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INSTITUTE

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May 21, 2018

Scott Wilson  
Office of Wastewater Management  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

[Submitted electronically via [www.regulations.gov](http://www.regulations.gov)]

Dear Mr. Wilson:

The Edison Electric Institute (EEI) appreciates the opportunity to submit these comments on the U.S. Environmental Protection Agency's (EPA or Agency) request for input on the Agency's previous statements regarding the Clean Water Act (CWA or Act) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation. *See Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water*, 83 *Fed. Reg.* 7,126 (Feb. 20, 2018).

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 60 international electric companies, with operations in more than 90 countries, as International Members, and hundreds of industry suppliers and related organizations as Associate Members. EEI's members own and operate electric generating units and other facilities that generate, transmit and distribute electricity to residential, governmental, commercial and industrial customers. EEI's members require many federal, state and local permits—including CWA section 402 permits, known as National Pollutant Discharge Elimination System (NPDES) permits—to site and operate their facilities.

Driven by a number of factors, including customer demands, technology developments, and federal and state regulatory obligations, the electric sector is undergoing a transition of its generating fleet that will continue over the next decade and beyond. Concurrent with this transition, EEI member companies are investing significant amounts of capital—more than 113 billion dollars in 2017 alone—to make the energy grid smarter, cleaner, more dynamic, more flexible and more secure to integrate and deliver to customers a balanced

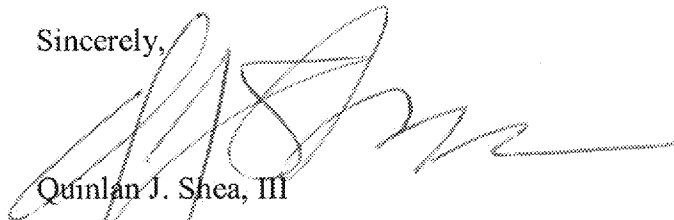
mix of resources from both central and distributed energy resources. As part of our commitment to this cleaner energy future, EEI and its members are working to develop "smart communities" to provide customers with innovative solutions and bring the benefits of clean energy resources to communities everywhere. This commitment and the industry's infrastructure investments are additionally beneficial in that they provide domestic job opportunities. Safe, reliable, affordable and clean energy powers the economy, promotes national energy independence and enhances the lives of all Americans.

EEI and its members have a substantial interest in the issue presented here, as some members currently are litigating or recently have litigated cases that address whether the NPDES program applies to discharges that migrate through hydrologically connected groundwater to reach waters that are jurisdictional under the CWA. Additionally, EEI members could be the target of future citizen suit litigation seeking to expand NPDES requirements to releases to groundwater, e.g., from coal ash impoundments.

It would be appropriate for EPA to take this opportunity to clarify that the strict, and potentially criminal, liability of the CWA does not apply to groundwater seepage and other diffuse means of pollutant transport. EEI's comments focus on why the CWA's text, structure and legislative history, read together, most reasonably support an interpretation that discharges to jurisdictional surface water via hydrologically connected groundwater are not subject to CWA liability. Accordingly, EPA should promptly adopt this reasonable interpretation through notice-and-comment rulemaking.

If you or your colleagues have any questions about these comments, please contact either Rich Bozek Ex. 6 or [rbozek@eei.org](mailto:rbozek@eei.org)) or Riaz Mohammed Ex. 6 or [rmohammed@eei.org](mailto:rmohammed@eei.org)).

Sincerely,



Quinlan J. Shea, III

cc: Hon. Matthew Leopold, EPA General Counsel  
Hon. David Ross, Assistant Administrator, EPA Office of Water

COMMENTS OF THE EDISON ELECTRIC INSTITUTE  
ON  
CLEAN WATER ACT COVERAGE OF “DISCHARGES OF POLLUTANTS”  
VIA A DIRECT HYDROLOGIC CONNECTION TO SURFACE WATER,  
83 *FED. REG.* 7,126 (FEB. 20, 2018)

**DOCKET ID NO. EPA-HQ-OW-2018-0063**

May 21, 2018

## **I. Introduction and Executive Summary.**

The Edison Electric Institute (EEI) appreciates the opportunity to submit these comments in response to the U.S. Environmental Protection Agency's (EPA or the Agency) request for comment on the Agency's previous statements regarding whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to Clean Water Act (CWA or the Act) regulation. *See Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water*, 83 *Fed. Reg.* 7,126 (Feb. 20, 2018).

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 60 international electric companies, with operations in more than 90 countries, as International Members, and hundreds of industry suppliers and related organizations as Associate Members. EEI's members own and operate electric generating units and other facilities that generate, transmit, and distribute electricity to residential, governmental, commercial, and industrial customers. EEI's members require many federal, state, and local permits—including CWA section 402 permits, known as National Pollutant Discharge Elimination System (NPDES) permits—to site their facilities and to conduct their operations.

Driven by a number of factors—including customer demands, technology developments, and federal and state regulatory obligations—the electric sector is undergoing a transition of its

generating fleet that will continue over the next decade and beyond. Concurrent with this transition, EEI member companies are investing significant amounts of capital—more than 113 billion dollars in 2017 alone—to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure in order to integrate and deliver a balanced mix of resources from both central and distributed energy resources to customers. As part of a commitment to this cleaner energy future, EEI and our members are working to develop smart communities in order to provide customers with innovative solutions that can improve our communities and support our ability to bring the benefits of clean energy resources to communities everywhere. This commitment and the industry’s infrastructure investments are additionally beneficial in that they provide domestic job opportunities. Safe, reliable, affordable and clean energy powers the economy, promotes national energy independence and enhances the lives of all Americans.

EEI and our members have a substantial interest in the issue presented here, as some members currently are litigating or recently have litigated cases that address whether the NPDES program applies to discharges that migrate through hydrologically connected groundwater to reach waters that are jurisdictional under the CWA. Additionally, EEI members could be the target of future citizen suit litigation seeking to expand NPDES requirements to releases to groundwater, *e.g.*, from coal ash impoundments. It is appropriate and necessary for EPA to take this opportunity to clarify that the strict, and potentially criminal, liability of the CWA does not apply to groundwater seepage and other diffuse means of pollutant transport.

Such a rulemaking is critical to providing much-needed legal and regulatory certainty to regulators, the regulated community, and the public and to preserve the careful balance between state and federal authority Congress crafted in the CWA. In particular, EPA should move swiftly

to clarify its previous conflicting statements concerning the scope of the NPDES program and whether the CWA covers releases of pollutants to groundwater that is hydrologically connected to jurisdictional surface waters.<sup>1</sup> EEI's comments focus on why the CWA's text, structure, and legislative history, read together, most reasonably support an interpretation that discharges to jurisdictional surface water via hydrologically connected groundwater are not subject to CWA liability.

