

Hot Topics in Clean Water Law

December 16, 2015



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Regulating Groundwater Via the Conduit Theory: Key Background to this Emerging Issue

NACWA Hot Topics in Clean Water Law Web Seminar
December 16, 2015

PRESENTED BY

Shawn Hagerty
Best Best & Krieger LLP

Overview

- Provide key background information about the emerging conduit theory that seeks to extend the NPDES program to groundwater.
- Important points:
 - WOTUS.
 - Point source.
 - Indirect discharge or “functional equivalent” of a discharge.
- Introduce the importance of the issue to POTW’s and other entities that manage or discharge to groundwater.

What Does the Act Say (Or Not Say) About The NPDES Program and Groundwater?

- The Act does not expressly extend the NPDES program to groundwater.
 - Groundwater expressly included in other portions of the Act.
- Legislative history of the Act and subsequent amendments suggest that groundwater is not included in NPDES program.
 - Groundwater management left to the States.

What Does the Act Say (Or Not Say) About Groundwater As A Conduit?

- “Point Source” means any discernible, confined and discrete conveyance, including but not limited to any . . . conduit . . . from which pollutants are or may be discharged. (33 U.S.C. § 1362(14).)
 - Conduit not defined in the Act.
 - Common definitions:
 - A channel or pipe for conveying fluids.
 - A tube or duct for enclosing electric wires or cables.
 - “Non-point source”.

What Does EPA Say About Groundwater and the NPDES Program?

- 2015 Clean Water Rule.
- 1973 Opinion of Office of General Counsel.
- Prior Regulatory Statements.
 - 1973 and 1979 regulations.
 - 1990 Preamble to NPDES Permit Regulation of Storm Water Discharges.
 - 2001 CAFO regulations.

What Do the Reported Cases Say About Groundwater and the NPDES Program?

- Different conclusions reached about groundwater and NPDES program.
 - NPDES program does not apply to groundwater, even when hydrologically connected to surface waters.
 - NPDES program applies to groundwater when hydrologically-connected to surface water.
- Point source/non-point source/conduit cases.

Conclusion

- Policies of the Act versus language of the NPDES program.
- WOTUS rule and emerging issues.



Regulating Discharges to Groundwater via Conduit Theory

Hot Topics in Clean Water Law Web Seminar (NACWA)

December 16, 2015

Samuel L. Brown

Case Law

- 40+ Federal Circuit Court and District Court decisions on CWA liability and groundwater.
- *Summary*: all over the place.
 - Result
 - Analysis
- *Focus*: hydrologically connected groundwater.
 - Isolated groundwater
 - Water of the United States
 - **“Discharge of a Pollutant”**

County of Maui

- *Haw. Wildlife Fund v. Cnty. of Maui*, 24 F. Supp. 3d. 980 (D. Haw. 2014); *Haw. Wildlife Fund v. Cnty. of Maui*, 2015 WL 328227 (D. Haw. Jan. 23, 2015).
 - Domestic wastewater, secondary treatment+
 - 4 injection wells dispose of treated effluent
 - Class V SDWA UIC permits (EPA and State)
 - eNGO CWA citizen suit

County of Maui

- District court on motions for summary judgment found the County liable under the CWA.
 - Injection well disposal 200+ feet into the ground is a “discharge of a pollutant” that requires an NPDES permit.
 - Migration of groundwater into ocean.

County of Maui

- “Conduit Theory”
 - The disposal into the injection well is “functionally equivalent” to discharge.
 - Not using “conduit” as used in point “source.”
 - Does not matter “how” pollutants enter navigable waters.
 - EPA statements and District Court decisions.
 - No Circuit Court or CWA text for support.

County of Maui

- Ninth Circuit appeal (*pending*)
- Amicus curiae coalition
- *Question:* my system doesn't use injection wells, why should I care about this decision or theory of CWA liability?

Pipelines and Groundwater

- *Chevron USA v. Apex Oil*, 2015 WL 6408191 (D. Md. Oct. 20, 2015)
 - Pipeline leak, groundwater migration, entered navigable water.
 - No liability, hydrologically connection groundwater not water of the United States.
- *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997)
 - Pipeline leak, groundwater migration, entered navigable water.
 - CWA liability, “regulates pollutants that enter [navigable waters] either directly or through groundwater.”

