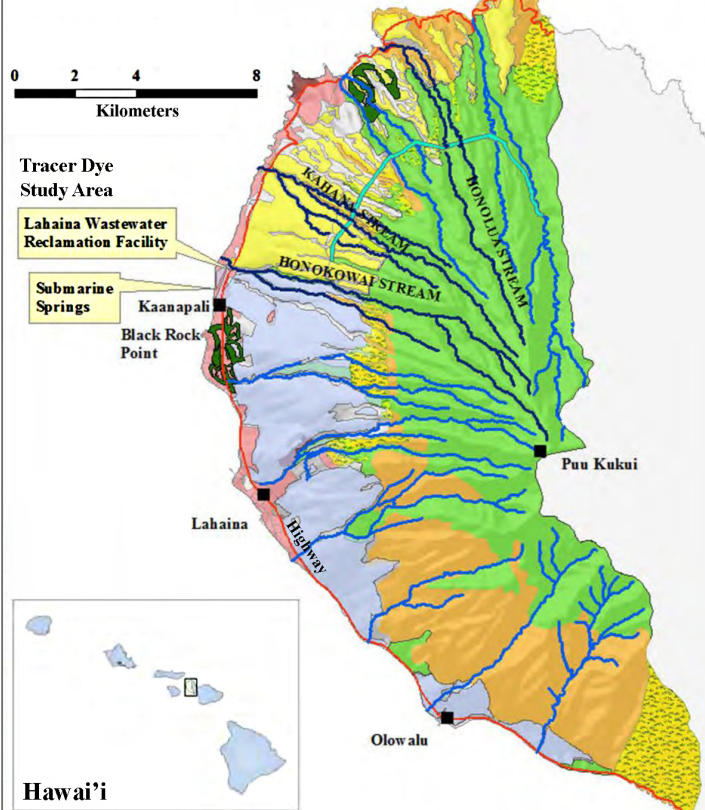
Indirect Discharges to Groundwater and the CWA in County of Maui

Groundwater has been the subject of a recent spate of cases before district and appellate courts, including most recently the Ninth Circuit, which has contributed to regulatory uncertainty about the Act. In *Hawai’i Wildlife Fund et al. v. County of Maui*, ___ F.3d ___, Case No. 15-17447 (9th Cir. Feb. 1, 2018), 2018 WL 650973 (*County of Maui*), the US Court of Appeals for the Ninth Circuit affirmed a federal district court ruling that the County’s discharge of treated effluent into its injection wells — through which pollutants then were carried by groundwater to the Pacific Ocean (part of the United States’ territorial seas and therefore a “navigable water”) — violated the CWA. The idea that indirect discharges of pollutants to navigable waters through groundwater are regulated under the CWA — sometimes known as the “groundwater conduit” theory — is not new. But the *County of Maui* decision has sparked renewed controversy about the regulatory reach of the CWA when groundwater is part of the equation.

The County of Maui (County) operates the Lahaina Wastewater Reclamation Facility. The County injects three-to-five million gallons of recycled, treated wastewater daily into four injection wells located a half-mile inland from the Pacific Ocean. The injection wells are long pipes that carry effluent about 200 feet underground into a shallow groundwater aquifer. The wastewater made its way through groundwater to the Pacific Ocean. A tracer dye study showed that 84 days after the dye was injected into two of the county’s four wells, the dye emerged from the seafloor through points known as “submarine springs.”

Hawai’i is among the 46 states authorized by the US Environmental Protection Agency (EPA) to administer the NPDES program. State regulators in Hawai’i knew of the County’s treated wastewater injections. The County did not hold an NPDES permit.

Western Maui



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Groundwater Regulation

Indirect Discharges

9th Circuit Holding

Nonpoint Source Ruling

Rapanos

Key Points

“Fairly Traceable”

Groundwater Jurisdiction

Rulings Split

Plaintiffs argued that the County’s effluent injections were discharges from a point source (the wells), carried through the groundwater to navigable water (the Pacific Ocean), causing damage to coral reefs and violating the CWA. The County argued that the discharge from a point source must be made directly to navigable waters to come under the jurisdiction of the CWA.

