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SCOTUS Will Review a Portion of the County of Maui Case Involving a Clean Water Act Citizen Suit

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The U.S. Supreme Court recently decided to take up review of a circuit court conflict regarding the jurisdictional reach of the Clean Water Act ("CWA"). On February 19, 2019, the Court partially granted a petition for writ of certiorari filed by the County of Maui. The Supreme Court will ostensibly determine whether discharges of pollutants to surface waters via groundwater and/or soil are regulated by the CWA. The Supreme Court's decision is certain to have far-reaching implications for permitting and enforcement pursuant to the CWA.

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The CWA was passed by Congress in 1972 as a significant amendment to the Federal Water Pollution Control Act of 1948. In the CWA, Congress declared its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To further this objective, the CWA makes it "unlawful" to discharge any pollutant into "navigable waters" without a permit, 33 U.S.C. §§ 1311(a), 1342(a). Thus, the CWA provides the U.S. EPA with the power to regulate and permit "discharges" of "pollutant(s)" to "navigable waters" pursuant to a National Pollutant Discharge Elimination System ("NPDES") program established by the CWA.

However, Congress declared another objective of the CWA "to recognize, preserve, and protect the primary responsibilities of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ." 33 U.S.C. §1251(b). Thus, the U.S. EPA may delegate much of that permitting authority to the states. See 33 U.S.C. §1329(b). EPA's NPDES website indicates that 46 states and one territory are currently authorized to administer the NPDES permitting program.

In the CWA, a "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source" and a "point source" is defined as "any 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." 33 U.S.C. § 1362(12), (14). The term "navigable waters" is defined in the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Although the CWA further defines "territorial seas, "[1] it does not provide a definition of "navigable waters."

Because the CWA controls only "discharges" of "pollutants" to "navigable waters," the states retain primary authority with respect to regulating and controlling other forms of pollution. To this end, the CWA requires that each state implement a management program for "controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b)(1). However, the CWA does not define or describe these "nonpoint sources." Thus, there has been controversy regarding whether pollutants discharged to "navigable waters" via soil and/or groundwater come within the reach of the CWA or whether they are within the ambit of the states' authority.

Importantly, the CWA also contains a citizen suit provision which allows anyone, including individuals, corporations

and non-governmental organizations to commence a civil action "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . ." 33 U.S.C. §1365(a). In recent years this citizen suit provision has been utilized by environmental conservation groups seeking to enjoin alleged unpermitted discharges to "navigable waters" via soil and/or groundwater. The defendants in these CWA citizen suits face the prospect of having to pay plaintiffs' attorney fees as well as significant daily fines determined by the courts.[2] Moreover, court-fashioned remedies for addressing discharges to navigable waters via soil or groundwater can be astonishingly costly and may take many years to accomplish.[3] Nevertheless, some courts have ordered just that sort of remedy in the context of CWA citizen suits brought by environmental conservation groups.

In the context of citizen suits brought by conservation groups, several cases interpreting the extent of CWA jurisdiction worked their way through the Ninth, Fourth and Sixth Circuits in 2018. In the first such case, the Ninth Circuit, held, in a February 1, 2018 opinion, that CWA jurisdiction extends to discharges of pollutants that travel via groundwater to waters of the United States. The County of Maui obtained injection well permits from the State of Hawaii authorizing it to dispose of treated municipal waste water in injection wells. This injected municipal waste water eventually flowed to the Pacific Ocean via groundwater. The Hawai'i Wildlife Fund brought suit against the County of Maui, under the citizen suit provision of the CWA, alleging that the County was violating the CWA by discharging treated effluent to the Pacific Ocean without a NPDES permit. A dye tracer test confirmed that these factual allegations were true; treated effluent from injection wells was reaching the Pacific Ocean via groundwater. However, the County of Maui argued that the discharges of treated effluent reaching the Pacific Ocean through groundwater did not constitute a CWA violation.

The Ninth Circuit adopted an expansive view of CWA jurisdiction, ruling that the injection wells were point sources under the CWA and that discharge of the treated effluent from the injection wells to waters of the United States via groundwater is an unpermitted discharge in violation of the CWA, "because 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." *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). The Ninth Circuit's opinion was guided, in part, by Justice Scalia's observation in Rapanos v. United States, 547 U.S. 715 (2006), that "the 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.