Pipelines and Groundwater

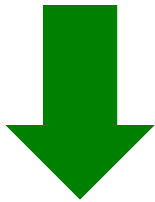
- *California River Watch v. E. Mun. Water Dist.*, No. 15-cv-01079 (C.D. Cal.)
 - Sanitary sewer pipeline *exfiltration*
- *Question*: the concern is *infiltration* into my collection system, not exfiltration, why should I care about this decision or theory of CWA liability?

Wastewater Ponds

- *Yadkin Riverkeeper v. Duke Energy Carolinas*, 2015 WL 6157706 (M.D.N.C. Oct. 20, 2015); *Sierra Club v. Virginia Elec. and Power Co.*, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015).
 - Wastewater pond, groundwater migration.
 - CWA regulates “pollutants [that] travel from a point source to navigable waters through hydrologically connected groundwater serving as a conduit between the point source and the navigable waters.” *Yadkin* at 10.

Case Law

- Injection wells; leaky pipelines; wastewater ponds



- Green infrastructure/LID; saltwater intrusion barriers; leaky infrastructure; compost facilities; percolation ponds and other groundwater recharge infrastructure; cesspools and septic systems; etc.

Encouraging Collaboration (and Cost Sharing) with Unpermitted and Disinterested Pollutant Contributors

Christopher 'Smitty' Smith
NACWA – Hot Topics in Clean Water Law Web Seminar
December 16, 2015



- **Brief Overview:** Strict Liability Operation of the CWA
- **The Problem:** Permittees Are Strictly Liable for Unpermitted Pollutant Contributors
- **Potential Solution:** Joint and Several Liability Through Contribution
- **Words of Caution:** Litigation Approach to a Regulatory Problem
- **Applying the Solution to Common Circumstances**

BRIEF OVERVIEW

CWA

- CWA relies on federally mandated permits issued under the NPDES program to regulate discharges of pollutants into waters of the US
- Most common types of NPDES permits include:
 - MS4
 - Industrial
 - Construction
 - Dredge and Fill



- Violations of NPDES permits invite both public and private enforcement actions
- Public enforcement undertaken primarily by State Regulators, but can also be undertaken by USEPA and USACE
- Private enforcement undertaken by primarily by environmental non-governmental organizations





- NPDES permit violations are subject to strict liability
- Strict Liability is absolute liability regardless of fault or contribution
- Remedies for NPDES permit violations include:
 - Civil penalties (administrative and judicial)
 - Criminal sanctions
 - Equitable relief
 - Injunctive relief
 - Attorney fee and cost recovery

BRIEF OVERVIEW

Penalties

- Penalties can be up to \$37,500 per violation
- Penalties are assessed per day for each violation (MS4/Industrial/Construction)
- Penalties are assessed per day of discharge/dredge/fill takes place or any day dredge/fill is allowed to remain in waters of the United States (Dredge and Fill)
- Civil penalties can accumulate quickly
- No real bargaining power with regulators
- Citizen-plaintiffs use as tool to leverage settlement
- **Bottom Line:** it can get expensive quick

THE PROBLEM

Permittees Strictly Liable for Unpermitted Contributors

- Monitored/Sampled effluent frequently routinely includes contributions from unpermitted contributors
- Unpermitted contributors typically include adjacent, upriver, or upgradient operations and properties
- How do you motivate unpermitted contributors?
- Regulators have inherent limitations
- CWA provides no help
- No commonly utilized legal theory to resolve the problem...until NOW!



POTENTIAL SOLUTION

Joint and Several Liability through Contribution

- Joint and several liability is a legal theory where multiple people can be held responsible for one event
 - **Example: an exceedance**
- How to achieve joint and several liability...CONTRIBUTION
- Contribution is assigning a proportional share of blameworthiness
- Contribution is a legal claim that can be found expressly (e.g., CERCLA) or impliedly (e.g., CWA)
- CWA contains no express provision for contribution or joint and several liability
- It must be implied then!!!