The Ninth Circuit held that the indirect discharge through groundwater to the Pacific was subject to regulation under the CWA and required an NPDES permit. The Ninth Circuit rejected arguments that a point source must discharge directly into navigable water to trigger CWA regulation, holding instead that it is enough for the discharge to come *from* a point source (here, the wells). The court also stated, “[w]e assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA” (*County of Maui*, Footnote 2). This statement is a departure from the district court opinion, which found that the groundwater was both. The Ninth Circuit emphasized that although there was no *direct* discharge to the Pacific, there was a “fairly traceable” connection established through the tracer dye studies, showing “the functional equivalent of a discharge into the navigable water” by the County. *County of Maui* at *7. The Ninth Circuit rejected arguments from the County that the indirect discharge was a “nonpoint source” regulated differently under the CWA. *Id.* at *8.

In doing so, the Ninth Circuit considered Justice Scalia’s plurality opinion in *United States v. Rapanos*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d (2006), “for its persuasive value,” which states that the CWA does not prohibit the “‘addition of any pollutant *directly* to navigable waters from any point source’ but rather the ‘addition of any pollutant *to* navigable waters” based on hydrologic connection. *Rapanos* at 743 (emphasis in original); *County of Maui* at *6. In its briefs, the County had pointed out that groundwater was not at issue in *Rapanos*. The Supreme Court considered in *Rapanos* the question of whether surface wetlands adjacent to point source surface “ditches or man-made drains” intermittently flowing into navigable waters are regulated under the CWA and concluded that the wetlands are. See e.g., *Rapanos*, 547 U.S. 730, 755.

The Ninth Circuit stated the three key points of its holding as follows:

We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants 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 (3) the pollutant levels reaching navigable water are more than *de minimis*.³ The second point in particular is an important one. We therefore disagree with the district court that “liability under the Clean Water Act is triggered when pollutants reach navigable water, *regardless of how they get there.*” *Haw. Wildlife*, 24 F.Supp.3d at 1000 (emphasis added). Here, the Tracer Dye Study and the County’s concessions clearly connect all four wells’ discharges to the consistently-emerging pollutants in the ocean. We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.

County of Maui at *6-7.

The County has requested rehearing en banc of the Ninth Circuit decision.

The Groundwater Conduit Theory in Other Cases

In 1994, in *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962 (7th Cir. 1994), the Seventh Circuit held that an artificial stormwater retention pond that retained oil, grease, and other pollutants was not regulated under the CWA, even if a possible hydrological connection could not be denied. The Seventh Circuit noted that Congress rejected proposals to regulate groundwater under the CWA because, according to the Senate Committee on Public Works, “the jurisdiction regarding groundwaters is so complex and varied from State to State... .” *Id.* at Footnote 13.

More than half a dozen recent district court opinions have been handed down addressing regulation of indirect discharges to groundwater under the CWA, several involving coal ash landfills. District courts are split on whether the CWA governs releases of pollutants into groundwater that eventually carries the pollutants to navigable waters. Since 2014, district courts including the Eastern District of North Carolina, South Carolina, Maryland, and Eastern District of Pennsylvania have refused to apply the conduit theory to impose CWA liability. District courts, including the Middle District of North Carolina and Eastern District of Virginia, have concluded that indirect discharges to groundwater are regulated under the CWA. Four district court decisions are on appeal to the circuit courts, two in the Fourth Circuit and two in the Sixth Circuit.

In each of the cases, as in *County of Maui*, both plaintiffs and defendants have relied on the language of the statute and regulations, legislative history, EPA’s past statements in guidance and court filings, the potential impact of the groundwater conduit theory on a host of industries and activities, and the appropriate

Groundwater Regulation

Pipe Leak

Coal Ash Landfills

Hydraulic Connection

Coal Ash Point Source

Indirect Discharges

“Navigable Waters”

CWA Language

interaction of the CWA with other legal regimes — including state and local regulation of groundwater and wells, and federal regulation of coal ash disposal and underground waste injection — to support their positions. The cases have attracted amici (friend of the court) briefs from environmental groups, industry sectors, trade associations, and a number of states.

