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Navigating Recent Court Decisions on Coal By-Products in Groundwater

By Katherine Walton – February 28, 2018

Much attention has been paid lately to the question of which waters are “navigable waters of the United States” subject to regulation under the Clean Water Act (CWA). However, several recent cases involving a different provision of the CWA—the definition of the term *point source*—could prove equally important in determining CWA jurisdiction, particularly for discharges of coal production by-products like coal ash and coal combustion residuals (CCR).

Pinpointing the Point Source

The CWA provides, in part, that the “discharge of any pollutant by any person shall be unlawful,” unless authorized by a permit under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. §§ 1311(a), 1342. *Discharge of a pollutant* means “any addition of any pollutant to navigable waters from any point source. . . .” 33 U.S.C. § 1362(12).

The CWA’s definition of *point source* includes “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.” *Id.* § 1362(14).

District Courts: Determining What Constitutes Point Source Discharges

Recent decisions by district courts in the Fourth and Sixth Circuits involving discharges of coal by-products through groundwater illustrate courts’ struggle to discern which coal-related discharges to groundwater are from “point sources” and thus subject to regulation under the CWA. Because it is generally true that groundwater alone is not “navigable” in the classic sense, the answer to this question can be a critical part of determining whether—and when—discharges to groundwater require an NPDES permit under the CWA.

In March of last year, a court in the Eastern District of Virginia held that coal ash piles at Dominion’s Chesapeake Energy Center in Chesapeake, Virginia, served as point sources for the discharge of arsenic into various creeks. *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017). In so holding, the court found that the coal ash piles “channel the pollutants away from the old power plant and directly into the groundwater” and are therefore “discrete conveyances of pollutants discharged into surface waters,” i.e., point sources under

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the CWA. *Id.* at 763. Because Dominion did not have an NPDES permit for discharges from the coal ash piles, the court ruled that it was in violation of the CWA. However, the court recognized that its finding was premised on a “novel” interpretation of the law and declined to impose civil penalties. *Id.* at 764.

Shortly after the court ruled in *Virginia Electric & Power Co.*, a court in the Eastern District of Tennessee similarly held that coal ash ponds at the Tennessee Valley Authority’s (TVA) Gallatin Fossil Plant constituted point sources under the CWA. *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2017). That court expressly found that “a cause of action based on an unauthorized point source discharge may be brought under the CWA based on discharges through groundwater, if the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced.” *Id.* at *44. Applying that standard, and relying in part on the court’s holding in *Virginia Electric & Power Co.*, the *Tennessee Clean Water Network* court found that even discharges from a dewatered ash pond system only exposed to water through precipitation were point source discharges. *Id.* at *47.

In contrast, in December, a court in the Eastern District of Kentucky rejected the *Virginia Electric & Power* and *Tennessee Clean Water Network* decisions, holding that Kentucky Utilities Co.’s handling, storage, treatment, transportation, and disposal of CCR at its E.W. Brown generating station was not subject to the CWA. *Ky. Waterways Alliance v. Ky. Utils. Co.*, 2017 WL 6628917, at *1 (E.D. Ky. Dec. 28, 2017). The court noted a split of authority, including the *Tennessee Clean Water Network* and *Virginia Electric & Power Co.* decisions, as to whether discharges to groundwater that are “hydrologically connected” to navigable waters constitute point source discharges under the CWA. Ultimately, the court answered that question in the negative, stating that to decide otherwise would subject virtually all groundwater discharges to the CWA—something that Congress explicitly declined to do when enacting the legislation. *Id.* at *11.

Ninth Circuit: Affirming District Court Ruling on Different Grounds

On February 1, 2018, the Ninth Circuit issued a decision affirming a district court finding of CWA liability in *Hawaii Wildlife Fund v. County of Maui*, No. 15-17447.

The district court in that case held that the county’s unpermitted discharge of wastewater from several injection wells violated the CWA where those discharges traveled through an aquifer that eventually discharged to the Pacific Ocean. *Haw. Wildlife Fund v. Cnty. of Maui*, 24 F. Supp.

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3d 980, 986 (D. Haw. 2014). The district court found that the injection wells constituted point sources because their eventual discharge to the ocean through the groundwater was a “confined and discrete conveyance” under the CWA. *Id.* at 1000. Interestingly, the district court also found that the groundwater to which the injection wells discharged was also, itself, a point source. *Id.* at 999.

In upholding the district court’s finding of CWA liability, the Ninth Circuit “assume[d] without deciding the groundwater here is neither a point source nor a navigable water under the CWA.” *Haw. Wildlife Fund v. Cnty. of Maui*, 2018 WL 650973, at *4 (9th Cir. 2018). Instead, the Ninth Circuit found the county liable based on the following:

(1) the County discharged pollutants from a point source [the injection wells], (2) the pollutants are fairly traceable from the point source to a navigable water [the Pacific Ocean] 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 *deminimis*.

Id. at *7.

The court cautioned that its “fairly traceable” finding was “an important one,” making clear its disagreement with the district court’s statement that “liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of how they get there.” *Id.* It is unclear whether other courts will adopt the Ninth Circuit’s “fairly traceable” test in considering whether a discharge is a point source discharge under the CWA.

Appeals in the Fourth and Sixth Circuits: Setting the Stage for a Circuit Split?

Both parties in *Virginia Electric & Power Co.* have appealed the district court’s ruling to the Fourth Circuit. As of January, that case was tentatively scheduled to be argued in March. TVA has appealed the district court’s decision in *Tennessee Clean Water Network* to the Sixth Circuit. Sierra Club and Kentucky Waterways Alliance also recently appealed the district court’s decision in *Kentucky Waterways Alliance* to the Sixth Circuit.

Forthcoming guidance from the Fourth Circuit in *Virginia Electric & Power Co.* and the Sixth Circuit in *Tennessee Clean Water Network* and *Kentucky Waterways Alliance* may provide additional clarity on whether and when discharges through groundwater constitute point source discharges requiring an NPDES permit under the CWA. However, it is just as likely that

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those decisions will result in a circuit split, leading to continued uncertainty until Congress or the Supreme Court takes up the issue.

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