Joint and Several Liability through Contribution

- Two cases have done just that
 - Mid-Valley Pipeline Co. v. S.J. Const., Inc., 847 F. Supp. 2d 982 (E.D. Ky. 2012)
 - U.S. v. Savoy Senior Housing Corp., No. 06-cv-031, 2008 WL 631161 (W.D. Va. March 6, 2008)
- Of those two cases, Mid-Valley is the most instructive
 - Savoy reached same conclusion, but did not engage in same careful consideration as did court in Mid-Valley
- Mid-Valley walks step-by-step through analysis carefully considering and applying well-accepted legal principles

POTENTIAL SOLUTION

Joint and Several Liability through Contribution

- **Step 1:** accept that any right to contribution will arise solely as an implied right
- **Step 2:** look to federal/state common law for basis to allow pursuit of implied right
 - Mid-Valley found discharges into WOTUS are a unique federal interest that provide basis to allow pursuit of implied right
- **Step 3:** identify federal/state statute that involves similar circumstances and courts have allowed pursuit of implied right
 - Mid-Valley analogized CWA to CERCLA where express and implied contribution are routinely utilized
- 3 Steps – it's that simple.

- Relatively new and untested approach
- However, that's not uncommon given the circumstances in which the approach is applied
- No guarantees of success, but a useful tool that's readily available



APPLYING THE SOLUTION TO COMMON CIRCUMSTANCES

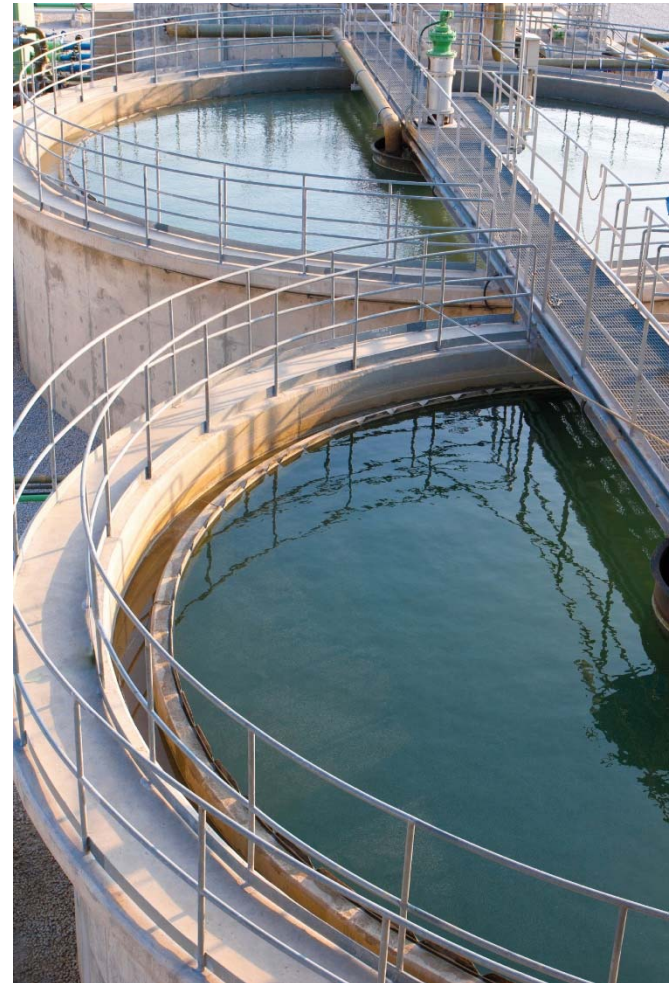
General Principles

- Engage unpermitted contributors early and often
- Regulators can aid you in engaging unpermitted contributors
- Interested environmental organizations can provide free labor
- Carefully balance all interests involved (**these are your neighbors after all**)
- Involve environmental professionals in the process
- Avoid litigation to the extent possible

APPLYING THE SOLUTION TO COMMON CIRCUMSTANCES

Administrative Application (MS4)

- **Circumstances:** MS4 permit negotiations dealing with accumulation of effluent and stormwater from both permitted and unpermitted contributors
- Regulators lack support necessary to engage unpermitted contributors
- MS4 permittees strictly liable for contributions from unpermitted contributors
- **Solution Application:** identify and engage unpermitted contributors in order to involve in negotiation of MS4 renewal
- **Solution Results:** increased collaboration and cost sharing



APPLYING THE SOLUTION TO COMMON CIRCUMSTANCES

Judicial Application (Citizen-Suit)

- **Circumstances:** Citizen-suit against permitted industrial facility dealing with its own contributions as well as contributions from surrounding facilities and properties
- Citizen-plaintiff lacks interest or support necessary to pursue unpermitted contributors
- Industrial Facility strictly liable for offsite contributions
- **Solution Application:** identify and pursue through interpleader offsite contributor in litigation
- **Solution Results:** increased effort and costs for citizen-plaintiff (possibly motivating settlement) and cost sharing



