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U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2822IT
Attention: Docket ID No. EPA-HQ-OW-2018-0063
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on Clean Water Act Coverage of “Discharge of Pollutants” via a Direct Hydrologic Connection to Surface Water

Dear Docket Clerk:

GPA Midstream Association (“GPA Midstream”) appreciates this opportunity to submit comments to the U.S. Environmental Agency (“EPA”) in response to its notice regarding Clean Water Act Coverage of “Discharge of Pollutants” a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126 (Feb. 20, 2018).

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream appreciates the opportunity to explain why the Clean Water Act does not and should not regulate pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the surface water. Hence, we urge EPA to repudiate its previous statements and revise its interpretation of the Act as it is not faithful to either the statutory text or Congressional intent and does not reflect sound policy. As detailed more further below:

- First, groundwater is not a “navigable water” subject to Clean Water Act jurisdiction. The Act and its legislative history make that abundantly clear – and EPA should make

equally clear that the statute should not be interpreted to circumvent that plain direction.

- Second, regulating the diffuse subsurface groundwater as if it were a conduit to jurisdictional surface waters is likewise contrary to the plain language of the Act. It would conflict squarely with the definition of a “point source,” which is a “discernable, confined, and discrete conveyance.” Moreover, it would eviscerate the distinction Congress made between point source and nonpoint source discharges.
- Third, repudiating EPA’s prior statements would be a counterweight to decisions like *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, Case No. 17-1640 (4th Cir. April 12, 2018). If left standing, that ruling would dramatically expand Clean Water Act liability well beyond the statute’s text and turn the National Pollution Discharge Elimination System (“NPDES”) permitting program on its head – effectively requiring thousands of permits for unanticipated spills.
- Fourth, in considering this issue, EPA should recognize that properly defining Clean Water Act jurisdiction would avoid improperly preempting State groundwater regulations, as absent a clear statement from Congress preemption would be contrary to established law. In fact, the Act affirmatively disclaims jurisdiction over fields, such as groundwater, which the statute left to the States. Moreover, Congress proffered a clear legislative intent against groundwater regulation.
- Fifth, urgent action by EPA on this issue would be sound policy. EPA should act to stop the transformation of the Act into a further remedial cleanup statute like the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Resource Conservation and Recovery Act (“RCRA”) corrective action program.

As such, EPA should use its authority to issue an interpretive guidance document expressly excluding discharges to soil or groundwater from coverage under the Clean Water Act.

Discussion

I. Groundwater is Not “Navigable Water”

The Clean Water Act regulates discharges from point sources to “navigable waters.” 33 U.S.C. § 1362(12). The Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). Although defining “waters of the United States” with precision has long been a frustrating exercise, the definition is not so amorphous as to include groundwater. The Supreme Court has characterized “waters of the United States” as “rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters’” as well as “wetlands adjacent to but not regularly flooded by” those water bodies. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *see also id.* at 132 (upholding regulation of the features somewhere “between open waters and dry land” such as “shallows, marshes, mudflats, swamps, bogs”). Groundwater, the water existing underground in “the spaces between grains of gravel, sand, silt, clay, and cracks within rocks” is neither navigable nor open. USGS, Ground Water and Surface Water, A Single Resource, Circular 1139 (1998) at 6.