Reading the statute as a whole allows EPA to preserve key CWA distinctions between both point source discharges and nonpoint source pollution—and between groundwater and navigable waters—in a manner that preserves the careful balance Congress established in the Act. Further, since such “discharges” are subject to other federal and state regulatory requirements, those requirements act as strong additional evidence that confirm the appropriateness of such an interpretation. Moreover, significant practical considerations weigh in favor of adopting an interpretation of the CWA that the NPDES program does not cover discharges via groundwater. If adopted, the “direct hydrologic connection” theory would leave most individuals and businesses with no real way of knowing whether their conduct requires an NPDES permit, and if so, what the requirements of that permitting program might be. It would be appropriate for the Agency to promptly adopt this reasonable interpretation through notice-and-comment rulemaking.

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<sup>1</sup> Federal district and appellate courts have conflicting opinions regarding whether the NPDES program should apply to releases to groundwater; these opinions have resulted in a great deal of confusion and uncertainty for EPA, state water quality agencies, the regulated community and the public. These impacts are discussed, *infra*. Numerous entities have noted in the many cases pending in both district courts and courts of appeals that the CWA unambiguously compels the conclusion that the NPDES program does *not* extend to discharges via hydrologically connected groundwater.

## II. EPA Should Clarify that the CWA Does Not Require NPDES Permits for Releases of Pollutants via Groundwater.

As EPA's request for comments explains, federal courts have struggled for decades with whether the CWA regulates the release of pollutants from a point source to groundwater, which ultimately reach jurisdictional surface waters via groundwater migration. *See* 83 *Fed. Reg.* at 7,127–28. Those courts have reached conflicting interpretations of the CWA, depending on what aspects of the statute they emphasized and what weight, if any, they gave to certain EPA statements on this issue. Amidst this confusion, at least one thing is clear: EPA has never conducted a rulemaking—or provided guidance—as to whether NPDES permits are required for discharges via hydrologically connected groundwater. Fortunately, EPA now has the opportunity to provide much needed clarity. EPA should definitively conclude that, read as a whole, the text, structure, and history of the CWA support the interpretation that discharges via groundwater migration do not require NPDES permits.

### A. The CWA's Text and Structure Support the Conclusion That NPDES Permits Are Not Required for Discharges via Groundwater.

The CWA prohibits “the discharge of a pollutant” except where an enumerated exception applies. 33 U.S.C. § 1311(a). The most prominent exception is for “the discharge of any pollutant” authorized by an NPDES permit. *See id.* § 1342(a)(1). The Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12). “Point source,” in turn, means “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” *Id.* § 1362(14).

The Act plainly distinguishes between point source discharges and nonpoint source pollution. Nonpoint source pollution is neither defined in the Act nor mentioned anywhere in CWA section 402. By definition, nonpoint source pollution is not subject to NPDES permitting, because a

“discharge of a pollutant” can only occur “from any point source.” *See id.* §§ 1342(a)(1), 1362(12); *see also Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013) (“NPDES permits are required for discharges from any ‘point source,’ but not for discharges from ‘nonpoint sources.’”). Congress instead left it to the states to control nonpoint source pollution under other provisions of the CWA. *See* 33 U.S.C. §§ 1288(b)(2), 1314(f), 1329; *see also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (“Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former.”). Congress drew this important distinction while expressly recognizing that the states retain primary responsibility over the development and use of land and water resources. *See* 33 U.S.C. § 1251(b).

Just as important as the Act’s distinction between point and nonpoint sources is the distinction between “navigable waters” and “ground waters.” As noted above, the Act’s NPDES program applies only to discharges “to *navigable* waters from any point source.” 33 U.S.C. § 1362(12) (emphasis added). There is no mention of “ground waters” in either the definitions of “discharge of a pollutant” or “point source.” *See id.* §§ 1362(12), (14). Nor is there any reference to “ground waters” anywhere in CWA section 402. *See id.* § 1342. Like nonpoint source pollution control, Congress left the regulation of groundwater to states. *See Rice v. Harken Expl. Co.*, 250 F.3d 264, 271-72 (5th Cir. 2001) (“Congress was aware that there was a connection between ground and surface waters” but nevertheless decided “to leave the regulation of groundwater to the States.”).

Several provisions of the statute indicate that Congress did not intend for discharges via groundwater migration to be subject to NPDES permitting. Congress knew that both point source

discharges and nonpoint source pollution could impact surface water quality, but it nevertheless purposefully decided to address those sources differently, requiring NPDES permits only for point source discharges to navigable waters. Section 301(b) of the CWA illuminates the point by making effluent limitations the principal mechanism in NPDES permits for controlling discharges of pollutants, and effluent limitations are integral to the overall NPDES scheme. *See* 33 U.S.C. § 1311. However, effluent limitations cannot be straightforwardly, practically or evenly applied to discharges into groundwater; by definition, they apply only to discharges “into navigable waters.” *Id.* § 1362(11). Thus, if discharges to groundwater were subject to NPDES requirements, the statute would make no sense, because the primary means of controlling pollutants under the NPDES program—the effluent limitation—would not apply to those discharges. EPA must avoid constructions of the statute that lead to such illogical outcomes.

Section 304(f) further illustrates that Congress did not mean for discharges via groundwater migration to be regulated under the NPDES scheme. Section 304 expressly directs EPA to issue “guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants” and “processes, procedures, and methods to control pollution” from things like “the disposal of pollutants in wells or in subsurface excavations.” 33 U.S.C. § 1314(f); *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 587 (6th Cir. 1988) (noting that “Congress apparently intended that pollution problems caused by” facilities described in § 1314(f) “are generally to be regulated by means other than the NPDES permit program”).

Likewise, in section 208 of the CWA, Congress required states to develop area-wide waste treatment management plans that include “a process to control the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality.” 33

U.S.C. § 1288(b)(2)(K). CWA section 208 and, later, section 319—which empowers the States to improve control of nonpoint sources affecting attainment of applicable water quality standards— “were designated by Congress as methods to keep states accountable for identifying and tracking nonpoint sources of pollution, as well as identifying ‘the best management practices and measures’ to reduce such pollution.” *Or. Nat. Desert Ass’n. v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008).

Last, Congress knew exactly how to differentiate between “navigable waters” and “ground waters” in the CWA, which is precisely what it did in sections 102 and 104 of the Act. *See* 33 U.S.C. § 1252(a) (referencing “navigable waters and ground waters”); *id.* § 1254(a)(5) (same). In numerous other parts of the Act, Congress referred to “ground waters” or “underground waters.” *E.g., id.* §§ 1256(e)(1), 1274(a)(4), 1282(b)(2), 1291(b), 1314(a)(1)–(2), 1329(b)(2)(A), 1329(h)(5)(D), 1329(i)(1). The omission of either of those terms from the key provisions relevant to the NPDES program, *see* 33 U.S.C. §§ 1342, 1362(12), (14), is strong contextual evidence that Congress did not intend for pollutants released via groundwater migration to be subject to the NPDES program.

In examining the statute as a whole, EPA must take care to preserve the Act’s distinction between point and nonpoint sources, which is an “organizational paradigm of the [CWA].” *Or. Nat. Desert Ass’n.*, 550 F.3d at 780. EPA also should focus on the Act’s distinction between navigable waters and ground waters. The obvious way to do so is for EPA to focus on *how* pollutants reach *navigable* waters.

