

# Clean Water Act Jurisdiction/Groundwater: National Association of Clean Water Agencies Amicus Brief



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The National Association of Clean Water Agencies (“NACWA”) joined a number of organizations in filing an Amicus Brief on September 8th with the United States Court of Appeals for the Fourth Circuit in the case styled *Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners, L.P., and Plantation Pipeline Company, Inc.* addressing issues related to the scope of Clean Water Act jurisdiction.

The other parties joining in the filing of the brief include:

- National Association of Counties
- National League of Cities
- American Forest & Paper Association
- American Iron and Steel Institute
- Edison Electric Institute
- National Mining Association
- Utility Water Act Group

The lower court litigation involved an allegation that an unauthorized discharge occurred because pollutants from a pipeline allegedly entered groundwater with a direct hydrologic connection to navigable waters. The discharge was alleged to have violated the Clean Water Act’s prohibition against “the discharge of any pollutant” unless authorized, in relevant part, by a National Pollutant Discharge Elimination System (“NPDES”) permit. The jurisdictional elements associated with this analysis require the addition of pollutants to navigable waters from a point source.

The lower court held that a pipeline could be a point source. However, it further held that there must be a demonstration “more than merely identify a possible point source.” It stated that the plaintiffs must allege (and prove) “the point source added pollutants to navigable waters.”

The plaintiffs were held to have failed to allege that a point source added pollutants to navigable waters. The pipeline was stated to have leaked into soil and groundwater (as opposed to navigable waters as that term is defined by the Clean Water Act).

The NACWA amicus brief argues that:

A direct hydrologic connection between groundwater and navigable waters does not eliminate the statutory requirement that the means by which the pollutants enter navigable waters must be a discernible, confined and discrete conveyance.

It further states:

While the CWA prohibits indirect discharges from point sources, pollutants still must enter navigable waters by means of some discernible, confined and discrete conveyance. Groundwater is not a discernible, confined and discrete conveyance. Any addition of pollutants in the navigable waters from groundwater is not by means of a discernible, confined and discrete conveyance. It constitutes nonpoint source pollution properly addressed by state law and/or other CWA or federal programs.

As a result, NACWA argues that the lower court correctly dismissed plaintiffs' Complaint.

The three principal arguments NACWA put forth in support of its position include:

- No Unauthorized Addition of Pollutants to Navigable Waters from a Point Source was Alleged, as Required by the Act
- United States Environmental Protection Agency statements on Direct Hydrologic connection Merit No Deference
- The Direct Hydrologic Connection Theory, if Adopted, would have Significant Adverse Consequences to Amici and the Public

[A copy of the NACWA Amicus Brief can be found here.](#)