Coal Ash Case Latest to Find CWA Liability for Groundwater Pollution
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It is well established that the CWA applies only to surfaces waters, and not to groundwater. However, courts have split over the years on how to categorize actions that pollute groundwater if the polluted groundwater later emerges in springs and streams. A recent decision by a federal district court in Virginia reflects an emerging trend of courts finding CWA liability for groundwater pollution that eventually reaches surface waters. These cases mark a potentially significant expansion in CWA liability and new opportunities for environmental groups to file CWA citizen suits.

These questions typically have arisen in CWA citizen suits involving a handful of factual situations:

- Leaks from landfills and impoundments;
- Polluted runoff or leachate from exposed operations or waste piles;
- Individual spills to the ground that infiltrate into the soil; or
- Pollution plumes migrating from active industrial or brownfields sites.

Although these cases have had varying outcomes, historically courts have generally been reluctant to find that groundwater pollution can result in a violation of the CWA. This general consensus may be shifting, however.

In Hawaii, in a case currently on appeal before the Ninth Circuit, a POTW lost a CWA citizen suit. The POTW injected wastewater into deep wells under a Safe Drinking Water Act injection permit, but some of the wastewater emerged from fissures into the Pacific Ocean. The court found the leaks to be unpermitted discharges in violation of the CWA. *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014), *appeal pending at* 15-17447 (9th Cir.). Significantly, EPA submitted an amicus brief in the pending appeal arguing that a discharge to groundwater with a direct hydrological connection to surface waters requires an NPDES permit.

In North Carolina, a federal court recently found that subsurface leakage from a coal ash impoundment that reached a nearby river through the groundwater violated the CWA. *Yadkin Riverkeeper Inc. v. Duke Energy Carolinas LLC*, 1:14-cv-753 (M.D.N.C.).

Most recently, in Virginia in a March 23, 2017 decision, a federal court ruled similarly. Dominion Virginia Power is in the process of closing a coal ash landfill and impoundment for a recently shuttered coal-fired power plant in Chesapeake, Virginia. The Sierra Club filed a CWA citizen suit against the company, alleging that arsenic leaking from the site is traveling through groundwater and into tributaries of the Elizabeth River. The court ruled

in favor of Sierra Club. It held that Dominion was engaged in an unpermitted discharge on the grounds that (1) the coal ash pile is a “point source” under the CWA because it concentrates pollutants and water flows through it and (2) a discharge to groundwater that is “hydrologically connected” to a surface water is materially the same as a discharge to the surface water. On April 21, Dominion Virginia Power appealed this decision to the Fourth Circuit Court of Appeals, where the case is now pending.

It is not unforeseeable that an environmental group may attempt to apply the same theory to situations that could affect VAMWA Members, such as groundwater infiltration from lagoons and other facilities. We will continue to follow these cases and report any noteworthy developments.