

May 21, 2018

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U.S. Environmental Protection Agency
EPA Docket Center
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2018-0063; Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water

The undersigned organizations appreciate the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) request for comment on the Agency’s previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA regulation. *See* 83 Fed. Reg. 7,126 (Feb. 20, 2018).

The scope and administration of the CWA has been a focal point of the agricultural community for decades. The undersigned groups and their members represent, own and operate facilities that are water-dependent enterprises. Farmers, ranchers, and foresters need to know whether their day-to-day activities are subject to the CWA’s National Pollutant Discharge Elimination System (NPDES) permitting program or whether they are instead addressed by states in accordance with the Act’s nonpoint source programs. Farmers, ranchers, and foresters have long had to defend against activist litigation seeking to expand the scope of the NPDES permitting program. Likewise, the undersigned organizations have frequently represented their members’ interests on the proper scope and limits of the NPDES program before Congress, federal regulatory agencies, and the courts.

Given the numerous conflicting EPA statements and court decisions over the decades, EPA should conduct a rulemaking to clarify its position on the proper scope of CWA regulation. In particular, EPA should conclude that Congress’s clear and precise distinction between point and nonpoint sources and its clear differentiation between “navigable waters” (which EPA also refers to as “jurisdictional surface waters” in its Request for Comment) and groundwater, which are both important distinctions in the CWA, would be upended by application of the Act’s point source requirements to pollutants that reach jurisdictional waters as a result of groundwater migration. It is not enough for those pollutants to have merely originated from a point source. They must also reach jurisdictional waters via a discernible, confined and discrete conveyance. When they reach jurisdictional waters in a diffuse way, such as migrating with groundwater, it is nonpoint source pollution. The Act’s text, structure, and legislative history support this interpretation, as do well-established principles of statutory construction. Moreover, that there are other federal and state regulatory programs to address pollution via groundwater migration, as discussed later in this comments, underscores the reasonableness of such an interpretation.

I. EPA Should Clarify that the NPDES Program Does Not Apply to Discharges via Groundwater in a Rulemaking.

In its request for comment, EPA catalogued some of its previous statements about how the CWA's permitting requirements may apply to pollutants discharged from point sources that reach jurisdictional waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water. 83 Fed. Reg. at 7,217. EPA correctly observed that it "made these statements in previous rulemaking, permitting, and guidance documents, although most of these statements were collateral to the central focus of a rulemaking or adjudication." *Id.*

In addition to those prior preamble statements, the United States filed an *amicus* brief in 2016 arguing that "discharges of pollutants to jurisdictional surface waters through groundwater with a direct hydrologic connection properly require CWA permits" and that this is EPA's "longstanding position." Brief of the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Hawaii Wildlife Fund v. County of Maui*, No. 15-17447, Doc ID: 9997388, at 14-20 & 22-25 (9th Cir. filed May 31, 2016). Although the Ninth Circuit ultimately created a different standard (the "fairly traceable" standard) in holding that the CWA covers discharges via groundwater, the Fourth Circuit more recently adopted the "direct hydrologic connection theory" in holding that "a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through ground water." *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, Slip Op. at 24 (4th Cir. Apr. 12, 2018). Thus, there currently exists no agreed-upon judicial interpretation of the CWA to support regulating discharges to groundwater under the NPDES program, as amply demonstrated by the Fourth Circuit's contradictory effort to both equate and distinguish the two standards *see id.* at 24 n. 12.

Interestingly, neither EPA's request for comment nor the United States' *amicus* brief in the *County of Maui* litigation mention the numerous EPA statements suggesting that the CWA does *not* regulate discharges via groundwater. EPA has made such statements over several decades, including around the time Congress enacted the CWA and around the time the *Maui* *amicus* brief was filed. Specifically, not long after the CWA's enactment, EPA identified features such as "lagoons, basins, and pits" as possible sources of groundwater contamination. *See* U.S. EPA, Ground Water Pollution from Subsurface Excavations, EPA-430/973012 (1973).¹ To control such pollution, EPA recommended that *states* develop their own control measures as opposed to touting the newly established NPDES program. *Id.* at 131-32. Two years later, EPA's Office of General Counsel stated that "the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters" and that "[d]ischarges into ground waters are not included." *In re E.I. DuPont de Nemours & Co.*, Op. No. 6, 1975 WL 23850, at *3 (EPA G.G. Apr. 8, 1975). Nothing in that memorandum suggested that discharges to hydrologically connected groundwater would be the functional equivalent of a discharge into navigable waters. That omission is important because it was well known then, as it is now, that the relationship

¹ Available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000Z6YZ.TXT>.

