

CASE LAW ON DISCHARGES TO GROUNDWATER THAT IS HYDROLOGICALLY CONNECTED TO SURFACE WATER

OPINION	COURT & YEAR	PROCEDURAL POSTURE	KEY FACTS OF THE CASE	DID THE COURT HOLD THAT HYDROLOGICALLY CONNECTED GROUNDWATER IS SUBJECT TO CWA JURISDICTION?	DID THE COURT FIND A JURISDICTIONAL DISCHARGE UNDER THE FACTS OF THIS CASE?	KEY ELEMENTS OF THE COURT'S REASONING
FIRST CIRCUIT						
Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175	District of Puerto Rico, 2009	Motions regarding whether to hold a jury or bench trial, in which defendants argued no right to a jury trial existed because no civil penalties were implicated under RCRA or CWA.	Plaintiffs alleged that gasoline from underground storage tanks owned by Esso reached navigable waters through groundwater hydrologically connected to the Piñonas River.	Yes	No. A factual determination still needed to be made about whether "contamination of the groundwater has an adverse impact on waters of the United States."	The court held that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States." However, in each case, "there is a factual determination to be made as to the relationship between the groundwater...and the surface water[]...which may lead the fact finder to conclude that contamination of the groundwater has an adverse impact on waters of the United States."
Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438	First Circuit Court of Appeals, 1992 ¹	Municipality's appeal of district court decision upholding decision of Army Corps of Engineers to issue a CWA section 404 permit to allow placement of fill in artificial wetlands, in connection with Boston Harbor cleanup project.	The town of Norfolk challenged the decision of the Corps to issue a permit under the CWA without considering groundwater resources as part of the "aquatic ecosystem" for purposes of the practicable alternatives analysis. Plaintiffs argued that groundwater resources should be considered because they are "waters of the U.S.," despite the Corps' interpretation of this definition to exclude groundwater.	No. The court deferred to the Corps' interpretation of "waters of the United States" as referring only to surface waters.	N/A	The court deferred to the Corps' interpretation of "waters of the United States," which excluded groundwater. With regard to whether "waters of the United States" should include groundwaters connected to surface waters, the court stated it agreed with the Corps that "since such a determination ultimately involves an ecological judgment about the relationship between surface waters and groundwaters, it should be left in the first instance to the discretion of the EPA and the Corps." The court affirmed the district court decision in favor of the Corps.
SECOND CIRCUIT						
26 Crown Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority, No. 3:15-cv-1439, 2017 WL 2960506	District of Connecticut, 2017	Defendant city's motion to dismiss plaintiffs' claims, which included a violation of the CWA's NPDES permit requirement.	Plaintiffs owned an apartment building in New Haven and alleged that the city's failure to properly operate its combined sewer system resulted in backflows of sewage into their building's basement. Plaintiffs also alleged that backflows into the basement of their building "seep into the ground and eventually to the ground waters below, and further that these ground waters in turn are 'hydraulically [sic] connected to the various streams that empty into the Long Island Sound'" in violation of the CWA's NPDES permit requirement.	No	N/A	The court first concluded that under <i>Rapanos</i> the plaintiffs had fallen well short of showing a surface connection as the plurality would require, or even a significant nexus as Justice Kennedy would require. The court went on to note that even if it assumed plaintiffs had alleged facts to show the backflows in their basement had a significant effect through groundwater migration on the Long Island Sound, this would still fall short of alleging a CWA violation for two reasons: First, the court held "ground water itself is not navigable, and so the act of polluting ground water does not of itself violate the [CWA]." Second, the court colorfully concluded that "[a]bsent exceptional

¹ Decisions by federal courts of appeal are shaded blue.

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						proof of something akin to a mythical Styx-like subterranean river, a diffuse medium like ground water for the passive migration of pollutants to navigable waters cannot constitute a 'point source' within the meaning of the Clean Water Act." Pollution by ground water migration, the court held, is not a "a discrete and channelized conveyance" but rather is nonpoint source pollution.
Waterkeeper Alliance, Inc. v. U.S. Env'tl. Prot. Agency, 399 F.3d 486	Second Circuit Court of Appeals, 2005	Challenge by various environmental and farm groups to EPA rule promulgating CWA technology-based performance standards for various categories of CAFOs.	Environmental-group plaintiffs challenged EPA's decision to remove from the final rule proposed provisions regulating discharges from CAFOs to surface water via hydrologically connected groundwater, which would have been the first (and only) time EPA promulgated rules regarding such discharges.	Yes (implicitly, by upholding EPA's decision to regulate groundwater-to-surface water discharges on a case-by-case basis)	N/A	The court upheld EPA's case-by-case approach to assessing jurisdiction for groundwater, noting that "groundwater-related requirements are highly dependent on site-specific variables and that, accordingly, such requirements are more effectively evaluated and implemented on a case-by-case basis, rather than imposed uniformly."
Mut. Life Ins. Co. of N.Y. v. Mobil Corp., No. 96-1781, 1998 WL 160820	Northern District of New York, 1998	Motion to dismiss CWA and other claims brought by shopping center against Mobil truck driver that released 750 gallons of gas into groundwater.	Plaintiffs alleged that this incident caused groundwater contamination on their property and the groundwater was hydrologically connected to wetlands and Bear Trap Creek, both navigable.	Yes	Not decided	The court agreed with case law holding that the "CWA does encompass ground waters that are hydrologically connected to regulated surface waters" and concluded that plaintiff had sufficiently pled a cause of action by alleging contamination via groundwater. The court noted, however, that "[a] general hydrological connection among all waters will be insufficient," and plaintiffs "will have to trace pollutants from their source to surface waters."
New York v. United States, 620 F. Supp. 374	Eastern District of New York, 1985	Motion for summary judgment brought by defendant United States. The court granted the U.S. summary judgment on the state's CWA claim on the basis of sovereign immunity.	Plaintiffs alleged that the defendants contaminated groundwater underlying former Suffolk County Air Force Base and the surrounding area with jet fuel and hydrocarbons. The plaintiffs alleged the contamination of the groundwater posed a threat to downgradient surface waters.	Yes (implicitly)	Not decided	The court declined to reach the defendants' legislative history arguments that the scope of the CWA does not cover groundwater. The court declined because, even though the discharges at issue were solely to groundwater, "it is clear that plaintiff has alleged that the pollutants threaten to contaminate [several] undisputably [sic] navigable waters."
THIRD CIRCUIT						
Aguilar v. Ken's Marine and Oil Service, Inc., No. 14-6735, 2016 WL 7234117	District of New Jersey, 2016	The court ruled on defendants' motion to dismiss plaintiffs' claims, including a claim under the Oil Pollution Act of 1990, 33 U.S.C. § 2701, et seq. (OPA), which imposes liability on "each responsible party	This lawsuit arose from the alleged discharge of oil and chemicals from defendants' properties to plaintiffs' properties during Superstorm Sandy. The opinion provides limited facts, but it appears that plaintiffs alleged in part that defendants' release of oil	No	N/A	In dismissing plaintiffs' OPA claim, the court held that plaintiffs failed to assert that defendants released oil into any "navigable waters or adjoining shorelines or the exclusive economic zone." In a footnote, the court went on to note that to the extent plaintiffs claimed groundwater constituted "navigable water," the claim would still fail. The court held