The Fourth Circuit Appeals

In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F.Supp. 3d 488 (D.S.C. 2017), an underground pipe leaked about 370,000 gallons of petroleum into groundwater and soil. The leak was repaired and is still being remediated. Plaintiffs argued that the groundwater carried petroleum to navigable waters. The district court held that the migration of pollutants through soil and groundwater is “nonpoint source” pollution and therefore not regulated under the CWA and dismissed the action. The Fourth Circuit heard argument on appeal on December 7, 2017, and a decision is expected this spring.

On March 21, 2018, the Fourth Circuit heard oral argument in *Sierra Club v. Virginia Electric Power Company*, 247 F.Supp.3d 753 (E.D. Va. 2017) (VEPCO), a case involving alleged indirect discharges of arsenic from closed coal ash landfills through groundwater to a nearby river and creek. In that case, the Virginia district court held that the indirect discharges through groundwater violated the CWA, finding the North Carolina middle district court ruling in *Yadkin Riverkeeper Inc. v. Duke Energy Carolinas*, 141 F.Supp.3d 428 (M.D.N.C. 2015), persuasive. In *Yadkin*, the district court held that the CWA governs where pollutants reach navigable waters through “hydraulically connected groundwater.” Just a year earlier, the North Carolina eastern district court held in *Cape Fear River Watch v. Duke Energy Progress, Inc.*, 25 F.Supp. 3d 798 (E.D.N.C. 2014), that the CWA does not cover discharges to hydrologically connected groundwater.

The Sixth Circuit Appeals

Two cases on appeal are pending in the Sixth Circuit, both involving coal ash landfills. In *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 3:15-cv-00424 (M.D. Tenn. Aug. 4, 2017) (TVA), the district court held that the coal ash landfill was a point source, and that unpermitted discharges of contaminated leachate migrating through groundwater hydrologically connected to nearby surface waters is a discharge from a point source regulated under the CWA. In *Kentucky Waterways Alliance et al. v. Kentucky Utilities Co.*, Civil Action No. 5:17-292-DCR (E.D. Kentucky, Dec. 28, 2017) (*Kentucky Utilities*), the district court held that movement of contaminants from groundwater to surface water is not subject to regulation under the CWA. (*Kentucky Utilities* opinion available at: www.leagle.com/decision/infdc020171229864).

In *Kentucky Utilities*, the utility had a permit allowing regulated discharges from ash ponds through an external outfall. The plaintiffs argued that the ash ponds also discharged to a nearby surface water through naturally flowing groundwater that was infiltrating the settling ponds and flowing through springs to the surface water. The utility argued that the indirect discharges were not regulated under the CWA, and the district court agreed, granting the utility’s motion to dismiss.

The district court in *Kentucky Utilities* considered whether groundwater could be subject to regulation under the CWA as navigable water, as a point source, or as a conduit, and rejected all three possibilities. As to groundwater as “navigable waters,” the *Kentucky Utilities* district court noted:

Courts have overwhelmingly found that groundwater, even if hydrologically connected to navigable waters, is not itself a navigable water under the CWA. *See, e.g., Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (“[G]round waters are not protected waters under the CWA.”); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.”) (citations omitted); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F.Supp. 3d 798, 810 (E.D.N.C. 2014) (“Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that ground water is eventually or somehow ‘hydrologically connected’ to navigable surface waters.”); *Copper Indus., Inc. v. Abbott Labs.*, No. 93-CV-193, 1995 WL 17079612, *4 (W.D. Mich. May 5, 1995) (“[T]he fact that these ground waters are hydrologically connected to some surface waters is insufficient to transform this case to a [CWA] cause of action.”).

