

Does the Clean Water Act Regulate Discharges to Groundwater? An Examination of Recent Case Law on the “Conduit Theory.”

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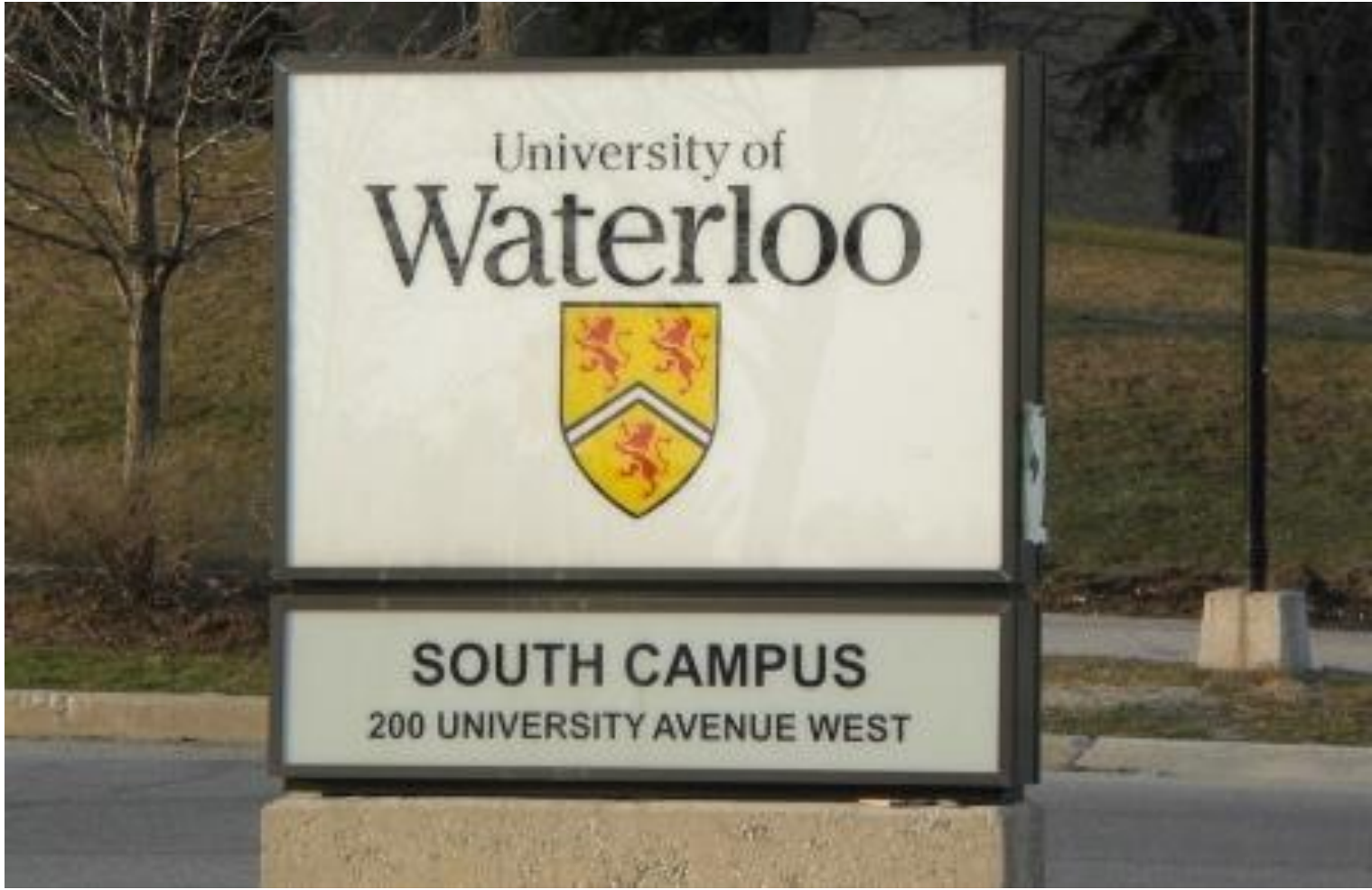
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Does the Clean Water Act govern discharges into **groundwater** that is **hydrologically connected** to jurisdictional surface waters of the U.S.?

