



## Alerts

### CWA Liability Expanded to Include Migrating Groundwater Contamination with a "Direct Hydrologic Connection" to Jurisdictional Surface Waters

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*Hinshaw Alert*

On April 12, 2018, the Fourth Circuit Court of Appeals held that the Clean Water Act (CWA) regulates point source discharges through groundwater with a "direct hydrologic connection" to the surface water. The Court's 2-1 decision in *Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, 2018 WL 1748154 (4th Cir. April 12, 2018) joined the Ninth Circuit in a significant expansion of CWA liability whereby companies now face potential citizen suits under the CWA for either direct or indirect discharges to groundwater from spills or leaks to wells, surface impoundments, underground storage basins, and pipes. This decision could also impact municipalities either through findings of liability or in permitting requirements.

*Upstate Forever* arose from a 2014 underground pipeline leak resulting in the release of over 369,000 gallons of gasoline. Although the leak was quickly repaired—and approximately 209,000 gallons of gasoline were recovered through remediation efforts—an underground gasoline plume remained for several years thereafter. Environmental organizations sued Kinder Morgan alleging that the underground gasoline plume traveled through ground water for a distance of less than 1,000 feet before entering several surface waters regulated as "navigable waters" under the CWA. The district court held that the plaintiffs failed to state a claim because the pipe had been repaired and was not discharging pollutants directly into navigable waters, thus there was not an "ongoing violation" from a "point source" as required for a CWA citizen suit. The district court further held that the CWA did not regulate the movement of pollutants through groundwater that is hydrologically connected to surface water.

The Fourth Circuit reversed the district court and held that an "ongoing violation" may occur where a pollutant migrates from groundwater to surface water. Further, the Fourth Circuit held that where the pollutant originated from a point source that migrated through groundwater with a "direct hydrologic connection" to jurisdictional surface waters, such discharges are regulated by the CWA. The court made clear that this required a fact intensive analysis. The extremely short distance of 1,000 feet or less between the leaked pipeline and the navigable waters, however, strongly supported the conclusion that Kinder Morgan's discharge was covered by the CWA.

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#### Service Areas

Government



The *Upstate Forever* case follows the Ninth Circuit's decision in *Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018) which also held that point source discharges traveling from groundwater to jurisdictional surface waters could be regulated by the CWA. While the Ninth Circuit employed a "fairly traceable" test, the Court in *Upstate Forever* stated that its "direct hydrologic connection" test was functionally similar to the "fairly traceable" test. Together, these rulings suggest a significant expansion of CWA liability, including liability for unintentional and accidental groundwater discharges. These rulings may also impact potential permitting requirements for companies and municipalities and will require the careful consideration for even remediated discharges. In all, more litigation is likely in cases involving similar discharges.

*This alert was featured in the July 2018 edition of our [Informing Illinois Newsletter](#).*