

Pair of Clean Water Act Decisions Creates Circuit Split over Discharges to Groundwater

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On Monday, divided panels of the U.S. Court of Appeals for the Sixth Circuit issued a pair of decisions holding that Clean Water Act (“CWA”) Section 301’s prohibition on unpermitted discharges does not apply to pollutants that reach surface waters through groundwater. In [Kentucky Waterways Alliance v. Kentucky Utilities Co.](#), No. 18-5115, and [Tennessee Clean Water Network v. TVA](#), No. 17-6155, the Sixth Circuit became the third appellate court this year to decide whether discharges to surface waters through groundwater require National Pollution Discharge Elimination System (“NPDES”) permits. Unlike the [Fourth](#) and [Ninth](#) Circuits, the Sixth Circuit rejected the theory that pollutants reaching navigable waters after passing through groundwater (or soil) are discharges that require NPDES permits.

In both *Kentucky Waterways* and *TVA*, environmental groups brought citizen suits alleging that power plant owners violated the CWA by failing to obtain NPDES permits for releases of pollutants from coal ash ponds into groundwater that subsequently migrated into surface waters. In *Kentucky Waterways*, the district court granted a motion to dismiss, holding that the releases to groundwater were not “discharges” regulated by the CWA. The district court in *TVA* concluded, after a bench trial, *TVA*’s coal ash ponds were illegally discharging to nearby surface waters through hydrologically connected groundwater.

Requiring Continuity of Point Source Conveyances

In *Kentucky Waterways*, the panel majority first rejected the plaintiffs’ theory that groundwater itself is a “point source” capable of discharging to navigable waters. The majority explained that groundwater is too diffuse and difficult to trace with precision necessary to make it a “discernible, defined, and discrete conveyance.” 33 U.S.C. § 1362(14). As a result, neither groundwater nor the medium through which it flows (*e.g.*, karst geology) is a point source subject to CWA Section 301. *Kentucky Waterways*, slip op. at 10-11.

The majority then found that a release to groundwater is not a discharge, even if that groundwater is

hydrologically connected to navigable waters. The opinion relied on the CWA's definitions of "discharge of a pollutant" and "effluent limitation" to conclude that a "discharge" requiring a NPDES permit requires a point source to introduce a pollutant directly to navigable waters. See *id.* at 11-12. Thus, the majority articulated a two-part test for when a discharge occurs: "(1) the pollutant must make its way to a navigable water (2) by virtue of a point-source conveyance." *Id.* at 12. Releases through a non-point source intermediary, like groundwater, fail to meet this test.

The panel majority in *TVA* applied the reasoning in *Kentucky Waterways* to reach the same conclusion. Notwithstanding the district court's findings that the groundwater at issue was hydrologically connected to nearby surface waters, the coal ash ponds' releases to groundwater were not discharges that required NPDES permits. See *TVA*, slip op. at 9-14.

Creation of a Circuit Split

The Sixth Circuit's decisions on Monday increase the odds that the U.S. Supreme Court will resolve the question of whether the CWA requires NPDES permits for "indirect" discharges. [Petitions for certiorari](#) seeking review of the Fourth and Ninth Circuit's decisions on this issue are currently pending. While both petitions argued that a circuit split existed, in the decisions in *Kentucky Waterways* and *TVA*, the Sixth Circuit expressly stated its disagreement with decisions of the Fourth and Ninth Circuits on this important issue. See *Kentucky Waterways*, slip op. at 10 ("we disagree with the decisions of our sister circuits..."). As a result, one can expect further litigation, potential for the U.S. Supreme Court to resolve the issue—and, for now, uncertainty—over what releases of pollutants require NPDES permits.

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