

GROUND WATER, DISCHARGES TO/FROM

33 U.S.C. § 1252(a) (??)

33 U.S.C. § 1254(a)(5) (water quality surveillance for groundwater)

33 U.S.C. § 1282(b)(2) (grants for POTWs where state has certified that groundwater is not adequate for public use)

33 U.S.C. § 1288(b)(2)(I) (planning for groundwater extraction)

33 U.S.C. § 1314(a)(1) (criteria for developing wqs incorporating scientific knowledge regarding groundwater)

33 U.S.C. § 1314(f)(2)(F) (identification of nonpoint sources including changes in flow of groundwater)

33 U.S.C. § 1329 (??)

40 C.F.R. § 130.6(c)(9) (Water Quality Management Plans: Groundwater)

Tennessee Clean Water Network v. TVA, 2019 WL 244730 (6th Cir. 2019) (denying rehearing en banc; NOTE two dissents)

Kentucky Waterways Alliance v. Kentucky Utilities Co., 905 F.3d 925 (6th Cir. 2018) (affirming district court, held that discharges from power plant ash pond that entered river via groundwater are not controlled by the CWA; groundwater is not a point source; while groundwater is a conveyance, it is not discernable, confined or discrete; the use of the term “into” in the definition of “effluent limitation” in § 502(11) requires directness; court distinguished language from plurality decision in Rapanos indicating discharges only need to be “to” WOTUS; stated purpose of CWA is both §§101(a) and 101(b); ash pond would be exempt from RCRA if CWA applied; NOTE dissent)

Tennessee Clean Water Network v. TVA, 905 F.3d 436 (6th Cir. 2018), reh'd en banc denied, 2019 WL 244730 (6th Cir. 2019) (reversing district court, held that discharges from coal ash pond that are hydrologically connected to river are not covered by CWA; RCRA coal combustion residual rule, not the CWA, is the framework envisioned by Congress for coal ash ponds; NOTE dissent)

Sierra Club v. Virginia Electric & Power Co., 903 F.3d 403 (4th Cir. 2018) (hydrologically-connected discharges via groundwater fall within the jurisdiction of the CWA; coal ash pond is not a point source because it does not act as a conveyance to WOTUS, but instead allows pollutants to slowly diffuse through groundwater into surface waters; because discharges via groundwater can't be measured, they are not conveyances)

Upstate Forever v. Kinder Morgan Energy, 887 F.3d 637 (4th Cir. 2018) (reversing district court, held that discharges from a groundwater plume from a ruptured pipeline that traveled 1000 feet via groundwater into a stream was an ongoing point source discharge even though the rupture had long been repaired, and the pipeline itself was no longer leaking; the definition of “discharge of pollutant” does not place temporal conditions on the discharge of a pollutant from a point source; the CWA is a strict liability statute; a pipeline is a point source; CWA does not bar plaintiff from seeking injunctive relief after the polluter has repaired the initial cause of the pollution; note dissent)

Hawai'i Wildlife Fund v. County of Maui, 881 F.3d 754 (9th Cir. 2018) (ground-injection wells used by POTW to dispose of treated wastewater are point sources where they are hydrologically connected to the

ocean; the CWA does not require that the point source itself convey the pollutants directly into the navigable water; the wells are not nonpoint source pollution because they are discrete in number and capable of being regulated through individual permits)

Northern Plains Resource Council v. Fidelity Exploration and Development Co., 325 F.3d 1155 (9th Cir. 2003), cert. denied, 540 U.S. 967 (2003) (reversing lower court, held that produced water from natural gas well was a pollutant despite fact that Montana did not consider ground water subject to state water quality standards; rejected argument that no addition of pollutant occurred; held that state law does not trump the CWA)

Rice v. Harken Exploration Company, 250 F.3d 264 (5th Cir. 2001) (where plaintiff failed to produce evidence of “a close, direct and proximate link between [defendant’s] discharges of oil” to the river via groundwater, no CWA jurisdiction exists)

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994) (discharges to artificial pond connected only to groundwater are not regulated under Act)

