Kentucky Waterways Alliance v. Kentucky Utilities Company: The Sixth Circuit Requires a "Direct" Discharge for Liability Under the Clean Water Act

I. OVERVIEW

Kentucky Utilities Company (KU) operated a coal-burning power plant that produced "coal combustion residuals" (CCRs), which it stored in unlined ponds that leached pollutants into groundwater.[1] The process of burning coal for energy produces two forms of ash: lightweight ash (which is discharged into the air through smokestacks) and "bottom ash" (which settles at the base of smokestacks and must be removed and disposed of).[2] KU disposed of the bottom ash through a system of sluicing.[3] Sluicing is a process of combining coal ash with large amounts of water, letting the ash settle in man-made ponds, and discharging of the excess water while the coal ash settles at the base of the pond.[4] The water is typically discharged subject to a Clean Water Act (CWA) permit and the CCRs are usually regulated under the Resource Conservation and Recovery Act (RCRA).[5] KU maintained two ash ponds and converted the primary ash pond into a dry landfill in 2011 after receiving a permit from the Kentucky Department of Environmental Protection (KDEP).[6]

The conservation-group plaintiffs contended that the coal ash in the ponds released pollutants into the groundwater, which in turn reached a nearby lake.[7] Further, they claimed the flow of pollution was exacerbated by the karst terrain upon which the ponds sat.[8] Karst terrain is formed by eroding subsurface rock that "creates a series of caverns, sinkholes,

1. Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925 (6th Cir. 2018).
2. *Id.* at 930.
3. *Id.* at 930-31.
4. *Id.*
5. *Id.* at 929.
6. *Id.* at 931-32.
7. *Id.* at 932.
8. *Id.* at 934.

tunnels, and paths."[9] The plaintiffs asserted KU's CWA liability under two theories.[10] First, they argued that groundwater itself is a point source.[11] Second, they contended that the ponds constituted point sources with the groundwater acting as the medium through which pollutants traveled before being discharged into the lake.[12] The United States Court of Appeals for the Sixth Circuit *held* that groundwater is not a point source under the CWA and that the CWA does not govern pollution that reaches protected waters by way of groundwater. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925, 940 (6th Cir. 2018).

II. BACKGROUND

The CWA was passed with the stated purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[13] Additionally, the Act declares the intent to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[14] To achieve these goals, the Act focuses on regulating the sources of pollution through effluent limitations and uses water quality as a measure of the effectiveness of the program.[15] States are authorized to issue National Pollutant Discharge Elimination System (NPDES) permits so long as their pollutant limitations are at least as strict as the federal restrictions.[16] The Act distinguishes between "point sources" and nonpoint sources of pollution.[17] A "point source" is "any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged."[18] Five elements must be met for an NPDES permit to be required: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source.*"[19] The Act empowers the U.S. Environmental Protection Agency (EPA) to bring civil and criminal charges against violators.[20] Additionally, the CWA allows private citizens to bring a civil action against violators so long as they give the alleged

9. *Id.* at 931.
10. *Id.* at 932.
11. *Id.*
12. *Id.* at 932-33.
13. 33 U.S.C. § 1251(a) (2018).
14. *Id.* § 1251(b).
15. *See, e.g., id.* § 1312(a).
16. *Id.* § 1342(b)-(d).
17. *Id.* § 1362(14).
18. *Id.*
19. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982).
20. 33 U.S.C. § 1319(a)-(c).

violator, the EPA, and the relevant state sixty-days' notice of their intent to file a claim.[21]

The issue of non-direct discharges through groundwater was specifically addressed by the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*[22] and by the Ninth Circuit in *Hawai'i Wildlife Fund v. County of Maui*.[23] In *Upstate Forever*, the defendant's gasoline pipeline ruptured underground, releasing over 369,000 gallons of gasoline.[24] The plaintiffs alleged that the gasoline traveled through the groundwater into nearby navigable waters.[25] The court concluded that liability may exist under the CWA where an indirect discharge is "sufficiently connected to navigable waters."[26] In *Hawai'i Wildlife Fund*, the County of Maui operated a wastewater treatment plant and injected treated wastewater into four wells.[27] The wells were the primary method of effluent disposal and they discharged directly into the groundwater.[28] Studies established a "hydrological connection" between the wells and the Pacific Ocean with the effluent travelling through the groundwater.[29] The court concluded that the wells constituted point sources and the pollutants found in the ocean were "fairly traceable" to the wells, making them "the functional equivalent of a discharge into the navigable water."[30]

