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Mr. David Ross, Assistant Administrator, Office of Water
Mr. Scott Wilson, Office of Wastewater Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: EPA’s Request for Comment on “Clean Water Act Coverage of ‘Discharges of Pollutants’ via a Direct Hydrologic Connection to Surface Water,” 83 Fed Reg. 7126 (Feb. 20, 2018); Docket ID No. EPA-HQ-OW-2018-0063.

Dear Messrs. Ross and Wilson,

On behalf of ourselves and our millions of members and supporters, Waterkeeper Alliance, Center for Biological Diversity, Food & Water Watch, Public Justice, Johns Hopkins Center for a Livable Future, and the undersigned U.S. Waterkeeper Member Organizations and Affiliates (collectively, “Commenters”), respectfully submit the following comments¹ in response to a request for public comment published by the U.S. Environmental Protection Agency (“EPA”) related to “discharges of pollutants” via a direct hydrologic connection to jurisdictional surface waters under the Clean Water Act, Docket No. EPA-HQ-OW-2018-0063. 83 Fed. Reg. 7126 (Feb. 20, 2018). In response to EPA’s request, Commenters explain herein that

¹ Portions of these comments are adapted from a recent amici curiae brief filed on behalf of Waterkeeper Alliance and others by Reed W. Super and Michael DiGiulio, Esqs., of Super Law Group LLC. *Tenn. Clean Water Network v. TVA*, Case No. 17-6155, Docket No. 70-1 (6th Cir. March 22, 2018).

there is no reason or justification for EPA to reconsider or revise its longstanding interpretation that point source discharges of pollutants that pass through groundwater to a jurisdictional surface water meet the Clean Water Act's ("CWA" or the "Act") discharge prohibition and thus require National Pollutant Discharge Elimination System ("NPDES") permits if there is a direct hydrological connection between the groundwater and the surface water. Nor should EPA attempt to meddle with the rational, workable, fact-specific inquiry the agency has relied upon for decades to determine whether a discharge meets the "direct hydrological connection" standard. Amending its interpretation to categorically remove oversight and regulation of such point source discharges of pollutants to jurisdictional waters via groundwater would harm public health, water quality, and wildlife, and would be arbitrary and capricious, an abuse of discretion, and unlawful.

Waterkeeper Alliance ("Waterkeeper") is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper is comprised of 340 Waterkeeper Member Organizations and Affiliates working in 44 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in and near waterways across the country – many of which are severely impaired by pollution. The CWA is the bedrock of Waterkeeper Alliance's and its Member Organizations' and Affiliates' work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. Our work – in which we have answered the Congressional call for "private attorneys general" to enforce the CWA when government entities lack the time, willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand, and have seen firsthand, the importance of regulating point source discharges to jurisdictional waters via direct groundwater connections as a result of our extensive work to address serious water quality impacts from, e.g., coal ash impoundments and CAFOs. Preserving EPA's longstanding interpretation of the CWA, consistent with the Act's plain meaning, objective, and intent, is critical to our collective work to protect the public health and the nation's waterways from dangerous pollution.

The Center for Biological Diversity ("Center") is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. For many years, the Center has worked to protect imperiled plants and wildlife, open spaces, and air and water quality, as well as to

preserve the overall quality of life for people and animals.

Food & Water Watch (“FWW”) is a non-profit, public interest organization that champions healthy food and clean water for all by standing up to corporations that put profits before people and advocating for a democracy that improves people’s lives and protects the environment.

Public Justice is a non-profit, national legal advocacy organization that pursues high impact lawsuits together with advocacy, education, and outreach to combat social and economic injustice, protect the Earth’s sustainability, and challenge predatory corporate conduct and government abuses. Since 1998, Public Justice has used environmental citizen suits under the Clean Water Act and other bedrock environmental laws to protect our nation’s natural resources and fight for healthy rural communities.

Johns Hopkins Center for a Livable Future (“JHCLF”) is based at the Bloomberg School of Public Health in the Department of Environmental Health and Engineering. The Center engages in research, policy analysis, education, and other activities guided by an ecologic perspective that diet, food production, the environment, and public health are interwoven elements of a complex system. JHCLF recognizes the prominent role that food animal production plays regarding a wide range of public health issues surrounding that system.

I. INTRODUCTION AND SUMMARY OF COMMENTS

After decades of widespread and serious water pollution and public health problems across the nation, Congress enacted the CWA in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, the Act explicitly prohibits the “discharge of any pollutant by any person,” *id.* § 1311(a), and defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,” *id.* § 1362(12) (internal quotation marks omitted). Since then, EPA has had responsibility for advancing the Act’s objective, as well as its national goal “of eliminating all discharges of pollutants into navigable waters by 1985” and the “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water . . . by 1983.” *Id.* § 1251(a).

Congress focused the NPDES permit program on protecting surface waters. In the 46 years since the passage of the Act, EPA, and the courts interpreting the Act, have followed this directive. Thousands of point sources that add pollutants to surface waters are covered by the NPDES permit program; millions of other pollution sources are not. EPA and the courts have

also encountered the relatively rare situation in which a point source discharge of pollutants to surface waters passes through groundwater. The text, purpose, and history of the Act plainly provide EPA with the authority to regulate these discharges.

Despite its consistent, longstanding, and rational interpretation regarding the applicability of the CWA's discharge prohibition and permit requirement to such discharges to surface waters through groundwater with a direct hydrological connection, EPA now requests public comment on whether it should reconsider or revise that interpretation. The answer to this question is *no* – not by guidance, memorandum, rulemaking, or through any other administrative process or procedure.

As discussed further herein, EPA and the federal courts have appropriately found time and again that the CWA authorizes (and, in fact, mandates) the agency to regulate the discharge of pollutants from point sources to surface waters via a direct groundwater hydrological connection, and that such authority can reasonably be exercised on a case-by-case analysis under both the Act's prohibition on the unpermitted discharge of pollutants to jurisdictional waters and through the Act's bedrock NPDES permitting program. Further, no other federal or state laws adequately and consistently act to *prevent* the discharge of pollution from point sources to surface waters, including through hydrologically connected groundwaters. There is, therefore, no legitimate basis for EPA to call this basic interpretation of the Act into question, and the EPA's Notice published in the Federal Register provides no meaningful support for a contrary conclusion.

It is clear that discharges to surface water which pass through groundwater may be sufficiently hydrologically connected such that the groundwater acts as a medium between the point source and the jurisdictional water. EPA's longstanding interpretation is consistent with CWA jurisprudence that a pollutant discharge which travels from a point source to surface water across some intervening medium – *e.g.*, land or air – may be subject to NPDES permitting requirements. Most courts that have considered the issue have held that discharges to surface waters are not exempt from the Act merely because they travel through groundwater or other media before they are added to jurisdictional surface waters.

This sensible interpretation of the Act covers discharges of pollution that reach surface waters while avoiding categorical rules based upon the medium through which the discharge travels. The limited jurisdiction exercised pursuant to EPA's longstanding interpretation of the Act does not mean that all discharges to groundwater that may eventually migrate to surface water are necessarily regulated under the NPDES program. Nor does this rationale upset the balance of power between the federal and state governments or the cooperative federalism

envisioned by the CWA. Rather, such an interpretation is completely consistent with the Act's plain language and unambiguous objectives of stopping the discharge of pollutants to waters for the benefit of public health, wildlife health, and resource preservation.

EPA and the courts have repeatedly rejected the prescriptive rule advanced by some stakeholders that the addition of a pollutant from a point source to a surface water is automatically exempt from the NPDES program if it passes through any amount of groundwater. Such a rule would arbitrarily and capriciously impede the ability of EPA, states, tribes and citizens to protect waterbodies and people who use them across the country. It would also create perverse incentives for polluters to evade the NPDES permitting program by discharging their wastes in basins or wells *next to* navigable waters, where the groundwater would predictably and directly convey pollutants to the adjacent or surrounding surface waters. The authority for EPA and states to require NPDES permit coverage for such groundwater-related discharges to surface waters on a case-by-case basis is critical to the administration of the Act.

As the United States and EPA aptly explained to the Ninth Circuit Court of Appeals less than two years ago:

Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water. Ascertaining whether there is a direct hydrological connection is a fact-specific determination. 66 Fed. Reg. at 3017. To qualify as "direct," a pollutant must be able to proceed from the point [source] to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. These factors will be affected by the type of pollutant, geology, direction of groundwater flow, and evidence that the pollutant can or does reach jurisdictional surface waters. *Id.*²

Consistent with EPA's longstanding interpretation and rationale, the determination of whether the Act's discharge prohibition is triggered by point source discharges of pollutants to groundwaters that are hydrologically connected to jurisdictional surface waters should remain "a factual

² Brief for the United States as Amicus Curiae, 9th Cir. No. 15-17447 (Dkt. Entry 40) (May 31, 2016) ("U.S. Amicus Br.") (Exhibit A to these comments).

inquiry like all point source determinations.”³

In sum, EPA’s longstanding interpretation constitutes a necessary, workable, flexible, and practical approach to administration of the Act. Regulated entities’ fears articulated in recent litigation and in response to EPA’s request for comment that maintaining EPA’s consistent and longstanding interpretation of the Act will lead to soaring compliance costs, an unwieldy administrative burden on regulatory agencies, and an uncertain regulatory landscape for industry, are factually unsupported and utterly unfounded. For over 30 years, EPA has consistently interpreted the Act in this manner, and for over 30 years the sky has not fallen. EPA should immediately withdraw and abandon its proposal to review or revise its commonsense and longstanding interpretation of the Act.

II. EPA’S SELF-DESCRIBED “LONGSTANDING INTERPRETATION” OF THE CWA.

The longstanding interpretation by EPA – the agency charged by Congress with implementing the CWA – is that a discharge of pollutants from a point source to navigable waters are subject to NPDES permitting if the pollutants travel through groundwater that bears a direct hydrological connection with surface water. EPA’s interpretation clearly supports the Act’s coverage of such discharges and belies the notion that EPA’s decades-old policy will suddenly create uncertainty throughout the regulatory landscape, impose unforeseen costs on industry, and be unworkable. As is recounted below, EPA has acted clearly, consistently, and rationally for decades, explaining its interpretation when acting in a rulemaking capacity (on multiple occasions), in issuing NPDES permits around the country that carry the force of law, and as *amicus curiae* before the Ninth Circuit.

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

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

discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body...).

³ EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations; Proposed Rule, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001).

55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (citations omitted).

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

EPA and most courts addressing the issues have recognized ..., for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. ... [T]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. *In these situations, the affected groundwaters are not considered “waters of the United States” but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.*

56 Fed. Reg. 64876, 64892 (Dec. 12, 1991) (emphasis added).

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

EPA interprets the CWA’s NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection....

...

[Construction General Permit] coverage can extend to discharges to surface water via hydrologically connected groundwater and CGP applicants, like any other NPDES applicant, should consider those types of discharges when applying for permit coverage.

63 Fed. Reg. 7858, 7881 (Feb. 17, 1998).

B. EPA’s 2001 “Formal Agency Interpretation” and Legal Analysis.

In 2001, EPA issued a “formal agency interpretation” and articulated the legal basis for its position at considerable length in a notice of proposed rulemaking for concentrated animal feeding operations (“CAFOs”). 66 Fed. Reg. 2960, 3018 (Jan. 12, 2001). Under the heading “Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to

Ground Water,” EPA stated:

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

Id. at 3015. In a 22-paragraph legal analysis, EPA discussed its authority to “determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act,” and why “the Act is best interpreted to cover such discharges.” *Id.*

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

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

Id. at 3015-16 (emphasis added). Exercising its authority to fill “an interpretive gap in the statutory structure,” *id.* at 3018, EPA reasoned:

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

Id. at 3015-16 (emphasis added). To reach this conclusion, EPA “utilized its expertise in environmental science and policy to determine the proper scope of the CWA,” its “knowledge of the hydrologic cycle and aquatic ecosystems,” and the policymaking authority delegated by Congress. *Id.* at 3018. EPA then explained:

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

Id. at 3017. EPA also found support for its interpretation in the legislative history: “Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the ‘navigable waters.’” *Id.* at 3016 (citing legislative history). EPA then accepted comment on the proposed rule and issued a final CAFO regulation in 2003. 68 Fed. Reg. 7176 (Feb. 12, 2003).

In its final rule, EPA determined that groundwater-related requirements should be implemented in CWA permits, as necessary, on a case-by-case basis due to site-specific variables such as topography, climate, and distance to surface water, among others. 68 Fed. Reg. at 7229. This differed from the proposed rule only in that the proposed rule would have categorically subjected CAFOs covered by the rule to groundwater-related requirements in NPDES permits, whereas the final rule left the imposition of such requirements to site-specific determinations. This is abundantly clear, not only from the CAFO rule itself, but also from *Waterkeeper Alliance, Inc. v. EPA*, a Second Circuit decision that reviewed the 2003 final CAFO regulation. 399 F.3d 486 (2d Cir. 2005). As the Second Circuit explained, the shift from uniform national requirements governing discharges to surface waters via groundwater to a case-by-case approach did not alter EPA’s position on the scope of the CWA:

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

Id. at 514, n.26. The Second Circuit upheld EPA’s determination and that aspect of the regulation. *Id.* at 514-15.

