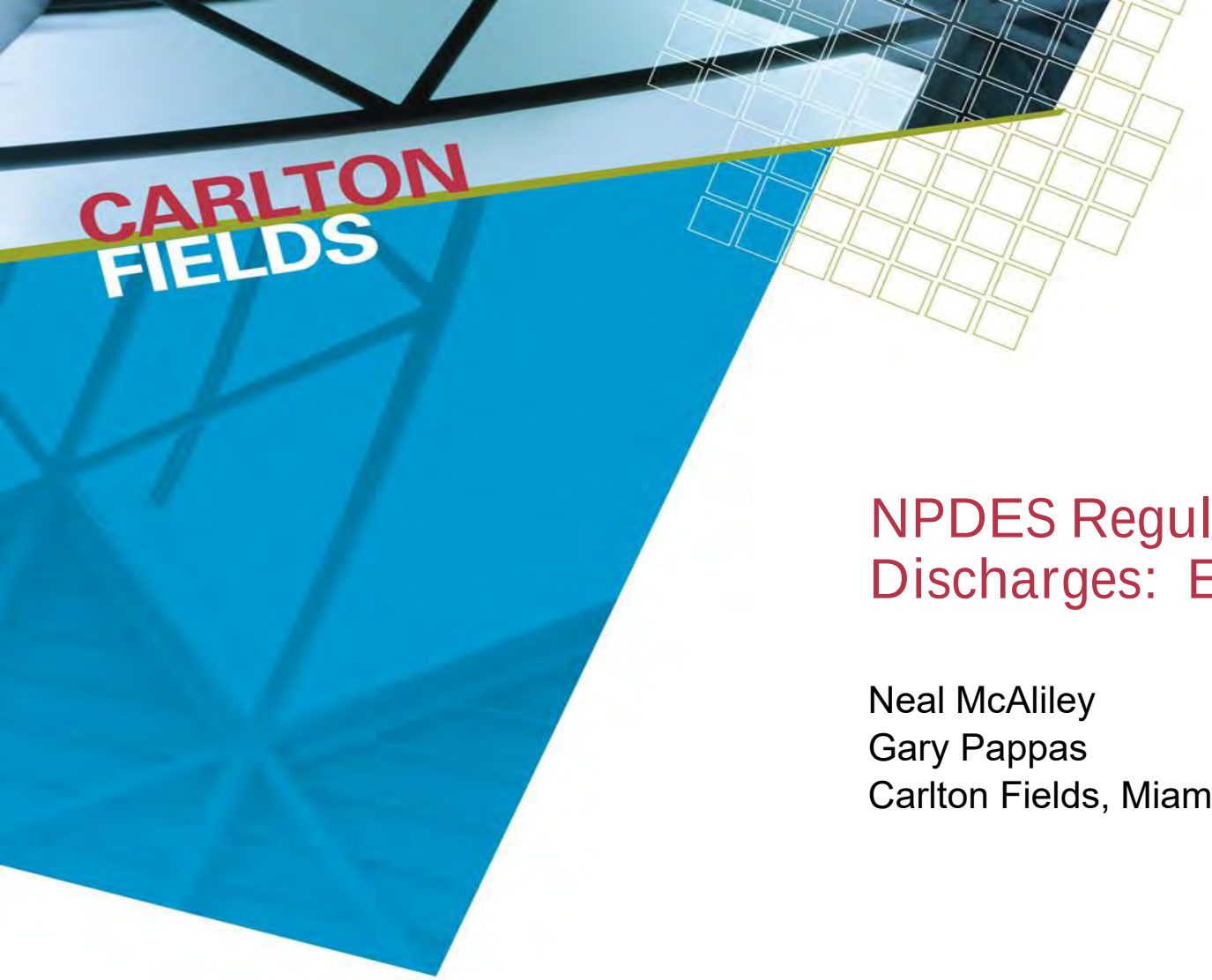

NPDES Regulation of Groundwater Discharges: Emerging Developments

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Overview of Presentation

- Overview of Clean Water Act Regulation
- Clean Water Act Regulation of Groundwater
- New Groundwater Decisions
- Forthcoming EPA Rulemaking
- Potential Implications for Regulated Parties