Indeed, Congress expressly recognized groundwater as being separate from regulated “navigable waters.” *See* 33 U.S.C. §§ 1252(a) (authorizing Administrator to investigate ways to prevent, reduce, or eliminate “the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.”); 1254(a)(5) (authorizing programs for “monitoring the quality of the navigable waters and ground waters”); 1256(e)(1) (rules for grant funding of programs to analyze data on “the quality of navigable waters and to the extent practicable, ground waters”). Further, the Clean Water Act’s references to ground water are exclusively for the purposes of non-regulatory study. *See* 33 U.S.C. §§ 1314(a)(1) (study of the biological, esthetic, and recreational effects “from the presence of pollutants in any body of water, including ground water”); 1314(a)(2) (publish information on the restoration of navigable waters and ground waters). Thus, groundwater, sharing none of the characteristics of “navigable waters” or “waters of the United States,” is consistently treated as something different from “navigable waters” under the Clean Water Act. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1450-51 (1st Cir. 1992) (groundwaters are not waters of the United States); *Chevron USA, Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 817 (D. Md. 2015) (“As several courts have observed, in other provisions of the CWA, Congress refers to ‘navigable waters’ and ‘ground waters’ as separate concepts, thus indicating them to be distinct.”); EPA, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 26, 2015) at 16 (“EPA has never interpreted ‘waters of the United States’ to include groundwater.”).

The legislative history confirms that Congress never intended groundwater to be “navigable waters,” “waters of the United States,” or otherwise directly regulated under the Act. *See* S. Rep. No. 414, 92d Cong., 1st Sess. at 73 (1972) (Congress rejected “[s]everal bills ... provid[ing] authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations.”). Indeed, Congress hotly debated the issue, with Representative Aspin proposing an amendment to the bill that would become the Federal Water Pollution Control Act Amendments of 1972 that would have regulated groundwater. He stated that the purpose of his amendment was to “bring[] ground water into the subject of the bill, into the enforcement of the bill. Ground water appears in this bill in every section, in every title except title IV ... when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. That is a glaring inconsistency which has no point.” 118 Cong. Rec. 10,666 (1972) (remarks of Rep. Aspin). Several members of Congress, however, rose in opposition to the amendment, stating that the Clean Water Act would only authorize EPA to study groundwater pollutants, not regulate them. *See, e.g.,* 118 Cong. Rec. 10,667 (remarks of Rep. Clausen); *id.* at 10,668 (remarks of Rep. Harsha); *id.* at 10,669 (remarks of Reps. Sisk and Harsha). The amendment which would regulate groundwater under the Clean Water Act was convincingly defeated by a vote of 86 to 34. 118 Cong. Rec. 10,669. Therefore, any interpretation of groundwater as “navigable waters” is not only unsupportable from the statutory text, but was an interpretation explicitly denied by Congress.

II. The Distinction Congress Made Between Point Source and Non-Point Source Pollutants Limits Clean Water Act Jurisdiction

Facing the clear text and legislative history excluding groundwater from regulation, some courts have asserted a more subtle argument – claiming that a Clean Water Act permit is required whenever groundwater acts as a conduit, channeling pollutants from any identifiable source to a navigable water. *See, e.g., Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754, 759 (9th Cir. 2018) (upholding Clean Water Act liability where groundwater acted as a “conduit” carrying pollutants from injection well to Pacific

Ocean); *Sierra Club v. Virginia Elec. & Power Co.*, 247 F. Supp. 3d 753, 756 (E.D. Va. 2017) (finding Clean Water Act jurisdiction where “piles and lagoons, in turn, conveyed arsenic created in the power plant to groundwater and, through the groundwater, to surrounding surface waters.”). Previous statements by EPA have supported this approach. See Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Hawaii Wildlife Fund v. County of Maui*, Case No. 15-17447, Dkt Entry 40 (9th Cir. May 31, 2016) (“2016 *Amicus* Brief”) at 13-14. However, this characterization of groundwater as a “conduit” that establishes a jurisdictional connection between a point source and a navigable water is contrary to the Clean Water Act’s definition of “point source” and Congress’ determination that non-point source pollution should not be regulated.