Moreover, EPA’s subsequent statements from 2008, when it reissued a final CAFO rule after remand from the Second Circuit, foreclose any argument that EPA disavowed its position. EPA said in the preamble:

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

73 Fed. Reg. 70420 (Nov. 20, 2008).⁴

⁴ See also EPA, *Clean Water Rule Response to Comments – Topic 10: Legal Analysis*, (available at https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf) (2015) (last visited May 15, 2018) (“[T]he agency has a longstanding and

**C. The United States’ Amicus Brief in the Ninth Circuit
Advocating EPA’s “Longstanding Interpretation” of the CWA.**

In 2016, the United States, representing EPA’s interest “in the proper interpretation of the NPDES permit provisions,” filed an amicus brief in the Ninth Circuit case, *Hawai’i Wildlife Fund v. County of Maui*. The brief reasserts EPA’s longstanding interpretation and persuasively articulates why and under what circumstances discharges to surface water via hydrologically connected groundwater are covered by the CWA:

Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water. Ascertaining whether there is a direct hydrological connection is a fact-specific determination. To qualify as “direct,” a pollutant must be able to proceed from the point of injection to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source.

U.S. Amicus Br. at 26.

**D. EPA’s Longstanding and Consistent Interpretation
is Reasonable, Administrable, and Adjudicable.**

For decades, regulators and courts have capably applied CWA permitting requirements to point source discharges of pollutants that travel through groundwater to surface waters. Recent claims of administrative infeasibility are belied by history. “EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, [CAFOs], mines, and oil and gas waste-treatment facilities.” U.S. Amicus Br. at 30 (citing permits). EPA uses the direct hydrological connection standard to identify discharges that are subject to permitting under the Act. To qualify as “direct,” EPA explains, “[t]he time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters” is relevant. 66 Fed. Reg. at 3017. Pollutants must be traceable from point source to surface water, “[i]t is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters.” *Id.* (quotation omitted).

consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation....”).

By way of example, in 2011, EPA issued an NPDES permit to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site “has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtillotte Creek.”⁵ EPA explained:

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

Id. at 2. EPA has issued other individual NPDES permits on a similar basis. *See, e.g.*, EPA Region 6, NPDES No. NM0022306 Fact Sheet for Questa Mine (May 2006) at 4-6; *see also id.* at 7 (describing other similar permits issued). In 2012, EPA issued a General NPDES Permit for CAFOs in Idaho, with specific conditions applicable to discharges from CAFOs to groundwater with a direct hydrological connection to surface water.⁶

The courts have also proven capable of making these case-by-case determinations. For example, in the district court in *Hawai’i Wildlife Fund v. County of Maui*, plaintiffs established at summary judgment that the pollutants defendants had injected into underground wastewater wells were reaching the Pacific Ocean near a popular swimming beach, relying in part on a study by EPA and other agencies that used tracer dye to show that pollutants were reaching the ocean in less than three months. 2015 U.S. Dist. LEXIS 8189 at *3-5. (D. Haw. Jan. 23, 2015). Similarly, in March 2017, a plaintiff proffered expert testimony and the defendant’s own data to show at trial that the defendant was discharging arsenic from its coal ash impoundments into a nearby surface water. *Sierra Club v. VEPCO*, 247 F. Supp. 3d 753, 756-61 (E.D. Va. 2017). Likewise, in *Tenn. Clean Water Network v. TVA*, the district court found, after trial, that the plaintiff in this case had proven that coal ash pollutants “migrated along a generally traceable” path through groundwater and after only a “short trip” discharged into Tennessee’s Cumberland River. *Tenn. Clean Water Network v. TVA*, 273 F. Supp. 3d at 841-42.

By contrast, in *McClellan Ecological Seepage Situation v. Cheney*, the district court held

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

⁶ EPA, Authorization to Discharge under the National Pollutant Discharge Elimination System For Concentrated Animal Feeding Operations at 30 (NPDES No. IDG01000) (May 8, 2012), (*previously available at* https://www3.epa.gov/region10/pdf/permits/npdes/id/cafo_fp_idg010000_wapps.pdf (last visited 10/30/2017)).

that discharges to surface water through groundwater *may* be subject to the CWA, but declined to regulate based on evidence that it would take “literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters.” 763 F. Supp. 431, 437 (E.D. Cal. 1989). And in *Greater Yellowstone Coalition v. Larson*, the court held that because groundwater would take 60 to 420 years to reach surface water, the hydrological connection was not direct. 641 F. Supp. 2d at 1140-41. EPA and the Courts have applied this interpretation for decades and, depending on the facts presented, evaluated whether the CWA applied. It is clear from this record developed under EPA’s longstanding interpretation that the horrors recently paraded by regulated entities will not come to pass.

Industry stakeholders have also argued in recent lawsuits that EPA’s continued implementation of its longstanding interpretation would extend the NPDES permitting program to millions of small sources never previously regulated under this program. These slippery slope arguments are simply wrong.⁷ Millions of point sources of pollution remain outside the NPDES program because their discharges do not reach, or cannot be traced to, a surface water. As noted previously, the generalized assertion that groundwater connects to surface water, without proof that pollutants in fact reach surface water, is insufficient to create liability under the Act. *See Rice v. Harken Exploration*, 250 F.3d 264, 272 (5th Cir. 2001) (finding no liability because there was no “evidence of a close, direct and proximate link between [the defendant’s] discharges ... and any resulting actual, identifiable oil contamination of a ... surface water.”). Despite the litany of industry concerns – e.g., uncertainty in the business community, disincentives for investment in water infrastructure – there is no indication that EPA’s decades-old position, repeatedly endorsed by courts, has caused any of these problems.

To the contrary, the slippery slope runs the other way. EPA’s adoption of a categorical rule exempting discharges to surface water via hydrologically connected groundwater would, in EPA’s words, effectively create a “ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water.” 66 Fed. Reg. at 3016. The CWA is the primary, comprehensive statutory program for regulating the discharges of pollutants to waters of the United States. Circumventing it would plainly thwart Congress’s intent. As one court noted:

It would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some

⁷ For example, fears that parking lots could be subject to the CWA’s stormwater regulations are wholly unfounded. The CWA requires that only a specific class of industrial facilities obtain stormwater permits for point source discharges. 33 U.S.C. § 1342(p)(2)(B). Parking lots are not a covered industry. *See* 40 C.F.R. § 122.26(b)(14).

distance short of the river and then allows the pollutants to seep into the river via the groundwater.

N. Cal. Riverwatch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, *7-8 (N.D. Cal. Sept. 1, 2005). And as the Ninth Circuit recently explained, the Act does not allow a polluter to do “indirectly that which it cannot do directly,” i.e., discharge pollutants into surface waters. *Haw. Wildlife Fund*, 881 F.3d at 768. Any other reading “would make a mockery of the [Act’s] prohibitions.” *Id.*

Discharges of pollutants from point sources that reach navigable waters through groundwater – such as the dumping of toxic coal ash from power plants or animal waste from CAFOs into unlined basins adjacent to rivers – can be regulated under the CWA where a site-specific (and factually intensive) determination shows that such coverage is warranted. The efforts of EPA, states, tribes, environmental organizations, and concerned citizens to implement and enforce the CWA’s prohibitions against such pollution would be imperiled, if not precluded entirely, if EPA were to now attempt to reverse decades of precedent, breach its duty to the public interest, and provide a perverse gift to polluting industries at the expense of all Americans.

III. CONTRARY TO INDUSTRY ARGUMENTS, EPA’S LONGSTANDING POSITION IS CONSISTENT WITH THE LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE CWA.

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). “Congress’ intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation.” *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). In section 301 of the CWA, Congress prohibited the “discharge of any pollutant” except in compliance with an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The NPDES permitting system is the “cornerstone of the [CWA]’s pollution control scheme.” *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).

Thus, when Congress prohibited the unpermitted “discharge of *any* pollutant,” it defined this term broadly as “*any* addition of *any* pollutant to navigable waters from *any* point source.” 33 U.S.C. §§ 1311, 1362(12)(A) (emphasis added). The Supreme Court has frequently observed that the word “any” in statutory text indicates Congress’ intent to give its words expansive meaning – an intent “underscore[d]” through the “the repeated use of the word ‘any’.” *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007) (citing *HUD v. Rucker*, 535 U.S. 125, 131

(2002)). The Act reaches “*any* addition ... from *any* point source,” not just those “point sources” adjacent to, submerged in, or that discharge directly to, surface water. Such restriction should not be grafted onto the statute contrary to the language Congress chose.

Justice Scalia’s plurality opinion in *Rapanos v. United States* makes clear that EPA’s longstanding interpretation of the Act is completely consistent with the Act’s plain language: “[t]he Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.’” *Rapanos v. United States*, 547 U.S. 715, 743 (2006). In other words, if pollutants that are added to surface water can be traced back to a particular point source, CWA liability is not defeated simply because the pollution is conveyed from the point source to surface water by way of an intervening media – through the air, over the surface of the land, or with the flow of groundwater. *See, e.g., Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188-89 (2d Cir. 2010) (holding that the spraying of aerosol pesticides into the air column from trucks and aircraft was a discharge of pollutants to navigable waters and covered by the CWA); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (“[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law”); *Hawai’i Wildlife Fund v. City of Maui*, 881 F.3d 754, 765 (9th Cir. 2018) (holding a polluter liable for discharging pollutants injected into the ground to surface water through ground water); *No Spray Coalition, Inc. v. City of N.Y.*, No. 00-Civ.-5395 (GBD), 2005 WL 1354041 (S.D.N.Y. June 7, 2005) (“Moreover, it would be unreasonable to distinguish between a sprayer releasing a fine mist pollutant into the atmosphere over the water and a pipe that released the same single flow of pollutant directly into water. Violators of the CWA would then need only to attach an airborne mist blower or hydraulic sprayer to their pipe to discharge a pollutant over the water in order to escape liability or regulation.”); *O’Leary v. Moyer’s Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981) (“[T]here is no requirement that the point source need be directly adjacent to the waters it pollutes.”).

Applying a similar concept, the 6th Circuit rejected a “temporal requirement to the ‘discharge of a pollutant’” because it “is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program.” *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009). In this regard, CWA liability is not thwarted simply because some period of time passes between when the pollution is discharged from a point source and when it reaches surface waters. *Id.* (explaining that to create a temporal link between the “‘addition’ (or ‘discharge’) of the pollution to the ‘point source’ does not follow the plain language of the Clean Water Act.”). The same principle applies here. The plain language of the Act does not support grafting additional requirements onto the definition of “discharge of a pollutant” – *i.e.*, that the pollutants not pass through intervening media before entering a navigable water. It simply

requires that the pollutants, which come from an identifiable point source, be added to waters of the United States.

In recent litigation, industry parties and amici have acknowledged that the CWA prohibits indirect discharges into navigable waters, but argued that such discharges must proceed from one distinct point source into another point source in order to be covered by the Act.⁸ These arguments are unsupported. Justice Scalia, and the plurality in *Rapanos*, espoused a narrower view of the “scope of ‘navigable waters’” than the other five justices, but vigorously denied that his interpretation would allow polluters “to evade the permitting requirement ... simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters.” 547 U.S. at 742-43.⁹ The cases Justice Scalia cited in support of this rationale make clear that, while the intervening conveyances may themselves constitute point sources, they need not. *Id.* at 743-44 (citing *inter alia*, *Southview Farm*).

In an effort to distinguish their positions on this issue from cases involving discharges to other types of media that later reach surface waters, some industry parties have also argued that Congress “carefully distinguished between navigable waters and ground waters” and that “[t]here is no textual basis for interpreting ‘navigable waters’ to cover groundwater.” *See* TVA Br. at 26. This was a proverbial attack on a strawman, as plaintiffs in that case did not take the position that TVA’s argument sought to disprove. Neither do Commenters take that position here, nor are we aware that EPA has ever taken that position. EPA’s longstanding interpretation is that the NPDES program regulates the addition of pollutants from a point source to a surface water even where those pollutants first pass through directly hydrologically connected groundwater – an interpretation with which Commenters agree.

Any Industry arguments that the statute’s structure supports their reading of the text are similarly misguided. Industry Amici Br. at 8. For example, it has been contended that the “point source program makes sense only” if it is “limited to circumstances where pollutants are carried into navigable waters by a ‘discernible, confined and discrete conveyance,’” because only these

⁸ Commenters refer herein for illustrative purposes to briefs filed by parties and amici in *Tenn. Clean Water Network v. TVA*, Case No. 17-6155, (6th Cir.), as follows: Brief of Defendant-Appellant Tennessee Valley Authority (Dkt. 31) (“TVA Br.”); Brief of Amicus Curiae the Chamber of Commerce of the United States of America, et al. (Dkt. 45-1) (“Industry Amici Br.”) and Brief of Amicus Curiae the State of Alabama, et al. (Dkt. 38) (“State Amici Br.”).