Potential Solution in Summary

- Tool to engage unpermitted pollutant contributors in permit negotiations and cost recovery
- Relatively simple approach for CWA permittees
- Accepted and unchallenged solution
- Minimal costs for solution implementation
- Regulators may appreciate private efforts to engage unpermitted contributors

Contact Info



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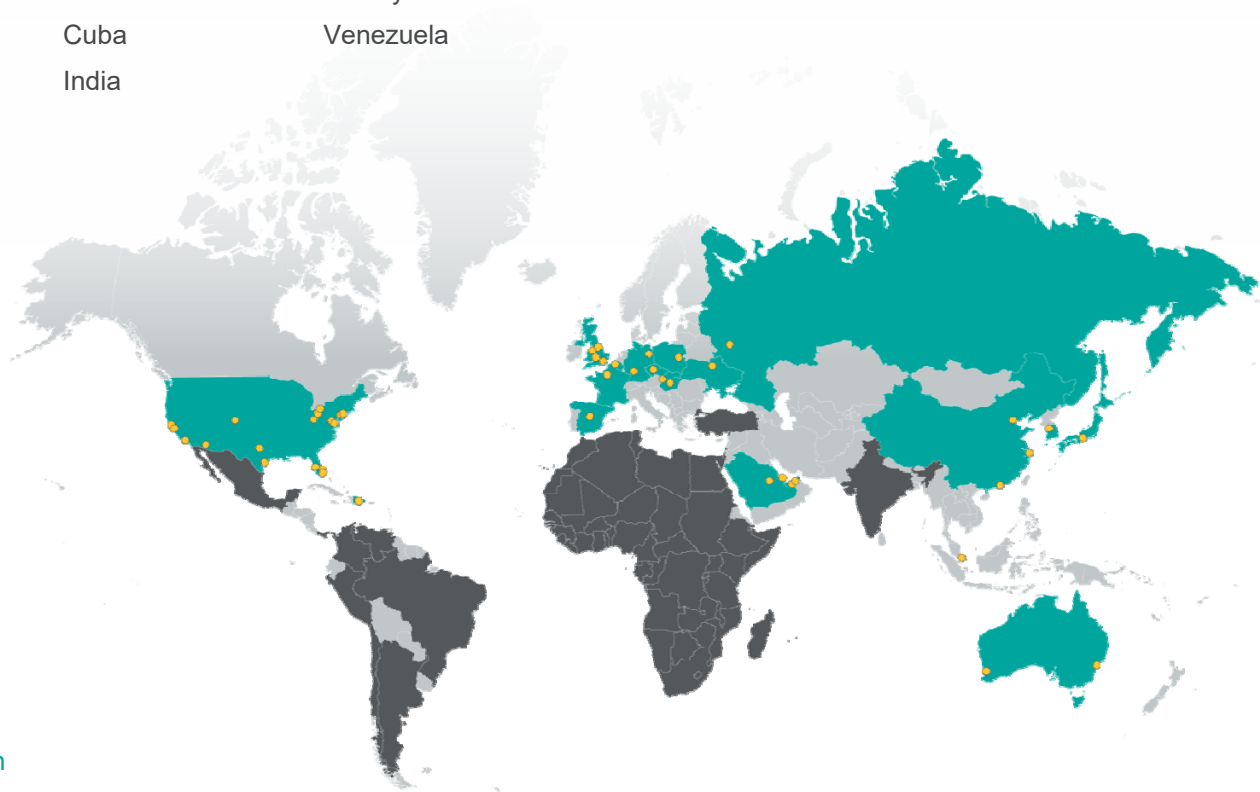
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■ Office locations

■ Regional desks and strategic alliances



A blue ribbon banner with a central rectangular box containing the text "Save the Date!".

Save the Date!

Hot Topics in Clean Water Law

March 16, 2016
2:00 – 3:30 pm

The NACWA logo, featuring the acronym "NACWA" in a large, blue, sans-serif font. Below it, the tagline "A Clear Commitment to America's Waters" is written in a smaller, blue, sans-serif font. The logo is positioned on the right side of the slide, above a decorative blue wave graphic.

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