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WATER POLLUTION

CLEAN WATER ACT

The Environmental Protection Agency and the Army Corps of Engineers are in a position to attempt to resolve a growing division among courts over whether the Clean Water Act provides jurisdiction over groundwaters. However, an EPA draft proposed rule sent to the Office of Management and Budget last year does not conclusively resolve whether ''waters of the United States'' may include groundwaters, which is likely to result in more litigation over this issue. If the draft proposed rule leaves the OMB without revision, interested parties should use the comment period to force action from the EPA and the corps on the Clean Water Act's jurisdiction, the author says.

Does the Clean Water Act Provide Jurisdiction Over Groundwaters?

By Brian G. Glass

Late last year, the U.S. District Court for the Eastern District of Pennsylvania quietly joined the long list of courts concluding that groundwaters are not ''navigable waters'' under the Clean Water Act. As the court acknowledged, however, there is a comparably long list of courts that have reached the opposite conclusion, at least with respect to groundwaters that are ''hydrologically connected'' to navigable waters. These decisions are likely to remain relevant because the Environmental Protection Agency and the Army Corps of Engineers appear to be foregoing an opportunity to try to resolve this issue in their regulations.

In *Tri-Realty Co. v. Ursinus College*, the owner of a residential apartment complex brought an action against a neighboring college. The owner alleged that underground storage tanks located on the college campus had leaked heating oil, which has migrated through the subsurface soil and contaminated its property as well as the Perkiomen Creek and one of its tributaries, Bum Hollow Run. Among other causes of action, the owner asserted a claim under the Oil Pollution Act (OPA). In connection with that claim, the owner alleged that the oil has contaminated groundwater that is ''hydrologically connected to Bum Hollow Run and to the Perkiomen Creek.'' The college moved to dismiss several of the owner's claims, including the OPA claim.[1]

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Court Finds No Jurisdiction Over Groundwaters. The OPA imposes liability on ''each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines . . . .'' Like the Clean Water Act, the OPA defines ''navigable waters'' as ''the waters of the United States, including the territorial sea.'' In light of their textually identical definitions and based on the legislative history of the OPA, courts have concluded that Congress intended the term ''navigable waters'' to have the same meaning in the OPA that it has in the Clean Water Act.

[1] *Tri-Realty Co. v. Ursinus Coll.*, 2013 BL 325454, E.D. Pa., No. 11-5885, 11/21/13; *see* 2013 WLPM, 12/4/13.

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Neither the OPA nor the Clean Water Act defines the term ''waters of the United States,'' but the EPA and the corps have broadly defined the term in their Clean Water Act regulations.

In deciding the motion to dismiss, the *Tri-Realty* court, while acknowledging that ''[c]ourts are divided as to whether groundwater is appropriately regulated as 'waters of the United States' under the CWA or the OPA,'' ultimately concluded that ''Congress did not intend either the CWA or the OPA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters.'' The court found support for its conclusion in the language and legislative history of the Clean Water Act. The court noted that ''Congress refers to 'navigable waters' and 'ground waters' as separate concepts in various Subchapters of the CWA'' but ''uses only the phrase 'navigable waters' '' in those Subchapters addressing water quality and discharge permitting. The court also noted that prior to passing the Clean Water Act, Congress had rejected certain bills and an amendment that would have expressly provided jurisdiction over groundwaters. As further support for its conclusion, the court cited the reasoning in the landmark U.S. Supreme Court case *Rapanos v. United States*, 547 U.S. 715, 62 ERC 1481 (2006), which it observed ''does not endorse a broad interpretation of the term navigable waters.'' Because the *Tri-Realty* court determined that groundwaters are not ''navigable waters'' under the Clean Water Act or the OPA, it held that the apartment complex owner had ''failed to allege a discharge of oil into or upon navigable waters or adjoining shorelines'' and dismissed the OPA claim on that basis.