Additionally, the issue of non-direct discharges was generally addressed by a plurality opinion of the Supreme Court in *Rapanos v. United States*.[31] Justice Scalia pointed out that the CWA does not forbid the "'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'"[32] As the Sixth Circuit noted, however, the plurality opinion in *Rapanos* is not binding precedent.[33]

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21. *Id.* § 1365(a)-(b).
22. 887 F.3d 637 (4th Cir. 2018).
23. 886 F.3d 737 (9th Cir. 2018).
24. 887 F.3d at 643.
25. *Id.* at 643-44.
26. *Id.* at 651.
27. 886 F.3d at 742.
28. *Id.*
29. *Id.* at 742-43.
30. *Id.* at 749.
31. 547 U.S. 715 (2006).
32. *Id.* at 743 (quoting 33 U.S.C. §§ 1362(12)(A), 1311(a) (2018)).
33. Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 936 (6th Cir. 2018).

III. COURT'S DECISION

In the noted case, the Sixth Circuit determined that non-direct discharges via groundwater connections to navigable waters do not create liability under the CWA.[34] The court rejected the plaintiffs' theory that groundwater is itself a point source.[35] It found that groundwater, as well as the karst terrain through which it traveled, failed to meet each of the three definitional requirements of "point source."[36] Groundwater, per the court, cannot be confined or discrete as it is a broad medium, seeping in all directions, and guided only by the force of gravity.[37] Furthermore, the court reasoned that even where the flow of groundwater may be tracked, its contours and specific movements are not "discernible" like that of typical point sources.[38] Similarly, the terrain through which groundwater moves cannot be a point source.[39] Although the karst terrain was more susceptible to water passing through it, the only difference between it and other terrain was expediency; thus, that fact did not change its failure to comprise the properties of being discrete, confined, or discernible.[40]

The court also rejected the plaintiffs' theory of liability based on a hydrological connection.[41] The court relied on both textual and contextual aspects of the CWA.[42] The textual analysis hinged on whether liability under the CWA requires a "direct" discharge into navigable waters.[43] The plaintiffs noted the explicit lack of the word "directly" in the statute and contended that the CWA prohibits the discharge of pollution from a point source, through a non-point source, into navigable waters.[44] The court, however, found an implied requirement of a "direct" discharge in the Act's definition of "effluent limitations."[45] Effluent limitations are the basis of regulation under the CWA, capping discharges of specific pollutants.[46] They are defined as restrictions on pollutants that are "discharged from point sources *into* navigable waters."[47] The court, relying on the dictionary

34. *Id.* at 937-38.
35. *Id.* at 934.
36. *Id.* at 933-34.
37. *Id.* at 933.
38. *Id.*
39. *Id.*
40. *Id.* at 934.
41. *Id.*
42. *See id.* at 934-37.
43. *Id.* at 934-35.
44. *Id.* at 934.
45. *Id.*
46. *Id.*
47. *Id.* (emphasis added) (quoting 33 U.S.C. § 1362(11) (2018)).

definition of "into," thereby found an implied meaning of directness by its reference "to a point of entry."[48] Thus, effluent limitations only apply when the effluent is discharged *into* a regulated water, meaning the effluent enters "directly" into the water.[49] Further, the court found a textual basis for its rejection of the hydrological connection theory in the definition of "discharge of a pollutant."[50] "Discharge of a pollutant" means an addition of a pollutant "*to* navigable waters *from* any point source."[51] For the Sixth Circuit, this also implied a requirement of directness of the discharge in that the pollution must come directly from a point source, rather than a non-point source intermediary.[52] In this case, the discharge came from groundwater, which is not a point source, such that there was not a violation of the CWA.[53] Likewise, the court dismissed the implications that the plaintiffs drew from *Rapanos*, noting that the plurality opinion, which addressed a different legal issue, was not binding precedent.[54]