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		for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, <i>into or upon the navigable waters</i> or adjoining shorelines or the exclusive economic zone," 33 U.S.C. § 2702(a) (emphasis added). The OPA definition of "navigable waters" is the same as the definition of "navigable waters" in the CWA. See 33 U.S.C. § 1362(7).	and chemicals into groundwater constituted a release into "navigable waters."			("as have most courts to address the issue") that "groundwater does not fall within the meaning of 'navigable waters' under the OPA," and, citing Tri-Realty Co., Chevron v. Apex Oil, and Rice v. Harken, for the proposition that this was the case "regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters."
Raritan Baykeeper, Inc. v. NL Indus., Inc., No. 09-4117, 2013 WL 103880	District of New Jersey, 2013	Various dispositive motions including defendants' motion to dismiss plaintiffs' CWA citizen suit.	The site at issue was surrounded on 3 sides by the Raritan River. NL Industries allegedly violated the CWA by discharging, without an NPDES permit, arsenic, copper, lead, nickel, and zinc into the river through various means including percolation to groundwater that then migrates to the river. Concentrations of these pollutants were higher where groundwater discharged into the river.	Yes	Not decided	In rejecting defendants' motion to dismiss, the court—noting a split in case law regarding "whether groundwater is a point source," and apparently siding with those courts that concluded groundwater can be a point source—held that plaintiffs had sufficiently pled the "point source" element of a CWA claim by alleging that the groundwater is hydrologically connected to Raritan River.
Tri-Realty Co. v. Ursinus Coll., No. 11-5885, 2013 WL 6164092	Eastern District of Pennsylvania, 2013	Defendant's summary judgment motion on plaintiff's RCRA and CWA claims regarding fuel oil discharged to groundwater from USTs located on defendant's property.	Pollution from USTs took approximately five to six years to travel from groundwater into navigable surface waters.	No	N/A	The court disagreed that "given its natural physical attributes, groundwater could fairly be described as a "discernible, confined and discrete conveyance" (i.e., a "point source"). Accordingly, the Court held that "the diffuse downgradient migration of pollutants on top of or through soil and groundwater alleged here is nonpoint source pollution outside the purview of the CWA."
FOURTH CIRCUIT						
Sierra Club v. Virginia Electric and Power Company, ___ F.Supp.3d ___ 2017 WL 1095039	Eastern District of Virginia, 2017	The Sierra Club sued Virginia Electric and Power Company d/b/a Dominion Virginia Power for violations of the CWA. The court's opinion followed a bench trial on the merits.	The violations stem from discharges of arsenic from Dominion's Chesapeake Energy Center (CEC) into the surrounding surface waters. For roughly fifty years, CEC burnt coal to generate electricity. Dominion stored ash from the burnt coal in piles and lagoons on the CEC site. The piles and lagoons, in turn, conveyed arsenic created in the power plant to groundwater and, through the groundwater, to surrounding	Yes	Yes	The court noted the split in courts but stated that it found persuasive those cases that hold that discharges to groundwater hydrologically connected to surface water are covered by the CWA. "Congress intended the CWA to protect the water quality of the nation's surface water. Where the facts show a direct hydrological connection between groundwater and surface water, that goal would be defeated if the CWA's jurisdiction did not extend to discharges to that groundwater." Here, the court found that there was a direct