Town of Norfolk v. Corp. Engineers, 968 F.2d 1438, 1451 (1st Cir. 1992) (held that CWA’s permitting provisions do not apply to any groundwater, deferring to Corps definition, which limited CWA coverage to surface waters)

Hoffman Homes, Inc. v. EPA, 961 F.2d 1310 (7th Cir. 1992), vacated, 975 F.2d 1554 (7th Cir. 1992) (isolated wetlands with non-hydrologic connection to navigable waters fall nevertheless within jurisdiction of CWA because of effect on interstate commerce)

Leslie Salt Co. v. United States, 896 F.2d 354, 358 (9th Cir. 1990) (CWA jurisdiction existed over salt flat even though hydrologic connection between salt flat and navigable waters was man-made)

Inland Steel Co. v. EPA, 901 F.2d 1419, 1422-23 (7th Cir. 1990) (“the legal concept of navigable waters might include ground waters connected to surface waters -- though whether it does or not is an unresolved question. . . [A] well that ended in such connected ground waters might be within the scope of the Act.”)

Quivira Mining Co. v. United States EPA, 765 F.2d 126, 129-130 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) (affirmed EPA’s decision that a CWA permit was required for discharges of pollutants into surface arroyos which, during storms, channeled rainwater both directly to navigable-in-fact streams and into underground aquifers that connected with such streams)

United States v. City of Fort Pierre, S.D., 747 F.2d 464, 466-67 (8th Cir. 1984) (Corps had no jurisdiction over slough that was completely separate from (although formerly a side channel of) the Missouri R. and was not hydrologically connected to the river; although some river water got into the slough, it was the result of Corps activities, which could not act to extend the Corps jurisdiction)

United States v. Byrd, 609 F.2d 1204, 1209-1211 (7th Cir. 1979) (a well that ended in such connected groundwaters might be within the scope of the Act, but the waters at the bottom of these wells are not connected to surface waters)

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (held that unpermitted leach mining waste escaping into the Rito Seco Creek through overflow of a reserve sump and through groundwater seeps violated the CWA which “was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes.”)

Exxon Corp. v. Train, 554 F.2d 1310, 1329 (5th Cir. 1977) (EPA does not have the authority to regulate discharges into deep wells as a condition to a permit that regulates discharges into navigable waters; case limited to isolated groundwaters)

Maryland v. Exxon Mobil Corp., 2018 WL 6111780 (D. Md. 2018) (denying motion to remand to state court in MTBE groundwater contamination case; defendants failed to carry their burden of showing there is a colorable CWA defense where they argued that groundwater met federal water quality standards; CWA typically governs surface water quality standards, not groundwater; states are free to set standards higher than federal standards)

Prairie Rivers Network vv. Dynegy Midwest Generation, LLC, 2018 WL 6042805 (C.D. Ill. 2018) (granting motion to dismiss in case involving seepage from coal power plant ash pits into river via groundwater seeps, held that CWA jurisdiction does not extend to either discharges to groundwater or discharges to surface waters via groundwater)

Pennenvironment v. PPG Industries, Inc., 2018 WL 5312778 (W.D. Pa. 2018) (denying motion to dismiss, held that railroad was an indispensable party in case against contaminated site that lay within the RR's right of way, and which was discharging leachate via groundwater into the adjacent river)

Toxics Action Center, Inc. v. Casella Waste Systems, Inc., 2018 WL 4696750 (D. Mass. 2018) (granting motion to dismiss, held that discharges of contaminated groundwater from landfill to wetlands do not violate the CWA because the landfill is not a point source; the groundwater discharge is not *from* a point source because it is not a discrete conveyance)

Red River Coal Co., Inc. v. Sierra Club, 2018 WL 491698 (W.D. Va. 2018) (held that plaintiffs alleged sufficient facts to overcome motion dismiss, where plaintiffs claimed that underdrains in coal mine valley fills that discharged pollutants to nearby streams were point sources; claims related to prior litigation on same discharges are not res judicata where the prior NPDES permits have been closed, and the current claims are for unauthorized discharges while the prior claims were for permit violations; court declined to dismiss claims on the Burford abstention doctrine which was based on theory that Congress intended to leave groundwater regulation to the states)