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- **Regulatory Framework**
 - Case Law Overview
 - Real World example and Technical Considerations

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Scope of State Authority Over Waters: Broad

- MPCA is authorized to “administer and enforce all laws relating to the pollution of **any of the waters of the state.**”

Minn. Stat. 115.03, subd. 1(a)

- “**Waters of the State**” includes all “bodies or accumulations of water, **surface or underground**, natural or artificial, public or private, which are contained within, flow through, or border upon the state.”

Minn. Stat. 115.01, subd. 22

- Minnesota Statutes prohibit “**discharging pollutants** into the **waters of the state** until a written **permit** for the discharge is granted by the agency.”

Minn. Stat. 115.07, subd. 1(b)(6)

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Scope of Federal Authority Over Waters: Limited

- CWA requires an NPDES permit when any pollutant is discharged to “navigable waters” from a “point source.”

33 U.S.C. 1311(a)

- A “point source” is a “discernible, confined and discrete conveyance.”

33 U.S.C. 1362(12)

- “Navigable waters” are “Waters of the United States” (WOTUS).

33 U.S.C. 1362(12)

- “WOTUS” excludes many surface waters (e.g., isolated wetlands) as well as groundwater.

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Broad View

“Congress **intended** the CWA to protect the water quality of the nation's surface water. Where the facts show a direct hydrological connection between ground water and surface water, **that goal would be defeated** if the CWA's jurisdiction did not extend to discharges to that groundwater.”

--*Sierra Club v. Virginia Electric and Power Company*, 247 F.Supp.3d 753 (E.D.Va. 2017).

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Narrow View

“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.”

--*Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F.Supp.3d 488 (D.S.C. 2017)

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Ninth Circuit Court of Appeals: WWTP Injection Well Decision

Hawai'i Wildlife Fund v. County of Maui, 881 F.3d 754 (9th Cir. Jan. 2018)

- Treated sewage disposed to GW via injection wells
- Transported by GW to Pacific Ocean



CWA only requires that:

“the pollutants are **fairly traceable** from the point source to a navigable water such that the discharge is the **functional equivalent of a discharge into the navigable water.**” – Ninth Circuit

➤ NPDES Permit **required**

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Fourth and Sixth Circuit Courts of Appeals: Coal-Ash Lagoon Decisions

*Two decisions from 6th
Circuit, One from 4th
Circuit*

- Seepage from coal ash lagoons associated with coal-fired power plants
- Pollutants transported by GW to nearby lakes or rivers



Sixth Circuit

Kentucky Waterways Alliance v. Kentucky Utilities Co., No. 18-5115 (6th Cir. Sept. 2018)

Tennessee Clean Water Network v. TVA, No. 17-6155 (6th Cir. Sept. 2018)

- CWA limited to discharges **directly** from a point source, not indirectly via groundwater.

“For a point source to discharge into navigable waters, **it must dump directly into those navigable waters**...[W]hen the pollutants are discharged to the lake, they are not coming from a point source; they are **coming from groundwater**, which is **a nonpoint-source conveyance**. The CWA has no say over that conduct.”

--Sixth Circuit Court of Appeals, *Kentucky Waterways*

- NPDES permit **not required**

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Fourth Circuit (Coal Ash Lagoon)

Sierra Club v. Va. Elec. & Power Co. (VEPCO), 903 F.3d 403 (4th Cir. Sept. 12, 2018)

- Focused on whether discharge originated from a **point source**, regardless of how pollutants reach WOTUS.

“Thus, the landfill and **settling ponds could not be characterized as discrete ‘points,’ nor did they function as conveyances.** Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them. Accordingly, we conclude that **the court erred in finding that the landfill and ponds were point sources** as defined in the Clean Water Act.”

–Fourth Circuit, *Sierra Club v. VEPCO*

- NPDES permit **not required**

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Fourth Circuit Court of Appeals: Pipeline Decision

- Gasoline leaked from a ruptured underground pipeline and entered groundwater.
- Pollutants transported by GW to nearby surface waters



Photo: www.climateprotection.org

Fourth Circuit (Pipeline)

Upstate Forever v. Kinder Morgan Energy Partners, L.P., 877 F.3d 637 (4th Cir. April 2018)

- Reached different result than coal-ash lagoon case because pipe was a traditional **point source**.

“The plaintiffs have alleged that the **pipeline is the starting point and cause of pollution** that has migrated and is migrating through ground water to navigable waters....The plain language of the CWA requires only that a discharge come **‘from’ a ‘point source’**...[It] does not require a discharge **directly** to ‘navigable waters.’”