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			surface waters. Sierra Club claimed the unpermitted discharge via groundwater violated the CWA's NPDES permit requirement.			hydrological connection to surface water. The court was also persuaded by EPA's position statements regarding discharges via groundwater, and rejected defendant's argument that the unofficial nature of the policy statements mean they are not entitled to deference. The court concluded the defendant had violated the CWA.
Upstate Forever v. Kinder Morgan Energy Partners, L.P., ___ F.Supp.3d ___, 2017 WL 2266875	District of South Carolina, 2017	Nonprofit environmental advocacy organizations filed citizen suit against parent company and its subsidiary pipeline owner, claiming violation of Clean Water Act (CWA) due to pipeline leak. Defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.	Spill from the underground pipeline discharged an estimated 369,000 gallons of gasoline and petroleum products into the soil. Plaintiffs alleged that contaminants entered groundwater hydrologically connected to creeks and wetlands located in vicinity of spill.	No	N/A	In granting the motion to dismiss, the court was persuaded by the fact that "the two circuit courts to address this issue [7 th Circuit in <i>Oconomowoc Lake</i> and 5 th Circuit in <i>Rice</i>] have concluded that 'navigable waters' does not include groundwater that is hydrologically connected to surface waters." The court agreed with the Eastern District of North Carolina in <i>Cape Fear</i> that "Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters."
Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, 141 F.Supp.3d 428	Middle District of North Carolina, 2015	Defendant Duke moved to dismiss citizen enforcement action under the CWA for failure to state a claim that seeps from coal ash lagoons into the Radkin River was a violation of the CWA.	Plaintiff alleged violations of NPDES permit for unpermitted discharges of wastewater through engineered and non-engineered seeps and an unpermitted pipe directly into waters of the U.S. It also alleged pollutants from the coal ash lagoons entered the groundwater, which is hydrologically connected to the Yadkin River and High Rock Lake, and contaminated both.	Yes	Not decided	The Court wrote that it "agrees with the line of cases affirming CWA jurisdiction over the discharge of pollutants to navigable surface waters via hydrologically connected groundwater, which serves as a conduit between the point source and the navigable waters." It framed the issue "not as whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater." The court concluded that the coal ash lagoons at issue were "point sources." The court also cited the goal of the CWA to protect the quality of the nation's waters. The Court denied defendant's request to dismiss the claim for failure to state a recognizable claim.
Chevron U.S.A. Inc. v. Apex Oil Company, Inc., 113 F.Supp.3d 807	District of Maryland, 2015	Energy corporation brought action against oil company and its parent company under various statutes including the Oil Pollution Act (OPA), alleging a discharge of oil to "navigable waters" and seeking to recover remediation costs incurred as a result of contamination from an underground pipeline allegedly	This dispute involved alleged ongoing releases of petroleum products from a 3.1-mile-long underground pipeline in southeast Baltimore, adjacent to Baltimore's Harbor. Plaintiff alleged that the oil leaked into the groundwater beneath the site, and then, over the course of several years, migrated across the Site, eventually entering a stormwater system approximately 200 yards from the	No	N/A	The court held that groundwater was not "navigable water" for purposes of liability under the Oil Pollution Act (OPA). Even if potentially connected to navigable waters, did not give rise to a claim under the Act. After discussing case law on both sides of the issue and noting that the only two circuit courts to weigh in on the issue rejected finding jurisdiction (<i>Oconomowoc Lake v. Dayton</i> , and <i>Rice v. Harken</i>), and after noting that the U.S. Supreme Court in <i>Rapanos</i> eschewed a broad interpretation of the CWA's jurisdictional reach, the

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		owned and operated by defendant oil company and parent company. Defendants filed a motion to dismiss all claims. The OPA definition of "navigable waters" is the same as the definition of "navigable waters" in the CWA. <i>See</i> 33 U.S.C. § 1362(7).	pipeline and discharging out through an outfall pipe connected to the drainage channel that emptied into the Harbor.			court held that "Congress did not intend for groundwater to fall within the purview of 'navigable water,' even if it is hydrologically connected to a body of 'navigable water.'" The court granted defendant's motion to dismiss the OPA claim.
Sierra Club v. Virginia Elec. & Power Co., 145 F.Supp.3d 601	Eastern District of Virginia, 2015	Defendant filed motion to dismiss nonprofit's suit alleging defendant violated CWA through seepage of pollutants from its coal ash disposal facility to groundwater hydrologically connected to navigable waters.	Power plant operated under a VPDES permit but permit did not authorize discharge of coal ash into groundwater or surrounding surface waters. Groundwater monitoring at the site showed elevated levels of pollutants migrating into surrounding waters of the U.S.	Yes	Not decided.	The court cited <i>Yadkin</i> in finding that the CWA extends jurisdiction to discharges of pollutants to surface waters via hydrologically connected groundwater. Here, plaintiff sufficiently pled that seepage from defendant's facility reaches navigable waters through hydrologically connected groundwater. Accordingly, the court denied defendant's motion to dismiss this claim.
Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F.Supp.3d 798, clarified 2014 WL 10991530	Eastern District of North Carolina, 2014	Defendant filed motion to dismiss for failure to state a claim, seeking dismissal of citizen's suit which alleged that the escape of coal ash from lagoons into groundwater discharging into drinking water supply wells was a violation the CWA.	Coal fired electricity generating plant discharged to Cape Fear River through an NPDES permit but had no permit for discharges to Sutton Lake. Pollutants from coal ash lagoons leached into the groundwater and formed a plume migrating towards drinking water supply wells. The contaminated groundwater also flowed directly into a canal that flowed into Sutton Lake.	No	N/A	Relying on <i>Oconomowoc Lake</i> , the court held the CWA did not extend federal authority over groundwater, even if connected to navigable waters. The court also said <i>Rapanos</i> does not endorse a broad meaning of navigable waters.
FIFTH CIRCUIT						
Rice v. Harken Exploration Co., 250 F.3d 264	Fifth Circuit Court of Appeals, 2001	Review of grant of summary judgment motion by defendant owner/operator of oil and gas leases in action by surface-rights owners alleging oil discharges into "navigable waters" in violation of the Oil Pollution Act of 1990. (The court concluded that "navigable waters" has the same meaning as in the CWA.)	The discharges at issue were a variety of leaks and spills onto dry land, which plaintiffs alleged seeped through the ground into groundwater, which in turn migrated into nearby bodies of "navigable" surface waters, including the Canadian River. Plaintiffs' only evidence of the hydrological connection between the groundwater and the river was "a general assertion by their expert that the Canadian River is down gradient" from the ranch. There was also "no evidence of actual oil contamination" in the Canadian River, no "discussion of flow rates into the river," "no estimate of when or to what extent the contaminants in the groundwater will affect	Not decided	N/A	The court affirmed the grant of summary judgment for defendant, holding that "a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability." The court was also influenced by the fact that plaintiffs "failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA."