⁹ Any argument that because groundwater is not a point source, any discharge into groundwater whether or not it reaches surface water is not a point source discharge to surface water and thus not covered by the Act, cannot be reconciled with the Supreme Court’s statement in *Rapanos* that discharges into “noncovered” waters, which are not point sources themselves but flow into covered waters, are covered by the Act.

conveyances are amenable to “effluent limitation” regulation. *Id.* Commenters agree that the point source requirement is crucial to the NPDES program’s regulation of discharges, but it is not true that such an approach requires that the pollutants be “carried into navigable waters” directly from a point source. The statutory definition of “effluent limitation,” upon which Industry Amici lean, does not bear weight. The definition refers to “any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.” 33 U.S.C. § 1362(11). While discharges subject to effluent limitations must be “from point sources into navigable waters,” the definition does not say, as Industry implies, that the discharges subject to effluent limitations must be “*carried by* points sources into navigable waters,” nor must the discharges be “from point sources *directly* to navigable water.” Again, as Justice Scalia recognized in *Rapanos*, when interpreting the very similar language found in the definition of “discharge of a pollutant,” “[t]he Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.’” As a practical matter, compliance with effluent limitations is measurable and enforceable at point sources, regardless of whether the pollutant that leaves the point source first passes through groundwater, or some other medium of exchange before reaching surface water. *See supra* § II.E. (describing EPA’s repeated permitting of point sources discharging to surface water via groundwater).

Industry have also contended that “many CWA provisions recognize that not all pollution is point source pollution, . . . including the release of pollutants into groundwater.” Industry Amici Br. at 9. Here, Industry Amici seem to be conflating non-point source pollution with groundwater pollution. While the Act distinguishes between point sources and non-point sources of pollution, both kinds of sources may discharge either to surface water or to groundwater. To be clear, Commenters’ position is not that all pollution of groundwater is point source pollution. Rather, Commenters’ position is identical to EPA’s longstanding position, *i.e.*, that a point source discharge of pollutants to surface water, that first passes through groundwater, may be subject to NPDES regulation.

Industry have also cited section 304(f) of the CWA in an attempt to argue that discharges that pass through groundwater, whether they reach surface water or not, are non-point source pollution exempt from NPDES regulation. Amici Br. at 9. This argument requires misreading the statute and ignoring Supreme Court precedent. In section 304(f)(1) and (2), EPA directed congress to issue “guidelines for identifying and evaluating the nature and extent of ***nonpoint*** sources of pollution,” as well as “processes, procedures, and methods to control pollution” from a variety of sources that the Supreme Court has recognized are not necessarily exempt from NPDES regulation. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004) (“We note, however, that [section 304 (f)(2)(F)] does not explicitly exempt nonpoint

pollution sources from the NPDES program if they *also* fall within the ‘point source’ definition.”).

Indeed, the one pollution source from section 304(f)(2) that Industry refers to is “the disposal of pollutants in wells or in subsurface excavations,” which they say “potentially discharge pollutants to groundwater.” 33 U.S.C. § 1314(f)(2)(D). But this further cuts against the argument that discharges into groundwater are necessarily non-point pollution, for the Clean Water Act defines “point source” to include “well[s],” 33 U.S.C. § 1362(14). The fact that wells are defined as point sources only serves to reinforce Commenters’ position that Congress intended the NPDES program to cover surface water discharges, even when the pollution first passes through a well or other point source that first enters into groundwater.

Finally, Industry reliance on the Act’s legislative history is misplaced. The legislative history cited by TVA and its supporting amici focuses on Congress’ decision not to categorically subject discharges to groundwater to the NPDES program. *See* TVA Br. at 29-31; Industry Br. at 11-12. While Congress debated regulating groundwater under Section 402 as a means of protecting surface water, *see* TVA Br. at 31, and recognized “the essential link between ground and surface water and the artificial nature of any distinction,” Congress decided against a categorical rule because “the jurisdiction regarding groundwaters is so complex and varied” S. Rep. No. 92-414 at 73 (1971). Congress’ recognition that groundwater is complex and varied supports EPA’s longstanding, fact specific, interpretation of the Act: that, without drawing categorical rules, when discharges to groundwater in fact reach surface waters, sections 301 and 402 may apply in order to protect surface water quality.

In sum, the Act covers every identifiable point source discharge of pollutants to surface waters, regardless of the medium the pollutants pass through before entering surface waters.

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

Federal circuit and district courts in at least 24 states have agreed with EPA’s longstanding interpretation.¹⁰ The reasoning behind these decisions is straightforward: Congress

¹⁰ *E.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. April 12, 2018), available at <http://www.ca4.uscourts.gov/opinions/171640.P.pdf> (last visited May 18, 2018); *Hawai’i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005) (embracing EPA’s authority to regulate discharges “via groundwater”); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (flows carrying pollutants “through underground aquifers ... into navigable-in-fact streams”); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977)

did not intend to exempt from the CWA “the introduction of pollutants into the groundwater [that] adversely affects the adjoining surface waters.” *Idaho Rural Council*, 143 F. Supp. 2d at 1180.

The Ninth Circuit in *Hawai’i Wildlife Fund v. County of Maui* recently reaffirmed this interpretation in a case involving discharges of sewage waste into underground wells which reached the Pacific Ocean. 881 F.3d at 758-61. There the court held that the defendant was liable under the Act because, among other things, “the pollutants are fairly traceable from the point source to navigable water such that the discharge is the functional equivalent of a discharge into navigable water.” *Id.* at 765. The court correctly focused on whether there was a discharge to surface water, regardless of whether it traveled through another medium. *Id.* at 762-65 (citing *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) and *Sierra Club v. Abston Construction*, 620 F.2d 41 (5th Cir. 1980)). The court rejected the defendant’s argument that a point source itself must convey pollutants “directly” to a navigable water in order for liability to attach under the Act, reasoning that this argument requires “reading into the statute at least one term that does not appear on its face.” *Id.* at 765 (citing *Rapanos*, 547 U.S. 715 (2006)). In concluding, the court noted that the Act’s language prohibits a polluter “from doing indirectly that which it cannot do directly,” because “[t]o hold otherwise would

(discharges through underground injection wells), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 644 (7th Cir. 1983); *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1367 (M.D. Ga. 2017), *cert. denied*, 261 F. Supp. 3d 1345 (M.D. Ga. 2017); *Va. Elec. & Power Co.*, 247 F. Supp. 3d at 761; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445; *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-11333, 2015 WL 2144905, at *8 (S.D. W. Va. May 7, 2015); *S.F. Herring Ass’n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 (JAP), 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013); *Tenn. Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, at *5-6 (N.D. Ala. Aug. 20, 2013); *Ass’n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009); *Coldani v. Hamm*, No. Civ. S-07-660 RRB EFB, 2007 WL 2345016, at *7 (E.D. Cal. Aug. 14, 2007); *N. Cal. Riverwatch*, 2005 WL 2122052, at *2; *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715, at *10 (D. Colo. Nov. 15, 2002); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Mutual Life Ins. Co. v. Mobil Corp.*, No. Civ. A. 96-CV1781, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195-96 (E.D. Cal. 1988), *vacated on other grounds sub nom McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985); *O’Leary v. Moyer’s Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981).

make a mockery of the CWA's prohibitions." *Id.* at 768.

While a few decisions have found groundwater-related claims to be outside the jurisdiction of the CWA, these contrary cases typically arose in situations where either a direct hydrological connection to surface water had not been pled, was remote or entirely unproven, or the plaintiff claimed that the CWA applies to *all* discharges to groundwater or the court construed the issue as such.¹¹

For example, in *Rice v. Harken Exploration*, the Fifth Circuit first rejected the plaintiff's claim that all groundwater that "affects interstate commerce" is covered by the Act. 250 F.3d at 269-79 (5th Cir. 2001). The *Rice* court then found the plaintiff's proof of a hydrological connection insufficient because it lacked "evidence of a close, direct and proximate link between [the defendant's] discharges ... and any resulting actual, identifiable oil contamination of a ... surface water," and instead depended on an expert's "generalized assertion that that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater." *Id.* at 272. Such a showing would not pass muster under the longstanding direct hydrological connection standard repeatedly articulated by EPA.

In *Oconomowoc Lake*, the court explained that the mere "possibility" of a hydrologic connection between groundwater and surface water was insufficient to justify regulation under the NPDES program. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). Likewise, in *Kelley*, the plaintiffs alleged only that the "plume of contamination is migrating ... and eventually discharging into [a surface water]." *Kelley on behalf of Michigan v. United States*, 618 F. Supp. 1103, 1105 (W.D. Mich. 1985). These cases are distinguishable on the basis that it was speculative that the discharges were, in fact, reaching surface waters.

The other recent cases that rejected a discharge to surface water via groundwater theory incorrectly framed the issue to be whether groundwater is itself "navigable water," or incorrectly analyzed the plain language of the statute.¹² These outlier cases are inconsistent with the great

¹¹ See *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *Allegheny Environmental Action Coalition v. Westinghouse Electric Corp.*, No. 96-2178, 1998 U.S. Dist. LEXIS 1838, *6 (W.D. Pa. Jan. 30, 1998); *U.S. v. ConAgra, Inc.*, No. CV 96-0134-S-LMB, 1997 U.S. Dist. LEXIS 21401, *8-18 (D. Id. Dec. 31, 1997); *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1316-20 (D. Or. 1997); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), *cert. denied* 513 U.S. 930 (1994); *Kelley on behalf of Michigan v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985).

¹² *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 2017 U.S. Dist. LEXIS 85053 (D.S.C. Apr. 20, 2017); *Chevron U.S.A. Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807 (D. Md. 2015); *Cape Fear River*

weight of judicial authority and EPA's longstanding interpretation of the Act.

V. POLLUTANTS DISCHARGED TO SURFACE WATERS VIA GROUNDWATER PRESENT SERIOUS THREATS TO PUBLIC HEALTH.

Clean and safe water is an important part of not only a healthy environment but also protecting public health and safety. While by no means comprehensive, contamination to surface waters due to groundwater pollution from animal feeding operations (AFOs) and coal combustion residuals (coal ash) sites illustrate this concern.

A. Animal Feeding Operations.

Contamination of surface and groundwater by manure from AFOs poses numerous risks to human health, including exposure to nitrates, drug residues, and other hazards, and infections resulting from transmission of harmful microorganisms from animal operations. These risks are described in more detail below.

1. Contaminated Groundwater and Surface Water.

The increase in concentration of livestock and poultry and transition to large, high-density, confined animal feeding operations over the last several decades has resulted in the concentration of animal waste over small geographic areas with serious adverse impacts on water quality.¹³ For example, in eastern North Carolina, "The land application of waste (wet and dry) is contributing to runoff of nutrients to the nutrient sensitive waters of the Neuse as well as from contaminated groundwater" and many swine CAFOs are located "in an area of the coastal plain where the groundwater table is high which requires ditching or tile drains in order to allow for crop harvesting and waste application. These are direct conveyances for the highly nutrient laden water to reach surface waters. These operations are having a significant negative impact on the Neuse River water quality."¹⁴ Without regulatory oversight over these waters that feed North

Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798 (E.D.N.C. 2014); *Tri-Realty Co. v. Ursinus College*, No. 11-5885, 2013 U.S. Dist. LEXIS 165471, at *28 (E.D. Pa. Nov. 21, 2013).

¹³ United States Environmental Protection Agency. Literature review of contaminants in livestock and poultry manure and implications for water quality. July 2013:1-137. Link: <http://ow.ly/mTDw308qwbZ>

¹⁴ North Carolina Department of Environment and Natural Resources, Division of Water, Neuse River Basin, Water Quality Plans, Cycle 4 - July 2009, at p. 360, *available at* <https://files.nc.gov/ncdeq/Water%20Quality/Planning/BPU/BPU/Neuse/Neuse%20Plans/2009%20Plan/NR%20Basinwide%20Plan%202009%20-%20Final.pdf> (last visited May 21, 2018); *see also*, USGS, Scientific Investigations Report 2004-5123, Ionic Composition and Nitrate in Drainage Water From

Carolina's rivers and coastal estuaries, we are likely to be unable to restore water quality and fisheries that are severely impaired by pathogens, nitrogen and phosphorus.

Although animal manure is an invaluable fertilizer, waste quantities of the magnitude produced by AFOs represent a public health and ecological hazard through the degradation of surface and ground water resources.¹⁵ Manure from these operations can contaminate ground and surface waters with nitrates, drug residues, and other hazards,^{16,17,18,19} and studies have demonstrated that humans can be exposed to waterborne contaminants from livestock and poultry operations through the recreational use of contaminated surface water and the ingestion of contaminated drinking water.^{20,21,22} Exposure to elevated levels of nitrates in drinking water is

Fields Fertilized with Different Nitrogen Sources, Middle Swamp Watershed, North Carolina, August 2000 – August 2001 (2004), available at <http://pubs.usgs.gov/sir/2004/5123/> (last visited May 21, 2018).