Addressing the contextual arguments, the court dismissed the plaintiffs' reliance on the stated purpose of the CWA;[55] they noted that the CWA's objective is to restore and maintain the integrity of the Nation's waters.[56] The Act goes on to state, however, that it is designed to "recognize, preserve, and protect the primary responsibilities and rights of States to . . . eliminate pollution."[57] Therefore, the court held that the plaintiffs could not simply point to the purpose of protecting the Nation's waters without also addressing the intention to preserve the system of "cooperative federalism."[58] Additionally, the court warned against relying heavily on the Act's stated objective "because Congress does not 'pursue[] its purpose at all costs.'"[59] Had Congress desired, it could have placed further-reaching restrictions in the CWA but instead placed important restrictions on the scope of the legislation.[60] To wit, the CWA only applies to "the discharge of pollutants to 'navigable waters from any point

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* (emphasis added) (quoting 33 U.S.C. § 1362(12)(A)).
52. *Id.*
53. *Id.*
54. *Id.* at 936.
55. *Id.* at 936-37.
56. *Id.* at 936.
57. *Id.* at 937.
58. *Id.*
59. *Id.* (quoting Rapanos v. United States, 547 U.S. 715, 752 (2006)).
60. *Id.*

source,'" thus restricting its reach to navigable waters and point sources.[61] If Congress pursued its stated objective at all costs, it would not have restricted the Act's reach as it did, per the Sixth Circuit.[62] Therefore, the court further rejected the plaintiffs' contextual argument by noting that Congress explicitly limited the Act's reach and left the rest to the states.[63]

Lastly, the court found an inherent conflict in the plaintiffs' proposed application of the CWA with other environmental regulations under the RCRA.[64] Per the court, the CWA and the RCRA are complementary statutes, meant to work in tandem while addressing different types of environmental dangers.[65] Under the RCRA, pollution that is regulated by the CWA is explicitly not covered under the RCRA.[66] If a discharge is approved by an NPDES permit under the CWA, the conduct cannot be regulated by the RCRA.[67] In this case, if the coal ash ponds were regulated under the CWA, they would not be covered under the RCRA.[68] This, according to the Sixth Circuit, would be problematic because coal ash is solid waste, which the RCRA was specifically enacted to regulate.[69] The court found this exclusion of RCRA regulations unacceptable and a disruption to the existing regulatory framework.[70] This problem was exacerbated in the court's view by the fact that the EPA has issued a rule, under the RCRA, that specifically addresses storage of coal ash.[71]

Circuit Judge Eric Clay rebutted many of the points made by the majority in a concurring and dissenting opinion, which, for the purposes of this Note, was effectively a dissenting opinion because it maintained that "the CWA clearly applie[d] to the allegations in this case."[72] Clay criticized the textual arguments made by the majority as reading in a requirement of direct discharge that Congress never intended.[73] He found this approach too nuanced of a regulatory scheme to not address explicitly if it were Congress' intent.[74] Clay also contested the validity of the

61. *Id.* (quoting 33 U.S.C. § 1362(12)(A) (2018)).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* (citing 42 U.S.C. § 6903(27) (2018)).
67. *Id.* at 937-38.
68. *Id.*
69. *Id.* at 938.
70. *Id.*
71. *Id.* (citing 80 Fed. Reg. 21,302 (Apr. 17, 2015)).
72. *Id.* at 940-47 (Clay, J., concurring in part and dissenting in part).
73. *Id.* at 940-41.
74. *See id.* at 942.

majority's distinction relative to the *Rapanos* plurality opinion, which he argued "made clear that the CWA applies to indirect pollution."[75] Lastly, Clay challenged the claimed disruption to cooperative federalism and the regulatory schemes of the CWA and RCRA.[76] By honoring the states' right to not regulate groundwater or non-point source pollution, he argued, the plaintiffs' interpretation only imposed restrictions on point sources where there was a direct hydrological connection to navigable waters.[77] Likewise, the plaintiffs' proposed interpretation would not, Clay argued, disrupt the balance between statutes because the CWA would apply if the pollutants entered navigable waters, while the RCRA would apply when coal ash were stored on land and if it affected groundwater.[78]

IV. ANALYSIS

This decision of the Sixth Circuit is in direct contention with the holdings of the Fourth and Ninth Circuits: "In so holding, we disagree with the decisions from our sister circuits"[79] The sister cases relied on similar fact patterns with different statutory interpretations to arrive at opposite conclusions.[80] Whilst other courts and cases have addressed pollutants discharged from point sources that travel through non-point sources into navigable waters, these were the only three to specifically address groundwater as the intermediary non-point source.[81] *Hawai'i Wildlife Fund* was decided in March 2018 and *Upstate Forever* was decided in April 2018, largely relying on key arguments from *Hawai'i Wildlife Fund*.[82]