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between groundwater and surface waters is complex and that many surface waters are recharged by groundwater.

Decades later, in 1992, EPA issued guidance on state ground water protections, which stated that “EPA and the States regulate facilities [under the CWA] that either discharge wastewaters *directly* to surface waters or discharge to municipal treatment systems.” US EPA, Final Comprehensive State Ground Water Protection Program Guidance, EPA 100-R-93-001, at 27 (Dec. 1992) (emphasis added).² EPA did not suggest that the CWA requires regulation of indirect discharges via hydrologically connected groundwater. Finally, in several NPDES permit proceedings between 2011 and 2017, EPA stated that discharges to groundwater are not regulated or addressed under the NPDES program. *See, e.g.*, US EPA, Response to Public Comments, EPA NPDES Pesticide General Permit, at xxii (Oct. 31, 2011);³ US EPA, Fact Sheet, Draft General Permits for Stormwater Discharges from Small Municipal Separate Sewer Systems in Massachusetts, at 18 (2014);⁴ US EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, at 7 (2017).⁵ Unlike the examples provided in the February 2018 request for comments, EPA did not qualify any of these 2011-2017 statements by stating that discharges *are* regulated if the groundwater had a direct hydrologic connection to a jurisdictional water.

Given that EPA has offered inconsistent interpretations over the decades since the CWA’s enactment and that courts have reached conflicting holdings about whether the CWA regulates discharges via groundwater, *see* 83 Fed. Reg. at 7,127-28, EPA should reevaluate *all* of its prior statements on this issue. EPA should do so in the context of a rulemaking that focuses on this important question. The conflicting EPA statements and court decisions have left landowners guessing for too long about whether their day-to-day activities might be swept into the NPDES program.

II. To Preserve Congress’s Important Distinctions Between Point and Nonpoint Sources and Between Navigable Waters and Groundwater, the CWA Should *Not* be Construed to Regulate “Discharges” via Groundwater Migration Under the NPDES Program.

Amidst all of the ambiguity in the CWA, two things are clear: *First*, Congress drew a bright line between point source discharges and nonpoint sources of pollution, subjecting only point source discharges to CWA permitting. *Second*, Congress carefully differentiated between “navigable waters” and “ground waters,” and it limited the CWA’s point source requirements to additions to “navigable waters.” Both nonpoint source pollution control and groundwater regulation fall within the traditional authority of State governments. Maintaining the distinctions

² Available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/100048T6.PDF?Dockey=100048T6.PDF>.

³ Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0257-1277>.

⁴ Available at <https://www.epa.gov/npdes-permits/massachusetts-small-ms4-general-permit>.

⁵ Available at <https://www3.epa.gov/region1/npdes/remediation/ResponsetoComments.pdf>.

between point and nonpoint sources and between navigable and ground waters is critical to the federal-state balance that Congress recognized and preserved in the CWA.

A. The Point vs. Nonpoint Source Distinction is Central to the CWA’s Proper Functioning.

On its face, the Act’s point source permitting requirements apply only to the “discharge of any pollutant.” 33 U.S.C. § 1342(a). Congress defined “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any *point source*.” *Id.* § 1362(12). Nothing in the NPDES provision (Section 402) or the relevant definitions mentions nonpoint source pollution. Instead, the Act dealt with “nonpoint sources of pollution” in various other provisions, such as 33 U.S.C. §§ 1251(a)(7), 1288(b)(2)(F), 1314(f), 1329. This was by design. Congress wanted to draw a “clear 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 through the section 208 process.” S. Rep. No. 95-370, at 8 (1977).⁶