¹⁵ Ibid.

¹⁶ Spencer JL, Guan J. Public health implications related to spread of pathogens in manure from livestock and poultry operations. *Public Health Microbiology: Methods and Protocols*. 2004:503-515. Link: <https://www.ncbi.nlm.nih.gov/pubmed/15156064>

¹⁷ Graham JP, Nachman KE. Managing waste from confined animal feeding operations in the United States: The need for sanitary reform. *Journal of Water and Health*. 2010;8(4):646-670. Link: <https://www.ncbi.nlm.nih.gov/pubmed/20705978>

¹⁸ Showers WJ, Genna B, McDade T, Bolich R, Fountain JC. Nitrate contamination in groundwater on an urbanized dairy farm. *Environ Sci Technol*. 2008;42(13):4683-4688. Link: <https://www.ncbi.nlm.nih.gov/pubmed/18677991>

¹⁹ Relation between nitrates in water wells and potential sources in the lower Yakima Valley, Washington state. U.S. Environmental Protection Agency, Washington, D.C., 2012. Link: https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate_in_water_wells_study_9-27-2012.pdf

²⁰ Ibid Showers et al. 2008

²¹ Ibid "Relation between..." 2012

²² Burkholder J, Libra B, Weyer P, et al. Impacts of waste from concentrated animal feeding operations on water quality. *Environ Health Perspect*. 2007:308-312. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817674/>

associated with adverse health effects, including cancer,^{23,24,25,26} birth defects and other reproductive problems,^{27,28,29,30} thyroid problems,^{31,32} and methemoglobinemia.^{33,34}

Nutrient runoff and leaching (including nitrogen and phosphorus) has also been implicated in the growth of harmful algal blooms,^{35,36} which may pose health risks for people who swim or fish in recreational waters, or who consume contaminated fish and shellfish.

²³ Ward MH. Too much of a good thing? Nitrate from nitrogen fertilizers and cancer. *Rev Environ Health*. 2009;24(4):357-363. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3068045/>

²⁴ Chiu H, Tsai S, Yang C. Nitrate in drinking water and risk of death from bladder cancer: An ecological case-control study in Taiwan. *Journal of Toxicology and Environmental Health, Part A*. 2007;70(12):1000-1004. Link: <https://www.ncbi.nlm.nih.gov/pubmed/17497410>

²⁵ Ward MH, Kilfoy BA, Weyer PJ, Anderson KE, Folsom AR, Cerhan JR. Nitrate intake and the risk of thyroid cancer and thyroid disease. *Epidemiology*. 2010;21(3):389-395. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2879161/>

²⁶ Gulis G, Czompolyova M, Cerhan JR. An ecologic study of nitrate in municipal drinking water and cancer incidence in Trnava district, Slovakia. *Environ Res*. 2002;88(3):182-187. Link: <https://www.ncbi.nlm.nih.gov/pubmed/12051796>

²⁷ Ibid Burkholder et al. 2007

²⁸ Ibid Ward, M.H. 2009

²⁹ Manassaram DM, Backer LC, Moll DM. A review of nitrates in drinking water: Maternal exposure and adverse reproductive and developmental outcomes. *Environmental Health Perspectives*. 2006. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1392223/>

³⁰ Brender JD, Weyer PJ, Romitti PA, et al. Prenatal nitrate intake from drinking water and selected birth defects in offspring of participants in the national birth defects prevention study. *Environ Health Perspect*. 2013;121(9):1083-1089. Link: <https://www.ncbi.nlm.nih.gov/pubmed/23771435>

³¹ Ibid Burkholder et al. 2007

³² Ibid Ward, M.H. 2009

³³ Ibid Burkholder et al. 2007

³⁴ Knobeloch L, Salna B, Hogan A, Postle J, Anderson H. Blue babies and nitrate-contaminated well water. *Environ Health Perspect*. 2000;108(7):675-678. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1638204/>

³⁵ Ibid United States Environmental Protection Agency 2013

³⁶ Heisler J, Glibert PM, Burkholder JM, et al. Eutrophication and harmful algal blooms: A scientific consensus. *Harmful algae*. 2008;8(1):3-13. Link: <http://www.sciencedirect.com/science/article/pii/S1568988308001066>

Exposure to algal toxins has been linked to neurological impairments, liver damage, gastrointestinal illness, severe dermatitis, and other adverse health effects.^{37,38}

2. Disease Transmission.

The poor conditions characteristic of AFOs, including crowding, present opportunities for disease transmission among animals and between animals and humans.^{39,40} Nearby residents, especially if they live in close proximity to multiple operations, may have an increased risk of infection from the transmission of harmful microorganisms from operations via contaminated water.^{41,42,43,44}

Of additional concern is exposure to pathogens that are resistant to antibiotics used in human medicine. Administering antibiotics to animals at levels too low to treat disease (non-therapeutic use) fosters the proliferation of antibiotic-resistant pathogens, and this practice is common in AFOs. Resistant infections in humans are more difficult and expensive to treat⁴⁵

³⁷ Carmichael WW. Health effects of toxin-producing cyanobacteria: “The CyanoHABs”. *Human and ecological risk assessment: An International Journal*. 2001;7(5):1393-1407. Link: <http://www.tandfonline.com/doi/abs/10.1080/20018091095087>

³⁸ Paerl HW, Fulton RS,3rd, Moisaner PH, Dyble J. Harmful freshwater algal blooms, with an emphasis on cyanobacteria. *Scientific World Journal*. 2001;1:76-113

³⁹ Gomes A, Quinteiro-Filho W, Ribeiro A, et al. Overcrowding stress decreases macrophage activity and increases salmonella enteritidis invasion in broiler chickens. *Avian Pathol*. 2014;43(1):82-90. Link: <https://www.ncbi.nlm.nih.gov/pubmed/24350836>

⁴⁰ Rostagno MH. Can stress in farm animals increase food safety risk? *Foodborne pathogens and disease*. 2009;6(7):767-776. Link: <http://online.liebertpub.com/doi/pdf/10.1089/fpd.2009.0315>

⁴¹ Rule AM, Evans SL, Silbergeld EK. Food animal transport: A potential source of community exposures to health hazards from industrial farming (CAFOs). *Journal of Infection and Public Health*. 2008;1(1):33-39. Link: <https://www.ncbi.nlm.nih.gov/pubmed/20701843>

⁴² Price LB, Graham JP, Lackey LG, Roess A, Vailes R, Silbergeld E. Elevated risk of carrying gentamicin-resistant *Escherichia coli* among US poultry workers. *Environ Health Perspect*. 2007:1738-1742. Link: <https://www.ncbi.nlm.nih.gov/pubmed/18087592>

⁴³ Spencer JL, Guan J. Public health implications related to spread of pathogens in manure from livestock and poultry operations. *Public Health Microbiology: Methods and Protocols*. 2004:503-515. Link: <https://www.ncbi.nlm.nih.gov/pubmed/15156064>

⁴⁴ Graham JP, Leibler JH, Price LB, et al. The animal-human interface and infectious disease in industrial food animal production: Rethinking biosecurity and biocontainment. *Public Health Rep*. 2008:282-299. Link: <https://www.ncbi.nlm.nih.gov/pubmed/19006971>

⁴⁵ Roberts RR, Hota B, Ahmad I, et al. Hospital and societal costs of antimicrobial-resistant infections in a Chicago teaching hospital: Implications for antibiotic stewardship. *Clin Infect Dis*. 2009;49(8):1175-1184.

and more often fatal⁴⁶ than infections with non-resistant strains. A growing body of evidence provides support that antibiotic-resistant pathogens are found on animal operations that administer antibiotics for non-therapeutic purposes⁴⁷ and are also found in the environment in and around production facilities, specifically in the litter^{48 49} and flies.⁵⁰

Manure runoff and leaching from AFOs may introduce these harmful microorganisms into nearby water sources.⁵¹ Land application of manure presents an opportunity for pathogens contained in the manure to leach into the ground and/or reach recreational water and drinking water sources, potentially causing a waterborne disease outbreak.⁵²

B. Coal Combustion Residuals (Coal Ash).

As described in more detail below, coal ash is an extremely potent and dangerous source of toxic surface water contamination by pollutants such as arsenic, chromium, selenium, lead, and other heavy metals. These pollutants readily leak from unlined impoundments into groundwaters which carry them via hydrologic connection directly into nearby surface waters at great risk to human health and the environment.

Link:

<https://academic.oup.com/cid/article/49/8/1175/425330/Hospital-and-Societal-Costs-of-Antimicrobial>

⁴⁶ Filice GA, Nyman JA, Lexau C, et al. Excess costs and utilization associated with methicillin resistance for patients with *Staphylococcus aureus* infection. *Infection Control & Hospital Epidemiology*. 2010;31(04):365-373. Link: <https://www.ncbi.nlm.nih.gov/pubmed/20184420>

⁴⁷ Price LB, Lackey LG, Vailes R, Silbergeld E. The persistence of fluoroquinolone-resistant *Campylobacter* in poultry production. *Environ Health Perspect*. 2007:1035-1039. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1913601/>

⁴⁸ Ibid United States Environmental Protection Agency 2013

⁴⁹ Graham JP, Evans SL, Price LB, Silbergeld EK. Fate of antimicrobial-resistant enterococci and staphylococci and resistance determinants in stored poultry litter. *Environ Res*. 2009;109(6):682-689. Link: <https://www.ncbi.nlm.nih.gov/pubmed/19541298>

⁵⁰ Graham JP, Price LB, Evans SL, Graczyk TK, Silbergeld EK. Antibiotic resistant enterococci and staphylococci isolated from flies collected near confined poultry feeding operations. *Sci Total Environ*. 2009;407(8):2701-2710. Link: <https://www.ncbi.nlm.nih.gov/pubmed/19157515>

⁵¹ Ibid United States Environmental Protection Agency 2013

⁵² Ibid United States Environmental Protection Agency 2013

1. Coal Ash is toxic.

There can be no reasonable scientific dispute as to the toxicity of coal combustion residuals (“CCR”), more commonly known as coal ash. EPA’s own data, not to mention the data obtained from various other scientific studies, establish that coal ash poses a substantial present and potential threat to human health and the environment. Worried about the effect of more stringent air pollution controls on the toxicity of coal ash, EPA conducted a study in December 2009 to characterize the leaching potential of certain toxic constituents in coal ash from coal-fired power plants with air pollution control technology.⁵³ In previous studies, which relied on the test known as the Toxicity Characterization Leaching Procedure (TCLP), EPA determined that the amount of toxic material leaching from coal ash did not reach the required threshold necessary to characterize the waste as toxic. However, in response to concerns raised by the National Academy of Science and EPA’s own Science Advisory Board about the accuracy of the TCLP test, the December 2009 study implemented new and improved methods that predict leaching potential “with much greater reliability.”⁵⁴ This is because the new test evaluates the impact of the surrounding environment on leaching.⁵⁵ As the report itself states, “management conditions are known to affect the leaching of many metals...[.]”⁵⁶ Because CCRs are subject to a wide variety of management conditions (land disposal, surface impoundments, various beneficial uses, etc.), any test evaluating the leaching potential of toxic constituents must take into account the actual field conditions under which CCRs are stored or reused.⁵⁷ No previous research on CCRs has ever considered this wide range of conditions.⁵⁸ In fact, the report clearly states that previously relied upon leaching tests, such as the TCLP, “may be inappropriate, or are at least not optimal for evaluating the leaching potential of CCRs as they are actually managed.”⁵⁹ Not surprisingly, the 2009 study, conducted with the newer, more reliable testing methods, produced quite different results regarding the toxicity and leaching potential of CCRs than EPA’s former studies.

⁵³ EPA Report, *Characterization of Coal Combustion Residues from Electric Utilities--Leaching and Characterization Data*, December 2009, p. viii.

⁵⁴ *Id.* at p. ix.

⁵⁵ *Id.* at p. viii.

⁵⁶ *Id.* at p. 17.

⁵⁷ *Id.* at p. viii-ix, 1.

⁵⁸ *Id.* at p. 1.

⁵⁹ *Id.* at p. 18.