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			the Canadian River," and "no evidence of any present or past contamination" of the river.			
Exxon Corp. v. Train, 554 F.2d 1310, 1322	Fifth Circuit Court of Appeals, 1977	A natural gas producer sought review of a claim by EPA that it had jurisdiction to control disposal of wastes into deep wells under certain circumstances and the Agency's denial of a permit to allow such waste disposal.	In designing the Flomaton natural gas facility, Exxon initially planned to dispose of waste water by discharging part of it into surface holding pits from which it eventually would enter the Escambia River system and by injecting the remainder into a formerly producing oil well about 5,000 feet deep. EPA argued it has the power to place conditions in such permits that limit the "associated" disposal of wastes into wells.	Not decided	N/A	In holding EPA did not have authority, as an incident to its power to issue permits authorizing the discharge of pollutants into surface waters to place conditions in such permits controlling the disposal of wastes into deep wells. The court provided a detailed overview of legislative history regarding Congress's decision not to regulate groundwater under the CWA. It concluded Congress did not mean to substitute federal authority for state authority over groundwater; rather, the court found a pattern of federal encouragement of states to control groundwater pollution, but no <i>direct</i> control. The court noted that neither party argued that the disposal into the deep wells was disposal into anything other than groundwaters. EPA "has not argued that the wastes disposed of into wells here do, or might, 'migrate' from groundwaters back into surface waters." The court clarified, "We mean to express no opinion on what the result would be if that were the state of facts."
United States v. GAF Corp., 389 F. Supp. 1379	Southern District of Texas, 1975	The US (EPA) requested an injunction prohibiting GAF from using deep wells for disposal without an NPDES permit. The Court's opinion addressed defendant's motion to dismiss for lack of subject matter jurisdiction for failure to state a claim.	The federal government sought relief against the drilling of deep wells and injecting organic chemical wastes (subsurface disposal) in them without the approval of the EPA.	Not decided	N/A	In granting defendant's motion to dismiss, the court concluded, based on legislative history, that Congress did not mean to include groundwater because it did not establish federal standards for groundwaters. The court concluded that "disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a 'discharge of a pollutant'" under the CWA. The court did not address what it might have ruled if EPA had alleged impacts to surface waters.
SIXTH CIRCUIT						
Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc., No. 10-00084, 2011 WL 1357690	Middle District of Tennessee, 2011	Defendant's motion to dismiss the CWA and RCRA claims was denied as plaintiff had provided sufficient evidence to survive a motion to dismiss.	Plaintiff citizen group alleged Tennessee Aluminum Processors operated a dump that discharged pollutants including aluminum, ammonia, chlorides, lead, and manganese via groundwater into the city of Mount Pleasant's POTW and that some of the pollutants passed through in the POTW's discharge to a tributary of Quality Creek, a water of the US,	Yes	Not decided	Defendant's motion to dismiss was based on its argument that groundwater is not regulated under the CWA and, therefore, any discharges to the groundwater from Defendant's slag waste piles from aluminum processing facilities into the POTW is not regulated by the CWA. The Court looked to the case law regarding groundwater discharges to waters of the United States for guidance to assess whether groundwater discharges violated the CWA's

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			contributing to the POTW's NPDES permit violations.			pretreatment standards for POTWs. The Court concluded the CWA was meant to be liberally construed and found sufficient evidence existed as to the impact of alleged groundwater contamination on the POTW to survive a motion to dismiss. The plaintiff would still have to prove a link between contaminated groundwater and navigable waters, and that a general hydrological connection among all waters will be insufficient; plaintiff must trace pollutants from the source to surface waters.
Cooper Indus., Inc. v. Abbott Labs et al., No. 93-CV-193, 1995 WL 17079612	Western District of Michigan, 1995	The court ruled on the motion of defendant Michigan Department of Military Affairs to dismiss plaintiff's claims arising under CERCLA and the CWA.	Plaintiff alleged that defendants, including the Department of Military Affairs, operated facilities from which there were releases of hazardous substances, including T.C.E., P.C.E., and Polynuclear Aromatic Hydrocarbons, which caused the pollution of defendants' facilities as well as the ground water and necessitated the plaintiff's treatment of the site pursuant to an EPA administrative order. Plaintiff allegations included a claim that defendant's facilities have floor drains which drain into the sewer, which in turn discharges into the Nye Drain, which in turn discharges into the Fawn River, in violation of the CWA's NPDES permit requirement.	No	N/A	The court rejected plaintiff's CWA claim. Citing Oconomowoc Lake, the court held that a claim involving a discharge to groundwater that reaches surface water through a hydrologically connection is insufficient to state a cause of action under the CWA "since they concern ground waters and not 'waters of the United States.'" The court held that "the fact that these ground waters are hydrologically connected to some surface waters is insufficient to transform this case to a FWPCA cause of action." The court dismissed plaintiff's CWA claim.
Kelley <i>ex rel.</i> Mich. v. United States, 618 F. Supp. 1103	Western District of Michigan, 1985	Defendant US filed a motion to dismiss Plaintiffs' complaint, or alternately for summary judgment, on plaintiff's CWA claims.	Plaintiffs alleged that certain toxic chemicals were released into the ground at the US Coast Guard Air Station in Traverse City, Michigan, by Coast Guard personnel. Plaintiffs further alleged that these chemicals contaminated the groundwater underlying the Air Station and that the plume of contamination was migrating downgradient and eventually discharging into the East Arm of Grand Traverse Bay, a water of the US. The Coast Guard did not have an NPDES permit for this discharge.	No	N/A	In dismissing plaintiff's CWA claim, the court found CWA legislative history "unmistakably clear" that Congress did not intend the CWA to extend to groundwater contamination, even if there was a subsequent migration and discharge to navigable waters. Note, the court rejected the reasoning of an earlier unpublished opinion from the Eastern District of Michigan, <i>Kelley v. United States</i> , No. 79-10199 (E.D.Mich. Oct. 28, 1980), which held that the state could maintain an action against the US under the CWA for an alleged discharge of toxic chemicals into the groundwater, where the state claimed the discharge was ultimately affecting surface waters. This opinion is not readily available.
SEVENTH CIRCUIT						

