

Environmental Law

Expert Analysis

Uncertainty About Hydrologically Connected Groundwater: NY Implications

Aging or absent sewers and other failing infrastructure, including pipes that carry wastewater to treatment plants, are contributing to water quality problems around the country, including across New York state. Although Gov. Andrew Cuomo recently signed legislation providing up to \$2.5 billion to help local governments address water quality needs, few people believe that this amount will be sufficient. After all, in January 2016, the U.S. Environmental Protection Agency (EPA) estimated that \$271 billion is needed to maintain and improve the nation's wastewater infrastructure. And earlier this year, State Comptroller

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Thomas P. DiNapoli cited the Department of Health's 2007 estimate that New York's water systems may require nearly \$40 billion in repairs and improvements over two decades.

Against this backdrop, it may be tempting to look to the federal Clean Water Act (CWA) to impose liability upon facilities that discharge pollutants to groundwater that is hydrologically connected to surface waters. The so-called "conduit theory" would extend the CWA to cover groundwater that serves as a conduit between an unpermitted discharge and regulated surface waters. This theory is not new. More than 20 years ago, the

Seventh Circuit concluded that even groundwater with a hydrologic connection to surface "waters of the United States" is not regulated by the CWA. *Vill. of Oconomowoc Lake v. Dayton Hudson*, 24 F.3d 962, 965 (7th Cir. 1994). The Fifth and First Circuits have reached similar results. See *D.E. Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001) and *United States v. Johnson*, 437 F.3d

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157 (1st Cir. 2006), vacated on other grounds, 467 F.3d 56 (1st Cir. 2006). However, because of recent and conflicting rulings, CWA liability based upon the conduit theory is receiving renewed attention. In this article

we explore these new developments and how CWA liability for discharges to groundwater might affect facilities in New York ranging from slurry pits, concentrated animal feeding operations, retention ponds, and septic systems to accidental spills.

Of course, the CWA prohibits the discharge of pollutants from point sources to “waters of the United States” unless the discharge complies with some provision in the statute. CWA compliance is most commonly achieved by securing a permit from EPA or an authorized state agency such as the New York Department of Environmental Conservation (DEC). Under the CWA, point source is defined as a “discernible, confined, and discrete conveyance.” The definition of “water of the United States” is the subject of immense controversy and confusion. Nevertheless, there is nearly universal agreement among courts, EPA and DEC that isolated groundwater which is not directly connected to a surface water body is not regulated by the federal CWA.

However, federal district courts are divided over whether the CWA prohibits discharges to groundwater when the subsurface receiving water is so closely connected to waters of the United States that it serves as a direct conduit to introduce pollutants to surface waters. Because the failure to have a permit for a regulated discharge can lead

to significant compliance obligations, material fines and penalties and can be enforced by private citizens, this unresolved question has far-reaching consequences. Since 2014, district courts in 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. For example, in *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798 (E.D.N.C. 2014) the court concluded that a complaint failed to state a

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CWA claim when it alleged that a power company released pollutants without a permit by allowing coal ash basins to seep into groundwater with a “close hydrologic flow” to a canal and then to a lake. In arriving at this conclusion, the court relied upon legislative history and agency interpretation to conclude that the CWA did not grant jurisdiction over discharges to groundwater “regardless of whether that groundwater is

eventually or somehow ‘hydrologically connected’ to navigable surface waters.” Id. at 809. However, since 2014, district courts, including at least Hawaii, the Middle District of North Carolina and Eastern District of Virginia, have reached the opposite conclusion. In *Hawai’i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014), the district court concluded that underground injection of wastewater from the county’s wastewater treatment facility was subject to the CWA because it had been demonstrated that this wastewater flows through a shallow groundwater aquifer and then emerges in the Pacific Ocean through submarine springs. The *Hawai’i Wildlife* court reasoned that an expansive view of the CWA was consistent with the statute’s remedial purpose. *Hawai’i Wildlife* is presently before the Ninth Circuit and is closely watched, in part because EPA filed an amicus brief in May 2016 that many believed reversed EPA’s prior stance by supporting the theory that the CWA provides jurisdiction over discharges to groundwater “with a direct hydrological connection” to surface waters but not where the connection is “too circuitous and attenuated.” The case is presently scheduled to be argued in mid-October.

A few states, including Colorado, Delaware and Oregon, regulate discharges to groundwater as part of

their delegated federal CWA permit programs. Most states, including New York, regulate discharges to groundwater under state law. In New York, the DEC relies upon authority granted to it by Article 17 of the Environmental Conservation Law to regulate some, but not all, discharges to groundwater. To further complicate matters, DEC has authorized Nassau and Suffolk Counties to issue permits for discharges to groundwater from private and institutional facilities and from some industrial facilities. However, like most states, New York does not apply surface water regulations to discharges to groundwater even if the groundwater has a direct hydrological connection to surface waters.

In 2013, a group of environmental organizations relied upon the conduit theory of CWA liability when they sued DEC for not requiring that several large institutional dischargers obtain surface water permits for large cesspools alleged to be discharging pollutants to groundwater that, in turn, had a direct hydrological connection to Long Island's Great South Bay. However, the dischargers in these cases agreed to properly abandon their large cesspools based, in part, upon DEC and EPA enforcement actions that were unrelated to the conduit theory or even the CWA. As a result, these cases were resolved before any New York court issued any substantive

ruling on the conduit theory of CWA liability.

To date, the Second Circuit has not spoken directly on CWA conduit liability. However, in a 2005 ruling on the scope of EPA's general permit governing concentrated animal feeding operations, the Second Circuit seemed to approve of precisely the case-by-case analysis of CWA jurisdiction over discharges to groundwater that EPA advanced in its amicus brief in *Hawai'i Wildlife*. See *Waterkeeper All. v. EPA*, 399 F.3d 486, 514 n 26 (2d Cir. 2005). As a result, the Second Circuit is viewed by some as favorably inclined towards the conduit theory where the facts demonstrate a direct hydrological connection.

On balance, cases rejecting CWA jurisdiction over hydrologically connected groundwater appear to be well grounded in the legislative history and statutory language and may represent the better-reasoned position. Indeed, adopting the conduit theory requires that courts and regulators overlook the requirement for a point source discharge which is a central feature of the CWA. Moreover, as a practical matter, attempting to apply the CWA to every discharge to groundwater that has the potential to seep into a surface water body in New York would severely tax DEC's resources and require many presently unregulated facilities and unpermitted

discharges across all sectors of the economy and all corners of the state to obtain permits. However, if the Ninth Circuit upholds the ruling in *Hawai'i Wildlife*, it is likely that a wide variety of interest groups will advocate for expanding the reach of the CWA. Indeed, until the Second Circuit and ultimately the Supreme Court decide whether or not the discharge of pollutants into hydrologically connected groundwater is subject to the CWA, the conduit theory of liability could become increasingly common in both government actions and private litigation in New York.