The results of the 2009 study revealed high concentrations of toxic pollutants leaching from coal ash into the surrounding environment, as well as staggering differences between the new test methods and the TCLP. EPA found that at the highest leach level for certain CCRs:

- Arsenic was 1,800 times the federal safe drinking water standard, more than 3 times the threshold established for hazardous waste and over 76 times the level of previous leach tests;
- Chromium was 73 times the federal safe drinking water standard, over 1.5 times the threshold for hazardous waste, and 124 times the level of previous leach tests;
- Selenium was 580 times the federal drinking water standard, 29 times the threshold for hazardous waste and nearly 66 times the level of previous leach tests; and
- Barium was 335 times the federal drinking water standard and almost 7 times the hazardous waste threshold.⁶⁰

These findings by EPA correspond with the contaminants found in the proven and potential damage cases reported in EPA's 2007 Coal Combustion Waste Damage Case Assessments, which includes cases of arsenic and selenium contamination of groundwater and surface water and ecological damage cause by selenium contamination.⁶¹ Contamination levels exceeding federal drinking water standards for arsenic, selenium, and lead have also been found at multiple coal ash disposal sites not yet considered by EPA.⁶²

In addition to arsenic, selenium, and lead, CCRs contain many other contaminants of environmental concern, including: mercury, antimony, chromium, cadmium, nickel, and beryllium.⁶³ By 2010, EPA itself had already recognized 67 proven and potential damage cases where maximum contaminant levels (MCLs) in drinking water have been exceeded and there has

⁶⁰ Earthjustice report, *Failing the Test: The Unintended Consequences of Controlling Hazardous Air Pollutants from Coal-Fired Power Plants*, By Lisa Evans (May 2010), p. 2.

⁶¹ *Id.* at p. 8.

⁶² *In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment, Thirty-nine New Damage Cases of Contamination from Improperly Disposed Coal Combustion Waste*, Environmental Integrity Project, Earthjustice and Sierra Club August 26, 2010 Jeff Stant, Project Director, Editor and Contributing Author, available at: http://www.environmentalintegrity.org/news_reports/documents/INHARMSWAY_FINAL3.pdf and Earthjustice report, *Failing the Test: The Unintended Consequences of Controlling Hazardous Air Pollutants from Coal-Fired Power Plants*, By Lisa Evans (May 2010), p. 8.

⁶³ EPA, Proposed Rule, *Disposal of Coal Combustion Residuals From Electric Utilities*, 74 Fed. Reg. 35128, 35138 (June 21, 2010) ("2010 Proposed CCR Rule").

been serious harm to human health and the environment due to CCRs.⁶⁴ Further investigation by outside organizations has identified 70 additional sites where groundwater or surface water has been poisoned by toxic pollutants from coal ash, bringing the tally up to at least 137 contaminated sites in 34 states.⁶⁵ Residents of the communities that contain these waste sites suffer from indigestion, diarrhea, nausea and vomiting, worsening eyesight, and problems with mental focus and comprehension.⁶⁶ Long-term exposure to the toxic pollutants found in coal ash can cause cancer, heart and lung damage, kidney disease, reproductive and gastrointestinal problems, birth defects, and interference with cognitive development.⁶⁷

2. Toxic Coal Ash Discharges to Surface Waters Via Directly Hydrologically Connected Groundwater.

Coal-fired power plants discharge at least 5.5 billion pounds of a poisonous cocktail of arsenic, boron, chromium, lead, mercury, selenium and thallium into our water every year - more than the other top nine polluting industries combined. These pollutants are stored in over 1,000 coal ash pits throughout the United States. Since 2010, Waterkeeper Alliance (WKA), Waterkeeper Member Organizations, Affiliates and our partners have investigated approximately 35 coal-fired power plants in nine states and documented illegal pollution at 27 of them. When we conducted these thorough site-specific investigations, over 80 percent of the time we discovered evidence to support initiating Clean Water Act litigation.

In response to litigation and advocacy by Waterkeeper and other conservation groups in North and South Carolina, Duke Energy is now required to excavate the coal ash from 10 of its 16 coal ash storage locations in North Carolina and South Carolina. Litigation continues as to

⁶⁴ 2010 Proposed CCR Rule, 74 Fed. Reg. at 35142-143.

⁶⁵ In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment, Thirty-nine New Damage Cases of Contamination from Improperly Disposed Coal Combustion Waste, Environmental Integrity Project, Earthjustice and Sierra Club August 26, 2010 Jeff Stant, Project Director, Editor and Contributing Author, p. vi, available at:

http://www.environmentalintegrity.org/news_reports/documents/INHARMSWAY_FINAL3.pdf

⁶⁶ Coal Ash: The toxic threat to our health and environment, Report from Physicians for Social Responsibility and Earthjustice, by Barbara Gottlieb with Steven G. Gilbert and Lisa Gollin Evans, September 2010, p. 18; see also Coal Ash: The Hidden Story, by Kristen Lombardi, Center for Public Integrity, February 19, 2009, available at:

http://www.publicintegrity.org/articles/entry/1144/?utm_source=publicintegrity&utm_medium=related_heds&utm_campaign=related_bottom

⁶⁷ Coal Ash: The toxic threat to our health and environment, Report from Physicians for Social Responsibility and Earthjustice, by Barbara Gottlieb with Steven G. Gilbert and Lisa Gollin Evans, September 2010, p. vii

other leaking, unlined and polluting coal ash storage facilities owned by Duke in North Carolina. We continue to utilize the CWA to compel Duke Energy and other utilities to take similar steps to protect communities and rivers from coal ash pollution. Southeastern utilities are now excavating 60 million tons of coal ash from leaking, unlined pits throughout the region.

If Waterkeeper has learned anything as a result of its above-described work to address coal ash pollution at power plants, it is that unlined coal ash impoundments virtually always leak dangerous toxic metals and other pollutants into shallow groundwater from which these pollutants often travel short distances into surrounding jurisdictional surface waters. In light of all of the overwhelming scientific and anecdotal evidence establishing the toxicity of coal ash and the dangers of this pollution on human health and the environment, it would be highly irresponsible, not to mention arbitrary and capricious and utterly contrary to EPA's mission, for the agency to ignore its own data and make it virtually impossible to regulate or address point source discharges of toxic coal ash into jurisdictional surface waters via directly hydrologically connected surface waters.

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

Prior to taking any action to reconsider and revise its position regarding the coverage of "discharges of pollutants" via direct hydrologic connection to surface waters under the Clean Water Act, the agency must comply with all relevant federal laws and policies, including the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, as necessary, and any other relevant laws and policies.

With respect to the ESA, EPA must consult with the Fish and Wildlife Service ("FWS") and/or National Oceanic and Atmospheric Administration ("NOAA") under Section 7 of the Act to assess whether its action may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the action may incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects. *See* 16 U.S.C. § 1536. Before EPA takes any action that "may affect" species listed as threatened or endangered under the ESA, or modify their critical habitat, the agency must first consult with the FWS and/or NOAA pursuant to Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

Under Section 7, consultation is required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat

...”⁶⁸ Agency “action” is broadly defined to include “(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.”⁶⁹

As FWS’s consultation handbook explains, an action agency may make an initial “no effect” or “may affect” determination to assess whether or not consultation is required.⁷⁰ EPA can only avoid undertaking informal or formal consultations when “the action agency determines its proposed action will not affect listed species or critical habitat.”⁷¹ The handbook defines “may affect” as “the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat.”⁷² A “may affect” determination is appropriate even when the action agency believes that its actions will have either beneficial or uncertain effects because the action agency is not the expert in determining how its actions will impact threatened and endangered species.

If EPA predicts an impact on a listed species may occur, then EPA must undergo consultation with the Services.⁷³ If the action agency elects to first complete an informal consultation, it must first determine whether its action is “not likely to adversely affect” (“NLAA”) a listed species or is “likely to adversely affect” (“LAA”) a listed species.⁷⁴ The Services define “NLAA” determination to encompass those situations where effects on listed species are expected to be “discountable, insignificant, or completely beneficial.”⁷⁵ Discountable effects are limited to situations where it is not possible to “meaningfully measure, detect, or evaluate” harmful impacts.⁷⁶ Discountable and insignificant impacts are rare if an agency’s actions will cause harmful effects.

⁶⁸ 16 U.S.C. § 1536(a)(2).

⁶⁹ 50 C.F.R. § 402.02.

⁷⁰ U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (hereafter “Consultation Handbook”) at 3-12 (1998).

⁷¹ *Id.*

⁷² *Id.* at xvi.

⁷³ *Id.* at xv.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

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

EPA may, of course, skip the informal consultation process and move directly to the formal consultation process. During the formal consultation process, FWS will assess the environmental baseline—“the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process⁷⁷—in addition to the cumulative effects to the species—“those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation”—and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.⁷⁸

The Section 7 consultation process applies to all discretionary actions,⁷⁹ and any effort by the EPA to review or revise its position here clearly represents such a discretionary action.

Further, NEPA, our “basic national charter for protection of the environment,”⁸⁰ requires that federal agencies prepare an Environmental Impact Statement (“EIS”), for any major federal action that may have significant environmental impacts.⁸¹ An EIS must discuss: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁸² An EIS serves the statute’s two key goals: (a) to ensure the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts, and (b) to guarantee that the relevant information will be

⁷⁷ *Id.* at xiv.

⁷⁸ *Id.* at xiii.

⁷⁹ *National Association of Home Builders v. Defenders of Wildlife*, 551 US 644 (2007).

⁸⁰ 40 C.F.R. § 1500.1.

⁸¹ 42 U.S.C. § 4332; 40 C.F.R. §1502.9.

⁸² 42 U.S.C. § 4322.

made available to the public.⁸³

In considering the effects of an action, an agency must consider all impacts on the environment, including, *inter alia*, “effects on air and water and other natural systems.”⁸⁴ An EIS must also consider “cumulative” effects —*i.e.*, “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions.”⁸⁵ Any change to the agency’s longstanding position that the “discharge of pollutants” to surface waters via direct hydrologic connection is covered under the CWA is likely to cause significant effects to the human environment that must be analyzed under NEPA. Those significant effects include, but are not limited to: an increase in water quality degradation and other environmental harm; impacts to endangered or threatened species or their habitats; impacts to public health and safety, and a variety of cumulative impacts.⁸⁶

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

VII. CONCLUSION

For all of these reasons, EPA should not reconsider or revise its longstanding interpretation that point source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and the surface water. Nor should EPA

⁸³ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁸⁴ 40 C.F.R. § 1508.8(b).

⁸⁵ *Id.* § 1508.7.

⁸⁶ See 40 C.F.R. § 1508.27.

attempt to meddle with the workable, fact-specific inquiry the agency has relied upon for decades to answer the question of whether the “direct hydrological connection” standard is met.

Respectfully submitted,

Daniel E. Estrin, Esq. Waterkeeper Alliance New York, NY	Hannah Connor, Esq. Center for Biological Diversity St. Petersburg, FL
Tarah Heinzen, Esq. Food & Water Watch Washington, D.C.	Jessica Culpepper, Esq. Public Justice Washington, D.C.
Bob Martin Johns Hopkins Center for a Livable Future Baltimore, MD	Myra Crawford Cahaba Riverkeeper Birmingham, AL
Charles Scribner Black Warrior Riverkeeper Birmingham, AL	David Whiteside Tennessee Riverkeeper Decatur, AL
Casi (kc) Callaway Mobile Baykeeper Mobile, AL	Justinn Overton Coosa Riverkeeper Mt Laurel, AL
Michael Mullen Choctawhatchee Riverkeeper Troy, AL	Jessie Green White River Waterkeeper Harrison, AR
Ben Lomeli Friends of the Santa Cruz River Rio Rico, AZ	Jennifer Kalt Humboldt Baykeeper Arcata, CA
Garry Brown Orange County Coastkeeper & Inland Empire Waterkeeper Costa Mesa, CA	Don McEnhill Russian Riverkeeper Healdsburg, CA
Steve Shimek Monterey Coastkeeper / Otter Project Monterey, CA	Melinda Booth Yuba River Waterkeeper Nevada City, CA

Sejal Choksi-Chugh San Francisco Baykeeper Oakland, CA	Gordon Hensley San Luis Obispo Coastkeeper San Luis Obispo, CA
Kira Redmond Santa Barbara Channelkeeper Santa Barbara, CA	Ted Ross Boulder Waterkeeper Boulder, CO
Marcel Gaztambide Animas Riverkeeper Durango, CO	Gary Wockner Poudre Waterkeeper Fort Collins, CO
Cindy Medina Alamosa Riverkeeper La Jara, CO	Bill Lucey Save The Sound - Long Island Soundkeeper New Haven, CT
Suzanne Kelly Anacostia Riverkeeper Washington, DC	Phillip Musegaas Potomac Riverkeeper Network Washington, DC
Georgia Ackerman Apalachicola Riverkeeper Apalachicola, FL	John Cassani Calusa Waterkeeper Fort Myers, FL
Lisa Rinaman St. Johns Riverkeeper Jacksonville, FL	Reinaldo Diaz Lake Worth Waterkeeper Lake Worth, FL
Rachel Silverstein Miami Waterkeeper Miami, FL	Laurie Murphy Emerald Coastkeeper, Inc. Pensacola, FL
Justin Bloom Suncoast Waterkeeper Sarasota, FL	Jen Lomberg Matanzas Riverkeeper St. Augustine, FL
Andrew Hayslip Tampa Bay Waterkeeper St. Petersburg, FL	Jason Ulseth Chattahoochee Riverkeeper Atlanta, GA
Tonya Bonitatibus Savannah Riverkeeper Augusta, GA	John S. Quarterman Suwannee Riverkeeper Hahira, GA

