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Dead Zones & Drinking Water: Updates on Waters of the U.S., Part 1

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A previous series of articles discussed water quality and environmental issues relevant, or potentially of concern, to agriculture (see e.g., *farmdoc daily*, April 6, 2017; February 9, 2017; March 24, 2016). In a return to the topic, recent developments on matters of water quality will be discussed in two articles. On February 14, 2019, the Environmental Protection Agency and the Army Corps of Engineers published a proposed rule for defining the waters of the United States for purposes of the Clean Water Act; the proposed rule is open for public comment until April 15, 2019 (Office of the Federal Register, February 14, 2019). Additionally, a recent decision by the Ninth Circuit Court of Appeals on a case out of Hawai'i will soon be heard by the Supreme Court regarding permitting under the Clean Water Act (*Hawai'i Wildlife Fund v. City of Maui*; Gilmer, February 19, 2019). This article reviews the lawsuit under the Clean Water Act that will soon be heard by the Supreme Court.

Background

What is commonly referred to as the Clean Water Act (CWA) was a comprehensive overhaul of the Federal Water Pollution Control Act by Congress in 1972 (P.L. 92-500; S. Rept. 92-1236). With the CWA, Congress's objective was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. §1251; P.L. 92-500, Sec. 101). The basic method for achieving this objective was to prohibit the discharge of a pollutant from a point source to the navigable waters of the United States, unless the person received a National Pollutant Discharge Elimination System (NPDES) permit (*Hawai'i Wildlife Fund*).

Among the many CWA issues litigated before the Supreme Court is that of what constitutes the navigable waters of the U.S. In the statute, Congress defined the term navigable waters as "the waters of the United States, including the territorial seas" (33 U.S.C. §1362(7)). In the conference report for the bill, the conferees instructed that they "fully intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes" (S. Rept. 92-1236, at 144). For a long time, federal courts—

including the Supreme Court—agreed that the term navigable waters was expansive; it was to be interpreted so as to provide the lead federal agencies (the Environmental Protection Agency and the Army Corps of Engineers) extraordinarily broad authority and jurisdiction to protect water quality and aquatic ecosystems (*United States v. Riverside Bayview Homes, Inc.*; *SWANCC v. United States Army Corps of Engineers*). For example, the Supreme Court understood that Congress had "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term" (*Riverside Bayview Homes*, at 133).

In an unusual and controversial opinion in 2006, the Supreme Court substantially confused this matter. Justice Scalia wrote an opinion that sought to limit the definition of, and the federal jurisdiction over, navigable waters (*Rapanos v. United States*). Justice Scalia's opinion achieved only a plurality (i.e., four votes: Justice Scalia, Chief Justice Roberts, Justice Thomas and Justice Alito) matched by a dissenting opinion that also achieved only four votes (Justice Stevens, Justice Souter, Justice Ginsburg and Justice Breyer). Justice Kennedy produced his own opinion rather than joining either side. Failing to reach a clear outcome, the split (four to four to one) or plurality opinion by the Supreme Court created substantial uncertainty about the full scope of the statute going forward. As will be discussed in the subsequent article, the recent proposed rule is the latest attempt to bring certainty to the matter.

It does remain clear, however, that the impact of pollution on navigable waters has not been limited to navigability. Courts have consistently recognized that pollution loads in non-navigable tributaries impact the water quality of navigable in fact waters and can be subject to the CWA. Thus, the law has been subject to an ongoing debate about hydrological connections and whether those connections are significant enough to warrant regulation under the statute.

Discussion

The Ninth Circuit Court of Appeals addressed one such related issue involving a wastewater reclamation facility operated by the County of Maui, Hawai'i that injects up to five million gallons of wastewater each day into wells connected to a groundwater aquifer (*Hawai'i Wildlife Fund*). Research found that a majority of the treated effluent injected into the aquifer migrated to the Pacific Ocean and was causing damage to local coral reefs. The Hawai'i Wildlife Fund sued, alleging a violation of the CWA's prohibition against discharges into navigable waters from a point source. Although the discharge in this case was to the groundwater, not to a navigable in fact water, the groundwater had a direct hydrological connection to the Pacific Ocean.

The court concluded that the CWA covers indirect discharges and that the County of Maui was liable for discharging a pollutant from a point source without an NPDES permit. A brief tour through decisions by other courts supported the decision. First, from New York in 1994 and in the agricultural context: the "collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges" (*Concerned Area Residents for Environment v. Southview Farms,* at 119). The direct connection between the field and navigable water was the basis for liability even if the field itself was not a point source. Similarly, the court found support for the indirect discharge theory under the CWA from a case where pesticides sprayed into the air by trucks and helicopters "constituted a point source" although any discharge to navigable waters was indirect (*Hawai'i Wildlife Fund*, at 747 (quoting, *Peconic Baykeeper, Inc. v. Suffolk County*)).

