

Attorneys General of Maryland, California, Massachusetts, Oregon, and Vermont

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Via Electronic Transmission

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Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water (EPA-HQ-OW-2018-0063; FRL-9973-41-OW)

Dear Mr. Wilson:

The undersigned Attorneys General appreciate the opportunity to submit these comments in the above-referenced docket to address whether the U.S. Environmental Protection Agency (EPA) should clarify or revise its longstanding position regarding “whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to [Clean Water Act (“CWA”)] regulation.” Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126, 7126 (Feb. 20, 2018) (“EPA Notice”).

As explained below, EPA’s long-held position that indirect discharges to navigable waters¹ via a sufficiently proximate groundwater connection are subject to CWA protections is correct and should not be revisited. *First*, as the EPA Notice acknowledges, this is indeed EPA’s long-held position, articulated in a variety of settings. *Second*, EPA’s position is consistent with the text of the CWA’s point source discharge provisions. *Third*, the case law overwhelmingly supports EPA’s position. *Fourth*, EPA’s position does not create unreasonable burdens with respect to compliance or implementation. *Finally*, other statutes do not provide any adequate substitute for the CWA’s protections against discharges to navigable waters via hydrologically connected groundwater.

The protections embodied by EPA’s longstanding position are important to our states—which, more generally, rely on appropriate implementation and enforcement of the CWA’s National Pollutant Discharge Elimination System (“NPDES”) program and its prohibition against unauthorized discharges of pollutants into navigable waters. While states normally are free to establish and implement pollution control programs (including programs to protect navigable waters) that are more stringent than their federal counterparts, they generally are not free to directly regulate discharges outside their borders. *See generally Int’l Paper Co. v. Ouelette*, 479 U.S. 481,

¹ The term “[n]avigable waters” is defined to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). These comments use the term “navigable waters” in the same manner as the statute.

489-91 (1987). And discharges into upstream waters can degrade the quality of waters downstream. Accordingly, our states rely on the CWA's federal regulatory floor to protect in-state waters against pollution flowing downstream from states that otherwise might opt for less restrictive controls on discharges of pollutants—including discharges that reach navigable waters via a groundwater intermediary. Because of the CWA, our states can trust that out-of-state discharges to navigable waters—including waters that ultimately flow within our boundaries—are monitored and subject to permits that take into account the capabilities of treatment technologies, impacts on water quality, and the Act's overall goal of protecting the nation's waters. Discharges into navigable waters via groundwater are one category of pollution as to which the CWA's regulatory floor is essential.

A. EPA Has Consistently Held That Discharges To Navigable Waters Via Hydrologically Connected Groundwater Are Subject To The CWA.

Pollutants traveling from a point source through groundwater to navigable waters can have the same devastating effects on such waters as pollutants that do not travel through an intermediary. Accordingly, as the EPA Notice recognizes, EPA has long stressed that the CWA's restrictions on point source discharges apply with full force to discharges that reach navigable waters via a sufficiently proximate groundwater connection. EPA Notice, 83 Fed. Reg. at 7127. Indeed, EPA emphasized in a recent amicus brief that its "*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." Br. for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 22-23, *Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018) (No. 15-17447) (emphasis added) ("EPA *Hawai'i Wildlife Fund* Br.").

EPA's recent statement of position is consistent with its regulatory pronouncements dating back nearly three decades. In the preamble to its 1990 NPDES stormwater discharge regulations, EPA stated that its rulemaking addressed only "discharges to waters of the United States," so that "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*)." NPDES Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added). In the years since, EPA has consistently made a similar point. *E.g.*, Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (discharges to groundwater with a direct hydrological connection to surface water "are regulated because such discharges are effectively discharges to the directly connected surface waters"); Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("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 . . . between the groundwater and the surface water."); NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001) ("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.").

B. EPA's Longstanding Position On CWA Jurisdiction Is Consistent With The Statutory Text.

EPA's past considered pronouncements regarding discharges to navigable waters via groundwater are correct and should not be revisited. To begin, those pronouncements are consistent with the CWA's text. The Act categorically prohibits the unpermitted "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). On its face, that broad language encompasses both direct and indirect additions of pollutants to navigable waters. Regardless of whether pollutants are discharged *directly* to navigable waters, they are still discharged "to navigable waters" within the meaning of the statute. *Id.* (emphasis added). The fact that they first pass through groundwater therefore does not except those discharges from the CWA's liability and permitting scheme.