As one court of appeals explained, Congress’s “disparate treatment” of point source discharges and nonpoint source pollution is an “organizational paradigm of the Act.” *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). Other courts of appeals have similarly highlighted Congress’s important and deliberate distinction. *E.g.*, *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 219-20 (2d Cir. 2009) (explaining that the statutory text must not be “interpreted so broadly as to read the point source requirement out of the statute” and that “the term ‘point source’ was included in the definition of discharges so as to ensure that nonpoint source pollution would *not* be covered”); *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 had good reasons for treating point and nonpoint sources differently in the CWA. First, it recognized that controlling nonpoint sources in a nationally uniform manner would be “virtually impossible” given variations in climate and geography. *Or. Natural Desert Ass’n*, 550 F.3d at 785. Second, because the diffuse nature of nonpoint source pollution, such as runoff from farms, forests, and parking lots, requires that it be addressed by controls over private land use, Congress left such controls “to the level of the government closest to the sources of the problem,” rather than giving the federal government regulatory authority. S. Rep. No. 95-370, at 9. *Third*, Congress knew that “many nonpoint sources of pollution are beyond present technology of control.” S. Rep. No. 92-414, at 39 (1972). Unlike point source discharges, nonpoint source pollution is not conducive to technology-based limitations on individual, “end-of-pipe” discharges.

⁶ Congress strengthened the Act’s provisions governing nonpoint sources in 1987, when it enacted Section 319, entitled “Nonpoint source management programs.” 33 U.S.C. § 1329.

B. Congress Left Groundwater Regulation to States and Did Not Extend the CWA’s Permitting Requirements to Groundwater.

Congress purposefully did not extend the reach of the NPDES program to groundwater. Again, NPDES permits are only required for discharges “to navigable waters from any point source.” 33 U.S.C. § 1362(12) (emphasis added). They are not required for discharges to “ground waters.” Congress obviously knew how to differentiate between “navigable waters” and “ground waters,” and it did so in the text of the statute. *E.g.*, 33 U.S.C. §§ 1252(a) (referring to “navigable waters and ground waters”); *id.* § 1254(a)(5) (same). In other provisions, the CWA refers only to “ground waters” or “underground waters,” including in many of the provisions related to nonpoint source pollution control. *E.g.*, 33 U.S.C. §§ 1256(e)(1), 1274(a)(4), 1282(b)(2), 1288(b)(2)(K), 1291(b), 1314(a)(1)-(2), 1314(f), 1329(b)(2)(A), 1329(h)(5)(D), 1329(i)(1). The inclusion or exclusion of either “navigable waters” or “ground waters” from any given provision of the CWA must be given effect.

To be clear, the absence of any reference to “ground water” from the provisions related to the NPDES program was deliberate. Congress engaged in rigorous debate about whether to bring groundwater into the CWA’s regulatory reach. For example, Congress debated an amendment offered by Congressman Leslie Aspin, who proposed to extend the CWA’s permitting and enforcement provisions to groundwater on the basis that “if [Congress did] not stop pollution of ground waters through seepage and other means, ground waters gets into navigable waters, and to control only navigable water and not the ground water makes no sense at all.” 118 Cong. Reg. 10,666, 10,669 (1972). As the Senate Report explains, Congress ultimately rejected this amendment as well as other proposals to subject groundwater to federal regulation. *See* S. Rep. No. 92-414, at 73 (1971). It did so even though legislators knew “that there was a connection between ground and surface waters.” *Rice v. Harken Expl. Co.*, 250 F.3d 264, 271-72 (5th Cir. 2001); *see also* S. Rep. No. 92-414 at 73 (acknowledging the “essential link between ground and surface waters and the artificial nature of any distinction” and emphasizing that “rivers, streams, and lakes are largely supplied with water from the ground—not surface runoff”).

C. NPDES Regulation of Discharges via Hydrologically Connected Groundwater Would Upend These Important Distinctions that Congress Made in the CWA.