B. Numerous Courts Have Held Conflicting Interpretations Regarding the Applicability of the NPDES Permit Program.

It bears emphasizing that the Supreme Court has never squarely addressed this issue. Contrary to what some citizen groups have argued in recent cases, the plurality in *Rapanos v. United States*, 547 U.S. 715 (2006), did *not* hold that the CWA unambiguously requires NPDES permits for indirect discharges that reach jurisdictional waters diffusely. Far from it. The *Rapanos* plurality's discussion of indirect discharges to "waters of the United States" (WOTUS) was on its face *dictum* that did not "decide th[e] issue." *Id.* at 743. Moreover, that opinion simply recounted how some courts have held that pollutants that originate from point sources are subject to the NPDES program even if they pass through intervening tunnels, culverts, storm drains, sewer pipes, and channels—features that are themselves point sources. Thus, the Court cited *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946–47 (W.D. Tenn. 1976), a case where the alleged point source and the covered navigable waters were separated by an intervening structure—a municipal sewer system. The *Rapanos* plurality also cited *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005), a case where a long tunnel separated the point source and the navigable waters. In *Velsicol* and *El Paso Gold Mines*, the pollutants that originated from a point source ultimately reached jurisdictional waters through other features that also fit the definition of "point source." Those sorts of discharges are readily distinguishable from discharges from point sources that only reach jurisdictional waters by diffuse movement. Read in context, therefore, the plurality's statement about the Act forbidding the "addition ... to navigable waters" and not "addition ... directly to navigable waters" is best understood as explaining that the point source that originated the pollutants need not discharge directly to navigable waters if the pollutants pass through another point source in the interim. The context of the Court's statement is clear;

In fact, many courts have held that such upstream, intermittently flowing channels themselves constitute "point sources" under the Act. The definition of "point source" includes "any pipe, ditch, channel, tunnel,

conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). We have held that the Act “makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004).

*See* 547 U.S. at 743.

More to the point, federal appellate courts are split on whether releases of pollutants from point sources *to groundwater* are subject to NPDES program when there is a direct hydrologic connection between the groundwater and jurisdictional surface waters. Through conflicting decisions, the appeals courts have found the CWA capable of supporting *either* interpretation. While the Fifth and Seventh Circuits have concluded that the NPDES program does not extend to pollutants that reach groundwater in certain circumstances, the Fourth and Ninth Circuits have concluded that, in fact, these discharges fall within the scope of the program.<sup>2</sup>

EPA should address the widespread confusion that these conflicting judicial opinions have created. In so doing, EPA must look to the statute as a whole to discern whether Congress intended for discharges via groundwater migration to require NPDES permits. *See Star Athletica*,

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<sup>2</sup> Four distinct case examples illustrate this point. On the one hand, *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), held that the NPDES program does not encompass pollutants “seep[ing]” into “local ground waters” even though the Court was aware of the possibility that those pollutants might reach “underground aquifers that feed lakes and streams that are part of the ‘waters of the United States’” And *Rice*, 250 F.3d at 271, found that it would be “an unwarranted expansion of the [statute]” to extend point source requirements to pollution that reaches jurisdictional waters by “gradual, natural seepage” through groundwater. On the other hand, *County of Maui*, 886 F.3d at 749, imposed liability for discharges via groundwater based on “fairly traceable” standard. And *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, 2018 WL 1748154, at \*9 (4th Cir. Apr. 12, 2018), concluded that “[A]n alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA.”

*L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (“Interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.”) (brackets omitted); *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) (explaining that “when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure” and that “absurd results are to be avoided and internal inconsistencies in the statute must be dealt with”).

As the Supreme Court has explained, the CWA “makes plain” that a point source must “convey the pollutant to ‘navigable waters’” to be subject to NPDES permitting. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). The point source “need not be the original source of the pollutant,” but it does “need [to] convey the pollutant to ‘navigable waters.’” *Id.* (emphasis added). Requiring that a pollutant be conveyed to *and* added to a navigable water by a point source—as opposed to merely having been released from some point source sometime before reaching the navigable water—prevents the NPDES program from expanding its reach to encompass all nonpoint sources.

An alternative approach, one that ignores how pollutants reach jurisdictional waters, would conceivably allow vast swaths of nonpoint source pollution to be reformulated as point source discharges and consequently swept into the NPDES program. It also disregards Congress’s intent to leave groundwater outside the scope of NPDES program. As one court recently observed, “any non-point-source pollution . . . could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources to come to rest in navigable waters. *26 Crown Assocs., LLC v. Greater New Haven Reg’l Water Pollution Control Auth.*, No. 15-cv-1439, 2017 WL 2960506, at \*8 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir.

Aug. 4, 2017). The way to preserve Congress’s “clear and precise distinction between point sources ... and nonpoint sources,” S. Rep. No. 95-370, at 8 (1977), is by limiting the NPDES program to pollutants that reach and are added to navigable waters by a discernible, confined, and discrete conveyance. *See Metacon Gun Club*, 575 F.3d at 224.

C. EPA Should Specifically Reject the Direct Hydrologic Connection Theory.

The “direct hydrologic connection” theory that EPA has occasionally endorsed subverts Congress’s distinction between point and nonpoint sources and between navigable and ground waters, so EPA should reconsider and definitively reject it. In fact, the Act does not even mention the term “direct hydrologic connection,” which is more commonly employed by courts “attempting to mitigate” the expansive and unpredictable consequences of holding that releases through groundwater might be subject to NPDES permitting.<sup>3</sup> Furthermore, trying to apply the “direct hydrologic connection” theory raises a host of practical questions. What exactly counts as a “hydrologic connection”? How “direct” must the connection be for the pollutants to come within the NPDES program? How would effluent limits be developed or compliance be determined? The Act does not answer these questions. Because the “direct hydrologic connection” requirement has no foundation in the text or history of the CWA, its contours are malleable and subject to all manner of distortion.<sup>4</sup> It invites precisely the type of expansive reading that would eviscerate the distinction between point and nonpoint sources.

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<sup>3</sup> *See Ky. Waterways All. v. Ky. Utils. Co.*, No. 5:17-CV-292, 2017 WL 6628917, at \*11 n.3 (E.D. Ky. Dec. 28, 2017), describing application of the “direct hydrologic connection” theory by the court in *Tennessee Clean Water Network v. Tennessee Valley Authority*, 273 F. Supp. 3d 775, 827 (M.D. Tenn. 2017).