The Supreme Court has confirmed that this is the correct reading of the CWA. In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Scalia's plurality opinion confronted arguments that a narrow construction of "waters of the United States" would "significantly affect[]" enforcement of the NPDES program. Responding to those arguments, the opinion stressed that the CWA's text does not limit the program's scope to "direct" discharges, meaning ones that pass directly from the point source into regulated navigable waters (such as discharges from a pipe directly into a river). Justice Scalia explained:

The 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." Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

Id. at 743 (emphasis in original; citations omitted). Consistent with *Rapanos*, EPA's longstanding position correctly recognizes that the statute contains no requirement that discharges be made *directly* to navigable waters without traveling through an intermediary.

That reading of the statute is supported by common sense, for it prevents polluters from manipulating CWA permitting requirements. Were the CWA's point source provisions limited to direct discharges, facility operators could evade those provisions by structuring discharges so that, instead of passing directly from the "end of the pipe" into surface water, they pass through an intermediary before entering the surface water. The CWA's text sensibly forecloses that type of manipulation by eschewing any "direct discharge" requirement. Indeed, reading in such a requirement could have an impact well beyond discharges via a groundwater intermediary. For instance, instead of discharging directly into a river, a polluter might evade CWA point source regulation by moving its discharge pipe a short distance away from the river, even though its pollutants are

sure to reach and affect those waters.² EPA's longstanding position properly declines to give polluters a road map to evade liability while threatening the integrity of the nation's waters.

EPA's position concerning discharges reaching navigable waters via a sufficiently proximate groundwater connection is also consistent with the statutory definition of "point source." The CWA defines "point source" as "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." 33 U.S.C. § 1362(15). A polluting source is no less a "discernible, confined and discrete conveyance," *id.*, when the pollutants it discharges first pass through groundwater before reaching navigable waters. For example, ponds, lagoons, and landfills that store coal ash can be point sources when they channel coal ash to navigable waters via leaks into groundwater. *See, e.g., Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017), *appeal docketed*, Nos. 17-1895 & 17-1952 (4th Cir. 2017) (oral argument heard Mar. 21, 2018); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 443-44 (M.D.N.C. 2015). Similarly, that source is no less one "from which pollutants are or may be discharged," 33 U.S.C. § 1362(15), when those pollutants pass through groundwater before reaching navigable waters.

To be sure, in passing the CWA, Congress declined to include groundwater as a class of waters covered by the NPDES program. *See, e.g.*, 118 Cong. Rec. 10,669 (1972). That rejection, however, does not undermine EPA's long-held position regarding discharges to navigable waters via groundwater. What Congress rejected was broad regulation of discharges to groundwater qua groundwater—*i.e.*, without any requirement of a subsequent connection to navigable waters. *See id.* EPA's long-held position, by contrast, does not interpret the statute to protect groundwater as such; it interprets the statute to protect navigable waters from point source discharges that reach such waters via groundwater. *See Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Ida. 2001) (agreeing with this view of "Congress's decision not to comprehensively regulate groundwater as part of the CWA"); *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445 (question is "not whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater").

Importantly, EPA's longstanding position does not mean that every discharge of pollutants to groundwater is covered by the NPDES program because those pollutants might ultimately find

² *See Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754, 768 (9th Cir. 2018) ("The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions."); *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005) ("[I]t 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.").

their way into navigable waters.³ Instead, there must be a sufficiently proximate connection between the point source and the navigable waters to trigger the NPDES permitting program. To that end, courts have required that pollutants be “traceable” to the source; that there be a “hydrologic connection” between the groundwater and navigable waters; or that there be a “direct” or “immediate” connection between the groundwater and navigable waters. *See infra* pp. 5-8. These are different articulations of the same principle:⁴ where it is predictable or demonstrable that discharged pollutants travel through groundwater to reach *particular* navigable waters, it is sensible to treat them as discharges to those navigable waters.

C. Case Law Supports EPA’s Longstanding Position.

EPA’s longstanding position is consistent with the overwhelming majority of decisions to address liability for discharges to navigable waters through groundwater. These decisions are so numerous and widespread that they underscore the absence of any need for EPA to revise or clarify its previous statements. Indeed, a change in EPA’s longstanding position would directly contradict a long line of precedent.