For Congress’s distinction between point and nonpoint sources to remain meaningful, EPA should reconsider the text, structure, purpose, and history of the CWA and conclude that the Act only requires an NPDES permit only when “pollutants reach navigable waters by a ‘discernible, confined and discrete conveyance.’” *Metacon Gun Club*, 575 F.3d at 224 (quoting 33 U.S.C. § 1362(14)). It is not enough for a discharge of pollutants to merely come from a point source and then reach navigable waters through diffuse means such as groundwater migration. Indeed, if Congress intended for the NPDES program to apply so broadly, “it could easily have chosen suitable language, *e.g.*, ‘all pollution released through a point source.’” *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982). Treating groundwater migration as nonpoint source pollution is consistent with how EPA has defined the term for decades. *See Metacon Gun Club*, 575 F.3d at 220-21 (quoting descriptions of nonpoint source pollution from 1987, 1994, and 2003 EPA guidance documents and emphasizing EPA’s view that such

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pollution can be “caused by rainfall or snowmelt moving over *and through the ground* and carrying natural and human-made pollutants,” eventually depositing them in navigable waters) (emphasis added); *see also* U.S. EPA, “What is Nonpoint Source?”⁷ (“Nonpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, *drainage, seepage* or hydrologic modification.”) (emphasis added).

Applying NPDES provisions based solely on whether one can trace pollutants back to a point source would effectively eliminate Congress’s distinction between point and nonpoint sources because “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 of the pollutants that eventually ended up through non-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). Nor is it enough to focus on whether pollutants originated from a point source. As the Supreme Court has held, 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.’” *S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

In addition, Congress’s decision to exclude groundwater from the CWA’s permitting programs would also be thwarted by application of NPDES requirements to discharges via hydrologically connected groundwater. As noted above, the legislative history reflects that members of Congress knew that water moves in hydrologic cycles and that navigable waters and groundwater are related. It nevertheless declined to extend NPDES requirements to groundwater. To require NPDES permits for releases of pollutants to hydrologically connected groundwater would be as disruptive to the statutory scheme (and the underling federalism principles) as treating the groundwater itself as “navigable water.”

The undersigned organizations recognize that the Fourth and Ninth Circuits have recently held that the CWA’s point source requirements apply to pollution that reached navigable waters through diffuse groundwater migration. *See Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018) (permit required for pollutants that are “fairly traceable” from a point source to a navigable water and arrive in more than *de minimis* levels); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, 2018 WL 1748154 (4th Cir. Apr. 12, 2018) (alleged discharge reaching navigable waters within 1,000 feet from the point source via groundwater with a direct hydrological connection is within the CWA’s scope).⁸ But those decisions are at odds with decisions from other courts of appeals. For example, the Second Circuit has held that “a point source discharge requires that pollutants reach navigable waters by a ‘discernible,

⁷ Available at <https://www.epa.gov/nps/what-nonpoint-source>.

⁸ Groundwater is, by its very nature, diffuse and not the sort of discernible, confined, and discrete conveyance that is required for there to be a point source discharge. *See, e.g., Ky. Waterways All. v. Ky. Utils. Co.*, No. 5:17-292-DCR, 2017 WL 6628917, at *10 (E.D. Ky. Dec. 28, 2017); 26 *Crown Assocs.*, 2017 WL 2960506, at *8. Appending nebulous, undefined concepts such as “direct hydrologic connection” or “fairly traceable” to groundwater does not change the fact that groundwater seepage and migration is diffuse, nonpoint source pollution.

confined and discrete conveyance” and thus, pollutants that reached navigable waters by wind dispersion were properly held to be nonpoint source pollution even though they were readily traceable to a nearby gun range. See *Metacon Gun Club*, 575 F.3d at 224. Similarly, the Fifth Circuit held in *Rice* that it would be “unwarranted expansion of the [statute]” to expand point source requirements to pollutants that reach navigable waters by “gradual, natural seepage” through groundwater. 250 F.3d at 271 (involving stormwater runoff that carried oil and gas brine that leaked from tanks onto the soil, which then percolated into groundwater before migrating to navigable waters). Finally, the Seventh Circuit held that the NPDES program does not cover pollutants “seep[ing]” into “local ground water” from a retaining pond, even though the Court understood that those pollutants might reach “underground aquifers that feed lakes and streams that are part of the ‘waters of the United States.’” *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). These other decisions illustrate that when pollutants reach jurisdictional waters in a diffuse manner, e.g., through groundwater, it is nonpoint source pollution, even if the pollutants are readily traceable to something that arguably fits within the definition of point source, which was true in all three cases.

The recent Ninth and Fourth Circuit decisions did not address most of the statutory interpretation arguments presented in these comments, and they selectively addressed contrary case law. Nor did either Court grapple with the practical consequences of regulating discharges via hydrologically connected groundwater under the NPDES program. Finally, those courts appear heavily influenced by concerns with the CWA’s pollution control goals. But those goals cannot serve as the basis for effectively eliminating Congress’s clear and precise distinction between point and nonpoint sources or for ignoring Congress’s decision not to extend permitting requirements to groundwater. Congress made those decisions, all while explicitly declaring its policy to recognize, preserve, and protect the primary responsibilities of the States to control water pollution and plan the development and use of land and water resources. See 33 U.S.C. § 1251(b).

D. Ordinary Principles of Statutory Interpretation Support the Conclusion that “Discharges” via Groundwater Constitute Nonpoint Source Pollution.

As explained above, the CWA’s text, structure, and purpose support the conclusion that Congress did not intend to regulate discharges via groundwater migration under NPDES. In any event, whatever doubts there may be about the scope of the NPDES program should be resolved against extending the program to discharges via groundwater migration in accordance with several canons of statutory interpretation.

First, “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 also *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173–74 (2001) (applying this clear statement rule in interpreting the CWA). The duty to preserve the federal-state balance that Congress struck is heightened when it comes to 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). There is nothing approaching a clear statement in the CWA that would intrude upon the States’ traditional

authority over nonpoint source control and groundwater resources. Yet such intrusion would result from regulating discharges via groundwater migration under the NPDES program.

Second, if a statutory interpretation would trigger an unprecedented and extraordinary expansion of federal regulatory authority, Congress must clearly indicate that result in the statute's text. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“*UARG*”). Notably, 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.* It has also warned that an interpretation of statutory text that puts “plainly excessive demands on limited governmental resources is alone a good reason for rejecting it.” *Id.* In light of *UARG*, EPA should conclude that the NPDES program cannot possibly encompass discharges via groundwater migration, because that could lead to an unprecedented expansion of the NPDES program. Consider septic tanks as an example: there are millions of them nationwide, most of which do not currently require NPDES permits. *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 disperse wastewater into soil and groundwater, they could be regulated under the “direct hydrological connection” theory (or “fairly traceable” theory).

Similarly, agriculture and many other industries rely on lagoons, basins, pits, and impoundments to support their operations. Many of those features do not currently require NPDES permits and are instead considered nonpoint sources of pollution. Under the “direct hydrological connection” (or a comparable) theory, however, releases of pollutants from such structures could be regulated as point source discharges. Finally, public and private stakeholders rely on various types of infrastructure that are designed to protect and preserve water resources via percolation, infiltration, and injection. *See U.S. EPA, 2012 Guidelines for Water Reuse*, at 4-25 (Sept. 2012).⁹ Green infrastructure, in particular, absorbs and infiltrates stormwater into the ground to minimize discharges of industrial and municipal stormwater. *See U.S. EPA, Benefits of Green Infrastructure*;¹⁰ *see also U.S. EPA, National Management Measures to Control Nonpoint Source Pollution from Urban Areas* 5-9, 5-10 (2005)¹¹ (promoting green infrastructure and other infiltration practices to control for pollution). If this type of infrastructure is swept into NPDES permitting, that would not only overburden the NPDES program, it could lead to environmental harm by discouraging use of such features.

Third, because of the CWA's harsh penalty scheme, it must be construed narrowly. “Knowing” violations of the CWA 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 day and two years' imprisonment. 33 U.S.C. § 1319(c).¹² Because the CWA has

⁹ Available at https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411.

¹⁰ Available at <https://www.epa.gov/green-infrastructure/benefits-green-infrastructure>

¹¹ Available at <https://www.epa.gov/nps/urban-runoff-national-management-measures>.

