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Does a Discharge to Groundwater Require an NPDES Permit?: Jordan Wimpy (Mitchell Williams) Arkansas Environmental Federation Conference Presentation

10/05/2018

My law firm colleague Jordan Wimpy undertook a presentation at the October 4th Arkansas Environmental Federation Annual Conference titled:

Does a Discharge to Groundwater Require an NPDES Permit? ("Presentation")

Jordan's *Presentation* discussed the federal developing judicial case law addressing whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act National Pollution Discharge Elimination System ("NPDES") permitting requirements.

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are present:

- A person
- adds a
- pollutant
- to navigable waters
- from a point source

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

The scope of the term "waters of the United States" from a Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact that it is also relevant to non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, whether, and to what extent, a discharge of pollutants into groundwater can potentially encompass this term is a significant issue.

Jordan's *Presentation* first reviewed the key jurisdictional terms, including certain exemptions from the permitting scheme.

The specific question he then addressed was:

Whether the Clean Water Act's permitting requirement is confined to discharges from a point source to navigable waters, or whether it applies to discharges into soil or groundwater whenever there is a "direct hydrological connection" between the groundwater and nearby navigable waters.

Of particular importance is Jordan's discussion of a number of recent federal judicial decisions that have discussed this issue. They are stated to include:

- *Hawai'i Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir., Feb. 1, 2018), *petition for cert. filed*, No. ____ (U.S. Aug. 27, 2018)
- *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir., Apr. 12, 2018), *petition for cert. filed*, No. ____ (U.S. Aug. 28, 2018)
- *Sierra Club v. Virginia Electric and Power Co.*, *slip opinion*, No. 17-1952, (4th Cir., Sept. 12, 2018)
- *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 2017 WL 6628917 (E.D. Ky, Dec. 28, 2017), *appeal pending*, No. 18-5115 (6th Cir.)
- *Tennessee Clean Water Network v. TVA*, 273 F. Supp. 3d 775 (M.D. Tenn Aug. 4, 2017), *appeal pending*, No. 17-6155 (6th Cir.)
- *26 Crown Associates, LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506 (D. Conn, Jul. 11, 2017), *appeal pending*, No. 17-2426 (2nd Cir.)

Each case is discussed with denominating headings, which include:

- Underground injection well
- Underground pipeline
- Coal Ash Pond/Landfill
- Combined Sanitary Sewer Overflow

Jordan concludes that "confusion persists and theories abound" and summarizes the debate as:

Direct Hydrological Connection vs. Fairly traceable and more than *de minimis*.

He further notes that the *Maui* case is the first petition to reach the United States Supreme Court. The facts of the case are characterized as "tough." EPA's position is stated to be that a discharge "that moves through groundwater with a direct hydrological connection [to surface water] comes under the purview of the Clean Water Act's NPDES permitting requirements.

The *Presentation* also included a chart addressing each of these cases.

A copy of the slides from the *Presentation* can be found [here](#).