Precedent Gives Agencies Deference. In concluding that the Clean Water Act does *not* provide jurisdiction over groundwaters, the Eastern District of Pennsylvania aligned itself with a number of other courts, including the Fifth Circuit, the Seventh Circuit, the District of Oregon and the Western District of Michigan. As the *Tri-Realty* court acknowledged, however, a number of other courts, including the Middle District of Tennessee, the District of Idaho, the Northern District of New York, the Southern District of Iowa, the District of New Mexico, the Eastern District of Washington and the District of Colorado, have concluded that the Clean Water Act *does* provide jurisdiction over certain groundwaters. Because under recent Supreme Court precedent agencies are entitled to deference in interpreting the statutory scope of their jurisdiction,[2] the EPA and the corps probably have the ability to resolve this division among the courts by offering an interpretation of the scope of their jurisdiction over groundwaters under the Clean Water Act.

Unfortunately, the agencies do not appear eager to do that. As Bloomberg BNA has reported, the EPA and the corps sent a draft proposed rule to the Office of Management and Budget (OMB) late last year (re)defining the term ''waters of the United States,'' at least partly in response to the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 51 ERC 1833 (2001) and *Rapanos*, both of which had called into question the agencies' existing regulatory definitions.[3] Based on a copy obtained by Bloomberg BNA, the draft proposed rule does not conclusively resolve whether ''waters of the United States'' may include groundwaters.[4]

Draft Proposed Rule Implications. To be sure, the preamble to the draft proposed rule contains some statements implying that groundwaters are *not* ''waters of the United States.'' For example, in explaining that states and tribes retain their ability to establish more protective standards or limits under the proposed rule, the preamble notes that ''[m]any States and Tribes, for example, protect groundwater.'' And in explaining that shallow subsurface connections are a form of direct hydrologic connections between adjacent waters and jurisdictional waters, the preamble states that ''[t]hese connections would provide evidence of a water body being adjacent, even if those connections would not be considered 'waters of the United States' in and of themselves.'' In the same context, the preamble notes ''that nothing under this proposed rule would cause the shallow subsurface connections themselves to become jurisdictional.'' Although all of these statements are probative on the question of whether ''waters of the United States'' may include groundwaters, none is dispositive. Notably, the preamble never directly states that groundwaters are *not* ''waters of the United States.''

Nor does the text of the draft proposed rule itself foreclose an interpretation that groundwaters *are* ''waters of the United States.'' It certainly is not impossible to interpret some of the categories of waters that the rule provides are ''waters of the United States,'' including those for ''adjacent'' waters and ''other waters,'' to include certain groundwaters. Although the draft proposed rule defines the term ''adjacent'' to include the term ''neighboring,'' which the rule in turn defines to include ''waters with a . . . shallow subsurface hydrologic connection to . . . a jurisdictional water,'' the rule does not expressly exclude the groundwaters providing that ''shallow subsurface hydrologic connection'' as ''waters of the United States.''

Notably, while the draft proposed rule identifies certain categories of waters that ''are *not* 'waters of the United States,' '' a category for groundwaters is not among them. Although the draft proposed rule does contain an exclusion for ''groundwater drained through subsurface drainage systems,'' draft guidance previously issued by the EPA and the corps clearly restricts this exclusion to a very limited subset of groundwaters.[5] In fact, this limited exclusion could potentially support an argument that as a general rule ''waters of the United States'' may include groundwaters. Those seeking to advance such an argument could assert that this exclusion for a limited subset of groundwaters would be

[2] *See City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

[3] *See* 2013 WLPM, 9/18/13.

[4] *See* 2013 WLPM, 11/13/13.

[5] *See* U.S. Environmental Protection Agency and U.S. Department of the Army, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* 21 n.xii (May 2, 2011) (explaining that a '' 'subsurface' drainage system is an agricultural practice designed to drain subsurface water through a below ground pipe system in order to maintain the groundwater table below the root zone to facilitate crop production'').

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unnecessary if all groundwaters were not ''waters of the United States.''[6]

Conclusion. To be clear, I do not mean to imply that the EPA and the corps are proposing to assert jurisdiction over groundwaters under the draft proposed rule. Rather, I am suggesting that the agencies may have, intentionally or otherwise, left the door open for others to do so. For that reason, assuming the draft proposed rule comes out of the OMB without revision, stakeholders should avail themselves of the public comment period to demand that the EPA and the corps clarify whether ''waters of the United States'' may include groundwaters. It is past time for the agencies to at least try to resolve this unsettled question.

[6] Of course, there are obvious responses to this argument, including that the EPA and the corps might simply have been trying to clarify that groundwaters do not become a ''point source'' when they are collected and channeled through a below ground pipe system.