Similarly, in a split panel opinion issued on April 12, 2018, the Fourth Circuit relied on this observation by Justice Scalia to declare that, "[j]ust as the CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters, *Rapanos*, 547 U.S. at 743, neither does the Act require a discharge directly from a point source." *Upstate Forever v. Kinder Morgan Energy Partners, L.P., et al.* 887 F.3d 637 (4th Cir. 2018).

Kinder Morgan operates and owns an interest in the Plantation Pipe Line which transports petroleum products from Gulf States through and to southeastern states. In 2014, a section of the pipeline in South Carolina developed a crack which allowed the release of petroleum products into soil and groundwater. When the release was discovered, the South Carolina Department of Environmental Control ("DHEC") immediately began overseeing Kinder Morgan's efforts to define and address the after effects of petroleum in soil and groundwater. These efforts included Kinder Morgan's monitoring of nearby downgradient streams. Sometime after the release, after the pipeline had been repaired and placed back into service, petroleum constituents were detected in one of the streams, having been transported to the stream via soil and/or groundwater.

Upstate Forever and Savanah Riverkeeper sued Kinder Morgan and Plantation Pipe Line under the CWA citizen suit provision. The District Court dismissed the suit and the conservation groups appealed to the Fourth Circuit.

Citing to the recent Ninth Circuit decision, the Fourth Circuit explained that "the CWA is not limited to discharges of pollutants 'directly' from the point source to navigable waters." 887 F.3d at 648. The Fourth Circuit concluded that CWA jurisdiction extends to situations where there is a "direct hydrological connection" between contaminated groundwater and nearby navigable waters. 887 F.3d at 652. However, the Court appeared to recognize that this "direct hydrological connection" standard was pushing the bounds of the CWA, writing that "[w]e hold only that an alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of groundwater, falls within the scope of the CWA."[4] *Id.* Thus, the Fourth Circuit held that an accidental and wholly past one-time release of pollutants from a petroleum pipeline constituted an ongoing CWA violation because some of the pollutants were still being transported via soil and/or groundwater to navigable waters in the months and years after the pipeline stopped releasing pollutants.

However, the Fourth Circuit later rendered a somewhat conflicting opinion regarding the extent of CWA jurisdiction. Exactly five months after the *Kinder Morgan* decision, a different panel of Fourth Circuit Judges determined that arsenic, which is transported via groundwater to waters of the United States from a coal ash pond, does not fall within the scope of the CWA. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018).

For more than six decades Virginia Electric & Power Company, d/b/a Dominion Energy Virginia ("Dominion") operated a coal-fired power plant in Chesapeake, Virginia, that produced coal ash as a combustion by-product. Dominion stored the coal ash in onsite settling ponds and in a landfill pursuant to permits from the Virginia Department of Environmental Quality ("VDEQ"). VDEQ issued those permits pursuant to the CWA and the Resource Conservation and Recovery Act. The VDEQ permits included groundwater monitoring requirements and, in 2002, Dominion detected arsenic in groundwater that exceeded Virginia groundwater protection standards. Coal ash contains arsenic, as well as other metals, and water permeating through coal ash will dissolve some of those metals, eventually transporting them to surface waters via groundwater.

With VDEQ's approval, Dominion implemented a corrective action plan to address arsenic in groundwater. But in 2015, Sierra Club filed a CWA citizen suit against Dominion, alleging that the coal ash landfill and settling ponds were "point sources" contributing arsenic to "navigable waters" in the area of the power plant. Sierra Club alleged that arsenic in the coal ash was being transported to these "navigable waters" via groundwater.

The *Dominion* panel first applied the earlier Fourth Circuit ruling in *Upstate Forever*, finding that "the addition of a pollutant into navigable waters *via groundwater* can violate 1311(a) if the plaintiff can show 'a direct hydrological connection between [the] groundwater and navigable waters." 903 F.3d at 409. Thus, the court ruled against Dominion on this issue.

However, the *Dominion* panel also focused on the issue of whether the landfills and settling ponds are "point sources" as defined by the CWA. In a unanimous decision, the *Dominion* panel found that "the landfill and settling ponds do not constitute 'point sources' as that term is defined in the Clean Water Act." *Id.* at 406. Concluding a careful examination of the defined term "point source," the court determined that "while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters […] that simple causal link does not fulfill the CWA's requirement that the discharge be from a point source. […] At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, 'conveyance.'" *Id.* at 410.