The *Kentucky Utilities* district court concluded there were three reasons that groundwater is not navigable water under the CWA:

First, considering ground waters to be “navigable waters” would strain the language of the CWA [citing *Village of Oconomowoc Lake*, 24 F.3d at 965]...Second, the legislative

<p>Groundwater Regulation</p>	<p>history of the CWA demonstrates that Congress extensively considered whether to extend the CWA to groundwater, and decided against it [citing legislative history in <i>Exxon Corp. v. Train</i>, 554 F.2d 1310, 1325-29 (5th Cir. 1977)]...Third, in <i>Rapanos v. United States</i>, 547 U.S. 715 (2006), the Supreme Court “eschewed a broad interpretation of ‘navigable waters’ and repeatedly cautioned against ‘attempting to expand the definition of navigable waters to encompass virtually all water, regardless of its actual navigability, location, or consistency of flow’” [citing <i>Upstate Forever v. Kinder Morgan Energy Partners, L.P.</i>, 252 F.Supp.3d 488, 497-98] [quotations from opinion omitted].</p>
<p>Definition Expansion</p>	<p>As to groundwater as a “point source” regulated by the CWA, the district court in <i>Kentucky Utilities</i> stated: Congress “drew a distinct line” between the discharge of pollutants from point sources and non-point sources in the CWA. <i>Or. Nat’l Res. Council v. United States Forest Serv.</i>, 834 F.2d 842, 849 (9th Cir. 1987). Discharges from point sources are subject to regulation under the NPDES, whereas the regulation of non-point sources is left to the states. <i>Id.</i> The Court must respect the line drawn by Congress, and cannot extend the CWA’s NPDES requirements to non-point source pollution...Non-point source pollution, by contrast [to point source pollution] “does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.” <i>Cordiano v. Metacon Gun Club, Inc.</i>, 575 F.3d 199, 220 (2d Cir. 2009) (quoting EPA Office of Water, Nonpoint Source Guidance 3 (1987)). Groundwater is, by its nature, “a diffuse medium” and not the kind of discernible, confined and discrete conveyance contemplated by the CWA’s definition of “point source.” <i>See 26 Crown Assocs.</i>, 2017 WL 2960506, at *8 (“It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil.”)</p>
<p>Point Source v. Non-Point</p>	<p>Finally, the court rejected the groundwater conduit theory: Adopting [the conduit] theory would be inconsistent with the text and structure of the CWA. The primary problem with this rationale is that, if adopted, “any non-point-source pollution (such as ordinary surface run-off from the land into navigable waters) could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through non-point sources to come to rest in navigable waters” <i>26 Crown Assocs.</i>, 2017 WL 2960506, at *8.³ This would lead to the extensive regulation of non-point source pollution and would “effectively read the ‘point source’ requirement out of the Clean Water Act.” <i>Id.</i> at *9.</p>
<p>Nature of Groundwater</p>	<p>The court also noted that a groundwater conduit theory “would be inconsistent with [the CWA’s] federalist structure” which left groundwater pollution to be regulated by the states.</p>
<p>Point Source Requirement</p>	<p>While <i>County of Maui</i> involved a dye tracer test, the cases on appeal to the Fourth and Sixth Circuits rely on indirect evidence and extensive expert testimony to establish a hydraulic connection. The district courts in <i>VEPCO</i> and <i>TVA</i>, for example, considered comparisons of samples taken from groundwater and surface water, expert reports discussing hydrologic principles, and factual statements in the defendants’ reports to find a hydraulic connection between the landfills and surface waters. But even the more direct dye tracer in <i>County of Maui</i> raises issues of how long can it take for contaminants to reach surface waters through groundwater, and how far away can the point source be from the navigable water, for indirect discharges through groundwater to come within CWA regulation? In <i>County of Maui</i>, the dye showed in the Pacific Ocean after 84 days, and the injection well determined to be a point source by the Ninth Circuit was located half a mile inland.</p>
<p>“Federalist Structure”</p>	<p>The cases on appeal set up a potential split in the circuits with <i>County of Maui</i> that soon could bring the issues before the US Supreme Court.</p>
<p>Evidence of Connection</p>	<p>EPA’s Position, and the February 28, 2018 Request for Comments</p>
<p>EPA Position</p>	<p>EPA filed an amicus brief in the <i>County of Maui</i> appeal to the Ninth Circuit, arguing that discharge of pollutants through groundwater can violate the CWA if there is a “direct hydrologic connection” to a water of the United States. EPA stated that regulation of these indirect discharges is “consistent with the purpose of the CWA” and “is consistent with EPA’s long-standing position.” EPA also stated that while it agreed with the district court’s outcome, it disagreed with the district court’s conclusions reaching that outcome: “To be clear, the United States does not contend that groundwater is a point source, nor does the United States contend that groundwater is a water of the United States regulated by the Clean Water Act. Moreover, the United States does not agree with the district court’s application of the ‘significant nexus’ standard from <i>Rapanos v. United States</i>, 547 U.S. 715 (2006).”</p>
<p>“Direct Hydrologic Connection”</p>	

