

Citizen Suit Enforcement/Clean Water Act: Federal Appellate Court Addresses Whether Pond Leakage Constitutes a Direct Discharge



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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in a recent opinion whether a Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit should have been obtained by a water and sewer district serving a Montana resort. See *Cottonwood Environmental Law Center v. Edwards*, 86 F.4th 1255 (Nov. 21, 2023).

The question considered was whether wastewater stored in the holding ponds that leak into the groundwater and flow into a river trigger NPDES permitting.

Plaintiff-Appellant Cottonwood Environmental Law Center (“Cottonwood”) filed a Clean Water Act citizen suit action against Defendant Big Sky Water & Sewer District No. 363 (“District”) for its alleged direct-discharge of treated wastewater into a water of the U.S. (i.e., a river) without a permit. The United States District Court (“Lower Court”) questioned Cottonwood’s direct-discharge theory because any leakage from the ponds had to move through an aquifer (not a water of the U.S.) before reaching the river.

The District provides water and wastewater services to a resort in Montana. Wastewater is stored in three holding ponds to use for irrigation of nearby properties. An underdrain is used to collect natural groundwater. The collected groundwater travels in pipes that enter West Fork of the Gallatin River.

Cottonwood alleged the ponds and the underdrain constitute “point sources” of pollution that transfer nitrogen (i.e., a pollutant) to the river.

A Clean Water Act NPDES permit must be obtained if five jurisdictional elements are met:

- A person
- Adds a
- Pollutant
- To navigable waters (waters of the United States)
- From a point source

The Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, concluded that discharges of pollutants into groundwater eventually reaching navigable waters still require a Clean Water Act permit if such indirect discharges are the “functional equivalent of a direct discharge from the point source into navigable waters.” 140 S. Ct. 1462, 1478 (2020).

The Supreme Court stated that:

. . . as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into the navigable waters . . . (the discharge is encompassed by the NPDES permitting requirements).

Cottonwood argued on appeal that the Lower Court erred in its holding that the District's underdrain pipe discharge of pollutants did not constitute a point source. This determination precluded Cottonwood from using a direct-discharge theory at trial. Instead, Cottonwood was required to pursue an indirect-discharge theory (i.e., *Maui*). This added additional elements to the burden of proof.

Since the underdrain pipe does not transport pollutants between "meaningfully distinct water bodies," the Ninth Circuit determined there was no discharge of a pollutant. The meaningfully distinct water bodies test evaluates the relationship between the source water and receiving water to determine if the waters are meaningfully distinct. *S. Fla. Water Mgmt. Dist. V. Miccosukee Tribe of Indians*, 541 U.S. 95, 111-12 (2004). If the source water and receiving water are not meaningfully distinct, then there is no discharge of pollutants. *ONRC Action v. US Bureau of Reclamation*, 798 F.3d 933, 937 (9th Cir. 2015) (quoting *L.A. Cnty. Flood Control Dist. V. Nat. Res. Def. Council*, 133 S. Ct. 710, 713 (2013)).

The water in the aquifer below the holding ponds would reach the river regardless of the underdrain pipe. Therefore, the source water and the receiving water were not meaningfully distinct. Instead, they were deemed a hydrologically connected waterbody.

The Ninth Circuit therefore affirmed the Lower Court's determination that the direct-discharge theory is inapplicable. Cottonwood may only pursue indirect-discharge theory of liability against the District, presumably using the guidance provided by *Maui*.

A copy of the opinion can be downloaded [here](#).