However, the *Dominion* panel did not leave its analysis there. Instead, it further noted that "'[c]onveyence' is a well understood term; it requires a channel or medium – i.e., a facility – for the movement of something from one place to another." *Id.* The court then cited to *South Florida Water Management. District V. Miccosukee Tribe of Indians,* 541 U.S. 95, 105 (2004) for the proposition that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters'" *Id.* at 411. The *Dominion* panel then concluded that "[i]f no such conveyance produces the discharge at issue, the discharge would not be regulated by the Clean Water Act . . ." *Id.* at 411. Thus, *Dominion* appears to be at odds with Fourth Circuit precedent in *Upstate Forever* on the issue of whether the CWA prohibits an unpermitted discharge of pollutants to navigable waters via soil and/or groundwater.

More recently, a split panel of the Sixth Circuit rendered two decisions that would place limits on the scope of CWA jurisdiction that *Upstate Forever* and *County of Maui* rejected. One of those cases also involved coal ash ponds that were the subject of a citizen suit brought by Kentucky Waterways Alliance and Sierra Club against Kentucky Utilities Company. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d. 925 (6th Cir. 2018). The conservation groups alleged that the coal ash ponds were causing metals contamination in groundwater that subsequently discharged into a nearby lake. Kentucky Waterways wasted little time in decisively concluding that the CWA "does not extend liability" to pollution that reaches surface waters via groundwater. *Id.*at 933.

As a prelude to its determination, *Kentucky Waterways* observed that, in addition to the prohibition against unpermitted discharges of pollutants to navigable waters, "Congress also sought to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." *Id.* at 937 (quoting 33 U.S.C. 1251(b)). The Sixth Circuit paid particular attention to the fact the CWA "draws a line" between point-source pollution [] and non-point-source pollution." *Id.* at 929. This distinction is critical because point-source discharges are subject to Federal NPDES permitting requirements while non-point-source discharges "are within the regulatory ambit of the states." *Id.*

In *Kentucky Waterways*, the conservation groups argued that the coal ash ponds were point sources pursuant to the CWA and groundwater was merely the medium for transport of pollutants to navigable waters. The Sixth Circuit rejected both theories of CWA jurisdiction and, in so doing, expressly disagreed with both *Upstate Forever* and *Hawai'i Wildlife Fund.* In so doing, *Kentucky Waterways* determined that groundwater, whether present in karst formations or otherwise, is not a "point source" because "it is neither confined nor discrete." *Id.* at 933. "For that reason, the CWA's text forecloses an argument that groundwater is a point source." *Id.* at 934.

With respect to the "hydrological connection" theory of CWA liability, the Sixth Circuit leveled several critiques at decisions which have found that the CWA prohibits unpermitted discharges to navigable waters via hydrologically connected groundwater. The Court first observed that, when Justice Scalia noted, in his plurality *Rapanos* opinion, that the word "directly" does not appear in the CWA's definition of the term "discharge of a pollutant," he did so

in order to explain that pollutants which travel through multiple point sources before discharging into navigable waters are still covered by the CWA." *Id.* at 935- 936. Thus, according to *Kentucky Waterways*, Justice Scalia's quote has been taken out of context by both the Ninth and Fourth Circuits.[5]

Kentucky Waterways also panned reliance by some courts on the CWA's stated purpose of protecting the nation's water quality, because those courts "fail to recognize the CWA's corresponding purpose of fostering cooperative federalism." *Id.* at 938. As a parting critique of any expansion of the CWA to nonpoint-source pollution and non-navigable waters, *Kentucky Waterways* observed that such expansion would detrimentally impact the operation of RCRA, which contains a clear textual exclusion of all pollution that is subject to regulation under the CWA. In the context of *Kentucky Waterways,* this would mean that RCRA would not regulate coal ash in ponds that are found to be point sources under the CWA, a nonsensical and unworkable result, especially in light of EPA's Coal Combustion Residuals rule, promulgated under RCRA.

On the same day that *Kentucky Waterways* was decided, the same split panel of the Sixth Circuit also decided *Tennessee Clean Water Network et al. v. TVA* adopting – in the context of another CWA citizen suit involving a coal ash pond - the same analysis and arriving at the same conclusions found in *Kentucky Waterways*. 905 F.3d. 436 (6th Cir. 2018). In fact, TVA liberally quotes, references and cites to *Kentucky Waterways* in holding that "the hydrological connection theory is not a valid theory of liability." 905 F.3d. at 443.