–Fourth Circuit, *Upstate Forever*

- NPDES permit **required**

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- Petitions pending before the US Supreme Court.
- Review seems likely.

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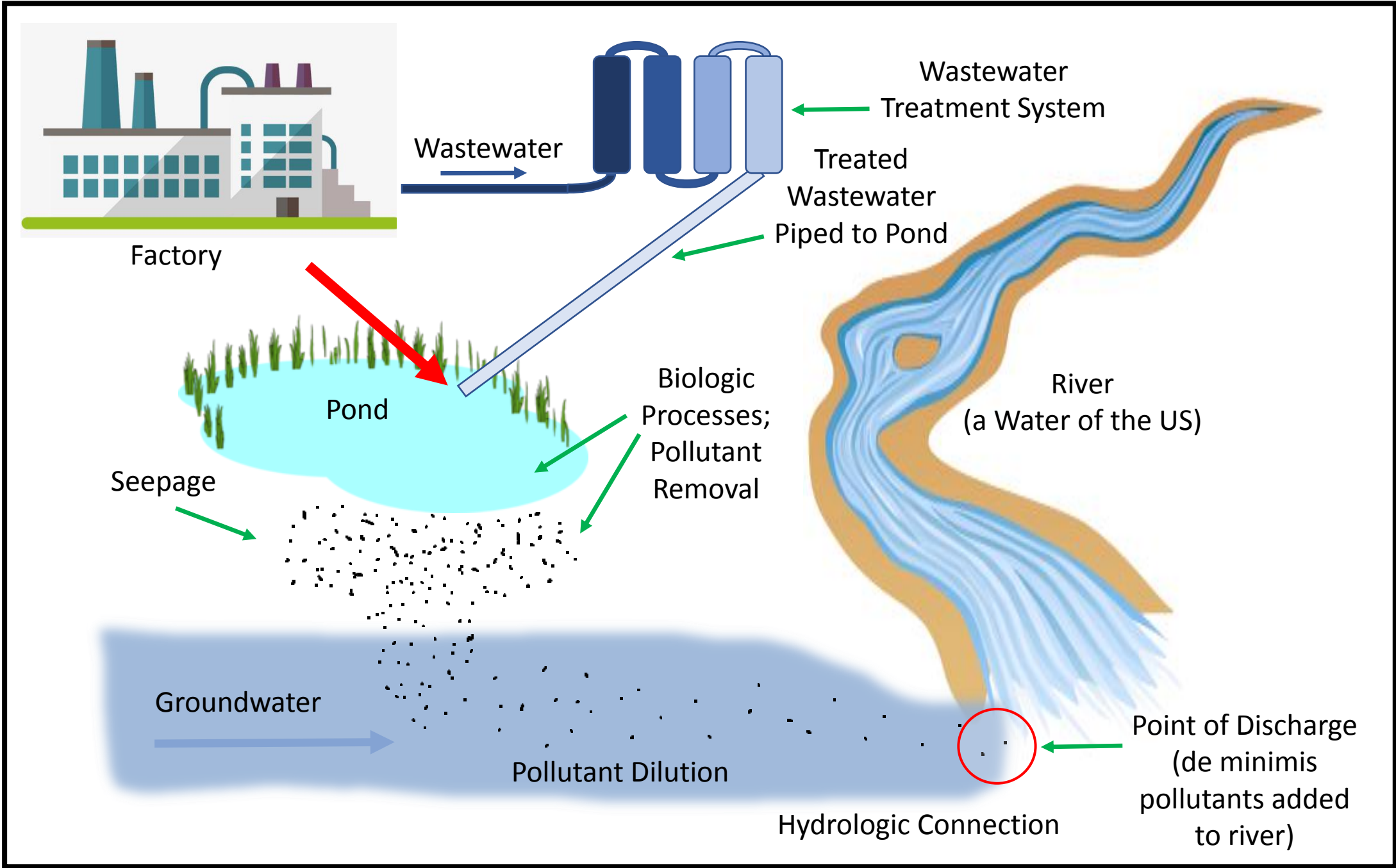
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Ramifications of Requiring an NPDES Permit, Instead of Simply a State Discharge Permit

- EPA retains authority to review and approve and **veto** the permit
- **Additional processes** and opportunities for public comment and **legal challenges**
- Discharge must comply with certain **unique federal restrictions**, including industry-specific TBELs.