A. Groundwater Contamination is Nonpoint Source Pollution, Not a Point Source of Pollution

The Clean Water Act’s permitting and liability provisions center on the discharge of pollutants from “point sources.” These include “any discernible, confined and discrete conveyance” such as a “pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants may be discharged.” 33 U.S.C. § 1362(14). Courts have construed the term “point source” broadly while maintaining the requirement that it be “discernible, confined and discrete” in nature. See *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (“The concept of a point source was designed to further” the Clean Water Act’s permitting scheme “by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.”); *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 629-30 (D. R.I. 1990) (“The courts in these cases have broadly interpreted the definition of point source to reach all pollution that comes from a confined system.”) (citing cases); see also *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 642, 648-49 (2d Cir. 1993) (refusing to interpret “point source” to include a human being). The “discharge of any pollutant by any person” is prohibited unless in compliance with the Act’s regulatory scheme. 33 U.S.C. § 1311(a). This scheme includes the NPDES permitting provision where EPA or a delegated State agency may “issue a permit for the discharge of any pollutant....” *Id.* § 1342(a)(1). The “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12).

Distinct from “point sources” are “nonpoint sources of pollution.” 33 U.S.C. § 1314(f). “Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits.” *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). Congress identified types of non-point source pollution as including, but not limited to, runoff from fields, crops, forest lands, mines, and construction sites. 33 U.S.C. § 1314(f). Congress did not directly regulate nonpoint source pollution in any way. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000) (“The Act explicitly recognized the separate problems of point versus nonpoint pollution and established different approaches to mitigate them. Point sources were subjected to NPDES regulation (under Sections 301-02 and 402). Nonpoint sources were left subject to state regulation.”); *Oregon Natural Res. Council v. U.S. Forest Serv.*, 835 F.2d 842, 849 (9th Cir. 1987) (Congress “drew a distinct line between point and nonpoint pollution sources ... Nonpoint sources, because of their very nature, are not regulated under the NPDES.”). Instead of direct regulation, Congress required the EPA Administrator to collect information on the nature and extent of non-point source pollutants and methods for controlling them. See 33 U.S.C. § 1314(f).

The key distinction between the “point sources” and “nonpoint sources” of pollution is the existence of a discrete conveyance. See *Northwest Env’tl Defense Center v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011) (distinction between a point source and non-point source depends “on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).”); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010) (it is “clear that some type of collection or channeling is required to classify an activity as a point source”); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D. N.M. 1995) (“In contrast, a nonpoint source should be understood as any source of water pollution or pollutants not associated with a discrete conveyance.”). Thus, the existence of a discrete, confined conveyance is the touchstone of point source pollution.¹

Groundwater is not a discrete, confined conveyance, but a diffuse medium that may transport pollutants to differing degrees. Movement can be “exceedingly slow” and ground water can discharge through springs, seepage into surface waters, well withdrawal, evaporation, or plant withdrawal. *Id.* at USGS, Basic Ground-Water Hydrology (1983) at 1, 14. Discharges of contaminants to groundwater, whether they be from many discernible above-ground sources or natural sources (*e.g.*, the leaching of metals from bedrock), are widely dispersed in three dimensions and diluted in concentration depending on the nature of the pollutant, groundwater, and soil. See *Studies in Geophysics, Groundwater Contamination* (Nat’l Academies Press 1984) at 37. The lateral and longitudinal dispersion of pollutants depend upon factors such as stratification, ion exchange, filtration, soil chemistry, and many other factors. *Id.* at 19; EPA, *Understanding Variation in Partition Coefficient, K_d, Values*, Vol. I (1998) at 2.1. The wide dispersion of groundwater contamination and dilution of contaminant concentrations makes it more akin to nonpoint source pollution. *Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 620 (D. Md. 2011) (“Discharge from migrations of groundwater or soil runoff is not point source pollution...”); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140, n.4 (10th Cir. 2005) (“Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.”); *LAC Minerals*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (“the seepages are non-point source carriers of pollutants similar to stormwater, and are therefore no subject to the Act’s permitting requirements.”).