Pacific Coast Federation of Fisherman's Associations v. Murillo, 2017 WL 3421910 (E.D. Ca. 2017) (denying motion for reconsideration, held that complaint did not adequately set out allegations to support argument in summary judgment motion that water seeping into the drain from adjacent non-irrigated lands, and which accumulated in the drain as toxic sediment was then released downstream)

Des Moines v. Sac Co. Bd. of Supervisors, 2017 WL 1042072 (N.D. Iowa 2017) (on motion for summary judgment, held that city's claims against drainage districts alleging unpermitted discharges of nitrates from agricultural tile drains were not redressable under state law because drainage districts had no statutory authority to correct nitrate discharges to rivers; court also rejected city's due process, equal protection and takings claims)

Tennessee Clean Water Network v. TVA, 268 F. Supp. 3d 276 (M.D. Tenn. 2017), rev'd, 905 F.3d 436 (6th Cir. 2018), reh'd en banc denied, 2019 WL 244730 (6th Cir. 2019) (after bench trial, held that discharges from TVA's coal ash ponds via groundwater to adjacent river were unauthorized and therefore violated the CWA; TVA ordered to move the ash piles "to a lined site that offers reasonable assurances that it will not discharge waste into [WOTUS];" discharges to surfaces waters via groundwater are actionable under the CWA)

Kentucky Waterways Alliance v. Kentucky Utilities Co., 2017 WL 6628917 (E.D. Kt. 2017) (the discharge of pollutants to a navigable water via hydrologically connected groundwater is not subject to the CWA's NPDES permit requirements)

Flint Riverkeeper, Inc. v. Southern Mills, Inc., 2017 WL 2059659 (M.D. Ga. 2017) (denying motion to dismiss, held that allegations in the complaint that defendant's land application area for process wastewater was discharging on the surface and via groundwater to surface waters was sufficient to state a cause of action under the CWA; rejected argument that discharges to surface waters via groundwater are not covered by CWA; rejected argument that land app area is not a point source; rejected argument that defendant's stormwater NPDES permit authorized contested discharges where permit specifically does not apply to discharges of process wastewater; rejected Burford extension doctrine argument that state land app permit regulated discharges; compliance with a state land app permit "is no defense to a CWA suit.")

Upstate Forever v. Kinder Morgan Energy Partners, L.P., 252 F. Supp. 3d 488 (D. S.C. 2017), rev'd, 887 F.3d 637 (4th Cir. 2018) (on motion to dismiss, held that seepage from pipeline spill that entered river via groundwater was not subject to regulation under the CWA because the spill from the pipeline has stopped and the groundwater plume was not a confined discrete conveyance; "[T]he CWA does not apply to claims involving discharge of pollution to groundwater that is hydrologically connected to surface waters.")

26 Crown Associates, LLC v. Greater Newhaven Reg. WPCA, 2017 WL 2960506 (D. Conn. 2017) (on motion to dismiss, held that corporate plaintiffs lack standing to assert injuries based on loss of aesthetic enjoyment of a clean environment; plaintiffs had standing to assert injuries from backflow of CSO into their properties, but such backflows did not violate the CWA because they were not to WOTUS; court rejected argument that seepage of sewage through groundwater to river one-half mile away established jurisdiction where plaintiffs failed to allege facts supportive of either the Kennedy or the Scalia tests under Rapanos and groundwater is not a point source)

Sierra Club v. Virginia Electric and Power Co., 2017 WL 1095039 (E.D. Va. 2017) (after trial, held that arsenic contaminated leachate from coal power plant ash piles that reached adjacent river via shallow subsurface aquifer were unpermitted discharges; ash piles are a point source; court declined to assess any penalties because company had been working in good faith with state regulators for years; court denied plaintiff's injunctive relief request to move the piles to an upland location as too "draconian," and instead ordered further monitoring)