Groundwater Regulation

Chevron Deference

"Fairly Traceable" Connection

Shifting EPA Position

Well Injection

Comments Requested

"Direct" Discharges

CWA Jurisdiction (WOTUS)

In its amicus brief, EPA took the position that the district court’s judgment was “consistent with the language and purpose of the CWA.” But EPA went on to say that “[e]ven if Congress’s intent on this issue had been ambiguous, EPA has clearly stated for decades that pollutants that move through groundwater can constitute discharges subject to the CWA, and that interpretation is entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).” [Editor’s Note: *Chevron* deference is a doctrine that requires a court to defer to administrative agencies’ interpretations of federal law]. According to EPA, relevant evidence to determine whether a point source discharge reaches navigable waters “without significant interruption”...“includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source.” EPA. Br. at 26.

The Ninth Circuit rejected EPA’s “direct hydrologic connection” standard, opting instead for a standard that a “fairly traceable connection” between indirect discharges to groundwater and navigable waters is “the functional equivalent of a discharge into navigable waters” under the CWA. *County of Maui* at *7. The court stated:

The EPA as *amicus curiae* proposes a liability rule requiring a “direct hydrological connection” between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA (“direct” and “hydrological”) that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a “fairly traceable” connection, consistent with Article III standing principles. *See, e.g., Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

County of Maui, Footnote 3.

Some have argued that EPA’s position over the years has been inconsistent. EPA states repeatedly in its amicus brief that “discharge of pollutants that move through groundwater to jurisdictional surface waters” are subject to the CWA. But early on, in EPA’s 1979 Federal Register response to comments about the NPDES permit limit exclusion for well disposal (then § 122.41, now § 122.50), EPA stated that well disposal does not fall under the CWA:

The provision does not regulate well injection, directly or indirectly, nor does it place any limit on the amounts which may be injected, the rates of injection, or the design and operation of injected wells. Instead, § 122.41 focuses on the remaining wastes which are being discharged into waters of the United States. The purpose of the regulation is to ensure that the Act’s treatment requirements are met for discharges into surface waters.

44 FR 32854, 32870 (June 7, 1979).

EPA stated this position again in 1984: “The regulation does not regulate, directly or indirectly, the wastewater that is diverted. No limits are placed on the amount of wastewater that may be diverted, nor upon how that waste is treated or disposed of. Generally, such activities are outside the scope of the NPDES program.” 49 FR 37998, 38022 (Sept. 16, 1984).

On February 20, 2018, EPA requested comment on whether “EPA should review and potentially revise its previous statements” about “pollutant discharges from point sources that reach jurisdictional waters via groundwater or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water” and specifically (i) whether “subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA;” (ii) would “those releases be better addressed through other federal authorities than the CWA NPDES permitting program;” (iii) “whether some or all such releases are adequately addressed through existing state statutory or regulatory programs” or federal programs. EPA also seeks comment on whether it should clarify statements regarding the meaning and circumstances under which such discharges are “considered ‘direct’ in order to reduce regulatory uncertainties.” 83 FR 7126 (Feb. 20, 2018). The comment period closes May 21, 2018.

The results of any formal rulemaking could be relied on by EPA to bolster a “*Chevron* deference” argument in future cases, in support of the position EPA ultimately takes on the issue. In the *County of Maui* case, the Ninth Circuit declined to extend *Chevron* deference to the EPA’s views on indirect discharges. *See County of Maui*, Footnote 3 (quoted above).

Defining Jurisdictional Waters Under the CWA

The groundwater conduit cases come at a time of uncertainty about what constitutes “navigable water” under the CWA. The definition of navigable waters, or “waters of the United States,” is *already the subject of lawsuits* across the country challenging the 2015 Waters of the United States (WOTUS) Rule and its regulatory aftermath. Defining the jurisdiction of waters regulated under the CWA is a struggle that has been going on for the life of the now-45 year old statute. *See Glick & Atencio, TWR #149 Moon, TWR #155; Taylor, TWR #157; and Kolanz, TWR #160.*

Groundwater Regulation

District Courts

“Suspension Rule”

Water Transfers Rule

Increased Permit Requirements?