In *Hawai’i Wildlife Fund*, for instance, the defendant injected wastewater into groundwater via disposal wells; the groundwater, in turn, conveyed much of that wastewater into the ocean. 881 F.3d at 758-60. The court held that the defendant’s unpermitted discharges of pollutants into the ocean, via a groundwater conduit, violated the CWA. *Id.* at 768. In reaching this conclusion, the court cited other cases in which pollutants were discharged from point sources into protected waters “indirectly”—that is, via an intermediary conduit such as groundwater or rainwater. *Id.* at 763 (citing *Peconic Baykeeper Inc. v. Suffolk County*, 600 F.3d 180, 188 (2d Cir. 2010), which involved pesticides sprayed from trucks and helicopters that traveled through the air to reach protected water; *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994), which concerned liquid manure discharged from tankers onto fields with a direct connection to navigable waters; and *Sierra Club v. Abston Constr.*, 620 F.2d 41, 45 (5th Cir. 1980), which involved sediment discharged from collection basins via gravity flow of rainwater). The crucial question, the court reasoned, is whether the pollutants are “fairly traceable” from the point source through the groundwater to the protected water. *Hawai’i Wildlife Fund*, 881 F.3d at 765.⁵

³ *See* EPA Notice, 83 Fed. Reg. at 7127 (“EPA has not stated that CWA permits are required for all pollutant discharges to groundwater in all cases, but rather that pollutants discharged from point sources to jurisdictional surface waters that occur via groundwater or other subsurface flow that has a direct hydrologic connection to the surface water may require such permits.”); *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (emphasizing that “a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability”).

⁴ *See, e.g., Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 n.12 (4th Cir. 2018) (“We see no functional difference between the Ninth Circuit’s fairly traceable concept and the direct hydrological connection concept developed by EPA that we adopt today, which as we explain below includes a concept of traceability.”).

⁵ The court’s reasoning in *Hawai’i Wildlife Fund* was consistent with the position EPA took as amicus curiae in that case. *See EPA Hawai’i Wildlife Fund Br. 14* (“This reading of ‘discharge

Just last month, in *Upstate Forever*, the Fourth Circuit reached the same result. *Upstate Forever* involved a pipeline spill of “several hundred thousand gallons of gasoline,” some of which reached nearby navigable waters. 887 F.3d at 641; *see id.* at 643 (allegation that pipeline broke less than 1000 feet from one creek and wetland, and 400 feet from another creek and wetland). Relying on *Rapanos*, the court “observe[d] that a discharge of a pollutant under the Act need not be a discharge ‘directly’ to a navigable water from a point source.” *Id.* at 649; *see also id.* at 650 (explaining that “a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters”). Thus, the court reasoned, “an indirect discharge may fall within the scope of the CWA”—but “such discharges must be sufficiently connected to navigable waters to be covered under the Act.” *Id.* at 651. On that score, the court adopted EPA’s “direct hydrological connection” formulation, which “identif[ies] for purposes of the CWA whether there is a clear connection between the discharge of a pollutant and navigable waters when the pollutant travels through ground water.” *Id.*

Lower court decisions, too, are consistent with EPA’s longstanding position. For instance, in *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753 (E.D. Va. 2017), *appeal docketed*, Nos. 17-1895 & 17-1952 (4th Cir. 2017) (oral argument heard Mar. 21, 2018), the court considered ponds and a landfill used to store coal ash from a power plant surrounded by navigable waters. *Id.* at 756-57. Coal ash pollutants dissolved into the groundwater, which then carried them to the navigable waters. *Id.* at 758. The court observed that the ponds and landfills “channel[] and convey[] arsenic directly into the groundwater and thence into the surface waters.” *Id.* at 763. The discharges were covered by the CWA’s point source program, the court continued, even though they traveled to navigable waters through groundwater. *See id.* at 762. “Where the facts show a direct hydrological connection between ground water and surface water,” the court reasoned, denying liability would defeat Congress’s goal of “protect[ing] the quality of the nation’s surface water.” *Id.*

The court in *Yadkin Riverkeeper* reached a similar result. *Yadkin Riverkeeper* concerned discharges from coal ash lagoons at a power plant into an adjacent river, via a groundwater connection. 141 F. Supp. 3d at 436-37, 443. The court concluded that the lagoons were “confined and discrete” because they were “designed to hold accumulated coal ash,” and that they were “conveyances” because they were “allegedly unlined and leaking pollutants into the groundwater.” *Id.* at 443-44. The discharges fell within CWA jurisdiction, moreover, because they allegedly reached navigable waters via a hydrologically connected groundwater conduit. *See id.* at 445 (noting the Act’s goal of “protect[ing] the quality of the nation’s waters,” and describing EPA’s statements on the issue).