Chevron v. Apex Oil Co., 113 F. Supp. 3d 807 (D. Md. 2015) (dismissing plaintiff's OPA claims tied to leaks from underground transmission line to nearby harbor via groundwater, held that CWA (and by extension OPA) does not regulate discharges to groundwater, even if hydrologically connected to surface waters)

Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, 141 F. Supp. 3d 428 (M.D. N.C. 2015) (coal ash lagoons are points sources; discharges to surface waters via groundwater are jurisdictional under the CWA)

Sierra Club v. Virginia Electric and Power Co., 145 F. Supp. 3d 601 (E.D. Va. 2015) (denying motion to dismiss, where plaintiffs alleged that power plant was violating its NPDES permit by discharging heavy metals to river via contaminated groundwater, held that plaintiffs were not collaterally attacking the state permit; discharges of pollutants to river via contaminated groundwater are enforceable under the CWA; plaintiffs have standing to bring this action)

OVEC v. Pocahontas Land Corp., 2015 WL 2144905 (S.D.W.V. 2015) (rejected defendant coal company argument that discharges from valley fills were unregulated groundwater discharges, held that discharges to surface water from the toe of a valley fill may require an NPDES permit)

Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) amended, 2014 WL 10991530 (E.D.N.C. 2014) (“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 water.”)

Hawai’I Wildlife Fund v. County of Maui, 24 F. Supp.3d 980 (D. Haw. 2014) (discharges to groundwater that are hydrologically connected to surface waters can be a conduit to waters of the United States; held that county injection wells that contaminated groundwater that entered ocean were point source discharges subject to regulation)

OVEC v. Hernshaw Partners, LLC, 984 F. Supp. 2d 589 (S.D.W.V. 2013) (denying motion to dismiss in case challenging selenium discharges from coal mine valley fill, held that plaintiffs had standing to sue; plaintiffs need not show to scientific certainty that the defendant’s conduct caused the present harm suffered by the plaintiffs; rejected argument that valley fill discharges seeping from toe of fill were not ongoing because fill because fill activity ceased years before; valley fill is a point source; unnamed tributary effected by valley fill discharges is a WOTUS because it flows into a TNW)

Tri-Realty Co. v. Ursinus College, 2013 WL 6164092 (E.D. Pa. 2013) (“Diffuse downgradient migration of pollutants on top of or through soil and groundwater . . . is nonpoint source pollution outside of the purview of the CWA.”)

Pacific Coast Federation of Fisherman's Associations v. Glaser 2013 WL 5230266 (E.D. Cal. 2013) (in case involving allegations of unpermitted discharges of polluted groundwater from ag tile drains in California, on motion to dismiss, held that the exemption “return flows from irrigated agriculture” in subsection 1342(1)(l) and section 1362(14) covers discharges from irrigated agriculture that do not contain additional discharges unrelated to crop production”; rejected argument that exemption applies only to surface flows; dicta at end of case hints that tile drain discharges during the non-irrigation season might not qualify for the exemption)

Pacific Coast Federation of Fisherman's Associations v. Glaser 2012 WL 3778963 (E.D. Cal. 2012) (denying motion to dismiss challenge by environmental group to tile drain discharges allegedly containing both ag and non-ag runoff, held “Based on the language of the exclusion, legislative history and applicable case law, the court cannot conclude at this phase of the proceedings that intentional drainage of contaminated groundwater is subsumed in the irrigation return flows exemption.”)

Chesapeake Bay Foundation v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-620 (D. Md. 2011) (“Discharge from migrations of groundwater or soil runoff is not point source pollution, however, but nonpoint source pollution.”)

Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc., 2011 WL 1357690 at *18 (M.D. Tenn. 2011) (discharges through groundwater may be actionable, but plaintiffs must be able to “prove a link between contaminated ground waters and navigable waters” through which the plaintiff can “trace pollutants from their source to surface waters.”)