In *Hawai'i Wildlife Fund*, the Ninth Circuit took a fresh look at the issue of pollutants discharged to navigable waters through groundwater but relied on a string of precedential opinions addressing indirect discharges.[83] In *Concerned Area Residents for the Environment v. Southview Farm*, the Second Circuit determined that liquid manure, discharged from point sources onto fields and flowing directly into

75. *Id.* at 944 (citing Rapanos v. United States, 547 U.S. 715, 745 (2006)).
76. *Id.* at 944-45.
77. *Id.*
78. *Id.* at 945-46.
79. *Id.* at 933.
80. *See* Upstate Forever v. Kinder Morgan Energy Partners, L.P, 887 F.3d 637 (4th Cir. 2018); Hawai'i Wildlife Fund v. Cty. of Maui, 886 F.3d 737 (9th Cir. 2018).
81. *Hawai'i Wildlife Fund*, 886 F.3d at 747-48.
82. *See Upstate Forever*, 887 F.3d at 648.
83. *See Hawai'i Wildlife Fund*, 886 F.3d at 747-48.

navigable waters constituted a violation under the CWA.[84] The court held it to be a point source discharge because the initial conveyance was a point source and there was a direct connection from the field to the navigable water, despite the field not itself being a point source.[85] In *Sierra Club v. Abston Construction Co.*, the Fifth Circuit held that liability was ultimately based on whether the pollutants were initially collected and discharged from a point source, such that liability would extend even if pollutants were carried off by rainwater and the flow of gravity.[86] In *Peconic Baykeeper, Inc. v. Suffolk County*, the Second Circuit further affirmed liability for indirect discharges of pollutants dispersed through the air.[87] That appeals court overturned the lower court's holding that pesticides sprayed from trucks and helicopters were indirect discharges into the air and thus could not constitute point sources.[88]

In light of these previous rulings regarding liability for indirect discharges under the CWA, the holding in *Kentucky Waterways* marked a significant departure from a growing consensus that the CWA applies when a pollutant is discharged from a point source, through a non-point source, and into a navigable water where the pollutant is fairly traceable from source to water.[89] Here, the Sixth Circuit notably granted diminished importance to the express purpose of the CWA.[90] As discussed, the CWA was intended "to restore and maintain . . . the Nation's waters" and was designed to give the states some degree of autonomy in regulating pollution.[91] Its regulatory scheme clearly hinges on the difference between point sources and non-point sources.[92] The Sixth Circuit, however, lost sight of the practical connection between this distinction and achieving the goals of the CWA. Point sources are regulated under the CWA because the pollution comes from a distinct, identifiable source, which can be somewhat easily regulated under a national scheme. Non-point sources have no easily identifiable source and are thus much harder to identify and regulate; they are genuinely diffuse and non-discrete, often depending on phenomena such as local agricultural practices. It is non-point pollution that states and local governments are thereby in a unique position to

84. 34 F.3d 114, 118-19 (2d Cir. 1994).
85. *Id.* at 119.
86. 620 F.2d 41, 45 (5th Cir. 1980).
87. 600 F.3d 180, 188-89 (2nd Cir. 2010).
88. *Id.*
89. *See* Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 929, 933 (6th Cir. 2018).
90. *See id.* at 936-37.
91. 33 U.S.C. § 1251(a)-(b) (2018).
92. *Ky. Waterways*, 905 F.3d at 929.

address through local management plans. However, a discharge from an evident point source, which then becomes readily traceable via a non-point source conveyance into a navigable water, fits squarely within the fundamental intent of the CWA such that liability should follow if such a discharge is made in the absence of a permit.

V. CONCLUSION

As the aforementioned cases demonstrate, this is a somewhat volatile area of law that has large implications for liability under the CWA and the protection of our national waters. The trend of cases from multiple circuits addressing indirect discharges seemed to establish that, if there were a significant connection from point source to regulated water, liability would be triggered. Indeed, there is often some intermediary between discharge and navigable water, whether it be a few feet of air or a short distance between a pipe and a river bank. In keeping with Judge Clay's (mostly) dissenting opinion, the Sixth Circuit's complete dismissal of intermediate transport would allow for undue escape from CWA liability via an irrational loophole.

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