<sup>4</sup> *See id.*; *see, e.g., McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1998), *vacated on other grounds, McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995), finding that discharges to groundwater are subject to CWA regulation if “the groundwater is *naturally connected* to surface waters” (emphasis added); *Ass’n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-cv-84, 2011 WL 1357690, at \*17 (M.D. Tenn. Apr. 11, 2011), finding that “[G]roundwater is subject to the

Reconsidering and rejecting the “direct hydrologic connection” theory will not require a wholesale reversal of any longstanding EPA position. To be sure, EPA has raised the direct hydrologic connection theory in various contexts, *see* 83 *Fed. Reg.* at 7,127 (listing examples), including in an *amicus* brief in the recent *County of Maui* litigation, *see* Doc. # 40, Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, *Haw. Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir., filed May 31, 2016). But none of those examples acknowledges the numerous *contrary* statements EPA has made about the scope of the NPDES program. To illustrate:

- A 1973 memorandum from the Office of General Counsel asserts that “[d]ischarges into ground waters are not included” within the scope of the statutory term “discharge of a pollutant.” *In re E.I. DuPont de Nemours & Co.*, Op. No. 6, 1975 WL 23850, at \*3 (E.P.A.G.C. Apr. 8, 1975).
- A 1992 EPA guidance document notes that “EPA and the States regulate facilities [under the CWA] that either discharge wastewaters *directly* to surface waters or discharge to municipal treatment systems.” EPA, Final Comprehensive State Ground Water Protection Program Guidance, at 1-27 (Dec. 1992).
- In a 2005 permit proceeding, EPA noted that discharges “could be re-directed to a non-surface water discharge location, such as ground injection” and that “NPDES requirements would not apply, because there would be no direct discharge to a surface water of the United States.” EPA, RTC Holyoke Gas & Electric Department Cabot Street Station, Permit No. MA0001520, at 20 (Aug. 9, 2005).
- In the 2011 Pesticide General Permit proceeding, EPA responded to comments about potential groundwater impacts by stating that “discharges to groundwater

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CWA provided there is an *impact on federal waters.*” (emphasis added); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-1133, 2015 WL 2144905, at \*8 (S.D. W. Va. May 7, 2015), stating that “Defendant may be required to seek an NPDES permit even if groundwater is *somehow hydrologically connected* ... to surface waters.” (emphasis added); *Tenn. Clean Water Network*, 273 F. Supp. 3d at 827, noting that releases into groundwater are subject to NPDES requirements “if the hydrologic connection between the source of the pollutants and navigable waters is *direct, immediate, and can generally be traced*” (emphasis added).

are not regulated under the NPDES program.” EPA RTC, NPDES Pesticide General Permit (Oct. 31, 2011).

- In a 2014 Small Municipal Separate Storm Sewer System permit proceeding, EPA stated in a fact sheet that “NPDES permits are applicable for point source discharges to waters of the U.S.” and that “discharges to groundwater are not addressed in the NPDES program and as such as not addressed by this permit.” EPA, Fact Sheet, Draft General Permits for Stormwater Discharges from Small Municipal Separate Sewer Systems in Massachusetts, at 18 (Sept. 30, 2014).
- In a 2017 permit proceeding related to remediation activity in Massachusetts and New Hampshire, EPA said “discharges to groundwater are not regulated by the NPDES program.” EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, at 7 (Mar. 9, 2017).

The inconsistency between prior EPA statements on this issue warrants clarification. EPA should take the time to reconsider the statute’s text, structure, history, and purpose, taking into account case law and practical considerations, and arrive at a definitive position rejecting the direct hydrological connection theory.

D. The CWA’s Legislative History Further Shows that Congress Did Not Intend to Subject Discharges via Groundwater to the NPDES Program.

The legislative history of the CWA also supports a conclusion that Congress did not want to subject discharges via groundwater migration to NPDES permitting. For one thing, it shows that Congress was aware that pollutants might reach jurisdictional waters as a result of subsurface disposal, yet it still opted to keep states and local governments responsible for controlling such pollution under nonpoint source programs. Prior to passage of the 1972 Act, EPA sought authority from Congress to “control [] all sources of pollution, be they discharged directly into any stream or through the ground water table.” *Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. On Pub. Works, 92nd Cong. 230 (1971)* (statement of William Ruckelshaus, Administrator, EPA). Similarly, an amendment offered by Congressman Leslie Aspin sought to bring groundwater within the CWA’s permitting and enforcement provisions, on the premise that “if [Congress did] not stop

pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only navigable water and not the ground water makes no sense at all.” *See* 118 Cong. Rec. 10,666, 10,669 (1972) (statement of Rep. Aspin).

Congress ultimately rejected the Aspin Amendment and EPA’s request for control over groundwater sources, along with other proposals to extend federal regulatory authority to groundwater, “[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State[.]” S. Rep. No. 92-414, at 73 (1971). Again, it is no secret that “Congress was aware that there was a connection between ground and surface waters,” but nevertheless chose “to leave the regulation of groundwater to the States.” *Rice*, 250 F.3d at 271–72.

When Congress wanted to address subsurface pollution in the CWA, it did so expressly. Thus, section 304(f) of the Act specifically mentions dealing with water pollution that ultimately results from disposal in subsurface excavations. *See* 33 U.S.C. § 1314(f). In explaining that section 304 of the Act was intended to address subsurface pollution, the House Committee Report described how EPA should provide technical guidance to states for their *nonpoint* source programs:

This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. ... The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources, and the information on processes, procedures, and methods for control of pollution *from such nonpoint sources as ... the disposal of pollutants in wells or other subsurface excavations*[.]

H.R. Rep. No. 92-911, at 109 (1972) (emphasis added). Similarly, the Senate Report explained that, under CWA section 304(f), EPA must provide information that “may range from provisions for evaluating geological characteristics of disposal sites to the costs and benefits of alternative

methods of disposal.” S. Rep. 92-414, at 53. Congress acknowledged the risk of “groundwater contamination” at “shallower disposal sites,” which is why it directed EPA to outline provisions “to control leaching of materials from such sites, which include land-fill sites as well as abandoned mines.” *Id.* But nowhere did Congress declare that those sites ought to be subject to NPDES permit requirements.

The legislative history for section 208(b)(2) of the Act provides comparable support that NPDES requirements were never intended to address activities like disposal of pollutants on land or in subsurface excavations. A senate report discussing that CWA section 208 notes that, “Section 208, the 1972 act’s laboratory for new institutional control mechanisms for vexing nonpoint source problems ... may not be adequate.” S. Rep. No. 95-370, at 10. Congress also understood that states might resist developing protective control measures, speculating that it “may be that sometime in the future a Federal presence can be justified and afforded.” *Id.* Congress nevertheless concluded that “it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control” under section 208. *Id.* The “direct hydrologic connection” theory, or any similar theory for imposing NPDES requirements on discharges via groundwater migration, erases that distinction.

If Congress had wanted the NPDES program to apply more broadly, such that it would cover releases via groundwater migration, it could simply have said so. And yet, Congress never did.

As the D.C. Circuit recognized decades ago:

[I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*,

“all pollution released through a point source.” Instead, as we have seen, the NPDES system was limited to “addition” of “pollutants” “from” a point source.

*Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982).

That Congress did not use language that would have extended the NPDES program to groundwater discharges is further proof that Congress did not intend for such discharges to come within the program's ambit. *See Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (inferring statute's meaning based on alternative language that Congress could have used but ultimately did not).

E. Well-Known Principles of Statutory Interpretation Resolve any Doubt that the CWA's NPDES Requirements Do Not Apply to Discharges via Groundwater.

Any doubt about whether the CWA's text, structure, and purpose support the conclusion that Congress did not intend to regulate discharges via groundwater migration under the NPDES program should be resolved against applying NPDES requirements. Such a conclusion would be in keeping with numerous canons of statutory interpretation.