Northwest Environmental Defense Center v. Grabhorn Inc., 2009 WL 3672895 (D. Or. 2009) (proximity of a pond to a creek and a river is insufficient to establish jurisdiction; distinguishing Umatilla, held that CWA covers discharges to navigable surface waters via hydrologically-connected groundwater;

environmental plaintiffs failed to establish that pollution of pond would have any effect on interstate commerce)

George v. Reisdorf Bros., Inc., 696 F. Supp. 2d 333 (W.D.N.Y. February 2010), aff'd, 2011 WL 326511 (2d Cir. 2011) (dismissing claims that dairy farm operations discharged pollutants contaminating surface water via groundwater since speculation that waters may enter groundwater hydrologically connected to surface water not sufficient to create triable issue of fact)

Greater Yellowstone Coalition v. Larson, 641 F. Supp. 2d 1120 (D. Idaho 2009), aff'd, 628 F.3d 1143 (9th Cir. 2010) (no 401 certification required for new phosphate mine where government studies showed that the hydrologic connection between the mine dump and surface waters was tenuous, and little to no impact on surface water was predicted; court gave deference to EPA's assessment of the scientific evidence)

Hernandez v. Esso Standard Oil Co., 599 F. Supp. 2d 175 (D.P.R. 2009) (where gas station storage tank leaked into aquifer and plume reached nearby surface waters, held that "CWA extends federal jurisdiction over groundwater that is hyrdologocially connected to surface waters that are themselves waters fo the United States."); good summary of case law pro and con jurisdiction over hydrologically-connected groundwater)

Humboldt Baykeeper v. Union Pacific Railroad Co., 2006 WL 3411877 (N.D. Cal. 2006) (discharges of contaminated groundwater from defendant's railroad yard covered under the CWA)

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Id. 2001) (in denying defendant's motion for summary judgment, held that plaintiffs may attempt at trial to prove that leakage from dairy's waste storage pond entered creek via groundwater; "[W]hether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation or our nation's rivers and streams." slip op. at 15)

Potter v. Asarco Inc., 49 ERC 1083 (D. Neb. 1999) (citizen suit alleging unpermitted discharges of wastewater to river via groundwater dismissed on grounds that authorized state NPDES program had opined that it had no authority to include groundwater seeps in Asarco's NPDES permit; court held that it lacks jurisdiction to hear challenge to state-issued permit where citizen's never challenged permit administratively as required by state law)

Patterson Farm, Inc. v. City of Britton, 22 F. Supp. 2d 1085 (D.S.D. 1998) (held that court lacked subject matter jurisdiction over alleged discharges into groundwater because groundwater not included within CWA definition of "navigable waters")

Wilson v. AMOCO Corp., 46 ERC 1998, 2001 (D. Wy. 1998) (dismissing case on *Gwaltney* grounds, held that "migration of residual contamination from previous releases [at an oil refinery] does not constitute an ongoing discharge.")

Allegany Evt'l Action v. Westinghouse Elec. Corp., 1998 U.S. Dist. LEXIS 1838 (W.D. Pa. 1998) (claim of unpermitted discharge from groundwater to lake dismissed on grounds that groundwater is not a point source; relied on Umatilla)

Mutual Life Insurance Co. v. Mobil Corp., 1998 U.S. Dist. LEXIS 4513 (N.D.N.Y. 1998) (Mobil gas truck mistakenly pumped 750 gallons of gas into a monitoring well, thinking it was a fill pipe for an UST; upholding jurisdiction over groundwater, court held "It is now well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to navigable waters.")

Potter v. ASARCO, Inc., (D. Neb. Mar. 3, 1998), aff'd in part, rev'd in part on other grounds, 138 F.3d 382 (8th Cir. 1998) ("in light of judicial precedent, Congress' remedial purpose, the absence of any specific legislative intent pertaining to hydrologically connected groundwater and the informal pronouncements of EPA, any pollutants that enter navigable waters, whether directly or indirectly through a specific hydrological connection, are subject to regulation by the CWA")

Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1318-1319 (S.D. Iowa 1997) (held that hydrologically-connected groundwater covered by the CWA; "The majority of courts have held that groundwaters that are hydrologically connected to surface waters are regulated waters of the United States, and that unpermitted discharges into such groundwaters are prohibited.")