Why CWA Regulation of Groundwater Discharges Matters

- Many facilities have discharges to groundwater
  - Known discharges associated with design of a facility (e.g., stormwater basins)
  - Accidental discharges (e.g., spills)
- Groundwater is commonly connected to surface water in Florida
  - Discharges to groundwater can turn up in nearby surface waters
- If discharges from groundwater to surface waters are regulated under the CWA, then this may create new compliance issues
  - CWA permits may be required for broad range of activities
  - Project opponents may be able to bring lawsuits based on alleged groundwater discharges

Clean Water Act Overview

Structure of Clean Water Act Regulation

- The federal Clean Water Act establishes the national framework for regulation of water pollution
  - Establishes minimum standards that apply nationwide
  - States can impose additional requirements that are --
    - More stringent than the federal requirements
    - Broader in scope than federal requirements (e.g., regulate non-federal waters)
- Many CWA programs are administered by state agencies
  - CWA allows for states to be delegated the authority to implement permitting programs
    - Under delegation, state agencies issue the federal permits in addition to their own permits
    - Federal government retains oversight and enforcement authority
  - Florida DEP has been delegated the authority to administer the NPDES program
- The U.S. Environmental Protection Agency has primarily responsibility for administering the CWA
  - EPA promulgates most regulations
  - Issues federal NPDES permits (where there is no delegation)
  - Has oversight authority over –
    - Delegated state programs
    - U.S. Army Corps of Engineers' wetland dredge-and-fill program (Section 404)

Regulated Activities Under the Clean Water Act

- The CWA is a limited statute: it does not regulate all activities in all waters
  - The focus is on discharges of pollutants to certain, federally-regulated waters
    - If activity falls outside of the scope of CWA, then the statute does not apply and no CWA permit is required
  - Florida law is much broader: it regulates all "work" in all waters in Florida
- CWA establishes a default standard of no discharges except in compliance with a permit (where the CWA applies)
  - Agencies almost always issue permits when requested, but impose conditions
  - Discharges without a permit, or in violation of a permit condition, are prohibited
- There are two primary permit programs
  - The National Pollutant Discharge Elimination System ("NPDES") program
    - CWA Section 402, 33 U.S.C. § 1342
    - Regulates discharges of traditional pollutants from facilities
    - In Florida, NPDES permits are issued by Florida DEP pursuant to delegation from EPA
  - The wetland dredge-and-fill program
    - CWA Section 404, 33 U.S.C. § 1344
    - Regulates discharges into wetlands and navigable waters
    - Permits issued by U.S. Army Corps of Engineers

Elements of a Clean Water Act Violation, 33 U.S.C. §§ 1311(a), 1319

- A person
- Discharges
  - “Addition of a pollutant”
- Pollutants
  - Virtually any form of “industrial, municipal and agricultural waste”
- Into the “Waters of the United States”
  - Includes traditionally navigable waters, tributaries to those waters, and adjacent wetlands
- Either
  - Without a permit, or
  - In violation of the terms of a permit

Enforcement under the Clean Water Act

- Government enforcement
  - Both federal and state agencies can bring enforcement related to NPDES permits
  - Agencies have multiple enforcement options
    - Administrative (e.g., NOV)
    - Civil lawsuits
    - Criminal prosecutions
- Private “citizen suit” enforcement
  - CWA allows for private parties to bring civil enforcement actions (33 U.S.C. § 1365)
  - More limited remedies than government enforcement
    - Injunctive relief
    - Civil penalties
    - Attorneys fees
  - “Citizen suits” are often brought in instances where regulatory agencies do not believe enforcement is merited
    - Circumstances where regulators do not believe a permit is being violated, or that the violations are minor
    - Cases where private plaintiffs are pushing the boundaries of regulation under the statute

Clean Water Act Regulation of Groundwater

Groundwater Is Not Part of the "Waters of the US"

- Clean Water Act only regulates discharges to the "navigable waters"
  - CWA defines "navigable waters" as the "waters of the United States"
    - 33 U.S.C. § 1362(7)
  - Federal regulations further define "waters of the United States" to include various categories of surface waters
    - 33 CFR § 328.3
- Groundwater is not part of the "waters of the United States"
  - EPA and Corps "have never interpreted [groundwater] to be a "water of the United States" under the CWA."
    - EPA and Corps, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37073 (June 29, 2015)
- No CWA permit is required for discharges to groundwater
  - Controlling court case for Florida holds that an NPDES permit is not required for discharges to groundwater
    - *Exxon Corp. v. Train,* 554 F.2d 1310 (5th Cir. 1977)
  - Safe Drinking Water Act has separate permitting scheme for underground injection wells

Groundwater Generally Is Not a "Point Source"

- The NPDES program only regulates discharges from "point sources"
  - Under the CWA, "discharge of a pollutant" is defined as "any addition of any pollutant to the navigable waters from any point source."
    - 33 U.S.C. § 1362(12)
  - A "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, … from which pollutants are or may be discharged."
    - 33 U.S.C. § 1362(14)
  - The CWA leaves the regulation of "non-point source" pollution, such as general stormwater runoff from farms, to the states
- Groundwater generally is not considered a "point source"
  - Pollutants sometimes can seep from groundwater into surface waters
  - Where groundwater enters surface waters across a diffuse area, it does not meet the definition of a "point source"

New Court Decisions Regarding NPDES Regulation of Groundwater Discharges

CWA "Citizen Suits" Aimed at Groundwater Discharges

- Environmental organizations have brought a series of lawsuits based on groundwater discharges
  - The cases generally involve industrial facilities where pollutants allegedly seep through groundwater into the "waters of the United States
  - Many cases concern coal ash ponds at electrical power plants
    - Plaintiffs claim that unlined ponds leak toxins and heavy metals in the ground, which then migrate to nearby surface waters
  - Few industrial facilities have NPDES permits addressing such groundwater discharges
- Plaintiffs have advanced several theories, including --
  - Groundwater is a regulated "water of the United States" if it has a hydrological connection to surface waters
  - The "point source" is the industrial facility itself, so it does not matter that groundwater is not a "point source," because groundwater just conveys the pollutants from the facility
- These lawsuits have support in older EPA guidance, which suggests that discharges of pollutants through groundwater may be regulated if there is a "direct hydrological connection"
  - *E.g.,* EPA, NPDES Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960 (Jan. 12, 2001)

CWA "Citizen Suits" Aimed at Groundwater Discharges

- Lower courts have ruled both ways in these lawsuits
  - Some U.S. District Courts have ruled that discharges through groundwater require an NPDES permit
    - *E.g., Sierra Club v. Virginia Elec. Power Co.,* 145 F.Supp.3d 601, 607-08 (E.D. Va. 2015)
  - Some U.S. District Courts have ruled that the NPDES program does not regulate discharges through groundwater
    - *E.g., 26 Crown Associates LLC v. Greater New Haven Regional Water Pollution Control Auth.,* 2017 WL 2960506 (D. Conn. 2017)
- Two U.S. Courts of Appeal recently have held that groundwater discharges are regulated under the NPDES program
  - *Hawaii Wildlife Fund v. County of Maui,* 886 F.3d 737 (9th Cir. 2018)
  - *Upstate Forever v. Kinder Morgan Energy Partners LP,* 887 F.3d 637 (4th Cir. 2018)

Hawaii Wildlife Fund v. County of Maui, 886 F.3d 737 (9th Cir. 2018)

- Case concerned discharges from a sewage treatment plant on the island of Maui
  - Plant disposes treated wastewater through underground injection wells
  - Tracer dye studies showed that 64% of wastewater ended up seeping into the Pacific Ocean
    - Groundwater traveled approximately ¼ mile in 84 days
  - Government planners knew there would be some seepage to the ocean, but did not believe they needed an NPDES permit
- Court held that an NPDES permit is required
  - It found that the Pacific Ocean is a regulated "water of the United States"
  - The Court found that the underground injection wells are the "point sources"
  - The fact that the pollutants traveled through groundwater was not dispositive
- Court set forth a test for determining when discharges through groundwater are regulated:
  - The pollutants must be "fairly traceable from the point source to the navigable waters such that the discharge is the functional equivalent of a discharge into the navigable waters"
  - "The pollutant levels reaching the navigable waters are more than de minimis"

Upstate Forever v. Kinder Morgan Energy Partners LP, 887 F.3d 637 (4th Cir. 2018)

- Case concerned an accidental leak of gasoline from a pipeline in South Carolina
  - Gasoline leaked from an underground pipeline, at a location 400-1000 feet from creeks and wetlands
  - Pipeline owner fixed the pipeline and removed some, but not all, of the spilled gasoline
  - Unrecovered gasoline in the groundwater seeped into nearby wetlands and tributaries of the Savannah River
- Court held that the continuing seepage without an NPDES permit violated the CWA
  - It held that pipeline was the "point source"
  - The creeks and other surface wetlands receiving the gasoline were the "waters of the US"
  - The Court held that the CWA regulates discharges to the "waters of the US" that are both direct and indirect, and that fact that the gasoline flowed through groundwater does not matter
- The Fourth Circuit followed a longstanding EPA language for determining when groundwater seepage is regulated
  - There must be a "direct hydrological connection between the point source and the navigable waters"
  - This is a fact-specific determination
  - Court identified several factors that would be relevant
    - The distance pollutants travel through groundwater
    - Whether the pollutants are traceable to the original source
    - Whether there are contributing sources to the groundwater seepage

Potential EPA Rulemaking on Groundwater Issue

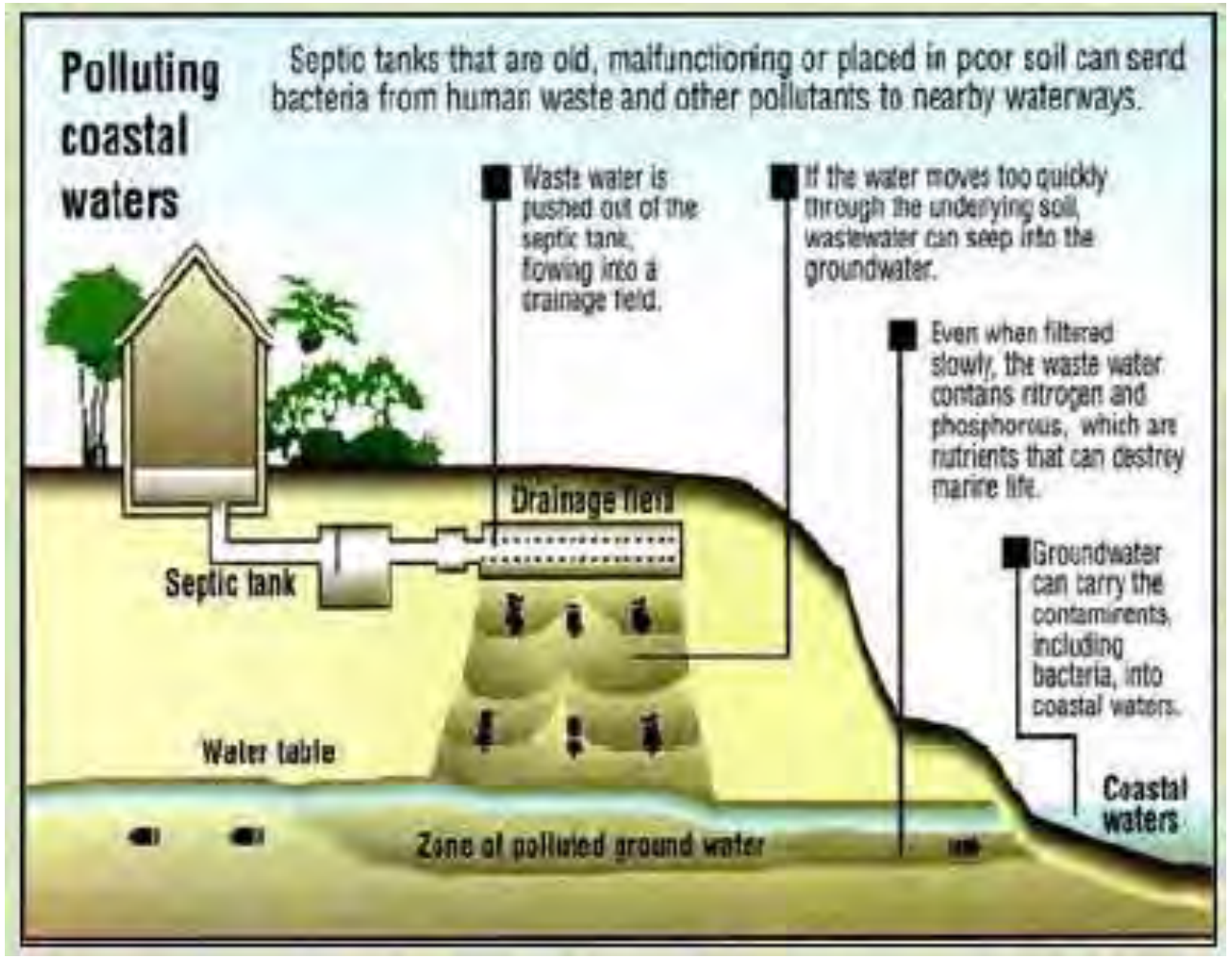
- On February 20, 2018, EPA issued a “request for comment” on the groundwater conduit issue [83 Fed. Reg. 7126 (Feb. 20, 2018)]
  - EPA acknowledged that it had made statements that discharges through groundwater are regulated if there is a “direct hydrological connection” to regulated surface waters
  - EPA pointed out the arguments both ways on the issue, and asked for comment on whether it should clarify or change its prior guidance
- More than 60,000 comments were submitted to EPA
  - Some argue that discharges through groundwater should be regulated
  - Others argue that such discharges should not be regulated
- EPA may (or may not) propose to revise its prior statements on the issue based on these comments
  - Likely a years-long process
  - In the meantime, the court cases control the issue in the circuits where they are issued