Jen Hilburn Altamaha Riverkeeper Macon, GA	Laura Early Satilla Riverkeeper Nahunta, GA
Jesse Demonbreun-Chapman Coosa River Basin Initiative/Upper Coosa Riverkeeper Rome, GA	Simona Perry Ogeechee-Canoochee Riverkeeper Savannah, GA
Arthur W Norris Quad Cities Waterkeeper Inc. Davenport, IA	Buck Ryan Snake River Waterkeeper Boise, ID
Sharon Bosley Lake Coeur d'Alene Waterkeeper Coeur d'Alene, ID	Rae Schnapp Wabash Riverkeeper Lafayette, IN
Jason Flickner Lower Ohio River Waterkeeper New Albany, IN	Dawn Buehler Friends of the Kaw/Kansas Riverkeeper Lawrence, KS
Dean Wilson Atchafalaya Basinkeeper Lafayette, LA	Angela Haren Blue Water Baltimore/Baltimore Harbor Waterkeeper Baltimore, MD
Kathy Phillips Assateague Coastal Trust Berlin, MD	Isabel Hardesty ShoreRivers Easton, MD
Jesse Iliff South River federation Edgewater, MD	Betsy Nicholas Waterkeepers Chesapeake Takoma Park, MD
Frederick L. Tutman Patuxent Riverkeeper Upper Marlboro, MD	Ron Huber Friends of Penobscot Bay Rockland, ME
Ivy Frignoca Friends of Casco Bay South Portland, ME	Heather Smith Grand Traverse Baykeeper, The Watershed Center Grand Traverse Bay Traverse City, MI

Rachel Bartels Missouri Confluence Waterkeeper St. Louis, MO	Abby Braman Pearl Riverkeeper Madison, MS
Guy Alsentzer Upper Missouri Waterkeeper Bozeman, MT	Jerry O'Connell Big Blackfoot Riverkeeper Greenough, MT
Hartwell Carson French Broad Riverkeeper Asheville, NC	Andy Hill Watauga Riverkeeper Boone, NC
Emily Sutton Haw River Assembly Bynum, NC	Sam Perkins Catawba Riverkeeper Foundation Charlotte, NC
Gray Jernigan Green Riverkeeper Hendersonville, NC	David Caldwell Broad River Alliance, a Waterkeeper Affiliate Lawndale, NC
Larry Baldwin Crystal Coast Waterkeeper/Coastal Carolina Riverwatch New Bern, NC	Matthew Starr Upper Neuse Riverkeeper (Sound Rivers Inc.) Raleigh, NC
Katy Langley Lower Neuse Riverkeeper (Sound Rivers Inc.) New Bern, NC	Larry Baldwin White Oak-New Riverkeeper Alliance Midway Park, NC
Forrest English Pamlico-Tar Riverkeeper (Sound Rivers Inc.) Washington, NC	Kemp Burdette Cape Fear River Watch Wilmington, NC
Brian Fannon Yadkin Riverkeeper Winston-Salem, NC	Captain Bill Sheehan Hackensack Riverkeeper Hackensack, NJ
Bill Schultz Raritan Riverkeeper Keasbey, NJ	Greg Remaud NY/NJ Baykeeper Matawan, NJ
Jen Pelz Rio Grande Waterkeeper Santa Fe, NM	Jill Jedlicka Buffalo Niagara Waterkeeper Buffalo, NY

Lee Willbanks Save The River / Upper St. Lawrence Riverkeeper Clayton, NY	Chris Navitsky Lake George Waterkeeper Lake George, NY
Richard Webster Riverkeeper, Inc. (Hudson Riverkeeper) Ossining, NY	Yvonne Taylor Seneca Lake Guardian Watkins Glen, NY
Earl Hatley Grand Riverkeeper/LEAD Agency, Inc. Vinita, OK	Robyn Janssen Rogue Riverkeeper Ashland, OR
Roger Rocka Columbia River Estuary Action Team Astoria, OR	Brett VandenHeuvel Columbia Riverkeeper Hood River, OR
Pamela Digel Upper Allegheny affiliate Bradford, PA	Eric Harder Youghiogheny Riverkeeper with Mountain Watershed Association Melcroft, PA
Rob Walters Three Rivers Waterkeeper Pittsburgh, PA	Carol Parenzan Middle Susquehanna Riverkeeper Ass'n, Inc. Sunbury, PA
Ted Evgeniadis Lower Susquehanna Riverkeeper Association Wrightsville, PA	Michael Jarbeau Narragansett Baykeeper Providence, RI
Meg Adams Edisto Riverkeeper Aiken, SC	Jacob Oblander Lower Savannah River Alliance Allendale, SC
Andrew Wunderley Charleston Waterkeeper Charleston, SC	Bill Stangler Congaree Riverkeeper Columbia, SC
Christine Ellis Winyah Rivers Foundation, Inc. Conway, SC	Steve Box Environmental Stewardship Bastrop, TX
Cynthia Seale Cook Trinity Waters Dallas, TX	Jordan Macha Bayou City Waterkeeper Houston, TX

<p>Diane Wilson San Antonio Bay Estuarine Waterkeeper Seadrift, TX</p>	<p>John Weisheit Colorado Riverkeeper Moab, UT</p>
<p>Lauren Wood Green River Action Network (Green Riverkeeper Affiliate) Salt Lake City, UT</p>	<p>Eleanor Hines North Sound Baykeeper at RE Sources for Sustainable Communities Bellingham, WA</p>
<p>Jerry White, Jr. Spokane Riverkeeper Spokane, WA</p>	<p>Cheryl Nenn Milwaukee Riverkeeper Milwaukee, WI</p>
<p>Angie Rosser West Virginia Headwaters Waterkeeper Charleston, WV</p>	<p>Rica Fulton Upper Green River Network, a Colorado Riverkeeper Affiliate Laramie, WY</p>

Exhibit A

No. 15-17447

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAWAII WILDLIFE FUND; SIERRA CLUB-MAUI GROUP;
SURFRIDER FOUNDATION; WEST MAUI
PRESERVATION ASSOCIATION,

Plaintiffs-Appellees,

v.

COUNTY OF MAUI,

Defendant-Appellant.

On Appeal from the U.S. District Court, Dist. of Hawaii
No. 12-cv-198, Hon. Susan Oki Mollway, District Judge

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLEES**

JOHN C. CRUDEN
Assistant Attorney General

OF COUNSEL:

KARYN WENDELOWSKI
U.S. Environmental
Protection Agency
Office of General Counsel
Washington, D.C.

AARON P. AVILA
R. JUSTIN SMITH
FREDERICK H. TURNER
Attorneys, U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

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33 U.S.C. § 1365	4

Federal Register

39 Fed. Reg. 43,759 (Dec. 18, 1974)	4
55 Fed. Reg. 47,990 (Dec. 2, 1990)	23
56 Fed. Reg. 64,876 (Dec. 12, 1991)	5, 23
66 Fed. Reg. 2960 (Jan. 12, 2001)	12, 23, 24, 26
80 Fed. Reg. 37,054 (June 29, 2015)	17, 25

The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

INTEREST OF THE UNITED STATES

The United States Environmental Protection Agency (EPA) implements the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, together with the states. That includes promulgating regulations regarding the CWA's National Pollutant Discharge Elimination System (NPDES). *Id.* § 1342. The United States participates as amicus curiae because it has an interest in the proper interpretation of the NPDES-permit provisions and the framework for analyzing whether discharges of pollutants to jurisdictional surface waters through groundwater are subject to those provisions.¹ The United States also has an interest because it enforces the CWA and because it is a potential defendant in actions alleging the discharge of pollutants from federal facilities through groundwater.

The United States agrees with the result the district court reached in this case and urges affirmance. In the United States' view, a NPDES

¹ We use the term "jurisdictional surface waters" throughout this brief to mean "waters of the United States."

permit is required here because the discharges from the Defendant-Appellant County of Maui's wastewater treatment facility are from a point source (*i.e.*, the injection wells) to waters of the United States (*i.e.*, the Pacific Ocean²). To be clear, the United States does not contend that groundwater is a point source, nor does the United States contend that groundwater is a water of the United States regulated by the Clean Water Act. Moreover, the United States does not agree with the district court's application of the "significant nexus" standard from *Rapanos v. United States*, 547 U.S. 715 (2006).

ISSUES PRESENTED

This amicus brief addresses the following issues:

1. Whether a discharge of pollutants from a point source to jurisdictional surface waters through groundwater with a direct hydrological connection to jurisdictional surface waters is regulated under the CWA.
2. Whether the site-specific facts here give rise to a "discharge of a pollutant" under the CWA.

² More specifically, into the Pacific Ocean that is part of the United States' territorial seas under the CWA. 33 U.S.C. § 1362(7), (8).

3. Whether the County had fair notice that it was subject to civil penalties for its discharges to jurisdictional surface waters without a NPDES permit.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress therefore prohibited any non-excepted “discharge of any pollutant” to “navigable waters” unless it is authorized by a permit. *Id.* §§ 1311, 1342, 1344, 1362. The CWA defines “discharge of a pollutant” as “any addition of any pollutant *to* navigable waters from any point source.” *Id.* § 1362(12)(A) (emphasis added). Pollutant means “dredged spoil, solid waste, incinerator, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* § 1362(6). The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas”; and a point source is “any discernible, confined and discrete

conveyance, including but not limited to 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.” *Id.* § 1362(7), (14).

The CWA authorizes EPA to issue NPDES permits under Section 402(a), but EPA may authorize a state to administer its own NPDES program if EPA determines that it meets the statutory criteria. *Id.* § 1342(a), (b). When a state receives such authorization, EPA retains oversight and enforcement authorities. *Id.* §§ 1319, 1342(d). Hawaii obtained such permitting authority in 1974. *See* 39 Fed. Reg. 43,759 (Dec. 18, 1974).

The CWA is a strict-liability regime that prohibits non-excepted discharges unless they are authorized by a CWA permit. *Id.* §§ 1311, 1342, 1344. An unpermitted discharge constitutes a violation of the CWA regardless of fault and is subject to enforcement by the state or federal government or a private citizen. *Id.* §§ 1319, 1365. To establish liability for a violation of the permit requirement, a plaintiff must show there was (1) a discharge (2) of a pollutant (3) to navigable waters (4)

from a point source. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001).

The CWA includes a civil-penalty provision for those who violate the Act. 33 U.S.C. § 1319(d). When determining a civil-penalty amount, courts must consider “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” *Id.*

EPA’s longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA’s permitting requirements. *E.g.*, Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,982 (Dec. 12, 1991) (“[T]he affected ground waters are not considered ‘waters of the United States’ but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.”).

II. FACTUAL BACKGROUND

The County operates the Lahaina Wastewater Reclamation Facility. *Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 983 (D. Haw. 2014) [*Hawaii I*]. The facility receives approximately four million gallons of sewage each day. *Id.* After treating the sewage, the facility releases three to five million gallons of effluent into four on-site injection wells. *Id.* at 983-84. The effluent travels into a shallow groundwater aquifer and then flows into the Pacific Ocean through the seafloor at points known as “submarine springs.” *Id.* at 984; *see also Hawaii Wildlife Fund v. Cty. of Maui*, No. 12-198, 2015 WL 328227, at *1 (D. Haw. Jan. 23, 2015) [*Hawaii II*].

EPA, the Hawaii Department of Health (DOH), and others conducted a tracer-dye study that confirmed this conclusion for injection wells 3 and 4. *Hawaii I*, 24 F. Supp. 3d at 984. According to the study, it took the leading edge of the dye 84 days to go from wells 3 and 4 to the ocean and about 64% of the dye injected into these wells was discharged from the submarine springs to the Pacific Ocean. *Id.* The dye’s appearance in the ocean “conclusively demonstrated that a hydrogeologic connection exists.” *Id.* at 985-86.

Although tracer dye was not placed into well 1 and dye from well 2 was not detected in the study, the County “acknowledge[d] that there is a hydrogeologic connection between wells 1 and 2 and the ocean.” *Hawaii II*, 2015 WL 328227, at *1-2. The tracer-dye study models indicated that, in some circumstances, treated effluent from well 2 would move along flowpaths similar to those traveled by the dye injected into wells 3 and 4 and emerge at the same springs. Supplemental Excerpts of Record (SER) 237, 240, 243. There is no dispute that given the proximity of wells 1 and 2, the modeling for well 2 predicts the flowpaths for discharges from well 1. Excerpts of Record (ER) 443; SER 189.

III. PROCEDURAL BACKGROUND

In April 2012, Plaintiffs-Appellees Hawaii Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation, and West Maui Preservation Association filed suit seeking to require the County to obtain and comply with a NPDES permit and to pay civil penalties. *Hawaii I*, 24 F. Supp. 3d at 986. The district court issued three partial summary-judgment opinions in favor of Plaintiffs. The parties then entered into a settlement agreement, in which the County stipulated to terms

contingent on a final judgment that the County violated the CWA and that the County was “not immune from” civil penalties. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, ECF No. 259. The court entered final judgment in accordance with its opinions and the settlement agreement.