Friends of the Coast Fork v. Co. of Lane, OR, 1997 U.S. Dist. LEXIS 22705 (D. Or. 1997) (held that defendant had "violated the CWA by discharging pollutants in the form of leachate and condensate into navigable waters" and that this discharge resulted in part "from leaking of the leachate from the pile of garbage and lagoons into the groundwater which is hydrologically connected to the surface waters of the Camas Swale Creek." Id. at 6)

Umatilla Water Quality Protective Assoc., Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Or. 1997) (CWA does not regulate discharges to groundwater even where hydrologic connections exists; held, however, had EPA opined on the issue, court would consider the Agency's position persuasive)

United States v. ConAgra, 1997 U.S. Dist. LEXIS 21401 (D. Id. 1997) (ConAgra discharged in one summer 45 million gallons of wastewater to a 4-acre field with a high water table on a hill next to a creek; relying on Umatilla, held that discharges to surface waters via groundwater outside jurisdiction of CWA; french drain discharges of groundwater, however, may be point sources)

United Anglers v. East Bay Municipal Utility, No. C-95-2671 SI (N.D. Cal. Oct. 24, 1996) (court held that plaintiffs had not met burden of proof for Summary judgment on issue of hydrologic connection between defendant's impoundment and surface waters)

Cooper Indus., Inc. v. Abbott Labs., 1995 WL 17079612 (W.D. Mich. 1995) ("allegations . . . that the pollution of ground water which in part circulated from a point source on defendant's property was hydrologically connected to the pollution of the Fawn River . . . are insufficient to state a casue of action under the [CWA].")

Friends of Sante Fe Co. V. LAC Minerals, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995) (held that Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985) forecloses "any argument that the CWA does not protect groundwater with some connection to surface waters" because the 10th Cir. has expansively interpreted the CWA's jurisdictional reach in a non-groundwater context)

Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wash. 1994) (disagreed with Oconomowoc and ruled, after surveying the case law that the "logic of these cases is compelling: since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation")

Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428 (D. Col. 1993) ("[The] Clean Water Act's preclusion of the discharge of any pollutant into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater.")

Slagle v. United States by and through Baldwin, 809 F. Supp. 704, 709 (D. Minn. 1992) (wetland is adjacent where there is no dispute that hydrologic connection exists between wetland and river)

Martin v. Kansas Board of Regents, 32 ERC 1944 (D.Kan. 1991) (“Groundwater . . . that is naturally connected to surface waters constitute ‘navigable waters’ under the Act.”)

Werlein v. United States, 746 F. Supp. 887, 897 (D.Minn. 1990) (citing MESS with approval for the proposition that determinations of discharges to waters of the U.S. through a direct hydrological connection are factual)

McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182, 1194 (E.D. Cal. 1988) (EPA has no statutory authority to regulate discharges to isolated wetlands; the legislative history of the CWA also demonstrates that “Congress did not intend groundwater and navigable waters to be synonymous”, however, NPDES permit may be required)

McClellan Ecological Seepage v. Cheney, 763 F. Supp. 431, 437 (E.D. Cal. 1988) (held that groundwater was isolated and does not presently discharge pollutants to American R. or Sacramento R. and has not done so since 1968; the legislative history of the CWA also demonstrates that “Congress did not intend groundwater and navigable waters to be synonymous.”)

Kelley v. United States, 618 F. Supp. 1103, 1107 (W.D. Mich 1985) (discharges of toxic chemicals into migrating groundwater that “eventually” would reach the bay not illegal; “Congress did not intend the [CWA] to extend federal regulatory and enforcement authority over groundwater contamination.”)

United States v. GAF Corp., 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (“The 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’ within the meaning of § 1311(a). . . . The question before the Court is whether, in its breadth, the FWPCA applies to subsurface wells. The legislative history shows conclusively that it does not.”)