Although the recent spate of Circuit Court decisions regarding the scope of CWA jurisdiction has resulted in significant interest and commentary, there are at least two earlier Circuit Court opinions that are well worth examining. More than two decades ago, the Seventh Circuit, in Village of *Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994), found that discharges into groundwater are not regulated by the CWA, even if that groundwater is hydrologically connected with surface waters. The plaintiff, in that case, sued to enjoin a construction project which would include a man-made retaining pond for collection of water with petroleum contaminants and other pollutants for exfiltration of the water and pollutants to the ground below the pond. The Seventh Circuit was clear: "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." *Id.* at 965.

Similarly, the Fifth Circuit determined that the Oil Pollution Act of 1990 ("OPA") does not authorize citizen suits for the discharge of petroleum into groundwater that is hydrologically connected to surface waters. In *Rice v. Harken Exploration Co.*, 250 F.3d. 264 (5th Cir. 2001), the Fifth Circuit observed that the textually identical definitions of "discharge" and "Navigable Waters" under the OPA and the CWA require the same analysis. Plaintiffs in Rice alleged that the defendant oil exploration company was discharging pollutants into nearby creeks and other "independent ground and surface waters." *Id.* at 265. But the Fifth Circuit observed that groundwater is not "within the class of waters protected by the CWA." *Id.* at 269. In addressing plaintiffs' contention that "discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water," the Fifth Circuit found that "'navigable waters' do not include groundwater." Id. at 271. Arguably, the Fifth and Seventh Circuits are already in line with Kentucky Waterways and TVA on whether the CWA prohibits discharges to groundwater which eventually reaches surface waters.

Defendants in *County of Maui* and *Kinder Morgan* both filed and briefed petitions for writ of certiorari with the Supreme Court in 2018 and the *County of Maui* petition has been granted in part. Specifically, the Supreme Court has agreed to consider "[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater."[6]

With the ideological Circuit split clear and, in fact, transparently articulated by the Sixth Circuit, it is perhaps unsurprising that SCOTUS has decided to address "[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." After all, deciding whether pollutants which reach surface waters via soil or groundwater are within the ambit of the CWA certainly seems to be a neatly circumscribed issue which should – in theory – turn on the text and legislative history of the CWA. However, despite the fact that, as some Supreme Court Justices have previously noted, "[t]he reach of the Clean Water Act is notoriously unclear," it does not seem likely that the CWA's ambiguous breadth will soon be resolved in its entirety. *Sackett v. EPA,* 132 S. Ct. 1367 (2012)(J. Alito concurring). See also *U.S. Army Corps of Engineers v. Hawkes Co.*, Inc. et al. 136 S.Ct. 1807, 1816 (2016)(J. Kennedy, J. Thomas and J. Alito concurring).

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[1] "The term "territorial seas" means the belt of seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." 33 U.S.C. § 1362(8).

[2] Civil penalties under the CWA can be as much as $53,484 per day (as last adjusted for inflation on January 9, 2018).

[3] In Clean Water Network et al. v. Tennessee Valley Authority, for example, the District Court ordered TVA to excavate 13.8 million cubic feet of coal ash.

[4] In a footnote, the Fourth Circuit saw "no functional difference between the Ninth Circuit's fairly traceable concept and the direct hydrological connection" standard that the Fourth Circuit adopted. 887 F.3d at 650 n.12. However, the Ninth Circuit had previously rejected the "direct hydrological connection" theory of CWA liability that had been touted by the EPA's amici brief in County of Maui. In so doing, the Ninth Circuit noted the absence of the words "direct" and "connection" in the text of the CWA and concluded that its "fairly traceable" standard was more in keeping with case law within the Ninth Circuit, even though the terms "fairly" and "traceable" are not found within the CWA either. 886 F.3d at 749 n.3.

[5] In a long footnote, the Sixth Circuit continued to denounce the "hydrological connection" theory of CWA liability by noting that, even if that theory were correct, Plaintiffs would still need to identify a "point source." But, because the coal ash ponds are not conveyances – "they do not 'take or carry [pollutants] from one place to another" – they cannot be point sources under the CWA. That this was the same analysis and conclusion found in Dominion, did not escape the Sixth Circuit, as several quotes from Dominion can be found in that footnote. 905 F.3d at 934 n.8.

[6] The Supreme Court has taken no action with regard to other issues presented by the County of Maui petition or the Kinder Morgan Petition