Yet, in order to establish Clean Water Act liability over pollutants that pass through groundwater, one *must* treat the groundwater itself as a point source even though it does not meet the definition of point source: a “discernible, confined and discrete conveyance” such as a “pipe, ditch, channel, tunnel, [or] conduit ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362 (emphasis added). For instance, in *Hawaii Wildlife Fund*, 881 F.3d at 759, the Ninth Circuit upheld the lower court’s determination

¹ In *Hawaii Wildlife Fund*, the Ninth Circuit reasoned that, if one can identify the source of pollution, then it cannot be nonpoint source pollution. 881 F.3d at 761; see *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, Opinion, Case No. 17-1640, (4th Cir. April 12, 2018) at 16, n.7 (claiming that any pollution that “is traceable not to dispersed activities” but “a discrete source” cannot be nonpoint source pollution). Congress, however, clearly recognized that some nonpoint source pollution could be traced back to specific sources. See 33 U.S.C. § 1314(f) (identifying nonpoint source runoff pollution from “agricultural and silvicultural activities,” “mining activities,” “construction activity,” and the “disposal of pollutants in wells or in subsurface excavations”). Yet, Congress did not deem these to be “point sources” under the statute as they lacked the characteristic (and statutorily required) “discernible, confined and discrete conveyance.”

that groundwater was a “conduit” through which pollutants passed into the Pacific Ocean. It ignored the appellant’s argument that groundwater contamination is nonpoint source pollution. Instead, the court merely declared that groundwater is “no different” from any other point source in that effluent “just also travels through groundwater before entering the Pacific Ocean.” *Id.* at 762. This ignores both the nature of groundwater, and how it interacts with pollutants, and the definition of “point source” under the Clean Water Act.

Other courts have adopted internally inconsistent reasoning to rule that pollutants passing through groundwater are point source discharges. For instance, in *Yadkin Riverkeeper v. Duke Energy Carolinas*, 141 F. Supp. 3d 428, 443 (M.D.N.C. 2015), the argument “that groundwater is not a point source” was undisputed and accepted by the court. Yet, the court nonetheless found Clean Water Act jurisdiction over discharges to groundwater because “the groundwater beneath the lagoons serves as a *conduit* between the point source lagoons and the Yadkin River and High Rock Lake....” (emphasis added). Thus, the court did not classify groundwater as a point source but assumed that groundwater would *act* as a point source (a “conduit”) in order to reach its conclusion. *See id.* at 445 (“hydrologically connected groundwater ... serves as a conduit between the point source and the navigable waters.”). Other courts have similarly demanded that groundwater serve as a *de facto* point source despite its failure to meet that term’s definition. *See Sierra Club v. Virginia Elec. & Power Co.*, 247 F. Supp. 3d 753, 756 (E.D. Va. 2017) (groundwater conveyed pollutants from a lagoon to navigable waters); *Yadkin Riverkeeper v. Duke Energy Carolinas*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) (“groundwater ... serves as a conduit between the point source and the navigable waters”).

Advocates frequently cite *dicta* in *United States v. Rapanos*, 547 U.S. 715, 743 (2006) (plurality opinion) claiming it shows there is no need to prove that a point source discharges “directly” to a navigable water, only that pollutants must eventually reach navigable waters regardless of the means or process.² This not only ignores the Court’s prefatory statement that “we do not decide this issue,” *id.*, but ignores the context. The Court’s discussion of “direct” versus “indirect” discharges turned entirely on the Act’s treatment of “discharge[s] into intermittent channels,” not diffuse methods of communication devoid of any discernible, confined, or discrete conveyance or channel. *See Rapanos*, 547 U.S. at 743 (Clean Water Act liability can attach to “pollutants discharged from a point source [that] do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”) (quoting *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976)) (emphasis added). Thus, if *Rapanos* can be read to say anything on the issue, it is that discharges must move through point sources – be they the original source of the pollutant or intermediate conveyances – for Clean Water Act jurisdiction to attach. Yet, groundwater is not a conveyance, conduit, or any other point source, as the United States and others have already conceded. *See, e.g.* 2016 *Amicus* Brief at 11 (“To be clear, the United States views groundwater as *neither* a point source *nor* a water of the United States regulated by the CWA.”).

