Groundwater Discharges and the Clean Water Act

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"Words are chameleons, which reflect the color of their environment."

*Learned Hand*

“You can write the rest of the statute so long as I get to write the definitions.”

*A former negotiating partner*
OUTLINE

- **Key question**: are pollutant discharges to groundwater regulated by CWA §301(a)?
  - 4 Recent groundwater discharge cases
  - Statutory background
  - Holdings thus far
  - Comments and perspectives
Recent or pending cases in 3 circuits (possible circuit split, SCOTUS review)

- **Ninth Circuit:**

- **Fourth Circuit:**

- **Sixth Circuit:**

- **Note:** earlier district court and appellate cases.
Sewage effluent discharged into wells with admitted hydrological connection to Pacific Ocean
Hawai‘i Wildlife Fund v. County of Maui

Results of EPA dye injection study
- TVA sluices coal ash waste to unlined ash pond in close proximity to Cumberland River.
- Karst geology; coal ash pollutants in adjacent river.

*Tennessee Clean Water Network v. Tennessee Valley Authority*
Modeled migration of nickel from ash pond landfill into groundwater and then adjacent river
Kentucky Waterways Alliance v. Kentucky Utilities Co.

Essentially same facts as TVA case
Upstate Forever v. Kinder Morgan Energy Partners, L.P.

• Several hundred gallons of gasoline spilled from ruptured pipeline – entered groundwater.
• Pipeline repaired – no ongoing spills from pipeline. *(Gwaltney issue)*
• But ongoing release of pollutants from the groundwater into navigable waters less than 1,000 feet away.
CWA § 301(a)

“Except as in compliance with [various permitting and control requirements], the discharge of any pollutant by any person shall be unlawful.”
CWA § 502(12)

“The term ‘discharge of a pollutant’ ... means ... any addition of any pollutant to navigable waters from any point source ....”

- “Addition” not defined in CWA (there is case law), but:
CWA § 502(7)

“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”

• And:
CWA § 502(7)

“The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”
3 Key legal issues
(theories of liability for GW discharge)

(1) Can groundwater be a “water of the United States?”
(2) Can groundwater be a “point source” (from which an addition to a water of the U.S. occurs)?
(3) Does §301(a) impose liability for a discharge from a point source, through groundwater, into a water of the United States?
Conceptualizing the issues. 
Section 301(a) liability requires:

- Point source
- Addition of pollutants
- Water of the U.S.
Issue #1

- Point source
- Addition of pollutants
- Can GW = Water of the U.S.???
Can GW be the point source??  
Addition of pollutants  
Water of the U.S.

Issue # 2
Issue # 3

Point source

Addition of pollutants

Can GW be a conduit??

Water of the U.S.
<table>
<thead>
<tr>
<th>Court</th>
<th>Is GW a Water of the United States?</th>
<th>Is GW a Point Source?</th>
<th>Conduit theory? (Or is the GW conduit a NPS?)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hawaii Wildlife Fund (9th Circuit)</strong></td>
<td>• Dist. Ct.: YES</td>
<td>• Dist. Ct.: YES</td>
<td>YES if connection is “fairly traceable”/significant nexus</td>
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<td></td>
<td>• 9th Circ.: assumes no w/o deciding</td>
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<tr>
<td><strong>Upstate Forever (4th Circuit)</strong></td>
<td>Not alleged in complaint or addressed by the courts</td>
<td>Not addressed</td>
<td>• YES if “direct hydrological connection”</td>
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<td>• Dissent: NPS pollution; no ongoing discharge</td>
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<tr>
<td><strong>Tennessee Clean Water Network (on appeal to 6th Circuit)</strong></td>
<td>Implicitly rejected (dictum?)</td>
<td>Not addressed</td>
<td>YES if “direct and immediate hydrological connection” which can be traced</td>
</tr>
<tr>
<td><strong>Kentucky Waterways Alliance (on appeal to 6th Circuit)</strong></td>
<td>NO – GW is not “navigable” water (dictum?)</td>
<td>NO – GW is a diffuse medium</td>
<td>NO – Congress intended state control of GW even if hydrological connection</td>
</tr>
</tbody>
</table>
Issue # 1

Point source → Addition of pollutants → Can GW = Water of the U.S. ???

NO

Distinction between statutory and constitutional question.
Can GW be the point source? NO

Addition of pollutants

Water of the U.S.
Issue # 3

Direct hydrological connection, fairly traceable

Point source
Addition of pollutants
Can GW be a conduit??
YES IF:
Water of the U.S.

Water of the U.S.
But note competing tests for liability:

- When there is a “direct hydrological connection.”
  - *Upstate Forever*
  - EPA Guidance
- When pollutants in surface water are “fairly traceable” to the discharge into connected groundwater.
  - *Hawai‘i Wildlife Fund*
- Both.
  - *Tennessee Clean Water Network*
- *How different are the tests?*
Competing readings of the CWA text (both suggest improperly imputed words)

For “conduit” theory

• More restrictive view: “any addition of any pollutant \textit{directly} to navigable waters from any point source....”
  • Scalia, J. said no in \textit{Rapanos}

Against “conduit” theory

• More permissive view: “any addition of any pollutant to navigable waters \textit{with a direct hydrological connection} from any point source....”
  • And ignores the structure:
    • “any addition of any pollutant \textit{to} navigable waters \textit{from} any point source....”
Competing policy considerations

For “conduit” theory:

• **Loopholes**: Absent the conduit theory, how easy is it to avoid CWA regulation?
  • *Simply discharge to the ground adjacent to a water of the U.S.*

Against “conduit” theory:

• **Federalism**: Congress left groundwater regulation and NPS pollution control to the states.
  • *Improperly intrudes on legislative distinctions and policy choices.*
Alternative “take” on the case

Is it even about groundwater *per se*? (heresy at a groundwater conference!)

Look at the cases forming the underlying rationale:
Concerned Area Residents v. Southview Farms (2nd Circ.)

Manure sprayer is the point source

The field is the conduit
Headwaters v. Talent Irrig. Dist. (9th Circ.)

Pesticide sprayer is the point source

Irrigation system is the conduit
Peconic Baykeeper v. Suffolk County (2nd Circ.)

Helicopter is the point source

Atmosphere is the conduit
These cases

Wells, pipelines, and ponds are the point sources

Groundwater is the conduit
“The most valuable of all talents is that of never using two words when one will do.”

Thomas Jefferson

How many words did Congress use for the CWA focus?

- “Water” – definition of “pollution”
- “The Nation’s Waters” – statutory objective
- “Navigable waters” – definition of “discharge”
- “Waters of the U.S.” – definition of “navigable waters”
“The most valuable of all talents is that of never using two words when one will do.”

Thomas Jefferson

So nearly a half century after Congress passed the 1972 CWA, we still lack certainty about the most basic issue – what “water” or “waters” are covered by the Act.