The district court’s first opinion held the County liable under the CWA for unpermitted discharges from wells 3 and 4. *Hawaii I*, 24 F. Supp. 3d at 1000. The court started its analysis with the language and purpose of the CWA, and also relied on EPA’s interpretation and case law. *Id.* at 995-96. The court explained that Plaintiffs “must show that pollutants can be *directly traced* from the injection wells to the ocean such that the discharge at the LWRF is a *de facto* discharge into the ocean.” *Id.* at 998 (emphasis in original). The court found that Plaintiffs had met this burden. *Id.* at 998-1000. The district court also found CWA liability under the “significant nexus” standard from Justice Kennedy’s concurring opinion in *Rapanos*, 547 U.S. at 755-56, and the Ninth Circuit’s application of that standard in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007).

The district court's second opinion held the County liable for unpermitted discharges from wells 1 and 2. *Hawaii II*, 2015 WL 328227, at *6. The County "expressly conceded that pollutants introduced by the County into wells 1 and 2 were making their way to the ocean," and the court rejected the County's argument that liability does not arise unless a pollutant passes through "a series of sequential point sources." *Id.* at *2-4.

The district court's third opinion rejected the County's argument that it was not subject to civil penalties for its unpermitted discharges because it lacked fair notice. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, 2015 WL 3903918, at *6 (D. Haw. June 25, 2015) [*Hawaii III*]. The court determined that the County had notice because the discharges "clearly implicate[d] each statutory element." *Id.* at *4. The court further held that its adjudication of the first motion for partial summary-judgment provided notice to the County. *Id.* at *6.

The parties then entered into a settlement agreement, in which the County stipulated that it would make good faith efforts to obtain and comply with a NPDES permit and that it would pay \$100,000 in civil penalties and \$2.5 million for a supplemental environmental

project, all contingent on a final judgment and ruling that the County violated the CWA and that the County was “not immune from” civil penalties. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, ECF No. 259. The district court then entered a final judgment.

SUMMARY OF ARGUMENT

The judgment should be affirmed because it is consistent with the language and purpose of the Clean Water Act and EPA’s longstanding interpretation and practice of issuing NPDES permits for discharges of pollutants similar to the ones here. As Justice Scalia said in *Rapanos*, the statute’s language prohibiting “any addition of any pollutant to navigable waters from any point source” does not limit liability only to discharges of pollutants *directly* to navigable waters. *See Rapanos*, 547 U.S. at 743 (plurality op.) (emphasis in original). Courts have interpreted the CWA as covering not only discharges of pollutants directly to navigable waters, but also discharges of pollutants that travel from a point source to navigable waters over the surface of the ground or through underground means. *E.g., Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980). The discharges in this case fall squarely within the statutory language.

In the United States' view, a NPDES permit is required here because the discharges at issue are from a point source (*i.e.*, the injection wells) to waters of the United States (*i.e.*, the Pacific Ocean's coastal waters). To be clear, the United States views groundwater as *neither* a point source *nor* a water of the United States regulated by the CWA. The United States therefore agrees with the district court's conclusion that a NPDES permit was required here, but only to the extent that the court's analysis is consistent with the above-stated principles regarding groundwater.

The district court's conclusions accord with the CWA's purpose. Congress enacted the CWA "to restore and maintain . . . the country's waters"; and to achieve this goal, Congress created a strict-liability regime prohibiting discharges unless they are authorized under the CWA. Recognizing Congress's goals in the CWA, courts have concluded that in certain circumstances discharges of pollutants that reach navigable waters through groundwater fall squarely within the statute's terms. *E.g.*, *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001).

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

The County argues that the district court dispensed with the requirements that a discharge be "from a point source" and "to navigable water" because the effluent was discharged from a nonpoint source and because the effluent was discharged into groundwater, which is not covered by the CWA. Opening Brief (Op. Br.) at 21, 27, 30.

This attempt to bifurcate the movement of the pollutants into two separate events is inconsistent with the statute's language and purpose. It also ignores the undisputed fact that the pollutants moved *through* that groundwater to the ocean.

The County's argument that no civil penalty should have been imposed because the County lacked fair notice lacks merit. The County was on notice both as a general matter—through the CWA's language and EPA's statements in rulemakings—and specifically—through communications from EPA to the County. In any event, the question of fair notice goes to the amount of the civil penalty, an amount the County stipulated to, and is only one of many factors informing a civil-penalty amount.

ARGUMENT

I. THE DISTRICT COURT'S DECISIONS ARE CONSISTENT WITH THE LANGUAGE AND PURPOSE OF THE CWA.

The district court's judgment holding the County liable under the CWA is consistent with the text and purpose of the statute. It is also consistent with EPA's long-held position governing when the CWA requires permits for discharges of pollutants that move to jurisdictional surface waters through groundwater with a direct hydrological

connection. The County cannot recast the nature of the discharges to avoid that result.

A. Discharges of Pollutants to Jurisdictional Surface Waters Through Groundwater with a Direct Hydrological Connection Properly Require CWA Permits.

When Congress prohibited the unpermitted “discharge of any pollutant,” it defined this term broadly as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. §§ 1311, 1362(12)(A). As the County concedes, “a point source does not need to discharge directly into navigable waters to trigger NPDES permitting.” Op. Br. at 27. Because Congress did not limit the term “discharges of pollutants” to only direct discharges to navigable waters, discharges through groundwater may fall within the purview of the CWA.

This reading of “discharge of a pollutant” has been applied in other similar contexts where discharges of pollutants have moved from a point source to navigable waters over the surface of the ground or by some other means. In *Sierra Club v. Abston Construction*, which addressed discharges from mining operations that traveled to navigable waters in part through surface runoff, the Fifth Circuit stated that “[g]ravity flow, resulting in a discharge into navigable body of water,

may be part of a point source discharge if the [discharger] at least initially collected and channeled the water and other materials.”³ 620 F.2d at 44-45; *see also Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 628, 630 (D.R.I. 1990) (defendant liable for discharge of “raw sewage [that] was running directly from the leaching field, on the surface of the ground for approximately 250 feet, into the [surface water]”); *O’Leary v. Moyer’s Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981) (“[T]here is no requirement that the point source need be directly adjacent to the waters it pollutes.”).

That Congress gave the term “discharge of a pollutant” a broad meaning finds support in cases where CWA liability attached for discharges from point sources that traveled through other means before reaching surface waters. *See Rapanos*, 547 U.S. at 743 (noting that courts have found violations of Section 301 “even if the pollutants discharged from a point source do not emit ‘directly into’ covered

³ The County misconstrues the United States’ position as amicus curiae in *Abston Construction*. *See* Op. Br. at 30-31. The United States took the position that discharges of pollutants that traveled indirectly from a point source to jurisdictional surface waters through surface runoff or the gravity flow of rainwater come within the scope of the CWA. Brief for the United States as *Amicus Curiae*, at 35-36, *Sierra Club v. Abston Constr. Co.*, No. 77-2530 (5th Cir. 1980).

waters, but pass ‘through conveyances’ in between”) (citing *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137 (10th Cir. 2005) (defendant could be liable for discharges conveyed from its point-source mine shaft to jurisdictional surface water through a tunnel that defendant did not own); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976) (holding that CWA covered pollutants discharged from defendant’s point source to jurisdictional surface waters conveyed through a sewer system that the defendant did not own)).

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

The County concedes that discharges need not be direct and that a discharge through a conveyance requires a permit. Op. Br. at 27. The County argues, however, that the conveyance itself must be a point source and that because groundwater is not a point source, the district court “impermissibly ‘transform[s] a nonpoint source into a point source.’” *Id.* at 27-28, 33. The County’s interpretation is flawed. Contrary to the County’s argument, the district court did not eliminate the requirement that a discharge be “from a point source.” All it said was that pollutants from a point source need not be emitted *directly* into covered waters. The case law does not require the means by which the pollutant discharged from a point source reaches a water of the United States to be a point source.

While the County’s statement that the statutory definition of “navigable waters” does not include groundwater is accurate, Op. Br. at 21, it is beside the point. There is no dispute that groundwater itself is not a “navigable water,” 80 Fed. Reg. 37,054, 37,055 (June 29, 2015), but the district court’s decisions hinge on the movement of pollutants to jurisdictional surface waters through groundwater with a direct

hydrological connection. Such an addition of pollutants to navigable waters falls squarely within the CWA's scope.

The County relies on the treatment of groundwater in legislative history, Op. Br. at 21-23, but this “only supports the unremarkable proposition with which all courts agree—that the CWA does not regulate ‘isolated/nontributary groundwater’ which has no [effect] on surface water.” *Bosma*, 143 F. Supp. 2d at 1180. It does not undermine the conclusion that discharges of pollutants through groundwater to jurisdictional surface waters are subject to the NPDES program.

The County contends that case law does not support the district court's interpretation, Op. Br. at 35-37, but this argument largely ignores the majority of the courts that have addressed this issue and concluded that discharges that move from a point source to jurisdictional surface waters via groundwater with a hydrological connection are subject to regulation under the CWA. *See, e.g., Sierra Club v. Va. Elec. & Power Co.*, No. 15-112, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015); *Yadkin Riverkeeper v. Duke Energy Carolinas, LLC*, No. 14-753, 2015 WL 6157706 (M.D.N.C. Oct. 20, 2015); *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847 (N.D. Cal. 2015); *Hernandez*

v. Esso Std. Oil Co., 599 F. Supp. 2d 175 (D.P.R. 2009); *Nw. Env'tl. Def. Ctr. v. Grabhorn*, No. 08-548, 2009 WL 3672895 (D. Or. Oct. 30, 2009); *Mercer Fraser*, 2005 WL 2122052; *Bosma*, 143 F. Supp. 2d 1169.

The County's reliance on other case law (Op. Br. at 35-36) is unavailing for three reasons. *First*, none of the cases are controlling precedent. *Second*, most of these decisions are inapposite because they do not address the issue of discharges of pollutants that move through groundwater to jurisdictional surface waters. In *Village of Oconomowoc Lake v. Dayton Hudson, Corp.*, the court examined whether groundwater itself was a navigable water, *i.e.*, a water within the meaning of the CWA. 24 F.3d 962, 965 (7th Cir. 1994). That is distinct from whether a CWA permit is required when pollutants travel to jurisdictional surface waters through groundwater with a direct hydrological connection.

Third, these cases do not foreclose application of the CWA where a direct hydrological connection to jurisdictional surface waters can be found. In *Rice v. Harken Exploration Co.*, the court concluded that a discharge of oil that might reach navigable waters by gradual, natural seepage was not the equivalent of a discharge to navigable waters. 250

F.3d 264, 271 (5th Cir. 2001). The court suggested, however, that it would be open to finding a discharge had occurred through groundwater when it underscored the plaintiffs' failure to provide any "evidence of a close, direct and proximate link between [the defendant's] discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water." *Id.* at 272.

B. The District Court's Decisions Give Full Effect to Congress's Intent to Restore and Maintain the Nation's Waters.

Congress's purpose in enacting the CWA—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—embraced a "broad, systemic view . . . of water quality."

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). The County attempts to minimize that goal. Adopting the County's theory would allow dischargers to avoid responsibility simply by discharging pollutants from a point source into jurisdictional surface waters through any means that was not direct.

Courts have viewed the CWA's broad purpose of protecting the quality of navigable waters as a clear congressional signal that "any pollutant which enters such waters, whether directly or through

groundwater, is subject to regulation by NPDES permit.” *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994). “Stated even more simply, whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation to our nation’s rivers and streams.” *Bosma*, 143 F. Supp. 2d at 1179-80.

The state’s authority to protect groundwater is in no way impaired by subjecting point sources to NPDES-permit requirements to protect surface waters. Thus, the County’s argument that it should not be liable here because “preservation of states’ authority over the regulation of groundwater” is a “co-equal” goal of the CWA misses the mark. *Op. Br.* at 34-35. This emphatically is not a case about the regulation of groundwater. Instead it is about the regulation of discharges of pollutants to waters of the United States. To the extent the County’s argument relies on the regulatory scheme governing disposal into wells, *Op. Br.* at 24-27, that is flawed because the regulation of wells under the Safe Drinking Water Act’s (SDWA) Underground Injection Control (UIC) program does not preclude or displace regulation under the

CWA's NPDES program.⁴ See *Hudson R. Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1100 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991) (objectives of the CWA and the SDWA are not "mutually exclusive"); see also *Bath Petrol. Storage, Inc. v. Sovas*, 309 F. Supp. 2d 357, 369 (N.D.N.Y. 2004).

C. The District Court's Finding of Liability Is Consistent with EPA's Longstanding Position.

EPA's longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a "direct hydrological connection" between the groundwater and the surface water. EPA has repeatedly articulated this view in multiple rulemaking preambles. In 1990, EPA stated that "this rulemaking only addresses discharges to water of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a

⁴ The County misconstrues EPA's position in *Inland Steel v. EPA*, 901 F.2d 1419 (7th Cir. 1990). EPA argued that not all disposals into injection wells are discharges of pollutants under the CWA, and that the connection between the wells and navigable waters in that case was too attenuated to bring the discharges under the purview of the CWA. *Id.* at 1422-23. That position (embraced by the Seventh Circuit) does not mean that "injection into wells is not a discharge of pollutants requiring a NPDES permit." Op. Br. at 27.

hydrological connection between the ground water and a nearby surface water body).” NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Dec. 2, 1990).