Similarly, some would argue that Clean Water Act jurisdiction attaches to any pollutants that may eventually make their way to a navigable water, regardless of the method, means, or time required. In its 2016 *amicus* brief, the previous administration took the position that the Clean Water Act regulates

² *See, e.g., Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754, 759 (9th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, Opinion, Case No. 17-1640, (4th Cir. April 12, 2018) at 19-21; 2016 *Amicus* Brief at 10.

groundwater contamination because it “defines ‘discharge of pollutant’ as ‘any addition of any pollutant to navigable waters from any point source.’” 2016 *Amicus* Brief at 3 (citing 33 U.S.C. § 1362(12)(A) (emphasis in original)). However, the United States’ emphasis on the word “to” is not an argument. In fact, it only emphasizes that discharges to groundwater are discharges *to* groundwater, not navigable waters. Since the United States conceded that groundwater is not a “point source” itself, the jurisdictional chain is broken, just as if a pollutant was discharged from a point source into a parking lot.³ Moreover, if jurisdiction applies whenever a pollutant gets *to* a navigable water eventually, Section 402 would sweep in all non-point source pollution that Congress explicitly excluded from its scope. See 2016 *Amicus* Brief at 17 (“pollutants from a point source need not be emitted *directly* into covered waters.”). Indeed, it is the fact of whether pollution is discharged directly from a point source that distinguishes point source pollution from non-point source pollution. For instance, a car may leak motor oil onto a grocery store parking lot that is swept by rain through a storm drain into a nearby stream that is a tributary of a water of the United States. Even though this is a textbook example of non-point source pollution, the logical extension of the reasoning in the 2016 *Amicus* brief would demand that every car that does, or may, leak oil obtain a NPDES permit as the motor oil is discharged *to* a navigable water. The same would be true of every parking lot in the nation. In other words, the “indirect discharge” theory has no logical stopping point and ignores the limits on regulating non-point source pollution within the Clean Water Act itself.

B. *The Act’s Text Provides No Support for “Indirect” Discharges or the “Hydrological Connection” Theory with Respect to Groundwater*

The 2016 *Amicus* Brief, other than emphasizing the word “to” in the definition of “discharge of pollutant” cites to no other statutory language in support of its “indirect” discharge or “hydrological connection” theories. Nor do any of the cases that support those theories. For instance, one court found that the Clean Water Act regulated groundwater contamination simply because the idea made sense to the judge. See, *N. Cal. River Watch v. Mercer Fraser Co.*, 2004 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005) (“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 groundwater.”)

The Clean Water Act, however, does not extend jurisdiction over whatever situation an individual district court judge believes to “make sense.” In fact, Congress considered this very situation and *rejected* Clean Water Act jurisdiction. Other courts have similarly resorted to non-textual reasoning to ignore Congress’ decision, often making declarations about what Congress intended to do through the Clean Water Act while ignoring the Act’s text and legislative history. See, e.g., *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (“since the goal of the CWA is to protect the quality of

³ “The most common example of nonpoint source pollution is the residue left on roadways by automobiles ... drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the ... gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays and the ocean.” *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). Yet, the automobiles themselves are point sources. See *Avolyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes are point sources); *Concerned Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (“the manure spreading vehicles themselves were point sources.”).

surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit.”); *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 762 (“Congress intended the CWA to protect the water quality of the nation’s surface water ... that goal would be defeated if the CWA’s jurisdiction did not extend to discharges to that groundwater.”); *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, Opinion, Case No. 17-1640, (4th Cir. April 12, 2018) at 25 (the goals of the Clean Water Act could be defeated where “polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters.”); *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, (D. R.I. 1990) (courts should not “[d]well[]” on the statutory language where it does “not promote the purpose of the Clean Water Act.”); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Id. 2001) (“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 of our nation’s rivers and streams.”); *see also* 2016 *Amicus* Brief at 11 (citing to “Congress’s goals in the CWA....”). Relying solely on the “goal” or “purpose” of an act ignores the compromises and trade-offs Congress makes in determining how those goals or purposes should be implemented or how far they should be pursued at the expense of other priorities. Thus, by focusing on “the goal of the CWA,” courts effectively adopt a “by any means necessary” approach to federal jurisdiction even where Congress refused to do so.

