



Texas Environmental Law Roundtable

The Litigation Landscape in 2018

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Indirect Discharges via Hydrologically-Connected Groundwater:

The Legal Landscape and Its Implications for Permitting and Compliance



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The Basics

***CWA (NPDES) permit
required for . . .***

pollutant
discharge

from a point
source

to navigable
waters

***"any addition of any
pollutant to navigable waters
from any point source"***



The Question

Established

point sources that directly discharge pollutants to navigable waters = NPDES permit required

In Question

point sources that indirectly discharge pollutants to navigable waters via groundwater = ?

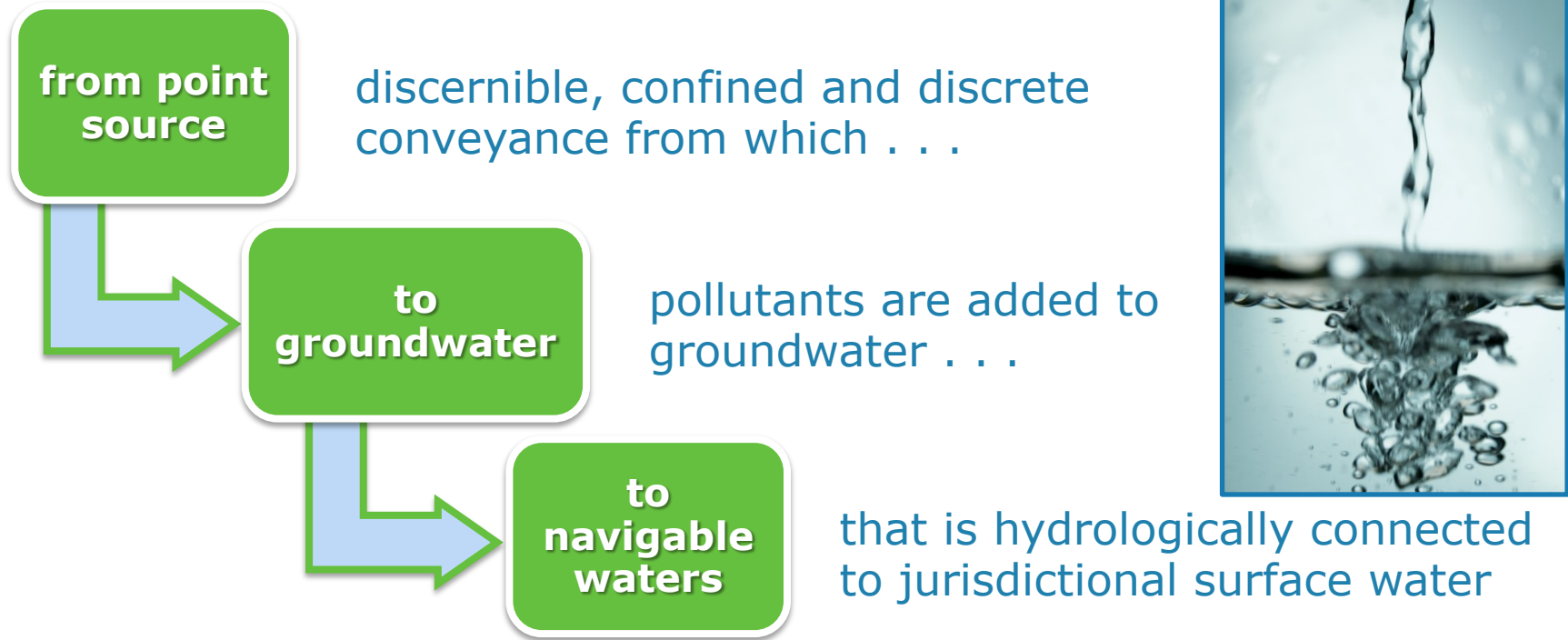


Non-Starters

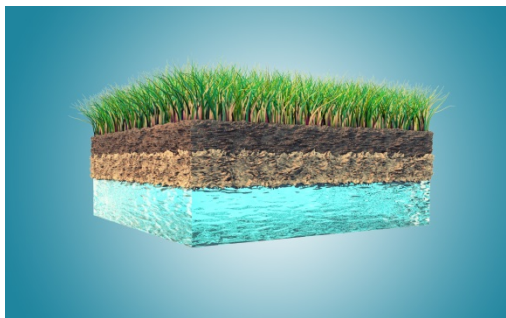
- Groundwater \neq Navigable Water
- Groundwater \neq Point Source
- Non-Point Source Pollution \neq NPDES Permit Requirement



Indirect Discharges via GW



Prior EPA Statements



the CWA "requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters"

56 Fed. Reg. at 64,892 (Dec. 12, 1991)

direct

hydrological

connection

"there are scientific uncertainties and site-specific considerations with respect to regulating discharges to surface water via groundwater with a direct hydrologic connection"

68 Fed. Reg. at 7,216 (Feb. 12, 2003)



Conflicting Case Law

Does CWA jurisdiction extend to point sources indirectly discharging pollutants to navigable waters via groundwater?