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Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962	Seventh Circuit Court of Appeals, 1994	Review of lower court decision dismissing citizen suits under CAA and CWA against a Target distribution center.	Plaintiffs alleged that contaminated water from a stormwater retention pond at the facility seeps into the groundwater. The decision provides no additional details. It is not even clear if plaintiffs alleged a hydrological connection with surface waters—the court simply brings the possibility up itself. 24 F.3d 965.	No	N/A	The court held that the CWA does not extend jurisdiction over groundwater, and that this conclusion does not change “just because these may be hydrologically connected with surface waters.” 24 F.3d 965. EPA’s “collateral reference” to hydrological connections as a basis for regulation was no substitution, in the court’s mind, for proper rulemaking. The court affirmed the decision below. The court concluded that Congress’s omission of groundwater from the CWA was not oversight, referencing rejected proposals to add groundwater to the CWA.
EIGHTH CIRCUIT						
Patterson Farm, Inc. v. City of Britton, 22 F. Supp. 2d 1085	District of South Dakota, 1998	The court ruled on cross motions for summary judgment, including defendant’s motion based on the court’s lack of subject matter jurisdiction over plaintiff’s CWA claims.	The plaintiff claimed the defendant city’s poor operation and maintenance of an industrial lagoon facility allowed sewage and pollutants to seep into groundwater in violation of the CWA’s NPDES permit requirement.	No	N/A	Citing both <i>Oconomowoc Lake</i> and <i>Washington Wilderness Coal</i> , the court held the CWA was not meant to regulate groundwater. ²⁰⁷ The court referred to its analysis as deciding that groundwaters are not part of the definition of “navigable waters.”
Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300	Southern District of Iowa, 1997	Judgment following trial in dispute between landowner and a pipeline company whose operations discharged significant amounts of hydrocarbons onto the property, including into a wetland. Landowner asserted various claims including a citizen’s suit claim under the CWA alleging unpermitted discharges to waters of the United States.	The relevant claim was that the pipeline company discharged pollutants into the Des Moines River without an NPDES permit, because the permit did not address seepage of pollutants from the wetland to groundwater that reaches the river. An investigation of the groundwater after years of spills indicated presence of hydrocarbons in the “shallow groundwater system” below the property. Expert testimony in the case showed that the groundwater moved toward the Des Moines River, and based on this testimony, the court concluded that the groundwater under the property was “hydrologically connected” to the river. The court stated that the facts presented “more than the mere possibility” that pollutants discharged into groundwater will enter navigable waters.	Yes	Yes	After concluding that the CWA does cover discharges to groundwater that is hydrologically connected to navigable waters, the court concluded that a hydrological connection existed in this case. This would have been sufficient to establish a violation of the CWA; however, the court concluded that it did not have jurisdiction over the citizen’s suit action because the state was “diligently prosecuting” the matter.
NINTH CIRCUIT						
Haw. Wildlife Fund v. Cnty. of Maui, 24 F.	District of Hawaii, 2014	Environmental organizations sought summary judgment in their suit	Tracer Dye tests demonstrated that the majority of the effluent from the injection	Yes	Yes	Recognizing that the EPA has never interpreted “waters of the United States” to include groundwater, the court

