

Clean Water Act Controversy



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A point source by any other name.

Federal Courts of Appeals have recently split on the question of whether pollution of surface water via groundwater is a violation of the Clean Water Act. The U.S. Supreme Court may weigh in.

The Clean Water Act prohibits the discharge of pollutants from any point source into waters of the United States—for example a manufacturer discharging process wastewater into a river—unless a permit is issued pursuant to the National Pollutant Discharge Elimination System (NPDES) program. Under the program, generally, a discharger submits an application for a proposed discharge to a permitting authority, and, if the application meets all requirements, the regulator then issues a permit containing pre-discharge treatment requirements, limitations on the discharge, monitoring and reporting requirements and other conditions.

The NPDES program only applies to a point source—defined as a “discernible, confined, and discrete conveyance.” Point sources have been generally understood as a pipe or ditch from a facility that discharges directly into surface water. However, recent Fourth and Ninth Circuit appellate cases have expanded the definition. The Sixth Circuit has rejected that expansion, giving rise to a circuit split on a significant issue that may be taken up by the U.S. Supreme Court.

In *Upstate Forever v. Kinder Morgan Energy Partners* 887 F.3d 637 (4th Cir. 2018), the defendant owned a gasoline pipeline that ruptured, spilling several hundred thousand gallons of gasoline that then seeped into the groundwater and ultimately into nearby waterways. The Court held that an indirect discharge to surface water via groundwater is a prohibited point source discharge under the Clean Water Act if the plaintiffs can show “a direct hydrological connection between ground water and navigable waters.” Notably, a subsequent Fourth Circuit case—*Sierra Club v. Virginia Electric Power*, 903 F.3d 403 (4th Cir. 2018)—effectively limited the holding to measurable discharges, finding that seepage from a coal ash pile was not “discernable, confined, and discrete.”

The Ninth Circuit adopted a similar approach as *Upstate Forever*, while rejecting the “direct hydrological connection” standard, in *Hawai‘i Wildlife Fund v. County of Maui* 886 F.3d 737 (9th Cir. 2018). The Court found that the Clean Water Act applies to point source discharges of pollutants that reach navigable water, such that the discharges are the “functional equivalent” of a discharge into navigable water. The Court rejected the “direct hydrological connection” standard as reading into the statute words that are not there, while curiously avoiding the fact that the statute omits the words “functional equivalent” as well.

The Sixth Circuit in a recent pair of cases interpreted the statute more strictly. In *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018) and *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018), the Court held that “groundwater is not a point source.” Under its view of the Clean Water Act, “for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters.”

The circuit split is significant enough that the U.S. Supreme Court asked the Solicitor General to weigh in on the question by amicus brief. In January 2019, the Solicitor General recommended that the Supreme Court take up the Ninth Circuit case in order to resolve the split. We think it likely that the Supreme Court will do so. The impact for both current NPDES permittees as well as facilities and operations that do not currently require an NPDES permit may be significant.