



## **Second Circuit Appeal Addresses Whether CWA Jurisdiction Extends to Basement Backups January 2018**

Three companies based in downtown New Haven, Connecticut brought suit against the City of New Haven (City) and the Greater New Haven Regional Water Pollution Control Authority (Authority), alleging in part that the City and Authority are responsible for basement backups from the City's combined sewer system under the Clean Water Act, because some of the backflow waters seep into the underground water table. This case may have national significance as the line between where CWA jurisdiction ends relative to groundwater, while clear from the face of the Act itself, has been blurred by recent court decisions like the Virginia Dominion Power case. For this reason, a group of municipalities, public water utilities and national and regional associations of municipalities and utilities (including WVMWQA) (Amici) filed an amicus brief in support of the City and Authority.

The case, *26 Crown Street Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority, City of New Haven*, was filed in the federal District of Connecticut. Shortly thereafter, the City and Authority filed a motion to dismiss the claims. On July 11, 2017, Judge Meyer sided with the defendants by dismissing the complaint. Related to the plaintiff's CWA claim, Judge Meyer held that plaintiffs did not allege a valid claim because no plausible inference could be drawn that any backflows of sewage onto plaintiff's property reached the Long Island Sound (more than a half-mile away). Additionally, Judge Meyer concluded that the "allegations of the pollution of navigable waters by means of passive ground water migration do not suffice as a matter of law to state a claim under the Clean Water Act." 2017 U.S. Dist. Lexis 106989, at 4 (D. Conn. 2017).

Plaintiffs appealed Judge Meyer's decision to the Second Circuit. Amici, including the WVMWQA, filed an amicus brief in support of the City and Authority. Specifically, Amici made the following arguments:

- Basements are not jurisdictional Waters of the United States;
- Groundwater is not a discernible, confined and discrete conveyance and, as such, cannot be a "point source" under the CWA's framework;
- Groundwater is not a "Water of the United States" as defined in the CWA; and
- Allegations that groundwater has a hydrological connection to Waters of the US is not sufficient to find a CWA violation, especially given the significant costs to utilities.

The Second Circuit has not yet rendered a decision on the pending motions.