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Supp. 3d 980		under the CWA against Maui County alleging the County discharged effluent to waters of the US without an NPDES permit. Plaintiffs alleged effluent from injection wells at defendant's wastewater treatment facility discharged into groundwater that migrated into the ocean. Note: an appeal of this case is currently pending before the Ninth Circuit Court of Appeals.	wells reached groundwater that flowed directly into the ocean. The dye tests demonstrated the effluent reached Maui's west shore beach through "submarine springs" within 84 days after being placed in the wells.			nevertheless found that migration of pollutants through groundwater into navigable-in-fact water brings the groundwater under the jurisdiction of the CWA. "If the point of emission is readily identified, and the transmission path to the ocean is clearly ascertainable, the discharge is functionally one into navigable water." Additionally, a plaintiff must also demonstrate that the pollutants emerging into navigable-in-fact water is more than de minimis. Finding uncontested evidence from the Tracer Dye testing that pollutants from the injection wells reached the ocean through groundwater in less than three months, the Court granted partial summary judgment to the plaintiff finding the County in violation of the CWA.
Nw. Env'tl. Def. Ctr. v. Grabhorn, Inc., No. 08-548, 2009 WL 3672895	District of Oregon, 2009	Cross motions for summary judgment in citizens' suit brought under the CWA against operator of construction and demolition dry waste landfill, alleging discharges without an NPDES permit.	The landfill property at issue included a manmade containment pond (which the court determined was not a navigable water). Among other things, plaintiffs alleged that the pond itself discharged pollutants into a nearby jurisdictional creek through "hydrologically connected groundwater." Defendants moved for summary judgment on this claim, arguing that the CWA did not regulate discharges to groundwater.	Yes	Not decided	The court denied this part of defendant's summary judgment motion. The court stated that its prior decision rejecting jurisdiction over discharges via hydrologically connected groundwater, <i>Umatilla Water Quality Protect v. Smith Frozen</i> , 962 F. Supp. 1312 (D. Or., 1997), was premised on EPA not having formally addressed the issue. Since <i>Umatilla</i> , EPA did address the issue (e.g., in a proposed CAFO rule) and clearly stated its grounds for jurisdiction. The court thus concluded that discharges via hydrologically connected groundwater are subject to regulation under the CWA and, therefore, the court denied defendant's motion for summary judgment on this point.
Greater Yellowstone Coal. v. Larson, 641 F. Supp. 2d 1120	District of Idaho 2009	Cross motions for summary judgment in challenge to Forest Service decision to allow expansion of phosphate mining operation without first obtaining a CWA section 401 certification from the state of Idaho.	The plaintiffs challenged the decision of federal agencies to approve a mine expansion, alleging the agencies failed to address selenium contamination that could occur. Plaintiffs were concerned with precipitation falling on seleniferous waste and infiltrating the groundwater. There was dispute over whether a "direct" hydrological connection existed between the new mining pits and the springs feeding Sage Creek. The issue in this case—whether a CWA 401 certification was required—involves the same jurisdictional question as the NPDES permit requirement, since both are triggered by a "discharge" into navigable waters.	Yes	No. Deferred to agency decision that a direct hydrological connection did not exist.	The court stated that there is "little dispute" that if groundwater is hydrologically connected to surface water it can be subject to 401 certification (i.e., CWA jurisdiction). However, the court concluded that the agency had a rational basis for its decision that a 401 certification was not required in this case and thus granted defendant's motion for summary judgment on this issue. Specifically, the court referred to EPA guidance (e.g., 66 Fed reg. 2960, 3017, 01-12-2001) stating that the decision of whether a connection is "direct" is a "factual inquiry," and that the time and distance of the connection will be affected by "many site-specific factors, such as geology, flow and scope." In this case, faced with conflicting scientific information, the court deferred to the agency's determination that there was no direct hydrological

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						connection between the groundwater underlying the phosphate mine and nearby surface waters. The agency's evidence indicated the contaminated water would have to pass through "hundreds of feet of overburden," "hundreds of feet of bedrock," and then travel underground through "soil and rock formations for between one to four miles" before reaching the surface water, all of which would take between 60 and 420 years. 641 F. Supp. 1139.
Coldani v. Hamm, No. 07-660, 2007 WL 2345016	Eastern District of California, 2007	The court ruled on defendant ranch-owners' motion to dismiss plaintiff's citizen suit action alleging violations of RCRA and the CWA.	The lawsuit alleged seepage and infiltration from defendants' waste storage ponds and irrigation water was polluting groundwater hydrologically connected to navigable waters. Plaintiff alleged the polluted groundwater migrated to the White Slough, which connected to the Sacramento-San Joaquin River Delta system--a navigable water located less than a mile from the ranch.	Yes	Not reached. Plaintiff later moved to dismiss his CWA claim.	The court denied defendants' motion to dismiss plaintiff's CWA claim, holding that by alleging defendants polluted groundwater that is hydrologically connected to surface waters that constitute navigable waters, plaintiff sufficiently alleged a claim within the purview of the CWA and consistent with the act's broad goals. In addition, the court concluded defendants' ranch met the definition of a CAFO and was thus by definition a "point source" under the CWA.
N. Cal. River Watch v. City of Healdsburg, No. 01-04686, 2004 WL 201502	Northern District of California, 2004	Defendant City of Healdsburg appealed the California Northern District Court's holding (after a four-day trial) that discharges into Basalt Pond violated the CWA.	Water from the city's wastewater treatment facility discharged into Basalt Pond (once a rock quarry) which drained into the surrounding aquifer and into the Russian River. Both the pond and the river rested upon a vast gravel layer 65 feet or more deep. The groundwater freely mixed the pond with the river. Basalt pond contains wetlands and borders additional wetlands that are adjacent to navigable waters (Russian River). The wastewater reaches the river from the pond within a few months and seeps into the river along as much as 2200 feet of its banks. The city had not obtained an NPDES permit for this discharge but did have a state water emission permit.	Yes	N/A	The court cited <i>SWANCC</i> as establishing jurisdiction over (i) actually navigable waters, (ii) their tributaries, and/or (iii) wetlands adjacent to each. The court concluded that Basalt Pond and the surrounding waters were jurisdictional waters because both were "adjacent" to the Russian River. As a separate basis for jurisdiction, the court held that the pond and subterranean groundwater were "tributaries" within the meaning of the NPDES permit requirement. Finally, although the court found it unnecessary to reach the issue of whether hydrologically connected groundwater is covered under the CWA, it nonetheless found "persuasive" the <i>Idaho Rural Council</i> holding that "the Act extends federal jurisdiction over groundwaters hydrologically connected to surface waters that are themselves navigable waters."
Idaho Rural Council v. Bosma, 143 F.Supp.2d 1169	District of Idaho, 2001	Defendant dairy farm operators' motion for summary judgment in CWA citizen suit alleging noncompliance with NPDES permit.	Plaintiff alleged unlined wastewater ponds discharged into groundwater hydrologically connected to Walker and Butler Springs. The court held Butler and Walker Springs are connected through surface water to Clover	Yes	Not decided	In denying defendants' summary judgment motion, the court held that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States." Congress did not to exempt groundwater from regulation if