On January 22, 2018, in *National Association of Manufacturers v. Department of Defense*, No. 16-299, 583 U.S. ___ (2018), the US Supreme Court ruled in a unanimous opinion that the federal district courts, rather than appellate courts, had original jurisdiction under the CWA to hear challenges to the 2015 WOTUS Rule, dubbed the “Clean Water Rule” by EPA, and clarify this jurisdictional question. The decision has sent numerous parties scurrying back to federal district courts to start anew litigation on a rule finalized in 2015 and litigated in the circuit court for the last two years.

On February 6, 2018, EPA and the Army Corps of Engineers published the “Suspension Rule,” a new rule putting off the effective date of the 2015 WOTUS Rule to 2020 to allow the agencies time to review and revise the WOTUS Rule before it takes effect. The Suspension Rule has been challenged in a complaint filed the same day by New York and ten other states, plus the District of Columbia. Similar suits were filed by environmental groups in district courts in New York and in South Carolina. The Suspension Rule continues the application of the agencies’ pre-2015 interpretation of the term “waters of the United States” in 2008 guidance documents, and follows the process set in motion by a February 2017 Executive Order directing the agencies to rescind or revise the WOTUS Rule.

The Supreme Court also decided on February 26, 2018 (no opinion), that it will not hear an appeal on the 2008 Water Transfers Rule, which was upheld by the Second Circuit. The Rule allows transfers of waters from one body to another without a permit under the CWA if there is no intervening pollutant added through the transfer or a treatment. The Supreme Court’s decision puts an end, for now, to challenges to the rule that have been going on for almost ten years.

CONCLUSION

POTENTIAL IMPACTS OF THE INDIRECT DISCHARGES CASES

The recent district court decisions and pending appeals set up the possibility for increased federal permit requirements for those discharging wastewater that moves through groundwater that ultimately reaches navigable waters. Superfund site cleanups, municipalities, golf courses, recreation areas, agriculture, businesses that contain stormwater onsite in unlined ponds, cesspools, septic systems, underground storage tanks, surface impoundments, landfills, and pipelines — all potentially fall under the CWA if groundwater carries a discharge from them as a point source to navigable waters. The decisions may also result in a significant increase in the number of CWA citizen suits. The regulatory uncertainty associated with the groundwater conduit theory could also negatively impact infrastructure investments needed to address water infrastructure in the United States.

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Christine Leas, Principal at Sive Paget & Riesel, PC (New York, NY), has over 25 years of experience practicing environmental law. She specializes in environmental regulatory compliance and transactional matters, counseling clients on the environmental aspects of mergers, acquisitions, and divestitures. Christine has worked on many aspects of brownfield redevelopment of properties under the New York State Brownfield Cleanup Program (and its predecessor Voluntary Cleanup Program) and Superfund sites (CERCLA and its state counterparts). She has represented private developers and public entities in connection with all phases of brownfield redevelopment — due diligence investigation, structuring and negotiating property acquisition/divestiture transactions, procurement and oversight of environmental consulting and remediation services, liability transfers, environmental insurance and regulatory permitting and compliance. Christine has also worked with corporate and financial institution clients on environmental aspects of mergers and acquisitions involving many domestic and international properties. Christine received her BA with a certificate in environmental studies from the University of Wisconsin-Madison (in the days before degree programs were offered in environmental studies), and her JD from the University of California, Hastings College of Law in San Francisco. She’s admitted to practice in New York, Connecticut and California.

GROUNDWATER and the CLEAN WATER ACT – Update

MURKY WATERS — ARE INDIRECT DISCHARGES TO GROUNDWATER REGULATED UNDER THE CWA?

by Kathy Robb, Sive, Paget & Riesel (New York, NY)

Since this article went to press for publication in *The Water Report* #170 (April 15, 2018), significant developments in two groundwater cases under the Clean Water Act (CWA) have occurred which bear mentioning.

County of Maui Seeking Review by the US Supreme Court

In *Hawai'i Wildlife Fund, et al. v. County of Maui*, __ F.3d __, Case No. 15-17447 (9th Cir. Feb. 1, 2018), 2018 WL 650973, defendant County of Maui's petition for rehearing en banc was denied by the Ninth Circuit. In its March 30, 2018 Order denying rehearing, the Ninth Circuit amended its February 1, 2018 opinion by adding language to three footnotes, apparently to further bolster and explain its holding:

1. On slip opinion page 12, footnote 2, the following text was added to the end of the footnote:
 "Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. *See Rice v. Harken Expl.*, 250 F.3d 264, 270 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*, where the Seventh Circuit only considered allegations of a 'potential [rather than an actual] connection between ground waters and surface waters,' 24 F.3d at 965."
2. On slip opinion page 19, footnote 3, the following text was added to the end of the footnote:
 "Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. *See* § 1365. Our approach is firmly grounded in our case law, which distinguishes between point source and nonpoint source pollution based on whether pollutants can be 'traced' or are 'traceable' back to a point source. *See Alaska*, 749 F.2d at 558; *Ecological Rights*, 713 F.3d at 508; *supra*, at 12–15."
3. On slip opinion at page 19, the following text replaces the sentence after the citation to *Haw. Wildlife*, 24 F. Supp. 3d at 1000:
 "Here, the Tracer Dye Study and the County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells' pollutants reaching the ocean. The Study also traced a southwesterly path from the wells' point source discharges to the ocean."
 The February 1, 2018 decision and March 30, 2018 amended Order are available at the Ninth Circuit's website: <https://www.ca9.uscourts.gov/opinions/> >> Search on Case No. 15-17447.

The County has announced its intention to petition for a writ of certiorari to the US Supreme Court to review the Ninth Circuit's decision, and had asked the Ninth Circuit on April 3, 2018 to stay the mandate in the case while a petition goes forward. The Ninth Circuit denied the request in a one-sentence order on April 12, 2018. The petition to the US Supreme Court is due 90 days from March 30, 2018.

Kinder Morgan District Court Reversed by Fourth Circuit

In *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Kinder Morgan)*, Case No. 17-1640 (April 12, 2018), the Fourth Circuit ruled — on the same day that the Ninth Circuit refused to stay its mandate in *Maui* — that a petroleum pipeline spill resulting in a discharge of pollutants reaching navigable waters through groundwater is regulated under the CWA. A divided Fourth Circuit panel vacated the district court decision, which had held that migration of pollutants through soil and groundwater is "nonpoint source" pollution not regulated under the CWA, and had dismissed the citizens' suit for lack of subject matter jurisdiction and failure to state a claim. The Fourth Circuit held that a claim could go forward under the CWA and remanded the case to the district court for further proceedings.

The case was filed in 2016 and arose from a 2014 underground pipeline spill of an estimated 370,000 gallons of gasoline into soil and groundwater in South Carolina. The pipeline, six to eight feet underground, was repaired within days, and remediation was begun under the oversight of the state agency authorized to issue NPDES permits and oversee water quality in South Carolina. Kinder Morgan has recovered about 210,000 gallons of gasoline. Remediation continues.

The plaintiffs allege that Kinder Morgan did not fully comply with the remediation measures required, and that the gasoline traveled after the spill through groundwater up to 1000 feet into two nearby creeks and adjacent

wetlands. Kinder Morgan argued that the violation ceased when the pipeline was repaired, and that if pollutants are seeping into navigable waters it is from a nonpoint source — groundwater — which is not regulated under the CWA.

The district court held that the plaintiffs had not stated a claim under the CWA because the pipeline was not continuing to release gasoline and therefore the violation was not ongoing. The district court also held that indirect discharges through groundwater to navigable waters were nonpoint sources that were not regulated under the CWA.

The Fourth Circuit reversed, holding that the point source, here, the pipeline, need not continue to release a pollutant in order to constitute a violation — it was enough that the spilled gasoline continued to migrate through soil and groundwater and enter surface waters. The court stated that any “delay between the time at which pollution leaves the point source and the time at which it is added to navigable waters” does not prohibit a citizens’ suit claim under the CWA. *Kinder Morgan* at 17. While the court noted that citizens’ suits provision under the CWA is intended primarily to allow citizens “to abate pollution when the government cannot or will not command compliance,” the court reasoned that a violation could be continuing even if the conduct that caused the violation had ceased. *Id.* at 14.

The court also held 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 that passes through ground water,” reflecting the position taken by EPA in its amicus brief in *Maui*. *Id.* at 23-24. This standard is a different articulation from the “fairly traceable” standard set by the Ninth Circuit in *Maui*, although the Fourth Circuit noted that in its view there was “no functional difference” between its standard and the Ninth Circuit’s “fairly traceable” standard. *Id.* at 24, fn. 12.

Like the Ninth Circuit in *Maui*, the Fourth Circuit looked to Justice Scalia’s opinion in *Rapanos v. United States*, 542 U.S. 715 (2006), for guidance. The Fourth Circuit quoted the same sentence from *Rapanos* that the Ninth Circuit included in the *Maui* opinion: “However, when analyzing the kinds of connected waters that might fall under the CWA, Justice Scalia observed that “[t]he Act does not forbid the “addition of any pollutant *directly* to navigable waters from any point source,” but rather the “addition of any pollutant *to* navigable waters.”” *Id.* at 743 (quoting 33 U.S.C. § 1362(12)(A)).” *Kinder Morgan* at p. 20 (emphasis in original).

The dissent stated that the majority’s reading threatened to undermine the CWA distinction between “point source” and “nonpoint source” discharges, stating that:

[C]lose examination of the text, history, and structure of the CWA reveals that not every addition of pollution amounts to a CWA violation — much less an ongoing CWA violation. Congress precisely defined a CWA violation as the addition of pollutants from a point source, and for there to be an ongoing CWA violation, there must be an ongoing addition of pollutants from a point source into navigable waters. *See* 33 U.S.C. § 1362(12). *Id.* at 27.

Focusing on “three central features” of the CWA — “point source” pollution, the NPDES program, and primary enforcement through state and federal regulators supplemented by citizens’ suits — the dissent emphasized legislative history and statutory language highlighting Congress’s intent to limit federal jurisdiction under the CWA to point source pollution, and stated that the CWA National Pollutant Discharge Elimination System (NPDES) permitting program is “not only ill-equipped to address, but also inapplicable to, nonpoint source pollution.” *Id.* at 36.

The Fourth Circuit decision in *Kinder Morgan* has raised further concerns that applying the NPDES program to indirect discharges through groundwater from a pipeline spill carrying pollutants to waters of the United States would expand the regulatory scope of the CWA and the number and scope of citizens’ suits significantly, create regulatory uncertainty, and require case-by-case analysis that is impractical at best. Both the *Maui* and *Kinder Morgan* court decisions have drawn the attention of the regulated community. Regulated entities could face increased permitting costs and related liabilities if they fail to obtain CWA permits for indirect discharges of pollution to waters of the United States through groundwater. Cities, states, and companies point out that they cannot know in advance if a spill or leak will occur, and so cannot identify what kind of permit they might need.

Four additional cases addressing indirect discharges through groundwater to navigable waters are pending in the Second, Fourth, and Sixth Circuits: *26 Crown Street Assocs. v. Greater New Haven Water Pollution Control Authority*, 2017 U.S. Dist. Lexis 106989 (D. Conn. 2017)(No. 17-2426, 2d Cir.); *Sierra Club v. Virginia Electric and Power Co.*, 145 F. Supp. 3d 601 (E.D. Va. 2015) (No. 17-1895, 4th Cir.); *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 5:17-292-DCR, 2017 WL 6628917 (E.D. Ky. Dec. 28, 2017) (No. 18-5115, 6th Cir.); and *Tennessee Clean Waters Network v. TVA*, 273 F. Supp. 3d 775 (M.D. Tenn. 2017) (No. 17-6155, 6th Cir.).

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Maui decision available at: cdn.ca9.uscourts.gov/datastore/opinions/2018/02/01/15-17447.pdf

Kinder Morgan decision available at: www.ca4.uscourts.gov/opinions/171640.P.pdf