Implications for Regulated Parties in Florida

Potentially Huge Number of Parties in Florida Could be Affected

- Hydrogeology of Florida means that there are close hydrological connections between groundwater and surface water
  - Water table in Florida is often close to ground surface
  - Groundwater aquifers can be highly transmissive
  - There are numerous “waters of the US” connected to surficial aquifers
- Many types of activities potentially could lead to seepage of pollutants into offsite surface waters
  - Septic tanks
    - Studies in the Florida Keys, St. Lucie Estuary, and Indian River Lagoon indicate that groundwater seepage from septic tanks cause nutrient enrichment and eutrophication of coastal waters
  - Surface water impoundments (e.g., stormwater ponds)
  - Spills/leaks from commercial and industrial activities
- These recent cases suggest that NPDES permits may be required for activities that might lead to seepage of pollutants into surface waters

Example: Septic Tank Pollution



- Source: Lapointe, Sewage Pollution and Eutrophication of Coastal Waters (2015)

Potential for Litigation / Enforcement

- Clean Water Act allows for private “citizen suits” to enforce the prohibition on discharges of pollutants without a permit
  - Citizen suits can obtain injunctive relief and civil penalties
  - Successful plaintiffs can recover their attorneys’ fees
- Citizen suits have focused so far on large facilities and/or industrial activities
  - Local government sewage treatment systems alleged to have leaking pipes
  - Electric power utilities using ponds in conjunction with power plants
- New groundwater cases would allow “citizen suits” to be filed against a wider range of targets

Potential Response by Florida DEP

- Florida DEP generally regulates discharges to groundwater under Florida law, not the NPDES program
  - Groundwater regulation has been the responsibility of states, pursuant to state law
  - Florida DEP does not typically issue NPDES permits based solely on concerns over groundwater seepage
- Florida has extensive rules governing groundwater
  - Ch. 62-520, Fla. Admin. Code, generally establishes groundwater quality standards
  - Minimum groundwater criteria include requirement that discharges to groundwater not "impair the reasonable and beneficial use of adjacent waters" [Section 62-520.400(1)(f), Fla. Admin. Code]
    - This means that groundwater seepage cannot impair the use of surface waters (e.g., cause violation of surface water quality standards)
- Recent court rulings could result in Florida DEP requiring NPDES permits for activities that just involve discharges to groundwater
  - Potential to change the scope of the Clean Water Act to include regulation of groundwater

How to Know Whether an NPDES Permit Is Required

- There is no single test regarding what is a sufficient groundwater connection for an NPDES permit to be required
  - Ninth Circuit: Pollutants must be “fairly traceable” from the original source, the “functional equivalent” of a direct discharge, and more than “de minimis”
  - Fourth Circuit: There must be a “direct hydrological connection” between the pollutant source and regulated surface waters, which is a case-by-case determination
- Potential questions about how these tests might be applied in Florida
  - How far can the pollutant travel through groundwater and still be regulated
  - How long can it take for the pollutant to reach surface waters
  - What is sufficient proof that groundwater seepage is “fairly traceable” to a source (e.g., are tracer dye studies required)
  - What does it mean that a discharge is “de minimis”? De minimis from the perspective of the receiving water? From the perspective of the discharger?
  - How does one take into account the contribution of a group of sources that all discharge similar pollutants into groundwater?