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			Creek, a water of the United States, to fall within the definition of waters of the United States.			pollutants affect jurisdictional waters. The legislative history only reveals the CWA should not cover isolated groundwater. However, the court emphasized that to succeed, the plaintiffs must be able to trace pollution from its source to the springs.
Umatilla Waterquality Protective Ass'n, v. Smith Frozen Foods, Inc., 962 F.Supp. 1312	District of Oregon, 1997	Joint motion to the district court for certification of three questions to the 9th Circuit (interpreted by the district court as a declaratory judgment motion) in CWA citizen suit against vegetable processing facility in Pine Creek, Oregon. The questions included whether discharges of pollutants via hydrologically connected groundwater were subject to the CWA.	Umatilla alleged that the defendant was discharging sodium and chloride from its old brine lagoon into groundwater that is then traveling to Pine Creek without an NPDES permit.	No, but the same court has since declined to follow this decision	N/A	The court determined that discharges to groundwater that subsequently released surface waters were not covered by the CWA (a finding the court overturned in its 2009 <i>Grabhorn</i> decision). However, the court noted that if the 9th Circuit found otherwise, then it concluded that "ongoing migration of pollutants from an old brine pit's residues through groundwater to surface water without an NPDES permit would constitute an ongoing violation of the CWA." The court cited legislative history to conclude EPA is entitled to deference in a formal interpretation, but it has not made one, and nothing in the CWA suggests the NPDES program extends to groundwater.
United States v. ConAgra, No. 96-0134, 1997 WL 33545777	District of Idaho, 1997	The court ruled on various motions by the parties, including defendant's motion to dismiss for lack of subject matter jurisdiction on the U.S.'s CWA claim, which was based in part on alleged unpermitted discharges to groundwater hydrologically connected to navigable waters.	Defendant operated a slaughterhouse. Wastewater was treated and discharged into Indian Creek, allegedly in violation of its permit. The plaintiff alleged additional CWA violations, including unauthorized discharge of pollutants via groundwater from ConAgra's wastewater land application site.	No	N/A	The court noted the lack of Ninth Circuit precedent on the issue, then proceeded to adopt the District of Oregon's reasoning in <i>Umatilla</i> . The court relied on <i>Umatilla's</i> legislative history analysis and lack of EPA interpretation to determine that "discharges of pollutants into groundwater are not subject to the CWA's NPDES permit requirement even if that groundwater is hydrologically connected to surface water."
Wash. Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983	Eastern District of Washington, 1994	Motion to dismiss by defendant gold and silver ore placer mine company on alleged violations of the CWA involving discharges of heavy metals.	The complaint alleged that from one of the mine's three tailing ponds, constructed without an impermeable liner, chemicals and heavy metals were bypassing a water collection system and seeping and leaking through the pond into the soil and groundwater, and thereafter, via a "hydrological connection" into the nearby surface waters of Eureka Creek and Mud lake.	Yes	Not decided	In denying the motion to dismiss, the court held the CWA encompasses discharge via hydrologically connected groundwater. However, the court cautioned that "Plaintiffs must still demonstrate that pollutants from a point source affect surface waters of the United States. It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA." 707 F. Supp. at 1196.
McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182 (E.D. Cal., 1988), vacated on	Eastern District of California, 1988	Cross motions for summary judgment in citizen suit action against DOD-operated aircraft maintenance facility alleging violations of various environmental	The plaintiffs alleged that Defendant was violating the CWA by allowing hazardous substances stored in unlined waste pits to enter groundwater beneath the base without an NPDES permit.	Yes	No	After concluding that the CWA does cover discharges to groundwater with a "direct hydrological connection to surface waters that themselves constitute 'waters of the United States,'" 707 F. Supp. 1194, the court denied the motions for summary judgment to allow plaintiffs to engage

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other grounds 47 F.3d 325 (1995)		laws including the CWA.				in additional discovery to “demonstrate a hydrological connection” between the groundwater beneath the waste pits and nearby surface waters. The court cautioned that “[t]he mere fact that the groundwater might ultimately be consumed or might be used for irrigation purposes” was insufficient. Plaintiffs had to show that the groundwater is “naturally connected” to the jurisdictional surface waters. 707 F. Supp. 1196.
TENTH CIRCUIT						
Sierra Club v. El Paso Gold Mines, 421 F.3d 1133	Tenth Circuit Court of Appeals, 2005	Appeal from Magistrate summary judgment ruling that a mining shaft was hydrologically connected to waters of the U.S.	The defendant owned a gold mine shaft and related mineral rights. The mine is connected to the Roosevelt Tunnel, which is a six-mile man-made underground tunnel that was constructed to drain water from mines in that district. The tunnel’s portal discharges water into Cripple Creek, which is a tributary of Fourmile Creek (a tributary of the Arkansas River). Samples from the discharge contained zinc and manganese.	Yes	No	The court determined the magistrate erroneously found there was no dispute regarding the composition of the tunnel water, where it came from and where it discharged. The court remanded for further review. The court found the receiving waters were waters of the U.S. and that the portal and mine shaft were point sources. Plaintiffs had failed to demonstrate, however, that the pollutants were coming from the mine AND being deposited in the navigable waters.
Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333	District of New Mexico, 1995	Summary judgment motion in citizens’ suit against past and present operators of the Cunningham Hill gold mine, regarding discharges of acid mine drainage (AMD) associated with the mine’s 77-acre overburden pile.	In the early 1990s, the owners found AMD in areas below the pile, including a catchment pond. After installing a state-approved remediation program, the owners again discovered AMD in seeps and an intermittent spring in the area. The mine owners installed a “curtain” to intercept minor amounts of AMD migrating in the shallow rock aquifer. Evidence in the case suggested that the AMD in the spring, surface flows, and seeps arising were released into the groundwater prior to completion of the remediation system (and prior to the lawsuit). Additionally, evidence showed that the AMD contamination was contained in a plume within the alluvium— thus, the AMD-affected water that occasionally emerged was simply emerging and changing positions in response to temporary fluctuations in the alluvial water level. Defendants acknowledged a direct	Yes	Not decided	The court acknowledged the validity of the basic “Conduit Theory” in the Tenth Circuit, noting that “the Tenth Circuit’s expansive construction of the Clean Water Act’s jurisdictional reach, foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters” and that “most courts to have considered the issue have held that hydrologically connected groundwaters are regulated waters of the United States.” In this particular case, however, the court concluded that the evidence before it did not establish the necessary hydrological connection. (“Acid water that is intercepted and moved to the surface and then moved downstream to percolate below the surface generally has no direct hydrologic connection with the groundwater in the area, but is just another component of the surface water regime.”)