Similarly, the Middle District of Tennessee has concluded that the CWA prohibits unauthorized point source discharges into navigable waters via a groundwater connection that is “real, direct, and immediate.” *Tenn. Clean Water Network v. TVA*, 273 F. Supp. 3d 775, 827 (M.D.

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.”).

Tenn. 2017), *appeal docketed*, No. 17-6155 (6th Cir. Oct. 3, 2017). *Tennessee Clean Water Network* involved a TVA-maintained series of unlined and leaking coal ash impoundments on the banks of the Cumberland River. *See, e.g., id.* at 785-79. After a full trial, the court found TVA responsible for discharges that reached the river by briefly traveling through groundwater. *See, e.g., id.* at 841-42. In so ruling, the court relied on expert testimony regarding high concentrations of coal ash pollutants, such as arsenic and other heavy metals, at locations where groundwater entered the river. *See, e.g., id.* at 797-99.

The foregoing are just a few of the many decisions to resolve this issue in a manner consistent with EPA's longstanding position. Other decisions have noted that position in concluding that discharges to navigable waters via hydrologically connected groundwater are covered by the CWA.⁶ Still others have reached the same result without taking note of EPA's position.⁷

The supposedly contrary decisions that the EPA Notice cites do not warrant clarifying or revising EPA's long-held position, for they are actually consistent with that position and the discussion above. *See* EPA Notice, 83 Fed. Reg. at 7128 (stating that "[c]ertain courts have concluded that a hydrological connection between groundwater and surface waters is insufficient to justify CWA regulation"). For instance, the EPA Notice cites the Fifth Circuit's decision in *Rice*, 250 F.3d 264. But that decision is fully consistent with EPA's established position on discharges reaching navigable waters through a groundwater intermediary. *Rice* held only that a "generalized

⁶ *See Flint Riverkeeper, Inc. v. S. Mills, Inc.*, No. 5:16-cv-435 (CAR), 2017 WL 2059659, *4-*5 (M.D. Ga. May 12, 2017); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. Civ. A. 3:14-11333, 2015 WL 2144905, *8 (S.D. W. Va. May 7, 2015); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, *10-*11 (D. Ore. Oct. 30, 2009); *Washington Wilderness Coal. v. Hecla Min. Co.*, 870 F. Supp. 983, 990-91 (E.D. Wash. 1994).

⁷ *See, e.g., S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015) (denying motion to dismiss CWA suit for discharges to navigable waters via groundwater because "it is clear that the plaintiffs designate the San Francisco Bay, and not groundwater, as the navigable water that is affected under the CWA"); *Tennessee Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, *5 (N.D. Ala. Aug. 20, 2013) (denying motion to dismiss CWA suit for discharges to navigable waters via groundwater because plaintiffs had adequately alleged a "substantial nexus" between groundwater and navigable waters); *Hernandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) (holding that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); *Coldani v. Hamm*, No. Civ. S-07-660 RRB EFB, 2007 WL 2345016, *7 (E.D. Cal. Aug. 16, 2007) (denying motion to dismiss because plaintiff alleged that defendant had "polluted groundwater that is hydrologically connected to navigable waters"); *N. Cal. River Watch*, 2005 WL 2122052, *3 (holding that "a hydrological connection between a man-made settling basin and a water of the United States is sufficient to subject the basin to the provisions of the CWA"); *Idaho Rural Council*, 143 F. Supp. 2d at 1180 (holding that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); *see also Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138-39 (D. Ida. 2009) (upholding agencies' determination that no direct hydrologic connection existed between the groundwater and surface water).

assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from . . . contaminated groundwater” will not establish liability. 250 F.3d at 272. In so holding, the Fifth Circuit did not address the “direct hydrologic connection” theory that EPA has repeatedly embraced. Indeed, it faulted the plaintiffs for not presenting evidence regarding, among other things, flow rates into navigable waters; “the level of threat to” those waters; or “any present or past contamination” of those waters. *See id.* Such evidence would be beside the point if a groundwater intermediary automatically vitiated CWA liability.⁸

The Seventh Circuit’s decision in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), also does not undermine what EPA has said about discharges to navigable waters via groundwater. In rejecting liability for discharges from an artificial pond (the claimed point source), the court held only that “the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters,” *id.* at 966, and noted that “the *possibility* that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the ‘waters of the United States,’” did not warrant liability, *id.* at 965 (emphasis added). As with *Rice*, the court did not address any argument regarding a direct hydrologic connection between groundwater and the particular navigable waters at issue in the case.

