
Sixth Circuit Holds Clean Water Act Does Not Require Permits for Discharges to Groundwater

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On September 24, 2018, the US Court of Appeals for the Sixth Circuit ruled that the Clean Water Act (CWA) does not require a National Pollution Discharge Elimination System (NPDES) permit for the discharges of pollutants to groundwater, even where those pollutants eventually reach navigable waters. The answer to the question of whether groundwater discharges are subject to CWA permitting requirements could have substantial and far-reaching consequences for many industries and could sweep coal ash, pipeline spills and agricultural runoff, among others, under the CWA's jurisdictional reach.

Moreover, the decision creates a circuit split with prior decisions from the Ninth and Fourth Circuits reaching the opposite conclusion, increasing the likelihood that the Supreme Court will make the ultimate decision on this issue. In those earlier cases, the appellate courts ruled that the CWA indeed requires NPDES permits for discharges of pollutants that flow through groundwater where those pollutants eventually reach navigable waters. This significant circuit split raises serious questions about the scope of the CWA's jurisdictional reach and highlights the evolution of the so-called conduit theory.

In *Kentucky Waterways Alliance v. Kentucky Utilities Company*, No. 18-5115 (6th Cir. Sept. 24, 2018) and *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 17-6155 (6th Cir. Sept. 24, 2018), the Sixth Circuit concluded that NPDES permitting requirements did not apply to the leaching of pollutants from coal ash ponds into groundwater where that groundwater was hydrologically connected to surface water. *Kentucky Waterways*, slip op. at 17; *Tennessee Clean Water Network*, slip op. at 14. In both cases, environmental groups brought complaints under the citizen suit provision of the CWA, alleging that pollutants that leaked from a coal-fired power plant's coal ash ponds into groundwater which eventually reached a navigable waterway were subject to NPDES requirements. *Kentucky Waterways*, slip op. at 6–7; *Tennessee Clean Water Network*, slip op. at 7–8. Specifically, the groups argued that the groundwater was a point source, and that because pollutants migrated from the ponds through the groundwater (a point source) to navigable waters, the discharges were subject to CWA jurisdiction. *Kentucky Waterways*, slip op. at 6–7; *Tennessee Clean Water Network*, slip op. at 7–8.

In rejecting this argument, the Sixth Circuit explicitly disagreed with the Fourth and Ninth Circuits, holding that “CWA does not extend liability to pollution that reaches surface waters via groundwater.” *Kentucky Waterways*, slip op. at 1, 10; *Tennessee Clean Water Network*, slip op. at 9. First, the Sixth Circuit held that groundwater is not a “point source” because it is not a “discernible, confined, or discrete conveyance,” as point source is defined in the CWA. *Kentucky Waterways*, slip op. at 10; *Tennessee Clean Water Network*, slip op. at 11. Second, the Sixth Circuit explicitly rejected the conduit theory, reasoning that although the CWA does not require a direct discharge to navigable waters for liability to attach, it covers only discharges “into” navigable waters “from any point source.” *Kentucky Waterways*, slip op. at 11–12; *Tennessee Clean Water Network*, slip op. at 9–12. The pollution from the coal ash ponds met neither requirement, according to the Sixth Circuit, because (1) for a point source to discharge into navigable waters, it “must dump directly into those navigable waters”; and (2) the pollutants are not coming from a point source, as groundwater is not a point source. *Kentucky Waterways*, slip op. at 11–12; *Tennessee Clean Water Network*, slip op. at 10–11. As a result, the Sixth Circuit concluded that the CWA does not prohibit the discharge of pollutants into navigable waters via groundwater. *Kentucky Waterways*, slip op. at 17; *Tennessee Clean Water Network*, slip op. at 14.

In a strongly worded dissent, Judge Clay called the majority opinion “way off the rails” and instead agreed with the Fourth and Ninth Circuits, stating that because the CWA does not require a discharge from a point source *directly* into navigable waters, “a short journey through groundwater does not defeat CWA liability.” *Kentucky Waterways*, slip op. at 21; *see also Tennessee Clean Water Network*, slip op. at 18, 21. Relying on the same CWA provision as the majority, i.e., that the CWA prohibits discharges “to navigable waters from any point source,” Judge Clay concluded that discharges from coal ash ponds to groundwater which eventually reached navigable waters are within the reach of the CWA. Judge Clay concluded that “the CWA does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters; a plaintiff must simply show that the defendant “add[ed] . . . any pollutant *to* navigable waters *from* any point source.” *Tennessee Clean Water Network*, slip op. at 18; *Kentucky Waterways*, slip op. at 21. The majority opinion, according to Judge Clay, will create a regulatory loophole by which polluters can avoid CWA liability by discharging into groundwater, “even if that groundwater flows immediately into a nearby navigable water.” *Kentucky Waterways*, slip op. at 22; *Tennessee Clean Water Network*, slip op. at 19.

Due to the conflicting decisions from the appellate courts, large uncertainty remains. As a result, it seems increasingly likely that the Supreme Court may decide the issue since a circuit split has emerged and petitions for *certiorari* were filed in Ninth and Fourth Circuits cases in September 2018. In addition, the Environmental Protection Agency (EPA) has requested and received comment on whether the CWA should apply to discharges from point sources that reach navigable waters via groundwater. [83 Fed. Reg. 7126 \(Feb. 20, 2018\)](#). In its request for comment, EPA outlined the mixed and conflicting case law interpretations, highlighting the potential need for clarification on whether and under what circumstances NPDES permits are required for discharges into groundwater.

In light of various rulings from the Fourth, Sixth and Ninth Circuits, for the time being, the answer to the question of whether the CWA applies to discharges to groundwater which eventually reach

navigable waters depends on the jurisdiction where the discharge occurred. Until further clarity emerges either from the Supreme Court or EPA, parties currently discharging pollutants into groundwater will have to look to court decisions in the jurisdiction where they operate for guidance as to whether such discharges require NPDES permits. In the meantime, we can expect to see an increase in citizen suits seeking to broaden the Ninth and Fourth circuit decisions to other jurisdictions.¹

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1. In addition to the cases discussed above, there is one additional case addressing this issue currently on appeal to the Second Circuit. *See 26 Crown Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority*, No. 17-2426 (2d Cir.) (argued April 18, 2018).
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