Northern Cheyenne Tribe v. Montana Department of Environmental Quality, DA 09-0131, 2010 MT 111 (Mont. May 18, 2010) (finding that state department of environmental quality violated CWA and state law by issuing NPDES permits for groundwater discharges (extracted with coal bed methane and containing high saline content) to surface water without imposing treatment technology-based effluent limits on the discharges under CWA § 301(b)(1)(A)-2(A), even in the absence of industry-wide federal guidelines for pre-discharge treatment standards)

Preamble, NPDES Permit Application Regulations for Storm Water Discharges, EPA Final Rule, 55 Fed. Reg. 47,990, 47,997 (1990) (“[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)”)

NPDES General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region 6 Public Notice of Final Permitting Decision, 58 Fed. Reg. 7,610, 7,631 (1993) (feedlots required to obtain NPDES permit for discharges to groundwater unless permittee can demonstrate lack of hydrologic connection to surface water)

Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 Fed. Reg. 64,876, 64,892 (1991) (“Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issue have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. In these situations, the affected groundwaters are not considered “waters of the United States” but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.”)

Senate Report No. 92-414, U.S. Code Cong. & Admin. News (1972) p. 3739 (“Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.”)

118 Cong. Rec. 10668 (1972) (remarks of Rep. Harsha) (“[T]his amendment purports to require water-quality standards for groundwater.”)

118 Cong. Rec. 10666 (1972) (remarks of Rep. Aspin) (“If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.”)

EPA, “President Clinton’s Clean Water Initiative,” (aka “Greenbook”) EPA doc. No. 800-R-94-001 (1994) (Clinton administration’s proposals for amendments to the CWA; would clarify that a point source discharge to groundwater or to water that has a hydrologic connection with surface waters is subject to regulation as an NPDES point source discharge if (1) a reasonably foreseeable direct hydrologic connection to surface water in the proximity of the release exists, (2) a significant quantity of the pollutant must reasonably be able to reach the surface water, and (3) no other Federal statute directly addresses the activity causing the release)

EPA, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste*, (OSWER 1995) (purpose of directive is “to clarify that [RCRA] requirements apply to discharges to leachate into groundwater from leaking waste management units, even when the groundwater provides a direct hydrologic connection to a nearby surface water of the United States.”)

General Counsel Opinion (December 13, 1973) (disposal of pollutants into a well O.K. because EPA has no statutory authority to regulate discharges to isolated wetlands)

EPA, Response to Comments – Topic 10 Legal Analysis (June 30, 2015) (“EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of ‘waters of the United States.’”)

79 Fed. Reg. 22188-01 (April 21, 2014) (“The Agencies have never interpreted ‘waters of the United States’ to include groundwater.”)

68 Fed. Reg. 7,175, 7216 (Feb. 12, 2003) (Final NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations) (EPA rejected establishing nationally applicable effluent limitation requirements related to releases to groundwater with a direct hydrologic connection to jurisdictional water and recognized that “there are scientific uncertainties and site-specific considerations with respect to regulating discharges to surface water via groundwater with a direct hydrologic connection to surface water [and] conflicting legal precedents on this issue.”)

66 Fed. Reg. 2960, 3017 (Jan. 13, 2001) (“in general, collected or channeled pollutants conveyed to surface water via groundwater can constitute a discharge subject to the Clean Water Act.”)

62 Fed. Reg. 20,177, 20,178 (1997) (“The EPA agrees that groundwater contamination is a concern around CAFO facilities. However, the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. The only situation in which groundwater may be affected

by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater. . . [T]he EPA agrees that the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. However, the permit requirements . . . are not intended to regulate groundwater. Rather, they are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection.”)

60 Fed. Reg. 44,489, 44,493 (1995) (in promulgating proposed draft CAFO permit, EPA stated: “[D]ischarges that enter surface waters indirectly through groundwater are prohibited”)

58 Fed. Reg. 7,610, 7,631 (1993) (feedlots required to obtain NPDES permit for discharges to ground water unless permittee can demonstrate lack of hydrologic connection to surface water)

56 Fed. Reg. 64,876, 64,892 (1991) (Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule: “Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issue have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. In these situations, the affected groundwaters are not considered “waters of the United States” but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.”)

55 Fed. Reg. 47,990, 47,997 (1990) (Preamble, NPDES Permit Application Regulations for Storm Water Discharges, EPA Final Rule: “[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking unless there is a hydrological connection between the ground water and a nearby surface water body.”)

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