1. Clear Statement Rules Argue Against NPDES Requirements Applying to Discharges to Groundwater.

Chief among these canons are a pair of clear statement rules. These rules typically require a clear statement on a statute's face to rebut a well-established policy presumption. One well-known clear statement rule provides that, “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *United States v. Bass*, 404 U.S. 336, 349 (1971); *see Gregory v. Ashcroft*, 501 U.S. 452, 560–61 (1991) (“If congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”). The Supreme Court has applied this clear statement rule in construing the meaning of the CWA. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173–74 (2001).

EPA has a specific duty to preserve the federal-state balance in administering the CWA because Congress expressly declared its “policy ... to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources.” 33 U.S.C. § 1251(b). Far from offering a “clear statement” sufficient to strip states of their traditional authority over nonpoint source control and groundwater resources, the CWA recognizes that the federal and state governments have distinct roles to play, with states playing the lead role as to nonpoint source pollution and regulation of groundwater. *See PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994). In particular, nonpoint source control most often implicates land use controls, which is why Congress elected to leave such responsibility to state and local governments, “the level[s] of government closest to the sources of the problem.” S. Rep. No. 95-370, at 9. Congress thus drew a “clean and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments[.]”, *Id.* at 8. Nothing about that statement suggests that the federal government should be responsible for regulating discharges via groundwater under the CWA.

The second clear statement rule implicated here provides that, where a statutory interpretation would lead to an unprecedented and extraordinary expansion of federal regulatory authority, the statute’s text must clearly indicate that Congress intended such a result. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (*UARG*). Unsurprisingly, the Supreme Court has “been reluctant to read into ambiguous statutory text” the “power to require permits for ... thousands ... [or] millions of small sources nationwide.” *Id.* The Court has also said the fact that an interpretation of ambiguous statutory text places “plainly excessive demands on limited governmental resources is alone a good reason for rejecting it.” *Id.* Congress “must speak

clearly if it wishes to assign to an Agency decision of vast ‘economic and political significance.’” *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

By both (or either) of those measures, EPA ought to authoritatively reject the “direct hydrological connection” theory. Regulation of discharges via groundwater migration would exponentially expand the scope of the NPDES program without a clear statement from Congress that this is what it intended. For instance, over 22.2 million homes have septic systems.<sup>5</sup> To date, almost none of those septic systems has required an NPDES permit because, with very narrow exceptions,<sup>6</sup> they are considered nonpoint sources. *See, e.g., United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 345 (E.D. Va. 1997) (referring to septic systems as nonpoint sources). But because many of those systems collect wastewater and disperse it into soil and groundwater, which might at some point reach navigable waters, the “direct hydrological connection” theory could subject millions of septic systems to NPDES requirements for the first time ever. Such an expansion of the NPDES permitting system would be unworkable for both homeowners and regulators, requiring a significant outlay of resources to permit the millions of septic systems for limited environmental protection that is not already provided by other state and federal programs.

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<sup>5</sup> *See* U.S. Dep’t of Housing & Urban Devel. & U.S. Census Bureau, American Housing Survey for the United States: 2011, Current Housing Reports, H150/11, at 14 Tbl. C-04-AO (Sept. 2013), *available at* <https://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf>.

<sup>6</sup> To be sure, if pollutants from septic tanks reach navigable waters via a discernible, confined, and discrete conveyance, they would be point source discharges. *See, United States v. Lucas*, 516 F.3d 316, 332 n.43 (5th Cir. 2008) (installation of “septic systems directly in wetlands that are waters of the United States, thus ma[de] a system that is typically a diffuse, non-point source into a point source”); *see also id.* at 333–34 (collecting cases holding that pollutants conveyed from septic systems to navigable waters via pipes were point source discharges).

Similarly, numerous industries, not just power generation, rely on impoundments—including stormwater ponds, farm ponds, surface impoundments, cooling ponds, and water supply reservoirs—that could release pollutants to groundwater. Many of these structures and facilities do not currently require NPDES permits. For those that do, the permits focus primarily on regulating pollutants that reach jurisdictional surface waters through a discernible, confined, discrete conveyance, rather than through passive and diffuse groundwater migration. Under the “direct hydrological connection” theory, however, owners and operators of those impoundments often would have to seek new or modified permits and identify additional discharge points.

The “direct hydrological connection” theory could also pull into the NPDES program a host of public and private water and pollution control and treatment infrastructure projects specifically designed to protect and preserve water resources. Groundwater recharge systems use spreading basins, percolation ponds, infiltration basins, and injection wells, among other technologies and structures, to convey stormwater or recycled wastewater into subsurface aquifers. These systems provide a host of ecological benefits: they augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls.<sup>7</sup> Green infrastructure also advances some of the same aims as the CWA by absorbing and infiltrating stormwater into the ground to minimize discharges of industrial and municipal stormwater; EPA even promotes green infrastructure and other infiltration practices to control for certain types of pollution.<sup>8</sup> The “direct hydrological

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<sup>7</sup> See U.S. EPA, *2012 Guidelines for Water Reuse*, at 4-25 (Sept. 2012), [https://cfpub.epa.gov/si/si\\_public\\_record\\_report.cfm?dirEntryId=253411](https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411).

<sup>8</sup> See U.S. EPA, *Benefits of Green Infrastructure*, <https://www.epa.gov/green-infrastructure/benefits-green-infrastructure>, and U.S. EPA, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas* 5-9, 5-10 (2005), <https://www.epa.gov/nps/urban-runoff-national-management-measures>.

connection” theory could subject many of these systems to NPDES permitting whenever the water (and any pollutants in it) that they collect or disperse ultimately migrates with the groundwater to navigable waters—which, thanks to the hydrologic cycle, much groundwater does. That would discourage these features’ use, which would result in harm to the environment of precisely the kind Congress intended to prevent when it promulgated the CWA.

For all of these reasons, the “direct hydrological connection” theory would cause the NPDES program to balloon exponentially. And yet, nothing in section 402 (or any other part of the Act) reflects the slightest intent to extend the NPDES program beyond traditional industrial and municipal end-of-pipe discharges, to reach things like well disposal and subsurface excavations that are already covered as nonpoint sources under CWA section 304(f). Absent a clear statement from Congress, the CWA should not be interpreted to embrace an approach—like the “direct hydrological connection” theory—that would impose such sweeping, new demands on thousands or even millions of people and business across the country.

2. Other Canons of Interpretation Also Lead to the Conclusion That NPDES Requirements Should Not Apply to Discharges to Groundwater.

Other interpretive canons compel the same conclusion as do the clear statement rules detailed above, but for reasons having to do with the uncertainty inherent in extending NPDES permitting to groundwater releases. For instance, because the “direct hydrological connection” theory does not come with any inherent or text-based geographic or temporal limitations, it could require an NPDES permit for any release of pollutants into the ground so long as the pollutants *might* somehow, someday, somewhere, make their way into navigable waters. Groundwater systems are complex, and it will often be difficult or impossible to ascertain whether pollutants released from point sources are likely to reach navigable waters through groundwater. Pollutants in

groundwater will sometimes migrate to navigable waters via someone else's land—or many others' lands—in which case the person responsible for releasing the pollutants might be unable to track or control their movements. The owner or operator of a point source might be unable to conduct the sampling or monitoring at the point where pollutants reach jurisdictional waters because those locations may be miles away or beyond the owner or operator's control—further, the point where pollutants reach jurisdictional waters might not be stable, and can migrate with rainfall and other land use patterns. And when those pollutants finally arrive at navigable waters after migrating through groundwater, they will likely contain pollutants from other sources, so that it will be exceedingly difficult to tell which pollutants came from which source. Such a scenario is untenable for regulated industries, regulators, and land owners.