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			hydrological connection between the alluvium and surface water (from which the seepages arose). However, Defendants denied any connection between the deeper bedrock groundwater and surface waters in the vicinity of the overburden pile, and plaintiffs did not present any sufficient evidence to the contrary.			
Sierra Club v. Colo. Ref. Co., 838 F. Supp. 1428	District of Colorado, 1993	Motion to dismiss by defendant refining company on alleged violations of the CWA involving discharges of petroleum and related compounds.	Sierra Club sued Colorado Refining Co. (CRC) for discharges into Sand Creek under the CWA and NPDES program. Sierra Club alleged, “[a]s a result of oilspills [sic], pipeline and tank leaks, and other releases at the refinery site, large quantities of petroleum and related compounds have entered, and continue to enter, the soils and groundwater,” and that pollutants were discharged via groundwater to a tributary of a river.	Yes	Yes	The court concluded that CWA’s prohibition of discharges of pollutants into “navigable waters” includes discharges that reach navigable waters through groundwater.” 838 F. Supp. 1434. Accordingly, the court found that the plaintiff’s allegations that CRC has and continues to discharge pollutants into the soils and groundwater, which then make their way to surface waters through the groundwater, stated a cause of action under the Act, and the court denied the motion to dismiss.
Quivira Mining Co. v. U.S. Env’t. Prot. Agency, 765 F.2d 126	Tenth Circuit Court of Appeals, 1985	Mining company challenged EPA’s decision to require an NPDES permit for discharges from two mining facilities into gullies and groundwater.	Plaintiffs challenged the authority of the EPA under the CWA to regulate the discharge of pollutants from uranium mining and milling facilities into gullies or “arroyos.” The companies contend that Arroyo del Puerto and San Mateo Creek are not “waters of the United States,” and therefore the EPA has no jurisdiction under the Clean Water Act to require permits authorizing discharges into these waters.	Yes (implicitly)	N/A	EPA had authority to issue NPDES permits regulating discharges into arroyos. The court held that, although the arroyos were not navigable in fact, “flow occasionally occurs, providing a surface connection with navigable waters independent of the underground flow.” Further, water in arroyos “soak into the earth’s surface, become part of the underground aquifers, and the underground water moves toward eventual discharge (“after a lengthy period, perhaps centuries”) at Horace Springs or the Rio San Jose.” The court stressed it was the “clear intent of Congress” to regulate waters of the United States to the fullest extent.
U.S. v. Earth Sciences, Inc., 599 F.2d 368	Tenth Circuit Court of Appeals, 1979	United States brought action against operator of gold leaching process under the CWA. The United States District Court for the District of Colorado dismissed the suit, and the government appealed.	Warm April temperatures caused faster melting than expected of a blanket of snow covering defendant’s gold ore heap, filling the primary and reserve sumps (fiberglass-lined pools) to capacity. This caused a one- to five-gallon-per-minute overflow discharge of the sodium cyanide-sodium hydroxide leachate solution into the Rito Seco Creek for about a six-hour period. In addition, groundwater	Yes (implicitly)	Yes	The court concluded that the sump was a “point source” and thus EPA had jurisdiction under the CWA. The court did not expressly discuss whether there was a “direct hydrological connection.” Rather, it stated that whether the sump fails “because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source.”

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			seeps of approximately one gallon per minute were observed below the sumps running toward the Rito Seco and partially gathering into pools near the creek. Samples taken from two of these pools were found to contain cyanide. EPA found violations of the CWA permit requirement for both the overflow and groundwater discharges.			
ELEVENTH CIRCUIT						
Flint Riverkeeper, Inc. v. Southern Mills, Inc., No. 5:16-CV-435, 2017 WL 2059659	Middle District of Georgia, 2017	The court ruled on defendant fabric mill's motion to dismiss plaintiff's CWA citizen suit alleging discharge of industrial wastewater without an NPDES permit.	Defendant disposes of wastewater from its protective-fabrics manufacturing plant through a land application system. Some of the wastewater seeps underneath the spray fields and enters surface waters indirectly through groundwaters that have a direct hydrological connection to the Flint River.	Yes	Not decided	Noting this was a matter of first impression in the 11 th Circuit, the court concurred with "a majority of district courts" and held that the CWA prohibits the discharge of pollutants that reach "navigable waters" through hydrologically connected groundwaters. Here, the court held plaintiffs had sufficiently stated a claim that "defendant discharges pollutants into 'navigable waters' via hydrologically connected groundwater," and denied defendant's motion to dismiss.
D.C. CIRCUIT						
NONE						