NO Indirect discharges are not jurisdictional:

- 7th Cir.: *Dayton Hudson Corp.* (5/18/94)
- 6th Cir.: *Kentucky Waterways/TVA* (9/24/2018)



Circuit Split

YES Indirect discharges are jurisdictional:

- 4th Cir.: *Upstate Forever* (4/12/18)
- 9th Cir.: *County of Maui* (2/1/18)

9th Cir.: *County of Maui*

- **1979/1985:** Four UIC wells permitted/constructed by POTW for disposal of treated effluent
- **April 2012:** Lawsuit filed for unpermitted discharges
- **Nov. 2012:** County applies for NPDES permit
- **June 2013:** Tracer dye study confirms hydrological connection to Pacific Ocean



EPA's Response to *Maui* and Other Pending Indirect Discharge Litigation

EPA Request for Comment (83 Fed. Reg. 7126 (Feb. 20, 2018))

- Is subjecting indirect discharges to NPDES permitting consistent with CWA?
- Are indirect discharges better addressed through other federal authorities?
- Are indirect discharges already adequately addressed through existing state or federal regulatory programs (e.g., SDWA)?
- Should EPA clarify its previous statements regarding indirect discharges to provide certainty for public/regulated community?

Request for Comment Only; No Rule Proposal

Comments Were Due 5/21/18; ~ 60,000 Submitted

4th Cir.: *Upstate Forever*

- **Nov. 2014:** 369,000+ gallons of gasoline spilled from ruptured underground pipeline
 - Pipeline repaired “shortly after” spill
- **By end of 2015:** 209,000 gallons of gasoline recovered
 - Remediation/recovery measures implemented with state oversight
- **Dec. 2016:** Lawsuit filed for unpermitted discharge



Judicially-Created Standards

4th Cir.: *Upstate Forever*

- Point source “starting point or cause of a discharge”
- Must allege “direct hydrological connection” between groundwater and surface water

9th Cir.: *County of Maui*

- Pollutants are “fairly traceable” from point source to surface water
- Pollutant levels reaching surface water must be more than *de minimis*

6th Cir.: *Kentucky Waterways and TVA*

- Releases from coal ash ponds
- Groundwater not a point source
- Release to groundwater not a discharge
- “CWA does not extend liability to pollution that reaches surface water via groundwater”



SCOTUS?

- ***Kentucky Waterways:***
“we disagree with the decisions from our sister circuits”
- ***Maui and Upstate Forever:*** petitions for certiorari filed



How CWA Jurisdiction Over Indirect Discharges Alters the State of Play

Consequences of 4th/9th Circuit Court Decisions

- Ambiguous/undefined standards:
 - direct hydrological connection/fairly traceable
 - *de minimis* pollutant levels
- EPA/states/courts to determine requisite factual nexus (when connection “is too tenuous to support liability”)
- Difficulty identifying/permitting indirect discharges

Typical NPDES Permit Application Information

Discharge route... to the nearest major watercourse

- Relocation of a discharge point is a major amendment

Latitude and longitude of the outfall(s)

At least two photographs of existing/proposed discharge point and as much area downstream (photo 1) and upstream (photo 2) as can be captured on film....

Flow schematic with a water balance showing...all treatment units...all wastewater flow [to] treatment and each outfall/point of disposal

- If a water balance cannot be determined, send drawings of all flows

Industry Sectors and Activities Most Vulnerable for Indirect Discharges

Underground Injection

Contaminated Sites (near WOTUS)

Owners/Operators of:

- Landfills/surface impoundments
- Pipelines
- USTs
- Retention/detention ponds
- Treatment lagoons
- Septic tanks/cesspools/pits
- Groundwater recharge systems
- Green infrastructure systems with infiltration



But see . . . 4th Cir.: Dominion



- Release from coal ash pond → groundwater → surface water
- Coal ash pond not a point source
- Not covered by CWA



Thank You!



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