¹² 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).

criminal applications, the rule of lenity applies, and statutory ambiguities should be resolved against the government. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *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). A conclusion that NPDES requirements apply to discharges via groundwater migration is far from “unambiguously correct,” it should be rejected. *See United States v. Granderson*, 511 U.S. 39, 54 (1994). Furthermore, because the “direct hydrological connection” theory (or any similar theory of liability that would subject discharges via groundwater migration to the NPDES program) would leave ordinary farmers, ranchers, and foresters guessing about whether their conduct exposes them to CWA liability, it 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.”); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”).

“[I]nclud[ing] hydrologically-connected groundwater within the NPDES permit program . . . would add a new 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). This is because 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. Ordinary people may well be unable to track or control their movements, much less conduct required sampling or monitoring at the point where pollutants reach jurisdictional waters if those locations may be miles away or beyond the owner or operator’s control. In most cases, the only way to determine if a particular source is releasing pollutants into groundwater, or whether certain pollutants in navigable waters ultimately come from that source, will be to conduct detailed hydrologic studies. Those studies are time-consuming, often requiring months to complete, and they are expensive. Even in relatively simple cases they cost many thousands of dollars and depending on the situation the costs can easily surpass ten thousand dollars. Even if farmers, ranchers, and foresters 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 navigable waters.

The CWA must be construed to avoid the aforementioned due process concerns. *See Fox Television Stations, Inc.*, 132 S. Ct. at 2317. This is even more important given the Act’s “notoriously unclear” geographic scope. *Sackett v. EPA*, 566 U.S. 120, 132–33 (2012) (Alito, J., concurring) (lamenting Congress’s and EPA’s failure to resolve the “critical ambiguity” in the “precise reach of the Act”); *see also U.S. Army Corps of Engr’s v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (highlighting concerns about “the reach and systemic consequences of the CWA). Rather than pile on an additional layer uncertainty by blurring the line between point and nonpoint sources, EPA should conclude that the NPDES program does not encompass discharges via groundwater migration.

III. Other Federal and State Regulatory Programs Address Groundwater Pollution.

Many federal and state environmental laws, including nonpoint source provisions of the CWA, are aimed at addressing impacts from groundwater pollution. The safeguards provided by those programs “further supports the reasonableness” of an EPA conclusion that the CWA’s point source requirements do not apply to discharges via groundwater. *See Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d at 529–30 (2d Cir. 2017) (“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[.]”). More importantly, regulating such discharges under the NPDES program could actually displace application of other regulatory programs.

The CWA’s nonpoint source programs address releases of pollutants to groundwater. *E.g.*, 33 U.S.C. §§ 1329(h), (i). For example, many States have successfully used Section 319 grants to control nonpoint source pollution like seepage from historic mining operations or from faulty septic tanks. *See* U.S. EPA, *Nonpoint Source Success Stories*.¹³ But Section 319 grant funding is only available to control nonpoint source pollution. Thus, if releases to groundwater (and ultimately to navigable waters) are swept into the NPDES program, States would no longer have access to Section 319 grant funding to control such pollution.

Additionally, various underground injection facilities are subject to regulation under the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f *et seq.* In particular, the SDWA’s Underground Injection Control program covers, among other things, hundreds of thousands of stormwater drainage wells, septic system leach fields, agricultural drainage wells, and aquifer storage and recovery projects. *See* EPA, *Class V Wells for Injection of Non-Hazardous Fluids into or Above Underground Sources of Drinking Water* (last visited Apr. 26, 2018).¹⁴ The SDWA requires submission of 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.

Finally, State laws also address groundwater pollution. In the context of ongoing litigation concerning discharges via hydrologically connected groundwater, plenty of states have weighed in as *amici*, explaining how their state laws protect groundwater independent of CWA regulation. *See, e.g.*, Brief of *Amici Curiae* the State of West Virginia et al., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. Sept. 8, 2017) (Doc. 55-1); Brief of the State of Alabama et al. as *Amici Curiae*, *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155 (6th Cir. Feb. 6, 2018) (Doc. 38); Brief of *Amici Curiae* States of Arizona et al., *Hawai‘i Wildlife Fund v. Cty. of Maui*, No. 15-17447 (9th Cir. Mar. 12, 2018) (Doc. 75). As those briefs explain, state laws prohibit discharges into “waters of the state,” which are defined

¹³ Available at <https://www.epa.gov/nps/nonpoint-source-success-stories>.