And in the preamble to its final rule addressing water quality standards on Indian lands, EPA stated:

[T]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered “waters of the United States” but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.

56 Fed. Reg. at 64,982.

In 2001, EPA reiterated its position: “As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act.” 66 Fed. Reg. at 3017. EPA recognized that the determination was “a factual inquiry, like all point source determinations,” adding:

The time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site specific factors, such as geology, flow, and slope. Therefore, EPA is not proposing to establish any specific criteria beyond confining

the scope of the regulation to discharges to surface water via a “direct” hydrological connection.

Id. A general hydrological connection between all groundwater and surface waters is insufficient; there must be evidence showing a direct hydrological connection between specific groundwater and specific surface waters. *Id.*

To the extent there is statutory ambiguity about whether the CWA applies to discharges to jurisdictional surface waters through groundwater, EPA’s interpretation is entitled to *Chevron* deference. *Chevron*, 467 U.S. at 842-43.

The County’s contention that the direct-hydrological-connection standard is at odds with EPA’s recently-stated position on whether groundwater is a jurisdictional water misinterprets EPA’s statements. Op. Br. at 38-39. The Clean Water Rule, which was promulgated in June 2015 (and stayed by the Sixth Circuit pending further order of the court, *see In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 809 (6th Cir. 2015)), expressly excludes groundwater from the definition of “waters of the United States.” 80 Fed. Reg. 37,054. But, as EPA clarified, the fact that groundwater itself is not jurisdictional under the CWA does not mean that pollutants that reach waters of the United

States through groundwater do not require CWA permits. “EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of ‘waters of the United States.’” See EPA, *Response to Comments – Topic 10 Legal Analysis* (June 30, 2015); available at <http://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states>. The County erroneously attempts to conflate the jurisdictional exclusion of groundwater with the role that groundwater can play as the pathway through which pollutants from a point source reach jurisdictional surface waters.⁵

⁵ The district court stated that if the proposed Clean Water Rule was finalized, it “would likely mean that the groundwater under the [facility] could not itself be considered ‘waters of the United States’” and that this would affect whether Plaintiffs could also prevail under *Healdsburg. Hawaii I*, 24 F. Supp. 3d at 1001. But the court erred in attempting to apply *Healdsburg* because the jurisdictional status of groundwater itself is irrelevant to whether discharges that move through groundwater to jurisdictional waters require NPDES permits.

II. THE COUNTY IS LIABLE FOR UNPERMITTED DISCHARGES DUE TO THE “DIRECT HYDROLOGICAL CONNECTION” BETWEEN THE GROUNDWATER AND THE OCEAN.

Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water.⁶ Ascertaining whether there is a direct hydrological connection is a fact-specific determination. 66 Fed. Reg. at 3017. To qualify as “direct,” a pollutant must be able to proceed from the point of injection to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. These factors will be affected by the type of pollutant, geology, direction of groundwater flow, and evidence that the pollutant can or does reach jurisdictional surface waters. *Id.*

Here, the district court correctly held that the County discharged pollutants to the ocean through groundwater. In *Hawaii I*, the court

⁶ Some courts refer to a “hydrological connection.” The more accurate formulation, however, is a “direct hydrological connection,” which recognizes that some connections are too circuitous and attenuated to be under the CWA’s purview.

determined that a direct hydrological connection exists between the groundwater and the ocean. The tracer-dye study clearly established that the discharges moved from wells 3 and 4 to the ocean in relatively short order.⁷ *Hawaii I*, 24 F. Supp. 3d at 984. The study concluded that after 84 days, the dye began to appear along the North Kaanapali Beach, half a mile from the facility. *Id.* The tracer-dye study also estimated that 64% of the treated effluent from wells 3 and 4 followed this route to the ocean. *Id.*

Although the court's ultimate conclusion was correct, the court's alternative explanation for the County's liability under the "significant nexus" standard from *Rapanos* and *Healdsburg* was erroneous. *Hawaii I*, 24 F. Supp. 3d at 1004. *Rapanos* and *Healdsburg* applied the "significant nexus" standard in determining whether the receiving waters were "waters of the United States." In contrast, here, there is no dispute that the Pacific Ocean (the receiving water in this case), as a "territorial sea," is a "navigable water" under the CWA. This Court

⁷ Although this tracer-dye study simplified the analysis, such studies are not the only means of demonstrating a direct hydrological connection. It also is not necessary to trace the exact pathway that the pollutants take to establish that a direct hydrological connection exists.

should clarify that the “significant nexus” standard has no relevance here.

In *Hawaii II*, the district court correctly held the County discharged pollutants from wells 1 and 2 to the ocean through groundwater. But the court’s opinion did not go into great detail about the movement through groundwater because the County “expressly conceded that pollutants introduced by the County into wells 1 and 2 were making their way to the ocean” and “acknowledge[d] that there is a hydrogeologic connection between wells 1 and 2 and the ocean.”

Hawaii II, 2015 WL 328227, at *2.

There was additional evidence that a direct hydrological connection existed between wells 1 and 2 and the Pacific Ocean. *First*, the tracer-dye study models indicated that in some circumstances treated effluent from well 2 would move along flowpaths that were similar to those traveled by the dye injected into wells 3 and 4 and would emerge at the same submarine springs. SER 237, 240, 243. Because wells 3 and 4 are located between the springs and well 2, the flowpath for these discharges would be affected by the amount of effluent injected into each well. SER 237. When most of the effluent was

injected into wells 3 and 4, the effluent from well 2 would travel northwesterly from the wells and not toward the springs; however, when well 2 received all of the effluent, the study indicated that the discharges would emerge at the springs. SER 240, 243. There was no dispute that given the proximity of wells 1 and 2, the modeling for well 2 predicts the pathways for discharges from well 1. ER 443, SER 189.

Second, Plaintiffs' expert stated that the effluent discharged from wells 1 and 2 "will be conveyed . . . relatively quickly (*i.e.*, with first arrival at the ocean in a matter of months)" and concluded that "[s]ince the aquifer material and hydraulic gradient in the area of all four . . . wells are similar, the groundwater flow will also be similar." SER 183. Although the County's expert argued that the point of entry for pollutants into the ocean from wells 1 and 2 could not be identified, the County did not dispute that the study showed effluent emerging at the same springs where the effluent from wells 3 and 4 emerged. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, ECF No. 136, at 16.

Any fears about the implications of point-source discharges to jurisdictional surface waters through groundwater with a direct hydrological connection being subject to NPDES-permit requirements

are unwarranted. Op. Br. at 43-44. EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities. *See, e.g.*, NPDES Permit No. NM0022306, available at <https://www.env.nm.gov/swqb/Permits/>; NPDES Permit No. WA0023434, available at <https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821>.

Further, only those discharges that move through groundwater with a direct hydrological connection to surface waters are affected. That not all discharges through groundwater are subject to NPDES-permit requirements is shown by cases where the hydrological connections were too attenuated. In *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, the court agreed with the plaintiff that discharges through groundwater may be subject to the CWA and allowed the parties to submit evidence on the issue. 707 F. Supp. 1182, 1196 (E.D. Cal. 1988). Based on evidence indicating that it would take “literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters,” the court found that there

were no regulated discharges. *MESS v. Cheney*, 763 F. Supp. 431, 437 (E.D. Cal. 1989). And even after allowing the plaintiff an opportunity to provide more testimony at trial, the court ruled that the plaintiff had failed to meet its burden. *MESS v. Cheney*, No. 86-475, 20 Env'tl. L. Rep. 20,877 (E.D. Cal. Apr. 30, 1990), *vacated on other grounds*, 47 F.3d 325, 331 (9th Cir. 1995).

Likewise, in *Greater Yellowstone Coalition v. Larson*, evidence indicated that the connection to surface waters was too attenuated. 641 F. Supp. 2d 1120 (D. Idaho 2009), *aff'd* 628 F.3d 1143, 1153 (9th Cir. 2010). In that case, federal agencies determined that a CWA Section 401 certification was not required for a mining operation. Under Section 401, “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions.” 33 U.S.C. § 1341(a)(1). The agencies based their determination on evidence that before reaching surface waters, the pollutants would pass through hundreds of feet of overburden and bedrock, and then travel underground through soil and rock for one to

four miles. *Greater Yellowstone*, 641 F. Supp. 2d at 1139. Modeling predicted that the movement of peak concentrations would take between 60 and 420 years. *Id.* The court weighed competing evidence from the plaintiff and ultimately deferred to the agencies' determination that the hydrological connection was too attenuated. *Id.* at 1141.

Unlike *MESS* and *Greater Yellowstone*, in which the connection was too attenuated, the discharges here resulted from a direct hydrological connection, and thus require a permit.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY HAD FAIR NOTICE FOR PURPOSES OF CIVIL PENALTIES.

In the Argument section of its brief, the County maintains that this Court should direct the district court to set aside any civil penalties “imposed on the County regardless of the outcome of the challenge to the district court’s liability rulings” because it lacked fair notice. Op. Br. at 47. As an initial matter, the County would seemingly be precluded from appealing the fair-notice issue as to civil penalties because it stipulated to their amount in the settlement agreement. To the extent that the County has reserved its right to appeal the issue, however, the County’s argument lacks merit.

This Court has held that a party may not be deprived of property through civil penalties without fair notice. *See United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008). To provide notice, “a statute or regulation must ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.’” *Id.*

This Court looks first to the language of the statute when determining whether a party had fair notice. *Id.* As discussed above, Congress used broad language in the CWA in defining the discharge of pollutants, and that expansiveness provides a reasonable opportunity for a person to know what the statute prohibits. The breadth of that language is only bolstered by the intent of the CWA.

Moreover, EPA has made multiple public statements in rulemaking preambles that consistently described its interpretation that discharges of pollutants to jurisdictional surface waters through groundwater with a direct hydrological connection are subject to NPDES permitting under the CWA. Further, with respect to specific communications with the County, EPA sent two letters to the County in early 2010. In January 2010, EPA stated that it was “investigating the

possible discharge of pollutants to the coastal waters of the Pacific Ocean along the Kaanapali coast of Maui.” SER 5. This investigation was spurred in part by a 2007 study concluding that much of the nitrogen in Kaanapali coastal waters came from the County’s facility and a 2009 study that found the same nitrogen signature and other “wastewater presence” in the ocean. *Hawaii I*, 24 F. Supp. 3d at 984. The letter continued: “In order to assess the impact of the [facility’s] effluent on the coastal waters and determine compliance with the Act, EPA is requiring the County to sample the injected effluent, sample the coastal seeps, conduct an introduced tracer study, and submit reports on findings to EPA.” SER 5. EPA required this sampling, monitoring, and reporting pursuant to CWA Section 308, under which “the [EPA] Administrator shall require the owner or operator of any point source” to provide the information. 33 U.S.C. § 1318(a)(A). The letter provided notice that there was evidence suggesting a hydrological connection.

In March 2010, EPA responded to the County’s request for a UIC permit renewal under the SDWA “by informing the County that recent studies ‘strongly suggest that effluent from the facility’s injection wells is discharging into the near shore coastal zone of the Pacific Ocean.’”

Hawaii I, 24 F. Supp. 3d at 984 (quoting ER 122). As a result, EPA required the County to apply for a CWA Section 401 water-quality certification for its injection facilities as a prerequisite to EPA's issuance of a new UIC permit. ER 121-22; *see* 33 U.S.C. § 1341(a). The County's assertion that this letter did not put it on notice of potential CWA liability because the certification was related to its UIC permit rather than any obligations under the NPDES program is unavailing. Op. Br. at 56-57. A UIC permit does not preclude the need for a NPDES permit where required, and the March 2010 communication reiterated EPA's position that the discharges might be covered by the CWA, depending on the results of the ordered sampling, monitoring, and reporting.

The County was on fair notice. In any event, fair notice is only one of many factors informing a civil-penalty amount, *see* 33 U.S.C. § 1319(d), and thus the County's argument that the penalty should be set aside for lack of fair notice *alone* is flawed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

OF COUNSEL:

KARYN WENDELOWSKI
U.S. Environmental
Protection Agency
Office of General Counsel
Washington, D.C.

/s/ Frederick H. Turner
FREDERICK H. TURNER
AARON P. AVILA
R. JUSTIN SMITH
Attorneys, U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (for amicus briefs as provided by Fed. R. App. P. 29(d)) because it contains 6,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook.

/s/ Frederick H. Turner
FREDERICK H. TURNER
U.S. Department of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will serve the brief on the other participants in this case.

/s/Frederick H. Turner
FREDERICK H. TURNER
U.S. Department of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov