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Andrew R. Wheeler, Administrator
David P. Ross, Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater," 84 Fed. Reg. 16,810 (April 23, 2019), Docket ID No. EPA-HQ-OW-2019-0166-0001.

Dear Messrs. Wheeler and Ross,

On behalf of Waterkeeper Alliance, the undersigned U.S. Waterkeeper Organizations and Affiliates, and all of our respective members and supporters (collectively, "Waterkeeper"), we respectfully submit the following comments in response to EPA's Interpretive Statement, signed on April 12. 2019, entitled "Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater."[1]

Waterkeeper Alliance is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper is comprised of more than 340 Waterkeeper Member Organizations and Affiliates working in 44 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of more than 170 U.S. Waterkeeper Member Organizations and Affiliates, all of their individual members and supporters, as well as the collective interests of over 10,000 individual supporting members of Waterkeeper Alliance that live, work and recreate in and near waterways across the country –

[1] 84 Fed. Reg. 16,810 (April 23, 2019) (hereafter the "Interpretive Statement").

many of which are severely impaired by pollution. The CWA is the bedrock of Waterkeeper Alliance's and its Member Organizations' and Affiliates' work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual members and supporters, as well as to protect the people and communities that depend on clean water for drinking, sustenance fishing, recreation, their livelihoods and their survival. Our work – in which we have answered Congress' call for "private attorneys general" to enforce the CWA when government entities lack the willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand, and have seen firsthand, the importance of regulating point source discharges to jurisdictional waters via direct groundwater connections as a result of our extensive work to address serious water quality impacts from, e.g., coal ash impoundments, animal feeding operations ("AFOs") and pipeline spills and leaks.[2] Preserving EPA's longstanding interpretation of the CWA, consistent with the Act's plain meaning, objective, and intent, is critical to our collective work to protect public health and the nation's waterways from dangerous pollution.

As we explain herein, there is no reason or justification for EPA to continue this misguided and unlawful effort to completely reverse its longstanding legal interpretation that point source discharges of pollutants that pass through groundwater to a jurisdictional surface water/water of the United States ("WOTUS") may trigger the Clean Water Act's ("CWA" or the "Act") discharge prohibition, and thus require National Pollutant Discharge Elimination System ("NPDES") permits, if there is a "direct hydrological connection" between the point source and the surface water. EPA and the vast majority of courts that have considered this question have repeatedly and correctly rejected the prescriptive rule that the agency now seeks to advance via the Interpretive Statement, i.e., that the addition of a pollutant from a point source to a surface water is categorically exempt from the discharge prohibition definition and NPDES program if it passes through any amount of groundwater. Such a draconian and extreme reinterpretation of section 301 will irresponsibly and dangerously impede the ability of EPA, states, tribes and citizens to protect waterbodies and people who use them across the country. It will also create perverse incentives for polluters to evade regulation and enforcement under the Clean Water Act by discharging pollutants in basins or wells *near* navigable waters, where groundwater will predictably and directly convey the very same pollutants to the adjacent or surrounding connected surface waters.

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[2] *See* Comments of Waterkeeper Alliance, *et al.*, submitted in response to EPA's Notice inviting public comment on "Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water," Docket No. EPA-HQ-OW-2018-0063-0506 (May 21, 2018), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0506. A true and correct copy of these Comments is submitted herewith as Exhibit 1, and incorporated by reference herein.

The authority for EPA and states to require NPDES permit coverage for such groundwater-related discharges to surface waters on a case-by-case basis is absolutely critical to the administration of the Act. The Agency's effort to reverse its longstanding, sensible interpretation of the Clean Water Act, and to create a new loophole that will categorically remove all federal oversight over, and regulation of, such point source discharges of pollutants to jurisdictional waters, is contrary to Congressional intent, will harm public health, water quality, and wildlife, and constitutes arbitrary and capricious agency action, an abuse of discretion, and is otherwise unlawful.

I. INTRODUCTION AND SUMMARY OF COMMENTS

After decades of widespread and serious water pollution and public health problems across the nation, Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] To achieve this objective, the Act explicitly prohibits the "discharge of any pollutant by any person,"[4] and defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[5] Since then, EPA has had federal responsibility for advancing the Act's objective, as well as its national goal "of eliminating all discharges of pollutants into navigable waters by 1985," and the "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water . . . by 1983."[6]

Congress clearly focused the NPDES permit program on protecting surface waters. In the 47 years since the passage of the Act, EPA, states, tribes, and the courts interpreting the Act have followed this directive. Thousands of point sources that add pollutants to surface waters are covered by the NPDES permit program; millions of other pollution sources are not. While EPA does not treat groundwater itself as jurisdictional under the Clean Water Act, the agency and the courts have occasionally encountered relatively rare situations in which an addition of pollutants to WOTUS that is traceable to an identifiable point source passes a short distance through groundwater between the point source and the WOTUS. As EPA has consistently concluded time and again over at least three decades, the text, purpose, and history of the Act plainly provide EPA with statutory authority to regulate such discharges of pollutants under an NPDES permit when there is a direct hydrological connection between the point source and the WOTUS.

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[3] 33 U.S.C. § 1251(a).

[4] *Id.* § 1311(a).

[5] *Id.* § 1362(12) (internal quotation marks omitted).

[6] *Id*. § 1251(a).

Such regulatory authority has been, and can continue to be, reasonably exercised on a case-by-case analysis under both the Act's prohibition of unpermitted discharges of pollutants to jurisdictional waters, and through the Act's bedrock NPDES permitting program. Further, no other federal or state laws adequately and consistently act to actively prevent the discharge of pollutants from point sources to surface waters, including through hydrologically connected groundwaters. There is simply no legitimate basis for EPA to call its own longstanding and rational interpretation of the Act into question, or to seek to curtail its own regulatory authority to achieve Congress's objective. EPA's Interpretive Statement should be immediately withdrawn.

As EPA correctly argued to the Ninth Circuit Court of Appeals only three years ago:

> Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water. Ascertaining whether there is a direct hydrological connection is a fact-specific determination. 66 Fed. Reg. at 3017. To qualify as "direct," a pollutant must be able to proceed from the point [source] to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. These factors will be affected by the type of pollutant, geology, direction of groundwater flow, and evidence that the pollutant can or does reach jurisdictional surface waters...[7]

Consistent with EPA's longstanding interpretation and rationale – and contrary to the position the Agency now purports to adopt in its Interpretive Statement – the determination of whether the Act's discharge prohibition is triggered by point source discharges of pollutants to groundwaters that are hydrologically connected to jurisdictional surface waters must remain "a factual inquiry like all point source determinations."[8]

In sum, EPA's longstanding interpretation constitutes a necessary, workable, flexible, and practical approach to the effective administration of the Act. Regulated entities' fears articulated

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[7] Brief for the United States as Amicus Curiae, 9th Cir. No. 15-17447 (Dkt. Entry 40) (May 31, 2016) ("U.S. Amicus Br."). A true and correct copy of the U.S. Amicus Brief is submitted herewith as Exhibit 2.

[8] EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations; Proposed Rule, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001).

in recent litigation and comments suggesting, e.g., that EPA's maintenance of its longstanding interpretation of the Act would somehow constitute an expansion of its scope and lead to soaring compliance costs, an unwieldy administrative burden, or an uncertain regulatory landscape, are factually unsupported and unfounded. For 30 years, EPA has interpreted the Act in a consistent manner, and for 30 years the sky has not fallen. EPA should immediately withdraw and abandon its Interpretive Statement and recommence implementing its commonsense and longstanding interpretation of the Act.

II. EPA'S SELF-DESCRIBED "LONGSTANDING" – AND DECIDEDLY NOT "MIXED" – INTERPRETATION OF THE CWA.

Notwithstanding EPA's disingenuous statements that its previous interpretations have been inconsistent or "mixed,"[9] for decades prior to its Interpretive Statement in April 2019, EPA's consistent and longstanding interpretation was that an addition of pollutants from a point source to WOTUS is subject to NPDES permitting if the pollutants travel through groundwater that bears a direct hydrological connection with the WOTUS. We don't use the word "disingenuous" lightly. It it plain from the Interpretive Statement that the agency is attempting to intentionally conflate and confuse two distinct issues to argue that its previous interpretation regarding the direct hydrological connection theory has not been "longstanding," but has rather been "mixed" – i.e., (1) whether groundwater may in-and-of-itself be regulated as WOTUS, and (2) whether discharges from a point source to WOTUS that pass a short distance through groundwater can meet the "discharge of a pollutant" definition. The agency plainly knows that these issues are distinct, yet seeks to conflate them in the Interpretive Statement by citing to its previous statements involving the former issue to confuse readers (and courts) and unscrupulously call its longstanding position regarding the latter into question.

As recounted below, EPA has acted clearly, consistently, and rationally for decades on this issue, explaining its interpretation when acting in a rulemaking capacity (on multiple occasions), in issuing NPDES permits around the country that carry the force of law, and just three years ago, as amicus curiae before the Ninth Circuit.

A. EPA's 1990s Statements in the Federal Register.

In 1990, when promulgating a final rule addressing municipal and industrial stormwater pollution that was subject to notice and comment, EPA stated:

discharges to ground waters are not covered by this rulemaking (***unless there is a***

[9] Interpretive Statement, 84 Fed. Reg. at 16,811, 16,812.

hydrological connection between the ground water and a nearby surface water body…).[10]

The following year, in the context of a final rule on water quality standards for Indian reservations, again subject to notice and comment, EPA offered more detail:

> EPA and most courts addressing the issues have recognized …, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. … [T]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters 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.***[11]

In 1998, again in the stormwater pollution context involving notice and comment, EPA reiterated:

> EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection....
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> * * *
>
> [Construction General Permit] coverage can extend to discharges to surface water via hydrologically connected groundwater and CGP applicants, like any other NPDES applicant, should consider those types of discharges when applying for permit coverage.[12]

B. EPA's 2001 "Formal Agency Interpretation" and Legal Analysis.

In 2001, EPA issued a "formal agency interpretation," and articulated the legal basis for its position at considerable length in a notice of proposed rulemaking for concentrated animal

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[10] 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added) (citations omitted).

[11] 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (emphasis added).

[12] 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998).

feeding operations ("CAFOs").[13] Under the heading "Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to Ground Water," EPA stated:

> Because of its relevance to today's proposal, EPA is ***restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water***.[14]

In a 22-paragraph legal analysis, EPA discussed its authority to "determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act," and why "the Act is best interpreted to cover such discharges."[15]

Instead of asking whether groundwater is regulated under the CWA as a point source or as a water of the United States, EPA astutely framed the issue before it, "whether a discharge to surface waters via hydrologically connected ground water is unlawful." *Id.* EPA noted:

> ***[T]he question of whether Congress intended the NPDES program to regulate ground water quality … is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water.***[16]

Exercising its authority to fill "an interpretive gap in the statutory structure,"[17] EPA reasoned:

> An interpretation of the CWA which excludes regulation of point source discharges to the waters of the U.S. which occur via groundwater would, therefore, be inconsistent with the overall Congressional goals…. ***[T]here is no evidence that Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water***.[18]

To reach this conclusion, EPA "utilized its expertise in environmental science and policy to determine the proper scope of the CWA," its "knowledge of the hydrologic cycle and aquatic

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[13] 66 Fed. Reg. 2,960, 3,018 (Jan. 12, 2001).

[14] *Id.* at 3,015 (emphasis added).

[15] *Id.*

[16] *Id.* at 3,015-16 (emphasis added).

[17] *Id.* at 3,018.

[18] *Id.* at 3,015-16 (emphasis added).

ecosystems," and the policymaking authority delegated by Congress.[19] EPA then explained:

> The determination of whether a particular discharge to surface waters via ground water which has a direct hydrological connection which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations. The time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site specific factors, such as geology, flow, and slope.[20]

EPA also found support for its interpretation in the Act's legislative history: "Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters.'"[21] EPA then accepted comment on the proposed rule and issued a final CAFO regulation in 2003.[22]

In its final rule, EPA determined that groundwater-related requirements should be implemented in CWA permits, as necessary, on a case-by-case basis due to site-specific variables such as topography, climate, and distance to surface water, among others.[23] This differed from the proposed rule only in that the proposed rule would have categorically subjected CAFOs covered by the rule to groundwater-related requirements in NPDES permits, whereas the final rule left the imposition of such requirements to site-specific determinations. This is abundantly clear, not only from the CAFO rule itself, but also from *Waterkeeper Alliance, Inc. v. EPA*, a Second Circuit opinion that reviewed the 2003 final CAFO regulation.[24] As the Second Circuit explained, the shift from uniform national requirements governing discharges to surface waters via groundwater to a case-by-case approach did not alter EPA's position on the scope of the CWA:

> "The EPA did not … mean to suggest that NPDES authorities lacked the power to impose groundwater-related requirements on a case-by-case basis, where necessary."[25]

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[19] *Id.* at 3,018.

[20] *Id.* at 3,017.

[21] *Id.* at 3,016 (citing legislative history).

[22] 68 Fed. Reg. 7,176 (Feb. 12, 2003).

[23] *Id.* at 7,229.

[24] 399 F.3d 486 (2d Cir. 2005).

[25] *Id.* at 514, n.26 (emphasis added).

The Second Circuit upheld EPA's determination and that aspect of the regulation.[26] Moreover, EPA's subsequent statements from 2008, when it reissued a final CAFO rule after remand from the Second Circuit, foreclose any argument that EPA disavowed its position. EPA said in its preamble:

> [N]othing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water.[27]

C. The United States' Amicus Brief in the Ninth Circuit Advocating EPA's "Longstanding Interpretation" of the CWA.

In 2016, the United States, representing EPA's interest "in the proper interpretation of the NPDES permit provisions," filed an amicus brief in the Ninth Circuit case, *Hawai'i Wildlife Fund v. County of Maui*.[28] The brief again reasserts EPA's "longstanding interpretation" of the Act and persuasively articulates why and under what circumstances discharges to surface water via hydrologically connected groundwater are regulated under the CWA. Among several important points and arguments that shine a bright light on the complete reversal articulated in the Interpretive Statement, EPA noted the following:

> EPA's ***longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements***. *E.g.*, Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,982 (Dec. 12, 1991) ("[T]he affected ground waters 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.").[29]

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[26] *Id.* at 514-15.

[27] 73 Fed. Reg. 70,420 (Nov. 20, 2008); *see also* EPA, *Clean Water Rule Response to Comments – Topic 10: Legal Analysis*, *available at* https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf (2015) (last visited May 31, 2019) ("[T]he 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….") (emphasis added).

[28] Ex. 2 hereto.

[29] U.S. Amicus Br. (Ex. 2), at 5 (emphasis added).

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As Justice Scalia said in *Rapanos*, the statute's language prohibiting "any addition of any pollutant to navigable waters from any point source" does not limit liability only to discharges of pollutants *directly* to navigable waters. *See Rapanos*, 547 U.S. at 743 (plurality op.) (emphasis in original). Courts have interpreted the CWA as covering not only discharges of pollutants directly to navigable waters, but also discharges of pollutants that travel from a point source to navigable waters over the surface of the ground or through underground means. *E.g., Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980). ***The discharges in this case fall squarely within the statutory language***.[30]

* * *

Even if Congress's intent on this issue had been ambiguous, ***EPA has clearly stated for decades that pollutants that move through groundwater can constitute discharges subject to the CWA, and that interpretation is entitled to Chevron deference.*** *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). ***It has been EPA's longstanding position that discharges moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a "direct hydrological connection" between the groundwater and the surface water.*** *See* NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001). This formulation recognizes that some hydrological connections are too circuitous and attenuated to come under the CWA. *Id*.[31]

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The County relies on the treatment of groundwater in legislative history, Op. Br. at 21-23, but this "only supports the unremarkable proposition with which all courts agree—that the CWA does not regulate 'isolated/nontributary groundwater' which has no [effect] on surface water." *Bosma*, 143 F. Supp. 2d at 1180. ***It does***

[30] U.S. Amicus Br. (Ex. 2), at 10 (emphasis added).

[31] U.S. Amicus Br. (Ex. 2), at 12 (emphasis added).

not undermine the conclusion that discharges of pollutants through groundwater to jurisdictional surface waters are subject to the NPDES program.[32]

* * *

Because courts have interpreted the term "discharge of a pollutant" to cover discharges over the ground and through other means, ***exempting discharges through groundwater could lead to absurd results***. As one court noted, "it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater." *N. Cal. River Watch v. Mercer Fraser Co.*, No. 04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005).[33]

* * *

Any fears about the implications of point-source discharges to jurisdictional surface waters through groundwater with a direct hydrological connection being subject to NPDES-permit requirements are unwarranted. ... ***EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities.*** *See, e.g.*, NPDES Permit No. NM0022306, available at https://www.env.nm.gov/swqb/Permits/; NPDES Permit No. WA0023434, available at https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821.[34]

In sum, a review of the Amicus Brief filed by EPA in *Hawai'i Wildlife Fund v. County of Maui* demonstrates that the Agency is shamelessly attempting to pull a "fast one" with respect to its views on the applicability of the CWA to point source discharges to WOTUS via directly connected groundwaters. For decades, and until less than two months ago, EPA's position on this question has been remarkably longstanding and consistent. EPA's newly reimagined history of its views on this issue set forth in the Interpretive Statement is demonstrably false. While the agency

[32] U.S. Amicus Br. (Ex. 2), at 18 (emphasis added).

[33] U.S. Amicus Br. (Ex. 2), at 16 (emphasis added).

[34] U.S. Amicus Br. (Ex. 2), at 29-30 (emphasis added).

seeks to avoid having even to invent a plausible rationale for its dramatic change in position by pretending its position has never really been settled at all, the long and consistent record of the Agency's longstanding "direct hydrological connection" interpretation could not be more plain.

D. EPA's Longstanding and Consistent Interpretation of the Act is Reasonable, Administrable, and Adjudicatable.

For decades, regulators and courts have capably applied CWA permitting requirements to point source discharges of pollutants that travel through groundwater to surface waters. Recent claims of administrative infeasibility are belied by history. "EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, [CAFOs], mines, and oil and gas waste-treatment facilities."[35] EPA applies the direct hydrological connection standard to identify discharges that are subject to permitting under the Act. To qualify as "direct," EPA explains, "[t]he time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters" is relevant.[36] Pollutants must be traceable from point source to surface water, "[i]t is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters."[37]

By way of example, in 2011, EPA issued an NPDES permit to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site "has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtillotte Creek."[38] EPA explained:

> Based on the modeling and the porosity of the soil, the first of the new discharge plume would take 3 to 5 years to reach the creek and 13 to 21 years before the entire breadth of the plume reaches the creek. However, since the existing facility had been discharging to the groundwater since the facility began operations in the 1970's, the existing discharge plume is already reaching Tourtillotte Creek.[39]

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[35] U.S. Amicus Br. (Ex. 2) at 30 (citing permits).

[36] 66 Fed. Reg. at 3,017.

[37] *Id.* (quotation omitted).

[38] EPA Region 5, NPDES No. WI0073059 Fact Sheet (April 2011) at 2.

[39] *Id*.

EPA has issued other individual NPDES permits on a similar basis.[40] In 2012, EPA issued a General NPDES Permit for CAFOs in Idaho, with specific conditions applicable to discharges from CAFOs to groundwater with a direct hydrological connection to surface water.[41]

The courts have also proven capable of making these case-by-case determinations. For example, in the district court in *Hawai'i Wildlife Fund v. County of Maui*, plaintiffs established at summary judgment that the pollutants defendants had injected into underground wastewater wells were reaching the Pacific Ocean near a popular swimming beach, relying in part on a study by EPA and other agencies that used tracer dye to show that pollutants were reaching the ocean in less than three months.[42] Similarly, in March 2017, a plaintiff proffered expert testimony and the defendant's own data to show at trial that the defendant was discharging arsenic from its coal ash impoundments into a nearby surface water.[43]

By contrast, in *McClellan Ecological Seepage Situation v. Cheney*, the district court held that discharges to surface water through groundwater *may* be subject to the CWA, but declined to regulate under the CWA based on evidence that it would take "literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters."[44] And in *Greater Yellowstone Coalition v. Larson,* the court held that because groundwater would take 60 to 420 years to reach surface water, the hydrological connection was not direct.[45] EPA and the Courts have applied this interpretation for decades and, depending on the facts presented, evaluated whether the CWA applied. It is clear from this record developed under EPA's longstanding interpretation that the horribles recently paraded before the Agency by regulated entities have not, and will not, come to pass.

Industry stakeholders have argued in recent comments and lawsuits that EPA's continued implementation of its longstanding interpretation would somehow extend the NPDES permitting program to millions of small sources never previously regulated under this program. These

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[40] *See, e.g.,* EPA Region 6, NPDES No. NM0022306 Fact Sheet for Questa Mine (May 2006) at 4-6; *see also id*. at 7 (describing other similar permits issued).

[41] EPA, Authorization to Discharge under the National Pollutant Discharge Elimination System For Concentrated Animal Feeding Operations at 30 (NPDES No. IDG01000) (May 8, 2012), (*previously available at* https://www3.epa.gov/region10/pdf/permits/npdes/id/cafo_fp_idg010000_wapps.pdf (last visited 10/30/2017)).

[42] 2015 U.S. Dist. LEXIS 8189 at *3-5. (D. Haw. Jan. 23, 2015).

[43] *Sierra Club v. VEPCO*, 247 F. Supp. 3d 753, 756-61 (E.D. Va. 2017).

[44] 763 F. Supp. 431, 437 (E.D. Cal. 1989).

[45] 641 F. Supp. 2d at 1140-41.

slippery slope arguments are simply wrong.[46] Millions of points sources of pollution remain outside the NPDES program because their discharges do not reach, or cannot sufficiently be traced to, a surface water. As noted previously, the generalized assertion that groundwater connects to surface water, without proof that pollutants in fact reach surface water, is insufficient to create liability under the Act.[47] Despite the litany of industry concerns – *e.g.,* uncertainty in the business community, disincentives for investment in water infrastructure – there is no indication that EPA's decades-old position, repeatedly endorsed by courts, has caused any systemic problems.

To the contrary, the slippery slope runs the other way. EPA's adoption of a categorical rule exempting discharges to surface water via hydrologically connected groundwater will, in EPA's own words, effectively create a "***ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water***."[48] The CWA is the primary, comprehensive statutory program for regulating the discharges of pollutants to waters of the United States. Circumventing it would plainly thwart Congress's intent. As one court noted:

> It would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.[49]

And as the Ninth Circuit recently explained, the Act does not allow a polluter to do "indirectly that which it cannot do directly," i.e., discharge pollutants into surface waters.[50] Any other reading "would make a mockery of the [Act's] prohibitions."[51]

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[46] For example, fears that parking lots could be subject to the CWA's stormwater regulations are wholly unfounded. The CWA requires only that specific classes of industrial facilities obtain stormwater permits for point source discharges. 33 U.S.C. § 1342(p)(2)(B). Parking lots are not a covered industry. *See* 40 C.F.R. § 122.26(b)(14).

[47] *See Rice v. Harken Exploration*, 250 F.3d 264, 272 (5th Cir. 2001) (finding no liability because there was no "evidence of a close, direct and proximate link between [the defendant's] discharges … and any resulting actual, identifiable oil contamination of a … surface water.").

[48] 66 Fed. Reg. at 3,016 (emphasis added).

[49] *N. Cal. Riverwatch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, *7-8 (N.D. Cal. Sept. 1, 2005).

[50] *Haw. Wildlife Fund*, 881 F.3d at 768.

[51] *Id.*

Discharges of pollutants from point sources that reach navigable waters through groundwater – such as the dumping of toxic coal ash from power plants or animal waste from AFOs into unlined basins adjacent to rivers – can be regulated under the CWA where a site-specific and factually intensive determination proves that such coverage is warranted. The efforts of EPA, states, tribes, environmental organizations, and concerned citizens to administer and enforce the CWA's prohibitions against such pollution will be imperiled, if not precluded entirely, if EPA continues on its current path to reverse decades of precedent, breach the public trust, and freely hand this perverse gift to polluting industries at the expense of all Americans.[52]

III. EPA'S LONGSTANDING DIRECT HYDROLOGICAL CONNECTION POSITION IS CONSISTENT WITH THE LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE CWA; EPA'S INTERPRETIVE STATEMENT IS NOT.

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation."[53] In section 301 of the CWA, Congress prohibited the "discharge of any pollutant" except in compliance with an NPDES permit.[54] The NPDES permitting system is the "cornerstone of the [CWA]'s pollution control scheme."[55]

Thus, when Congress prohibited the unpermitted "discharge of ***any*** pollutant," it defined this term broadly as "***any*** addition of ***any*** pollutant to navigable waters from ***any*** point source."[56] The Supreme Court has frequently observed that the word "any" in statutory text indicates Congress' intent to give its words expansive meaning – an intent "underscore[d]" through the "the repeated use of the word 'any'."[57] The Act reaches "***any*** addition … from ***any*** point source," not just those "point sources" whose effluent never comes in contact with groundwater. Such a restriction cannot lawfully be grafted onto the statute contrary to the language Congress chose.

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[52] *See, e.g.,* Sharon Lerner, *Hurricane Florence Released Tons of Coal Ash in North Carolina. Now the Coal Industry Wants Less Regulation*, The Intercept, Sept. 28, 2018, *available at*, https://theintercept.com/2018/09/28/north-carolina-coal-ash-hurricane-florence/ (copy submitted herewith attached as Exhibit 3); EPA FOIA documents referenced and linked therein (excerpts submitted herewith as Exhibit 4).

[53] *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981).

[54] 33 U.S.C. §§ 1311(a), 1342.

[55] *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).

[56] 33 U.S.C. §§ 1311, 1362(12)(A) (emphasis added).

[57] *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007) (citing *HUD v. Rucker*, 535 U.S. 125, 131 (2002)).

Justice Scalia's plurality opinion in *Rapanos v. United States* makes clear that EPA's longstanding interpretation of the Act is completely consistent with the Act's plain language: "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'"[58] In other words, if pollutants that are added to WOTUS can be traced back to a particular point source, CWA liability is not defeated simply because the pollution is conveyed from the point source to surface water by way of an intervening medium – through the air, over the surface of the land, or with the flow of groundwater.[59]

Applying a similar concept, the 6th Circuit rejected a "temporal requirement to the 'discharge of a pollutant'" because it "is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program."[60] In this regard, CWA liability is not thwarted simply because some period of time passes between when the pollution is discharged from a point source and when it reaches surface waters.[61] The same principle applies here. The plain language of the Act does not support grafting additional requirements onto the definition of "discharge of a pollutant" – *i.e.,* that the pollutants not pass through groundwater before entering a navigable water. It simply requires that the pollutants, which flow from an identifiable point source, be added to waters of the United States. Because the statute's prohibition is clear and unambiguous on this point, EPA does not have discretion to limit the statute's reach by regulatory fiat as it attempts to do here.

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[58] *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (emphasis in original).

[59] *See, e.g., Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188-89 (2d Cir. 2010) (holding that the spraying of aerosol pesticides into the air column from trucks and aircraft was a discharge of pollutants to navigable waters and covered by the CWA); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) ("[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law"); *Hawai'i Wildlife Fund v. City of Maui*, 881 F.3d 754, 765 (9th Cir. 2018) (holding a polluter liable for discharging pollutants injected into the ground to surface water through ground water); *No Spray Coalition, Inc. v. City of N.Y.*, No. 00-Civ.-5395 (GBD), 2005 WL 1354041 (S.D.N.Y. June 7, 2005) ("Moreover, it would be unreasonable to distinguish between a sprayer releasing a fine mist pollutant into the atmosphere over the water and a pipe that released the same single flow of pollutant directly into water. Violators of the CWA would then need only to attach an airborne mist blower or hydraulic sprayer to their pipe to discharge a pollutant over the water in order to escape liability or regulation."); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981) ("[T]here is no requirement that the point source need be directly adjacent to the waters it pollutes.").

[60] *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009).

[61] *Id.* (explaining that to create a temporal link between the "'addition' (or 'discharge') of the pollution to the 'point source' does not follow the plain language of the Clean Water Act.").

Finally, EPA's reliance on the Act's legislative history is misplaced. The legislative history cited by EPA focuses primarily on Congress' decision not to categorically subject discharges to groundwater to the NPDES program.[62] While Congress debated regulating groundwater under Section 402 as a means of protecting surface water,[63] and recognized "the essential link between ground and surface water and the artificial nature of any distinction," Congress decided against a categorical rule because "the jurisdiction regarding groundwaters is so complex and varied . . . ."[64] Congress' recognition that groundwater is complex and varied supports EPA's longstanding, fact specific, interpretation of the Act: that, without drawing categorical rules, when discharges to groundwater in fact reach surface waters, sections 301 and 402 may apply in order to protect surface water quality.[65]

In sum, the Act covers every identifiable point source discharge of pollutants to surface waters, regardless of the medium the pollutants pass through before entering surface waters. EPA lacks regulatory authority to overrule Congress and to attempt to limit the clear jurisdictional reach of the Act.

IV. THE VAST MAJORITY OF COURTS THAT HAVE ADDRESSED THE ISSUE HAVE HELD THAT POINT SOURCE DISCHARGES OF POLLUTANTS TO SURFACE WATERS VIA DIRECTLY CONNECTED GROUNDWATER REQUIRE NPDES PERMITS.

Federal circuit and district courts in at least 24 states have agreed with EPA's longstanding interpretation.[66] The reasoning behind these decisions is straightforward: Congress

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[62] Interpretive Statement, 84 Fed. Reg. at 16,815.

[63] *See id*.

[64] S. Rep. No. 92-414 at 73 (1971).

[65] Congress notably included specific requirements in the Act suggesting an intent that pollution of groundwater be controlled and regulated to the extent it may impact surface water quality. For example, the point source definition includes "any … well" and "any … discrete fissure." 33 U.S.C. § 1362(14). Perhaps even more notably, Congress expressly required that any State seeking delegated NPDES permitting authority first demonstrate to the EPA Administrator that it has adequate authority to "issue permits which … control the disposal of pollutants into wells." 33 U.S.C. § 1342(b)(1)(D). It would be odd indeed for Congress to require states to demonstrate that they have such authority in order to take over administering the NPDES permitting program if EPA itself did not possess such authority, at least in circumstances where well disposal of pollutants has potential to directly impact surface water quality.

[66] *E.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005) (embracing EPA's authority to regulate discharges "via groundwater"); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (flows carrying pollutants "through underground aquifers ... into navigable-in-fact streams"); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977)

did not intend to exempt from the CWA "the introduction of pollutants into the groundwater [that] adversely affects the adjoining surface waters."[67]

The Ninth Circuit in *Hawai'i Wildlife Fund v. County of Maui* recently reaffirmed this interpretation in a case involving discharges of sewage waste into underground wells which reached the Pacific Ocean.[68] There the court held that the defendant was liable under the Act because, among other things, "the pollutants are fairly traceable from the point source to navigable water such that the discharge is the functional equivalent of a discharge into navigable water."[69] The court correctly focused on whether there was a discharge to surface water, regardless of whether it traveled through another medium.[70] The court rejected the defendant's argument that a point source itself must convey pollutants "directly" to a navigable water in order for liability to attach under the Act, reasoning that this argument requires "reading into the

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(discharges through underground injection wells), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983); *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1367 (M.D. Ga. 2017), *cert. denied*, 261 F. Supp. 3d 1345 (M.D. Ga. 2017); *Va. Elec. & Power Co.*, 247 F. Supp. 3d at 761; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445; *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-11333, 2015 WL 2144905, at *8 (S.D. W. Va. May 7, 2015); *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 (JAP), 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013); *Tenn. Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, at *5–6 (N.D. Ala. Aug. 20, 2013); *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009); *Coldani v. Hamm*, No. Civ. S-07-660 RRB EFB, 2007 WL 2345016, at *7 (E.D. Cal. Aug. 14, 2007); *N. Cal. Riverwatch*, 2005 WL 2122052, at *2; *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715, at *10 (D. Colo. Nov. 15, 2002); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Mutual Life Ins. Co. v. Mobil Corp.*, No. Civ. A. 96-CV-1781, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195–96 (E.D. Cal. 1988), *vacated on other grounds sub nom McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985); *O'Leary v. Moyer's Landfill*, Inc., 523 F. Supp. 642, 647 (E.D. Pa. 1981).

[67] *Idaho Rural Council*, 143 F. Supp. 2d at 1180.

[68] 881 F.3d at 758-61.

[69] *Id.* at 765.

[70] *Id.* at 762-65 (citing *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) and *Sierra Club v. Abston Construction*, 620 F.2d 41 (5th Cir. 1980)).

statute at least one term that does not appear on its face."[71] In concluding, the court noted that the Act's language prohibits a polluter "from doing indirectly that which it cannot do directly," because "[t]o hold otherwise would make a mockery of the CWA's prohibitions."[72]

While a relatively small number of courts have found groundwater-related claims to be outside the jurisdiction of the CWA,[73] these contrary cases typically arose in situations where either a direct hydrological connection to surface water had not been pled, was remote or entirely unproven, or the plaintiff claimed that the CWA applies to *all* discharges to groundwater, or the court construed the issue as such.[74]

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[71] *Id.* at 765 (citing *Rapanos*, 547 U.S. 715 (2006)).

[72] *Id.* at 768.

[73] *See, e.g., Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018) (rejecting direct hydrological connection discharge theory in a 2-1 decision based in part on availability of a purported remedy under RCRA); *but see* dissenting opinion of Judge Clay:

> This case could have profound implications for those in this Circuit who would pollute our Nation's waters. And the issue is novel. This Court has never before considered whether the CWA applies in this context. However, the Fourth and Ninth Circuits have. Both courts determined that a short journey through groundwater does not defeat CWA liability. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649-51 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745-49 (9th Cir. 2018). The Second Circuit reached a similar conclusion where the pollutants traveled briefly through fields (which are not necessarily point sources) and through the air. *See Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118-19 (2d Cir. 1994) (fields); *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188-89 (2d Cir. 2010) (air). ***Until today, no Circuit had come out the other way. The reason is simple: the CWA does not require a plaintiff to show that a defendant discharged a pollutant from a point source directly into navigable waters; a plaintiff must simply show that the defendant "add[ed] . . . any pollutant to navigable waters from any point source."*** *See* §§ 1362(12)(A) (emphases added), 1365(a), 1311(a); *Upstate Forever*, 887 F.3d at 650; *Hawai'i Wildlife Fund*, 886 F.3d at 749.

Ky Waterways All., 905 F.3d at 941 (emphasis added).

[74] *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *Allegany Environmental Action Coalition v. Westinghouse Electric Corp.*, No. 96-2178, 1998 U.S. Dist. LEXIS 1838, *6 (W.D. Pa. Jan. 30, 1998); *U.S. v. ConAgra, Inc.*, No. CV 96-0134-S-LMB, 1997 U.S. Dist. LEXIS 21401, *8-18 (D. Id. Dec. 31, 1997); *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1316-20 (D. Or. 1997); *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962 (7th Cir. 1994), *cert. denied,* 513 U.S. 930 (1994); *Kelley on behalf of Michigan v. United States,* 618 F. Supp. 1103 (W.D. Mich. 1985).

For example, in *Rice v. Harken Exploration*, the Fifth Circuit first rejected the plaintiff's claim that all groundwater that "affects interstate commerce" is covered by the Act.[75] The *Rice* court then found the plaintiff's proof of a hydrological connection insufficient because it lacked "evidence of a close, direct and proximate link between [the defendant's] discharges … and any resulting actual, identifiable oil contamination of a … surface water," and instead depended on an expert's "generalized assertion that that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater."[76] Such a showing would not pass muster under the longstanding direct hydrological connection standard repeatedly articulated by EPA.

In *Oconomowoc Lake*, the court explained that the mere "possibility" of a hydrologic connection between groundwater and surface water was insufficient to justify regulation under the NPDES program.[77] Likewise, in *Kelley*, the plaintiffs alleged only that the "plume of contamination is migrating … and *eventually* discharging into [a surface water]."[78] These cases are distinguishable on the basis that it was speculative that the discharges were, in fact, reaching surface waters.

The other recent cases that rejected a discharge to surface water via groundwater theory incorrectly framed the issue to be whether groundwater is itself "navigable water," or incorrectly analyzed the plain language of the statute.[79] These outlier cases are inconsistent with the great weight of judicial authority and EPA's longstanding interpretation of the Act.

V. EPA MUST COMPLY WITH ALL RELEVANT FEDERAL LAWS AND POLICIES, INCLUDING THE ENDANGERED SPECIES ACT, PRIOR TO TAKING ANY FURTHER ADMINISTRATIVE ACTION.

Prior to taking any further action to reconsider and revise its position regarding the coverage of "discharges of pollutants" via direct hydrologic connection to surface waters under the Clean Water Act, the agency must comply with all relevant federal laws and policies,

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[75] 250 F.3d at 269-79 (5th Cir. 2001).

[76] *Id.* at 272.

[77] *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962, 965 (7th Cir. 1994).

[78] *Kelley on behalf of Michigan v. United States,* 618 F. Supp. 1103, 1105 (W.D. Mich. 1985).

[79] *E.g., Chevron U.S.A. Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807 (D. Md. 2015); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798 (E.D.N.C. 2014); *Tri-Realty Co. v. Ursinus College,* No. 11-5885, 2013 U.S. Dist. LEXIS 165471, at *28 (E.D. Pa. Nov. 21, 2013).

including the Endangered Species Act ("ESA"),[80] the National Environmental Policy Act ("NEPA"),[81] as necessary, and any other relevant laws and policies.

With respect to the ESA, EPA must consult with the Fish and Wildlife Service ("FWS") and/or National Oceanic and Atmospheric Administration ("NOAA") under Section 7 of the Act to assess whether its action may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the action may incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects.[82] Before EPA takes any action that "may affect" species listed as threatened or endangered under the ESA, or modify their critical habitat, the agency must first consult with the FWS and/or NOAA pursuant to Section 7 of the ESA.[83]

Under Section 7, consultation is required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat . . . ."[84] Agency "action" is broadly defined to include "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[85]

As FWS's consultation handbook explains, an action agency may make an initial "no effect" or "may affect" determination to assess whether or not consultation is required.[86] EPA can only avoid undertaking informal or formal consultations when "the action agency determines its proposed action will not affect listed species or critical habitat."[87] The handbook defines "may affect" as "the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat."[88] A "may affect" determination is appropriate even

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[80] 16 U.S.C. § 1531 *et seq.*

[81] 42 U.S.C. § 4321 *et seq.*

[82] *See* 16 U.S.C. § 1536.

[83] 16 U.S.C. § 1536(a)(2).

[84] *Id.*

[85] 50 C.F.R. § 402.02.

[86] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (hereafter "Consultation Handbook") at 3-12 (1998).

[87] *Id.*

[88] *Id*. at xvi.

when the action agency believes that its actions will have either beneficial or uncertain effects because the action agency is not the expert in determining how its actions will impact threatened and endangered species.

If EPA predicts an impact on a listed species may occur, then EPA must undergo consultation with the Services.[89] If the action agency elects to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" ("NLAA") a listed species or is "likely to adversely affect" ("LAA") a listed species.[90] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[91] Discountable effects are limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[92] Discountable and insignificant impacts are rare if an agency's actions will cause harmful effects.

Under the informal consultation process, if the agency reaches an NLAA determination, and the FWS concurs in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are is likely to adversely affect listed species, than formal consultations must occur.

EPA may, of course, skip the informal consultation process and move directly to the formal consultation process. During the formal consultation process, FWS will assess the environmental baseline—"the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process[93] —in addition to the cumulative effects to the species—"those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation"—and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.[94]

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[89] *Id*. at xv.

[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] *Id.* at xiv.

[94] *Id*. at xiii.

The Section 7 consultation process applies to all discretionary actions,[95] and any effort by the EPA to review or revise its position here clearly represents such a discretionary action.

Further, NEPA, our "basic national charter for protection of the environment,"[96] requires that federal agencies prepare an Environmental Impact Statement ("EIS"), for any major federal action that may have significant environmental impacts.[97] An EIS must discuss: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[98] An EIS serves the statute's two key goals: (a) to ensure the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts, and (b) to guarantee that the relevant information will be made available to the public.[99]

In considering the effects of an action, an agency must consider all impacts on the environment, including, *inter alia*, "effects on air and water and other natural systems."[100] An EIS must also consider "cumulative" effects —*i.e.*, "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions."[101] Any change to the agency's longstanding position that the "discharge of pollutants" to surface waters via direct hydrologic connection is covered under the CWA is likely to cause significant effects to the human environment that must be analyzed under NEPA. Those significant effects include, but are not limited to: an increase in water quality degradation and other environmental harm; impacts to endangered or threatened species or their habitats; impacts to public health and safety, and a variety of cumulative impacts.[102]

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[95] *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

[96] 40 C.F.R. § 1500.1.

[97] 42 U.S.C. § 4332; 40 C.F.R. §1502.9.

[98] 42 U.S.C. § 4322.

[99] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[100] 40 C.F.R. § 1508.8(b).

[101] *Id.* § 1508.7.

[102] *See* 40 C.F.R. § 1508.27.

Accordingly, EPA must comply with all relevant federal laws and policies, including the ESA and NEPA, prior to taking any further action regarding its longstanding interpretation related to the CWA coverage of "discharges of pollutants" via direct hydrological connection to surface water.

VI. CONCLUSION

For all of these reasons, EPA should withdraw its April 2019 Interpretive Statement and abandon its effort to reverse its longstanding interpretation that point source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and the surface water.

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Green Riverkeeper, MountainTrue
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