¹⁴ Available at <https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water>.

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to include both surface and groundwater. State laws provide important regulatory safeguards against groundwater pollution and any resulting effects on surface water.

At bottom, it is simply false that, absent NPDES regulation, there would be a regulatory gap that leaves water resources vulnerable. Regulating discharges via groundwater under the NPDES program would result in duplicative requirements, at best, and potentially displacement or more suitable regulatory programs, at worst.

IV. Important Practical Considerations Weigh in Favor of Concluding the NPDES Program Does Not Cover Discharges via Hydrologically Connected Groundwater.

As mentioned above in Part II.D, the NPDES program could grow to an unmanageable scale if such discharges are regulated. But apart from the sheer number of additional permits that would need to be issued, there are serious questions about whether NPDES requirements can even be applied to discharges to hydrologically connected groundwater.

NPDES requirements were not designed with diffuse groundwater migration in mind. Rather, NPDES requirements were aimed at “end-of-pipe” discharges directly into surface waters. *See* U.S. EPA, *Overview of the National Pollutant Discharge Elimination System (NPDES) Program*, at 16, 17, 23;¹⁵ *see also* 33 U.S.C. § 1311(b)(1)(A) (requiring achievement of “effluent limitations for point sources, other than publicly owned treatment works”); *id.* § 1362(11) (defining “effluent limitation” as “any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological or other constituents which are discharged from point sources into navigable waters, . . . including schedules of compliance”). For discharges from discernible, confined, and discrete conveyances such as pipes, ditches, spray nozzles, and other similar conveyances, permit writers generally are capable of crafting “effluent limitations.” But for pollutants that migrate diffusely from a particular structure, facility, or land area via groundwater, it may not be possible to do that. For instance, what outfalls or discharge points would permit writers use to calculate effluent limitations, and where would they require sampling and monitoring? *See* 40 C.F.R. Part 122 Subpart C. To add to the uncertainty, at the point where groundwater containing pollutants that were released from a “point source” ultimately connects with a navigable water, that groundwater will likely contain pollutants from a host of other sources as well. Variable aspects of groundwater seepage such as flow rates and chemistry could further make applying NPDES regulations impracticable. For instance, unlike traditional “end of pipe” discharges, at various times of year flows can change and surface water can instead flow back into groundwater—a contingency that NPDES regulations do not account for.

The point is it would be impracticable, if not impossible, to apply NPDES requirements to the types of pollution that could be subject to regulation under the “direct hydrological connection” theory or any similar approach that would extend NPDES requirements to

¹⁵ Available at <http://www.epa.gov/sites/production/files/2014-12/documents/module-npdes.pdf>.

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discharges via groundwater migration. The permitting process would become even more burdensome and expensive for permit writers and applicants than it already is.

V. Conclusion

The undersigned organizations appreciate the opportunity to comment on EPA's request for comments on whether discharges from point sources that reach jurisdictional waters via groundwater or subsurface migration are subject to CWA regulation. This is an important issue that some of the undersigned organizations' members have litigated (and must continue to litigate) in CWA citizen suits. Moreover, other members have been plagued by uncertainty over whether certain of their activities can be newly subjected to NPDES permitting based on alleged hydrologic connections between groundwater and jurisdictional surface waters. We hope the Agency finds these comments helpful as it decides whether and how to address these difficult issues moving forward. Thank you for your time and consideration.

Sincerely,

Agricultural Retailers Association
American Farm Bureau Federation
American Sugar Cane League
CropLife America
Illinois Corn Growers Association
Illinois Farm Bureau
Kansas Agribusiness Retailers Association
Minnesota Agricultural Water Resource Center
Missouri Corn Grower Association
Missouri Soybean Association
National Alliance of Forest Owners
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Milk Producers Federation
National Pork Producers Council
Ohio Agribusiness Association
Ohio Corn and Wheat Growers Association
The Fertilizer Institute
US Poultry & Egg Association
United Egg Producers