

Circuit Courts Extend Clean Water Act Liability to Discharging Treated Wastewater and Other Pollutants to Groundwater

When a half-mile from the nearest body of water, must you obtain a federal permit when discharging treated wastewater to groundwater? [According to a recent Ninth Circuit decision](#), the answer may be yes.^[1] This alarmed many because the Clean Water Act regulates discharges to navigable waters from "point sources" like pipes or ditches. Groundwater is neither a navigable water nor a "point source," so how is a Clean Water Act permit required?

The role of groundwater under the Clean Water Act is unsettled. Some courts find that discharges to groundwater are outside the statute's scope. Other courts, including those in California, note an inconsistency in regulating discharges conveyed to surface water through a pipe, but not if conveyed through groundwater. The Ninth Circuit grappled with this uncertainty in *Hawai'i Wildlife Fund v. County of Maui*, ultimately holding that a Clean Water Act National Pollutant Discharge Elimination (NPDES) permit is required when the following criteria are met:

- (1) the pollutants are discharged from a point source (e.g., wells, pipes, ditches);
- (2) the pollutants are "fairly traceable" from that point source to a navigable water such that it is a "functional equivalent of a discharge into the navigable water"; and
- (3) the pollutant levels reaching the navigable water are more than *de minimis*.

In *Hawai'i Wildlife Fund*, the County discharged treated wastewater from injection wells to groundwater. A tracer dye study tracked the wastewater as it meandered a half-mile via groundwater before it was discharged to the Pacific Ocean. Because the study demonstrated the County's wastewater discharges were "fairly traceable" to the ocean discharges, the Ninth Circuit held the Clean Water Act required a NPDES permit.

The tracer dye study's role in this decision is worth emphasizing. It provided certainty often missing when assessing groundwater discharges. Without such evidence, as the Court acknowledged, the relationship between a point source and navigable water may be too tenuous to support Clean Water Act liability. Thus, liability for groundwater discharges has its limits.



by Sean G. Herman & Michael J.
Van Zandt



Perhaps in response to the *Hawai'i Wildlife Fund* decision, the [Environmental Protection Agency \(EPA\) issued a Request for Public Comment](#) on whether the Clean Water Act should regulate discharges from point sources to surface waters via groundwater. The Request cites the *Hawai'i Wildlife Fund* decision and seeks comment on whether regulatory programs other than the Clean Water Act are better equipped to handle groundwater discharges. One example is state regulation of underground injections pursuant to the Safe Drinking Water Act. Comments to the EPA's Request must be received no later than May 21, 2018.

On April 12, 2018, however, the Fourth Circuit provided its support of the Ninth Circuit's analysis. The Fourth Circuit held a citizen suit may allege Clean Water Act liability for gasoline discharged from a broken pipe, even if the pipe was repaired, when the gasoline continued after to travel through groundwater to surface water.^[2] The Fourth Circuit relied upon *Hawai'i Wildlife Fund*, followed its rationale, and similarly held that a discharge of pollutants that is traceable or hydrologically connected to a navigable water triggers Clean Water Act liability.

The Ninth and Fourth Circuits' decisions bring to a boil yet another Clean Water Act issue. On March 30th, the Ninth Circuit denied the County of Maui's petition to reconsider the Court's decision *en banc*. Shortly after, the County asked the Ninth Circuit to stay its holding while the County seeks to petition the U.S. Supreme Court for review. Meanwhile, two other circuit courts are also considering the relationship between groundwater and the Clean Water Act. If these rulings are inconsistent with the Ninth and Fourth Circuit rulings, they may advance a circuit split that would increase the odds that the Supreme Court grants review.

This changing body of law affects many businesses and public agencies, including water reclamation districts, sanitary districts, wastewater treatment facility operators, and water providers. All should keep abreast of these rapid changes and understand how they affect operations involving groundwater discharges. Should you have any questions or concerns regarding how the Clean Water Act may affect you, [please contact our Water Law attorneys](#).

^[1] *Hawai'i Wildlife Fund v. Cty. of Maui*, No. 15-17447, 2018 WL 1569313 (9th Cir. Feb. 1, 2018).

^[2] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, 2018 WL 1748154 (4th Cir. April 12, 2018).

For more information, please contact:

Sean G. Herman, Associate
415-995-5899
SHerman@hansonbridgett.com

Michael J. Van Zandt, Partner
415-995-5001
mvanzandt@hansonbridgett.com