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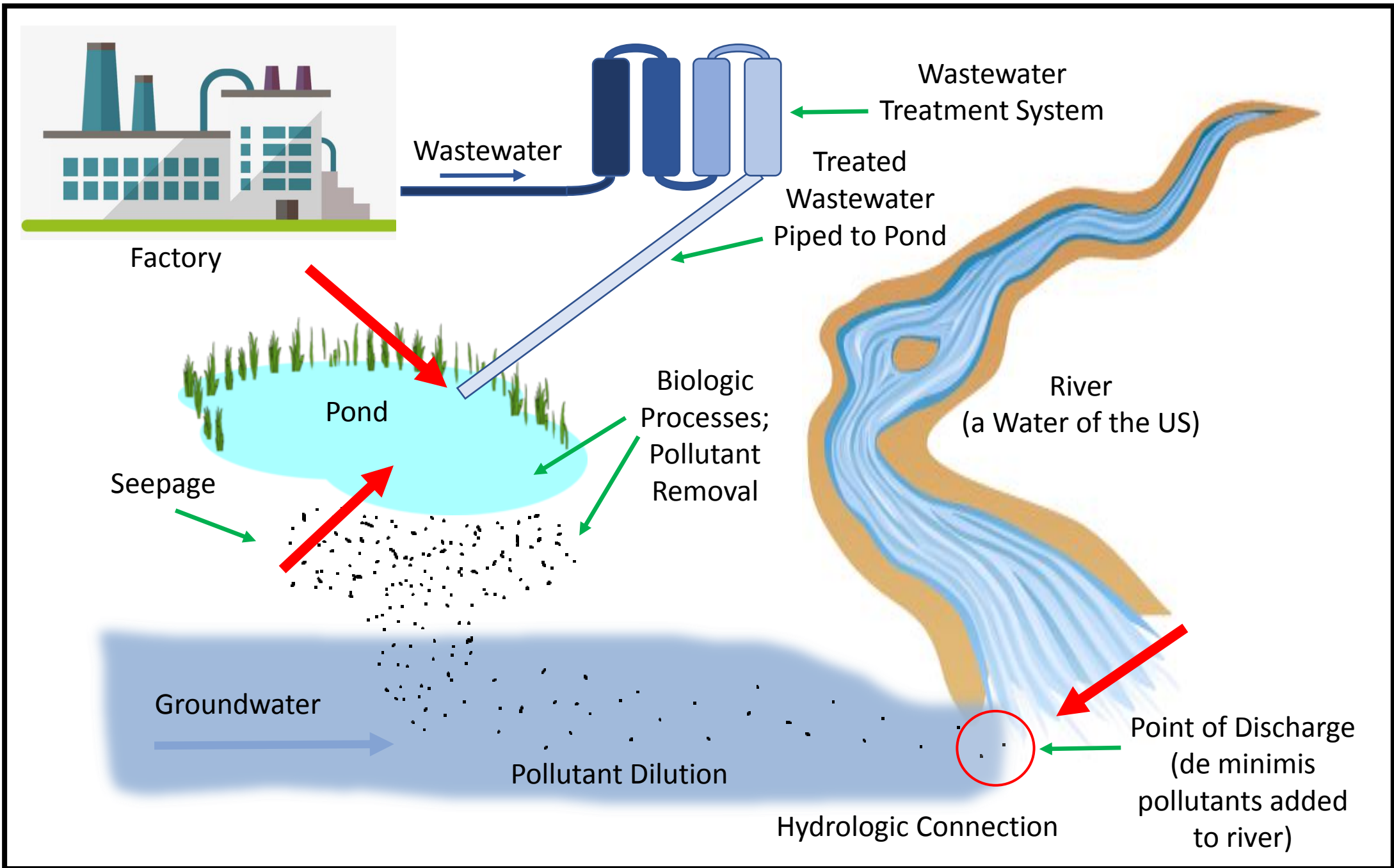


Technical Aspects and Considerations Associated with Conduit Theory

- Plaintiffs must demonstrate a “direct hydrological connection”
- “More than a *de minimis* amount” of pollutants must be shown to reach jurisdictional surface water.
- “Outside-the-box” solutions will likely be needed.

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QUESTIONS?

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