In many cases, the only way to tell whether a particular source is releasing pollutants into groundwater, or whether certain pollutants in navigable waters ultimately come from that source, will be to conduct incredibly detailed and intricate hydrologic studies. Those studies are time-consuming, often requiring months or years to complete, depending on the complexity of the terrain, flow and migration patterns (if any). And they are expensive, usually costing several thousand dollars, even in relatively simple cases. Even for people who can afford them, such studies do not always yield conclusive and reliable results, not least of all because it is not always possible to determine where groundwater releases into a navigable water. *See infra* Part IV.

The upshot is that subjecting groundwater releases to NPDES permitting requirements will often leave people and businesses in the dark about whether and how those requirements apply to them. When a proffered interpretation of a statute would leave ordinary people unable to discern

whether their intended course of conduct exposes them to liability under that statute, the interpretation offends due process. *See Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.”). Such an interpretation ought to be avoided when an alternative, reasonable one exists that does not raise similar constitutional difficulties. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (explaining canon of constitutional avoidance). The unworkable interpretation should be especially avoided when, as here, it would only further muddy the waters about the reach of a statute with a “notoriously unclear” geographic scope. *Sackett v. EPA*, 566 U.S. 120, 132–33 (2012) (Alito, J., concurring); *see also U.S. Army Corps of Engr’s v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring).<sup>9</sup> It is manifestly unreasonable to inject into the CWA this additional “level of uncertainty ... [that] would expose potentially [millions] of ... [sources] to ... litigation and legal liability if they [or regulators] happen[] to make the ‘wrong’ choice.” *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods*, 962 F. Supp. 1312, 1320 (D. Or. 1997). Yet that is exactly what would happen under practically any theory applying the NPDES program to releases to or from groundwater.

The notice and fair-warning problems inherent in the “direct hydrological connection” theory are particularly a concern because violators of the CWA face stiff criminal liability. “Knowing” violations of the Act are punishable by up to \$100,000 per violation per day and six years’ imprisonment, while “negligent” violations can lead to fines of up to \$50,000 per violation per

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<sup>9</sup> Lamenting Congress’s and EPA’s failure to resolve the “critical ambiguity” in the “precise reach of the Act,” and highlighting concerns about “the reach and systemic consequences of the Clean Water Act,” respectively.

day and two years' imprisonment. 33 U.S.C. § 1319(c).<sup>10</sup> Because the CWA has criminal applications, it must be construed in accordance with the rule of lenity. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011). Under lenity, statutory ambiguities should be resolved in regulated entities' favor. *See id.*; *see also United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (construing "point source" in accordance with rule of lenity). That is, unless the CWA's "text, structure, and history" demonstrate that applying the NPDES program to discharges via groundwater migration is "unambiguously correct," lenity demands that the government treat the discharges as not being subject to the program. *See United States v. Granderson*, 511 U.S. 39, 54 (1994). The "direct hydrologic connection" theory is far from "unambiguously correct."

As explained above, these well-established principles of statutory construction weigh in favor of the same conclusion that the CWA's text, structure, and history support: that the NPDES program does not encompass discharges via hydrologically connected groundwater.

### **III. Releases to Groundwater and any Subsequent Surface Water Impacts are Appropriately Addressed by Other Federal Authorities and State Laws, Which Lends Further Support to the Reasonableness of an Interpretation Excluding Discharges via Groundwater from the NPDES Program.**

There is no shortage of federal and state laws aimed at addressing impacts from groundwater pollution. The existence of these numerous other federal regulatory programs and state authorities "further supports the reasonableness" of an EPA interpretation that CWA regulations do not regulate discharges via groundwater that eventually reach jurisdictional surface waters.

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<sup>10</sup> The CWA also provides for civil penalties in enforcement actions by EPA or private citizens, which can be up to \$52,414 per violation. 33 U.S.C. §§ 1319(d), 1365(a); *see also* 82 Fed. Reg. 3,633, 3,636 (Jan. 12, 2017) (inflation adjustment ratio).

*See Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d at 529–30 (2d Cir. 2017) (*Catskill III*) (“Yet another consideration supporting the reasonableness of the Water Transfers Rule is that several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme[.]”).

Disposals of pollutants in wells and subsurface excavations are addressed under state CWA nonpoint source programs. *See*, Part II.A, *supra*. CWA section 319 grant programs, for example, have successfully addressed pollution from impoundments associated with legacy mining operations, wastewater treatment units, and a host of other features affecting groundwater quality.<sup>11</sup> Indeed, section 319 expressly requires States to identify best management practices for controlling pollution from nonpoint sources, “taking into account the impact of the practice on groundwater quality.” 33 U.S.C. § 1329(b)(2)(A).

A. The Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule Address Groundwater.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, directly regulates groundwater, including ash management features commonly used in the electric utility industry. “RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Of particular relevance here, RCRA’s Coal Combustion Residuals (CCR) Rule, 80 *Fed. Reg.* 21,302 (Apr. 17, 2015), provides a comprehensive groundwater monitoring and corrective action

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<sup>11</sup> *See, e.g.*, EPA, *Installing Best Management Practices Abates Acid Mine Drainage in Crab Orchard Creek*, EPA 841-F-14-001DD (May 2014), [https://www.epa.gov/sites/production/files/2016-12/documents/tn\\_crab\\_orchard2016\\_508.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/tn_crab_orchard2016_508.pdf); *see generally* EPA, *Nonpoint Source Success Stories*, <https://www.epa.gov/nps/nonpoint-source-success-stories> (last visited Apr. 26, 2018) (listing dozens of remediation projects, many involving subsurface releases, that have used section 319 funds).

scheme aimed at CCR impoundments and landfills. EPA designed the rule to ensure “no reasonable probability of adverse effects on health or the environment” from disposal of coal ash. *Id.* at 21,311. The rule achieves that goal by imposing robust requirements for groundwater monitoring and remediation. For instance, the rule requires monitoring for specific constituents found in coal ash. *See* 40 C.F.R. pt. 257, Appendices III & IV. If a facility detects contamination above background levels, it must conduct additional monitoring to determine whether contaminants exceed the rule’s rigid groundwater protection standards. *See id.* § 257.95(a). If those standards—most of which are equal to Safe Drinking Water Act “maximum contaminant levels” for finished drinking water<sup>12</sup>—are exceeded, the facility must undertake corrective action to remediate the groundwater until contaminant levels are at or below the level of the standard. *See id.* §§ 257.96(a), 257.98(c). In determining what corrective action is warranted, a facility must assess potential measures that can achieve the required remediation of groundwater impacts and abate not only future groundwater contamination, but also related surface water impacts. The facility must select a remedy that protects human health and the environment; attains the groundwater protection standard; controls the source of the releases of coal ash constituents; removes from the environment as much contaminated material released from the CCR unit as feasible; and satisfies all regulatory standards for management of wastes. *See id.* § 257.97(b).

