



## Environment, Land Use & Natural Resources ADVISORY ■

**APRIL 13, 2018**

### Fourth Circuit Expands Scope of Clean Water Act

Yesterday, in a 2–1 decision, the Fourth Circuit Court of Appeals held that the Clean Water Act (CWA) prohibits the discharge of pollutants from a point source through groundwater that has a direct hydrological connection to navigable waters of the United States. The decision, *Upstate Forever v. Kinder Morgan Energy Partners*, reversed the district court’s dismissal of a CWA citizen suit filed by two environmental groups against Kinder Morgan and Plantation Pipe Line following a pipeline rupture in South Carolina that released several hundred thousand gallons of gasoline. Coming on the heels of the Ninth Circuit’s *Hawai’i Wildlife Fund v. County of Maui* decision, the Fourth Circuit’s opinion will embolden environmental groups bringing citizen suits to enforce the Clean Water Act on similar grounds.

In support of its holding, the majority reasoned: (1) per Justice Scalia’s opinion in *Rapanos v. United States*, 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; (2) the plain language of the CWA requires only that a discharge come “from” a point source; and (3) both the Second (*Waterkeeper Alliance v. Environmental Protection Agency*) and Ninth (*County of Maui*) Circuits have rejected the theory that the CWA creates liability for discharges only when the point source itself directly feeds into the navigable water.

The majority further clarified that not all discharges that pass from a point source through groundwater to navigable waters may support a claim under the CWA. Rather, such connection between a point source and navigable water must be “clear,” i.e., have a “direct hydrological connection.”

The lone dissent argued that the citizen suit should have been dismissed because the only point source at issue—the pipeline—has been repaired and is not currently adding any pollutants into navigable waters, thus negating a necessary element of a CWA violation.

A completely different panel of Fourth Circuit judges recently heard oral argument in *Sierra Club v. VEPCO*, a case involving alleged indirect discharges of arsenic from closed coal ash landfills through groundwater to a nearby river and creek. In *Sierra Club*, following a bench trial, the district court held that indirect discharges of arsenic through groundwater to surface water violates the CWA. At oral argument, the Fourth Circuit panel appeared to doubt the CWA covered such discharges. Although the procedural posture of *Upstate Forever* differs from *Sierra Club*, the parties in *Sierra Club* will likely file extensive supplemental briefing in light of this opinion.

You can subscribe to future *Environment, Land Use & Natural Resources* advisories and other Alston & Bird publications by completing our **publications subscription form**.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Doug Arnold 404.881.7637 doug.arnold@alston.com	Jeffrey Dintzer 213.576.1063 jeffrey.dintzer@alston.com	Clynton Namuo 213.576.2671 clynton.namuo@alston.com	Jocelyn Thompson 415.243.1017 jocelyn.thompson@alston.com
Paul Beard 916.498.3354 paul.beard@alston.com	Skip Fulton 404.881.7152 skip.fulton@alston.com	Elise Paeffgen 202.239.3939 elise.paeffgen@alston.com	Andrea Warren 213.576.2518 andrea.warren@alston.com
Meaghan Goodwin Boyd 404.881.7245 meaghan.boyd@alston.com	Maureen Gorsen 916.498.3305 maureen.gorsen@alston.com	Bruce Pasfield 202.239.3585 bruce.pasfield@alston.com	Jonathan Wells 404.881.7472 jonathan.wells@alston.com
Nicki Carlsen 213.576.1128 nicki.carlsen@alston.com	Ronnie Gosselin 404.881.7965 ronnie.gosselin@alston.com	Geoffrey Rathgeber 404.881.4974 geoff.rathgeber@alston.com	Matt Wickersham 213.576.1185 matt.wickersham@alston.com
Edward Casey 213.576.1005 ed.casey@alston.com	Maya Lopez Grasse 213.576.2526 maya.grasse@alston.com	Max Rollens 213.576.1082 max.rollens@alston.com	
Roger Cerda 213.576.1156 roger.cerda@alston.com	Nate Johnson 213.576.1151 nate.johnson@alston.com	Chris Roux 202.239.3113 213.576.1103 chris.roux@alston.com	
Nicole DeMoss 404.881.4945 nicole.demoss@alston.com	Clay Massey 404.881.4969 clay.massey@alston.com	Phil Sandick 404.881.7632 phil.sandick@alston.com	

# ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2018

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500  
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260  
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001  
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001  
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333