What matters is the combination of human activities that discharge pollutants and a natural connection that transports those pollutants to waters; the natural processes become part of a system of discharging pollutants. For example, in a case involving mining sediment collection basins it was "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge" where the human activity "at least initially collected or channeled the water and other materials" but the pollutants were carried to navigable waters by flowing rainwater (*Sierra Club v. Abston Construction*, at 45). Similarly, where "precipitation flow[ed] into a stormwater drain system before entering the ground and, eventually, the surface water" the combined system "constituted a point source discharge" because the stormwater drainage was "exactly the type of collection or channeling contemplated by the CWA" (*Greater Yellowstone Coalition v. Lewis*, at 1152).

The court in the *Hawai'i Wildlife Fund* case noted that the injection wells were "more akin to the stormwater drain system in *Greater Yellowstone*" and that the county had collected and channeled "the pollutants in its wells and injected them into the ground, where they were carried away from the wells by the gravity flow of the groundwater" to the Pacific Ocean (*Hawai'i Wildlife Fund*, at 746-47). The groundwater flows from the wells to the Pacific Ocean were therefore in line with other indirect discharges: the field in *Southview Farms*; the basins in *Abston Construction*; the stormwater drainage system in *Greater Yellowstone;* and the pesticide applicators in *Peconic Baykeeper*. The court specifically did not decide whether groundwater is a "navigable water" under the statute and did not apply Justice Kennedy's significant nexus test from the *Rapanos* decision. Instead, the court relied on Justice Scalia's plurality opinion in which the justices rejected the proposition that the pollutant must be discharged *directly* into the navigable waters (*Hawai'i Wildlife Fund*, at 748-9). In sum, the pollutants were "fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water" (*Id.*, at 749). The county had thus "discharged the pollutants into a navigable water from a discrete source" constituting point source pollution for which "the polluter must obtain an NPDES permit if it wants to avoid liability under the CWA" (Id., at 750-1).

While the *Hawai'i Wildlife Fund* dispute was working its way through the court system, two other cases were being litigated in South Carolina and Kentucky. The South Carolina case involved the rupture of an underground gasoline pipeline and the subsequent migration of the gasoline via groundwater to various wetlands and eventually into several traditionally navigable waters (*Upstate Forever v. Kinder Morgan Energy Partners, L.P.*) The pipeline was, without question, a point source. The issue was whether this migration via groundwater and thus indirectly to traditionally navigable waters fell within the Clean Water Act. The court held that the statute does not require a direct discharge from a point source into navigable waters, but rather a direct hydrological connection between groundwater and navigable waters is sufficient for liability to attach (*Id*., at 652-3).

The Kentucky case, however, distinguished the reasoning in the *Upstate Forever* and *Hawai'i Wildlife Fund* cases, holding that groundwater is not a point source and the Clean Water Act does not regulate pollutants traveling through nonpoint sources en route to navigable waters—the discharge of the pollutant into traditionally navigable waters must come from a point source, not groundwater (*Kentucky Waterways Alliance v. Kentucky Utilities Co.*, at 934) At issue was a coal ash pond (a point source) that was leaking pollutants into groundwater that flowed to surface water (navigable waters).

The split in legal analysis among these three cases prompted the Supreme Court's decision to review the *Hawai'i Wildlife Fund* case in order to specifically determine whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater

Concluding Thoughts

For agriculture, the *Hawai'i Wildlife Fund* case adds to the difficult questions raised by Des Moines Water Works in its lawsuit against upstream farm drainage districts. The Des Moines Water Works case was dismissed on a technicality and the court did not reach a substantive decision on the CWA question (*farmdoc daily*, April 6, 2017). That key question for agriculture remains unanswered: whether nutrient losses from farm fields collected and channeled through a manmade system of drainage are excluded as agricultural stormwater runoff or whether they are discharges of pollutants, subject to regulation and permitting under the CWA (*farmdoc daily*, March 24, 2016). The Ninth Circuit decision from *Hawai'i Wildlife Fund* provides for concern if the Supreme Court affirms the reasoning of the courts of appeal in the Hawai'i and South Carolina cases, decisively bringing indirect discharges under the purview of the CWA. In light of this potential line of legal precedent, the application of fertilizer would appear to be a point source discharge, as would the discharge from the end of tile lines and drainage ditches. Rainwater and runoff from a farm field may remain a nonpoint source, but the clarity of the exemption provided to agricultural stormwater discharges in the CWA may be muddied for the pressing issues concerning fertilizer applications and nutrient losses from drainage systems.

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