

Conduit Theory under the Clean Water Act

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In September, the US Court of Appeals for the Sixth Circuit ruled in *Tennessee Clean Water Network v. Tennessee Valley Authority*, that discharging pollutants into groundwater does not require a National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA). Although the Sixth Circuit has ruled against the conduit theory, there is a circuit split from prior decisions from the Ninth and Fourth Circuits that reach a different conclusion. The resolution to this circuit split may very well have to be decided by the Supreme Court and poses serious potential ramifications for agriculture and other industries.

The issue in question concerns the idea of “conduit theory.” This idea was highlighted and discussed in *Hawai'i Wildlife Fund v. County of Maui*, where the court determined that liability arises “as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.” The court’s interpretation and application of the conduit theory broadens the accepted definition of “point source” for purposes of the CWA. Point source under the CWA 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 (CAFO), or vessel or other floating craft, from which pollutants are or may be discharged.”

The Ninth Circuit Court agreed with the District Court in *Hawai'i Wildlife Fund* and held that unconfined groundwater can act as a conduit that indirectly carries pollutants into a navigable water of the United States (“WOTUS”). In applying this theory, the Ninth Circuit set forth three factors: (1) pollutants are directly discharged from a point source; (2) the pollutants are fairly traceable to the point where the discharge is the functional equivalent of a discharge into a navigable

water; and (3) pollutant levels reaching navigable waters are significant. In a similar case in the Fourth Circuit, the court also recognized the conduit theory and its application to the CWA.

The Sixth Circuit recently disagreed with the Fourth and Ninth Circuit Courts of Appeal and held that groundwater is not a point source. The Defendant in this case, Tennessee Valley Authority, operates a coal-fired electrical plant near the Cumberland River on a nearby lake. The plant disposes of its waste by using unlined, man-made coal ash ponds. It is from these coal ash ponds that the plaintiffs in this case allege that some of the discharge was making its way into the river through leaks in the coal ponds by way of the groundwater into the river, which is a jurisdictional water under the CWA.

The court ultimately rejected the plaintiffs' argument concerning the conduit theory and held that groundwater does not fit within CWA's scope. The court also held that while the CWA does not require pollutants to directly discharge into a navigable water, it only covers discharges from point sources as defined. The court stressed the importance of not misinterpreting the late Justice Scalia's statement in *Rapanos v. United States* where he said that "[t]he CWA 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."

The court here stated that Justice Scalia's statement in *Rapanos* was to make clear that intermediary point sources do not break the chain of causation for CWA liability; but that it did not address when a point source pollutes a nonpoint source (i.e. groundwater) which is at issue in this case. The court further added that groundwater polluting is regulated through other statutory means and would interrupt the statutory framework already provided for by federal and state regulations.

The result of this case is a circuit split amongst the courts with the interpretation and implementation of the CWA and its language. It is likely that the Supreme Court will review the conduit theory to determine whether it should apply to present and future regulations and litigation under the CWA.

SOURCES:

Haw. Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980 (D. Haw. 2012).

Haw. Wildlife Fund v. Cty. of Maui, 881 F.3d 754 (9th Cir. 2018).

Kentucky Waterways Alliance v. Kentucky Utilities Company, No. 18-5115 (6th Cir. 2018).

Tennessee Clean Water Network v. Tennessee Valley Authority, No. 17-6155 (6th Cir. 2018).

Rapanos v. United States, 547 U.S. 715 (2006).

Tenn. Clean Water Network, et al. v. Tenn. Valley Auth., No. 17-6155 (6th Cir. Sept. 24, 2018).

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

STATUTE:

33 U.S.C. § 1362. (“Clean Water Act”)

ADDITIONAL RESOURCES

Clean Water Act Reading Room (National Agricultural Law Center)