D. CWA Coverage Of Discharges To Navigable Waters Via A Groundwater Intermediary Does Not Create Impracticalities.

In the past, litigants have argued that CWA coverage of discharges to navigable waters via groundwater would be impractical or unduly burdensome from the standpoint of compliance or implementation. Those arguments are beside the point because, as noted above, the CWA’s text does not limit its coverage to discharges directly to navigable waters. They also are wrong on the merits.

First, EPA’s longstanding position does not unreasonably increase the burdens of compliance or regulatory uncertainty. That position, as noted, provides not that the CWA regulates all discharges to groundwater, but only that it regulates discharges to navigable waters via hydrologically connected groundwater. *See supra* p. 2. For many sites, the prospect of CWA liability should be clear even when there are no direct discharges to navigable waters. For instance, coal-fired power plants normally are located adjacent to navigable waters, which they use for cooling purposes. *See, e.g., Tenn. Clean Water Network*, 273 F. Supp. 3d at 785. In the absence of appropriate precautions, the on-site impoundments where those plants dispose of coal ash obviously pose significant risks of leaks that contaminate navigable waters by traveling through groundwater.

⁸ Meanwhile, the district court’s decision in *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798 (E.D.N.C. 2014), is no longer good law in light of the Fourth Circuit’s recent decision in *Upstate Forever*, discussed above. The court in *Cape Fear River Watch*, moreover, appears to have understood the question to be whether groundwater itself falls within the definition of “navigable waters”—not whether a groundwater intermediary eliminates liability for discharges to such waters. *See id.* at 809-10.

To the extent that a site's operator is uncertain about the nature of any groundwater connection, the operator is well positioned to investigate the groundwater connection and either (1) take the measures necessary to forestall any discharges to navigable waters; or (2) apply for an NPDES permit. Because the CWA is a strict liability statute, the responsibility to assess and mitigate the risk of liability and associated environmental harm falls on the operator. Consistent with the CWA framework, EPA has long made clear its view that a groundwater intermediary does not vitiate liability for discharges to navigable waters. *See supra* p. 2. Further, numerous court decisions nationwide have been consistent with EPA's long-expressed view. *See supra* pp. 5-8. There is no reason to think that the consequences have been destabilizing for industry, or have undermined states' implementation of their NPDES programs.

Second, establishment of (and compliance with) effluent limitations regulating indirect discharges to navigable waters is neither impractical nor burdensome. Effluent limitations embodied in a CWA permit may take a variety of forms—not just numeric end-of-pipe measurements. The CWA defines “effluent limitation” broadly to include “*any restriction* established by a State or the [EPA] Administrator 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) (emphasis added). In appropriate circumstances, effluent limitations may consist of best management practices or other controls designed to minimize or prevent the discharge of pollutants from various types of facilities.⁹ And at times, appropriate limitations may be ones that eliminate discharges of the pollutants at issue. Further, compliance with effluent limitations may be assessed end-of-pipe or in the navigable water receiving the polluted discharge. *See, e.g., Natural Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1199-200 (9th Cir. 2013).

E. Other Federal Statutes Are Inadequate To Guard Against Discharges To Navigable Waters Via Groundwater.

Finally, other federal statutes implicating groundwater discharges do not diminish the importance of the CWA's protections against discharges to navigable waters via groundwater. *See* EPA Notice, 83 Fed. Reg. at 7128 (inquiring “whether some or all such releases are addressed

⁹ *See, e.g., Citizens Coal Council v. EPA*, 447 F.3d 879, 895-97 (6th Cir. 2005) (upholding coal remiming effluent limitation guidelines (ELGs) requiring best management practices, and citing cases); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 496-97 (2d Cir. 2005) (describing concentrated animal feeding operation (CAFO) ELGs as best management practices); 40 C.F.R. § 412.4 (best management practices ELGs for CAFOs); 40 C.F.R. § 122.44(k) (describing when best management practices may be used as permit conditions, including when “[n]umeric effluent limitations are infeasible” or “[t]he practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA”); 40 C.F.R. § 450.21-.24 (construction ELGs containing numerous management requirements including erosion and sediment controls, soil stabilization, and other practices); EPA 2015 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) – Fact Sheet, at 23 (discussing use of best management practices in lieu of numeric effluent limitations), *available at* https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_fs.pdf (last visited May 20, 2018).

adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs”).¹⁰ A brief discussion of three such statutes makes this clear. The Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*, governs the storage and disposal of solid waste and, in that context, includes certain requirements specific to groundwater. *See, e.g., id.* § 6924(p) (addressing groundwater monitoring). But RCRA generally does not target harms to navigable waters, and its coverage is limited to *solid* waste storage and disposal. *See id.* § 6903(5) (defining “hazardous waste” to include only certain “solid waste”). The CWA’s prohibition on unauthorized point source discharges into navigable waters, applied to discharges that first travel through groundwater, does not duplicate or interfere with RCRA’s provisions.¹¹

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, likewise does not eliminate the need for CWA coverage of discharges to navigable waters via hydrologically connected groundwater. The CWA is, in the first instance, a statute meant to prevent unauthorized discharges from taking place. *See* 33 U.S.C. § 1311(a) (“Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”); *see also, e.g., id.* § 1319(d) (prescribing civil penalties for violations of section 1311); *id.* § 1319(c)(1)(3)(A) (prescribing criminal penalties for certain violations of section 1311). Compliance means that navigable waters will not be sullied by unauthorized point source discharges. CERCLA, by contrast, does not make any particular discharge or contamination unlawful; instead,

¹⁰ Nor do state statutes or programs adequately substitute for the CWA’s protections. As noted above, states generally are free to make their *own* pollution control programs more stringent than what federal law requires—but not to regulate discharges taking place in other states. Federal protections are necessary to ensure that water quality in downstream states is not degraded by pollution in upstream states that otherwise might choose less stringent pollution controls. *See supra* pp. 1-2.

¹¹ Indeed, EPA has described the operation of certain regulations issued under RCRA in a manner making clear that RCRA coexists with the CWA’s prohibition on discharges to navigable waters via groundwater. Via a carve-out from the definition of “solid waste,” RCRA excludes from its coverage “solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to [NPDES permits].” 42 U.S.C. § 6903(27). Elaborating upon its Coal Combustion Residuals Rule, EPA has written that, for purposes of this exclusion, “EPA considers the ‘actual point source discharge’ to be the point at which a discharge reaches the jurisdictional waters, and *not in the groundwater* or otherwise prior to the jurisdictional water.” EPA, Relationship Between the Resource Conservation and Recovery Act’s Coal Combustion Residuals Rule and the Clean Water Act’s National Pollutant Discharge Elimination System Permit Requirements, <https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule> (last visited May 20, 2018) (emphasis added). That clarification would be nonsensical if discharges that first pass through groundwater before reaching navigable waters were not covered by the CWA in the first place.

it assigns liability for costs associated with the release (or threatened release) of hazardous substances. *See* 42 U.S.C. § 9607(a).

The Safe Drinking Water Act and its associated regulations likewise are insufficient to guard against discharges to navigable waters via a groundwater intermediary. The Safe Drinking Water Act targets the quality of drinking water, not navigable waters. *See, e.g.*, 42 U.S.C. § 300g (national primary drinking regulations apply only to certain “public water system[s]”); *id.* § 300f(4) (“public water system” is, subject to certain size limitations, “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances”); 40 C.F.R. Part 142. The underground injection control regulations promulgated under the Safe Drinking Water Act do address certain discharges into groundwater. *See* 40 C.F.R. Part 144; 42 U.S.C. § 300h(b). But they do so without regard to impacts on navigable waters, and they apply only to certain underground injection wells—not to the full panoply of discharges into groundwater with a hydrologic connection to navigable waters. *See* 40 C.F.R. § 144.1(g).

* * *

Our states rely on the CWA’s protections—including its protections against discharges to navigable waters via hydrologically connected groundwater—as a robust federal regulatory floor applicable throughout the United States. As explained above, EPA’s longstanding position concerning such discharges is well-supported by the CWA’s text and by case law. Other statutes, moreover, do not obviate the need for the CWA to cover such discharges. Accordingly, EPA should not revise or clarify its previous statements concerning liability for discharges to navigable waters via hydrologically connected groundwater. Should EPA nonetheless elect to initiate a proceeding aimed at such revision or clarification, we reserve the right to comment on any proposal that EPA advances at that time.

Respectfully submitted,

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