The CCR Rule’s comprehensive regulatory framework is the product of decades of EPA study on coal ash disposal. EPA designed the rule to identify and “ensure that groundwater contamination at new and existing CCR units will be detected and cleaned up as necessary to protect human health and the environment.” *See* 80 *Fed. Reg.* at 21,396. But the effective

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<sup>12</sup> “Maximum contaminant level” means “the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.” 40 C.F.R. § 141.2.

operation of the CCR rule’s regulatory framework would be thwarted by treating releases to groundwater as point source discharges. That is because RCRA regulations like the CCR Rule apply only to “solid wastes,” which RCRA defines to *exclude* industrial point source discharges subject to the CWA’s NPDES permitting program. *See* 42 U.S.C. § 6903(27). Thus, an interpretation of the CWA that treats releases of CCR to groundwater as point source discharges would have the perverse effect of actually *preventing* application of the more tailored CCR Rule.<sup>13</sup>

B. The Comprehensive Environmental Response, Compensation, and Liability Act and the Safe Drinking Water Act Also Apply.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, also addresses directly those pollutants released to groundwater.

CERCLA authorizes EPA to remove pollutants if any “hazardous substance is released or there is a substantial threat of such a release into the environment. *Id.* § 9604(a)(1). CERCLA defines “environment” broadly, to include both “ground water” and “subsurface strata.” *Id.* § 9601(8).

Federal law also addresses groundwater contamination through the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f *et seq.* In particular, over 650,000 stormwater drainage wells, septic

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<sup>13</sup> Several courts have applied RCRA’s industrial discharge exclusion to “point source” discharges regulated by the CWA’s NPDES program. *E.g.*, *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997) (dismissing RCRA claim because the discharges at issue were subject to NPDES permitting requirements); *Coldani v. Hamm*, Civ. No. S-07-660, 2007 WL 2345016, at \*10 (E.D. Cal. Aug. 16, 2007) (same); *State v. PVS Chemicals, Inc.*, 50 F. Supp. 2d 171, 177–78 (W.D.N.Y. 1998) (applying industrial discharge exclusion and dismissing RCRA claim to avoid subjecting the same discharges to duplicative regulation under the CWA and RCRA). To be clear, EEI believes that the *Williams* and *Coldani* courts wrongly decided the issue of whether discharges via hydrologically-connected groundwater require an NPDES permit. In any event, those cases illustrate that regulation of releases to groundwater as point source discharges under the CWA would displace regulation under RCRA.

system leach fields, agricultural drainage wells, and aquifer storage and recovery projects are covered by the SDWA's requirements for Class V wells.<sup>14</sup> Those requirements include submitting inventory information to permitting authorities, operating the wells in ways that do not endanger underground sources of drinking water, and properly closing the wells when they are no longer being used. *See* 40 C.F.R. pt. 144, subp. G. Subjecting Class V wells to NPDES permitting could mean imposing duplicative or inconsistent regulatory requirements.

C. State Programs Also Directly Address Discharges to Groundwater.

State laws also address groundwater pollution. States across the country regulate discharges into “waters of the state,” which are often defined broadly to include groundwater. For instance, Florida has a comprehensive groundwater program in place that addresses discharges of pollutants to groundwater and through groundwater, as set forth in Chapters 62-520 and 62-550, F.A.C., which include specific numeric concentrations applicable to a multitude of metals, inorganic compounds, and other constituents, as well as narrative groundwater standards that prohibit concentrations that are toxic, carcinogenic or cause nuisance conditions. Recognizing that discharges to groundwater may ultimately interact with down gradient surface waters, Florida's groundwater program mandates that “discharge to groundwater shall not impair the designated use of contiguous surface waters.” *See* F.A.C. subsection 62-520.310(12). Similarly, in Louisiana, the Louisiana Department of Environmental Quality solid waste regulatory program has been in place dating back at least into the late 1980s and mandates a permit for each solid waste impoundment and landfill. Permits require groundwater monitoring

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<sup>14</sup> *See* EPA, Class V Wells for Injection of Non-Hazardous Fluids into or Above Underground Sources of Drinking Water (last visited Apr. 26, 2018), *available at* <https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water>.

at each regulated unit. Monitoring systems consist of a sufficient number of wells installed at appropriate locations and depths to yield samples from the uppermost aquifer and from the uppermost water bearing zone. The program is structured to begin with detection monitoring followed by, as needed, risk-based assessment monitoring, assessment of corrective measures, selection of remedy and initiation of corrective action plan. Agency engineering, surveillance and enforcement staffs insure that the program is effective for protection of health and the environment.

The state of South Carolina has defined “Waters” to include bodies of “... surface or underground water ...” S.C. Code Ann. § 48-1-10(2). In 1985, South Carolina Regulation 61-68, Water Classifications and Standards, was amended to include groundwater as waters of the State consistent with the policy of South Carolina Department of Health and Environmental Control (Department). The amended regulation provides “... all ground waters of the State shall be protected to a quality consistent with the use associated with the classes described herein. Further, the Department may require the owner or operator of a contaminated site to restore the ground water quality to a level that maintains and supports the existing and classified uses ...” *See* S.C. Code Ann. Regs. 61-68(H). The regulation further establishes standards for groundwater based on the designated use as well as establishes a classification for exceptionally valuable ground water, such as in those areas in which groundwater is the only source of drinking water or groundwater provides the base flow for a particularly sensitive ecological system. The groundwater discharge permit is the State Land Application permit—which are also known as “ND” permits since there is no direct discharge (ND) to surface waters.

*See, also*, Michigan (M.C.L. §§ 324.3109(1), 324.3101(aa)); North Carolina (15A NCAC 2T .0102; 15A NCAC 18A .1934); Ohio (R.C. §§ 6111.04(A)(1), 6111.01). Many states also have filed amicus briefs in pending litigation illustrating how their state regulatory programs already address releases to groundwater and any resulting environmental impacts. Those briefs are attached here as Appendix A.

Should EPA assert that the NPDES program does not encompass discharges to surface waters via hydrologically connected groundwater, it will not be leaving a regulatory gap, despite what some stakeholders may claim. In fact, insofar as this industry is concerned, EPA would be ensuring that the more tailored regulatory program—put in place by the CCR Rule and other federal and state laws—would apply in full and that RCRA’s industrial discharge exclusion (in the definition of “solid waste”) would not be triggered.

#### **IV. Strong Practical Considerations Support Clarifying that the NPDES Program Does Not Encompass Discharges via Hydrologically Connected Groundwater.**

Aside from the foregoing legal considerations, EPA also should be cognizant of the strong practical considerations that militate against concluding that NPDES permitting requirements apply to discharges via hydrologically connected groundwater. These comments discussed many of the significant negative ramifications that could result from subjecting such discharges to NPDES requirements. *See*, Part II.E, *supra*.

When amending the CWA in the past, Congress has previously recognized the burdens EPA would face if it had to permit every possible point source discharge. *See*, 123 Cong. Rec. 38,924, 38, 956 (Dec. 15, 1977) (when exempting return flows from irrigated agriculture from NPDES,

Congress recognized “[t]he problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA”); 131 Cong. Rec. 15,616, 15,657 (June 13, 1985) (declaring it “absurd” to “require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source” and warning about an “administrative nightmare” that would be “prohibitively expensive to administer”). Applying NPDES permitting requirements to discharges via groundwater migration would raise just the sorts of concerns Congress foresaw when it intervened in the 1977 and 1987 CWA amendments.

For one thing, there is no meaningful limit to the number of new “point sources” that could require permits under the direct hydrologic connection approach—or under any similar approach, like the Ninth Circuit’s “fairly traceable” standard. *See County of Maui*, 886 F.3d at 749. Because such standards lack any clear textual or logical limiting principle, they could conceivably apply to almost any subsurface release of pollutants. *See*, Part. II.C, *supra*.

Further, NPDES requirements often cannot be applied intelligibly to the new “point sources” that would be permitted under a direct hydrologic connection theory. That is, in part, because NPDES permitting regulations are, by their nature, “end of pipe.” *See Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000). Unlike pollutants from a pipe, groundwater seldom discharges into a navigable water at a discrete and identifiable point. It is therefore not always possible to determine exactly where pollutants in groundwater reach navigable waters. And, when there is no readily identifiable, defined outfall or discharge point, there is nowhere to conduct the monitoring and sampling the Act requires. *See* 40 C.F.R. 122, subpt. C. Even assuming permit writers could somehow identify certain outfalls or discharge points, sampling and monitoring

locations may be both miles away *and* beyond the owner or operator's control. And at those outfalls or discharge points, groundwater will likely contain pollutants from many other sources.

Things get trickier still when, as is often the case, pollutants are injected into groundwater as part of the treatment process. In those cases, sampling at the injection site may not make sense because filtration through the soil is itself part of the intended treatment process, and compliance with the Act is to be determined only "after all treatment processes" have occurred."<sup>15</sup>

In sum, the result of the "direct hydrologic connection" theory is that many people and businesses will have no real way of knowing whether their conduct requires an NPDES permit, and if so, what the requirements of that permitting scheme might be.

#### **V. EPA Should Clarify its Interpretation of the CWA through Rulemaking.**

EPA should conduct notice-and-comment rulemaking to clarify the scope of the NPDES program. EPA should look to the Water Transfers Rule as a guidebook for how it should move forward. That rule, 73 *Fed. Reg.* 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)), grew out of extensive litigation over whether an NPDES permit is required to move existing pollutants from one navigable water to another. According to the "unitary waters theory," no NPDES permit was necessary because "it is not an 'addition ... to navigable waters' to move existing pollutants from one navigable water to another." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

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<sup>15</sup> See U.S. EPA, *NPDES Permit Writer's Manual* § 8.1.2.3 (Sept. 2010), available at <https://www.epa.gov/npdes/npdes-permit-writers-manual>.

Before EPA promulgated the Water Transfers Rule, several federal courts of appeals had rejected the unitary waters theory, instead holding that transferring pollutants from one navigable water body to another required an NPDES permit. *See, e.g., Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (*Catskill I*); *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 83 (2d Cir. 2006) (*Catskill II*); *Dague v. City of Burlington*, 935 F.2d 1343, 1354–55 (2d Cir. 1991); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996); *Plains Res. Council v. Fidelity Exploration and Dev.*, 325 F.3d 1155, 1163 (9th Cir. 2003). As EPA noted, however, none of those courts ... viewed the question of statutory interpretation through the lens of *Chevron* deference. 73 *Fed. Reg.* at 33,700 n.4.

The Second Circuit’s decisions in *Catskill I* and *Catskill II*, for example, rested on the plain meaning of “addition,” as used in the CWA’s definition of “discharge of a pollutant” in 33 U.S.C. § 1362(12). That Court held that “the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a ‘discharge’ that demands an NPDES permit.” *Catskill I*, 273 F.3d at 491. In rejecting the unitary waters theory, the Second Circuit emphasized that “[s]uch a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants[,] which would be “inconsistent with the ordinary meaning of the word ‘addition.’” *Id.* at 493. The Court went on to emphasize that, even if the text were ambiguous, legislative history would not compel a contrary interpretation, since “[t]he legislative history [was] silent on the meaning of ‘addition.’” *Id.* In *Catskill II*, the Second Circuit again rejected the unitary waters theory, reiterating that it “simply overlook[s] [the] plain language” of the CWA. *Catskill II*, 451 F.3d at 84.

Circumstances changed once EPA promulgated the Water Transfers Rule, which provides that “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use” is “not subject to regulation under the [NPDES] permitting program.” 73 *Fed. Reg.* at 33, 697. EPA supported that Rule with an extensive analysis that took account of all relevant statutory provisions, as well as the statute’s structure and legislative history, construing each part or section ““in connection with every other part or section to produce a harmonious whole.”” *Id.* at 33701. After the Water Transfers Rule took effect, challenges to that rule ended up back in the Second Circuit. In 2017, that Court held that whether a water transfer is an “addition” within the meaning of the CWA is ambiguous, and it ultimately upheld the Rule after deferring to EPA’s interpretation at *Chevron* “Step Two.” *See Catskill III*, 846 F.3d at 508. In upholding the Rule, the Court went out of its way to downplay the significance of its “plain language” holdings in *Catskill I* and *Catskill II*, asserting that it had, in fact, never held that the CWA’s text was so “unambiguous” as to preclude *Chevron* deference in the event EPA adopted a rule based on the unitary waters theory. *See id.*

All of this is to say that, even where prior judicial opinions may appear to foreclose a possible interpretation of the CWA, EPA may still promulgate and successfully defend a regulation which exercises its expertise in a manner compelling a different outcome. And it is what makes it so important that EPA act by rulemaking in this case. A regulation—as opposed to a less formal action— will bring welcomed force and clarity to EPA’s ultimate position, thus benefitting regulators, the regulated community and the public alike. EPA ought to engage in notice-and-

comment rulemaking to promulgate such a regulation rejecting the “direct hydrologic connection” theory.

## **VI. Conclusion.**

As things stand now, EEI’s members face significant regulatory uncertainty when it comes to discharges via hydrologically connected groundwater. EPA can eliminate this uncertainty by undertaking a rulemaking to clarify that the CWA’s NPDES program does not extend to discharges via hydrologically connected groundwater. Such a rule would be entirely consistent with the text, structure, history, and purpose of the CWA, and would preserve the function and purpose of other state and federal programs designed to address groundwater. It also would make eminently good sense and would avoid the many serious pitfalls that would present themselves under the “direct hydrologic connection” theory identified in EPA’s request for comment. For all of those reasons, EEI respectfully requests that EPA swiftly conduct a rulemaking to establish that the NPDES program does not apply to discharges that occur via groundwater or subsurface flow.