Indeed, to the contrary, Congress explicitly rejected the assumptions these courts made. Congress was certainly aware of the “indirect” and “hydrological connection” theories, even if it did not use those phrases. “The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction ... it must be remembered that rivers, streams and lakes themselves are largely supplied with water from the ground – not surface runoff.” S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1972). In his amendment to directly regulate groundwater under the Clean Water Act, Representative Aspen declared that “[i]f we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.” 118 Cong. Rec. 10,666 (1972); *see also* 118 Cong. Rec. 10,668 (“Mr. Chairman, to consider that we are providing for the protection of the surface waters – which we can see – and omitting from the strong provisions of this measure vast ground-water supplies – is to my mind unthinkable.” 118 Cong. Rec. 10,668 (1972) (remarks of Rep. McClory). The House of Representatives, however, disagreed. The amendment to extend Clean Water Act jurisdiction over “indirect” discharges and “hydrologically connected” groundwater was soundly voted down, 86 to 34. 118 Cong. Rec. 10,669. This knocks out the foundational assumptions of the cases supporting the “indirect” discharge and “hydrological connection” theories as they ignored this legislative history and merely presumed that Congress either intended such a result or was ignorant of groundwater’s interaction with surface water. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Id. 2001) (endorsing the “view ... that Congress intended to regulate the discharge of any pollutants that could affect surface waters of the United States, whether it reaches the surface water directly or through groundwater.”). In fact, Congress affirmatively refused to extend Clean Water Act jurisdiction over such “indirect” or “hydrologically connected” discharges. Imposing federal jurisdiction anyway through case law makes Congress’ vote irrelevant.

By contrast, those courts that actually considered the relevant legislative history reached the opposite conclusion, finding no federal jurisdiction. *See, e.g., Rice v. Harken Exploration Co.*, 250 F.3d 264, 271-72 (5th Cir. 2001) (“we noted that Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA.”) (citing

Exxon Corp. v. Train, 554 F.2d 1310, 1325 5th Cir. 1977)); *Village of Oconomowac Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (discussing legislative history); *Chevron U.S.A., Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807, 816 (D. Md. 2015) (“the legislative history of the CWA indicates that Congress chose not to regulate groundwater, in part because ‘the jurisdiction regarding groundwaters is so complex and varied from State to State.’”) (quoting S. Rep. No. 414, 92d Cong., 1st Sess. at 73 (1972)); *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) (“this court ... holds that Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow ‘hydrologically connected’ to navigable surface waters.”).

In sum, this is not a matter of which way to interpret an ambiguity in the statute; this is a matter of recognizing the limits on jurisdiction the Congress established in the Clean Water Act. No statutory language regulates groundwater contamination even where one can clearly identify the contamination’s source and the Clean Water Act’ legislative history demonstrates that this was a purposeful decision by Congress.

III. If Sustained, Clean Water Act Liability for Releases to Soil or Groundwater Would Dramatically Expand Clean Water Act Liability and Re-define “Discharge” in a Way that Creates Absurd Results

Regulating discharges to groundwater is contrary to not only the Act and Congressional intent, but unless restrained by EPA, it would expand Clean Water Act liability dramatically and produce absurd results. Case in point is the recent decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, Case No. 17-1640 (4th Cir. April 12, 2018). There, the court imposed Clean Water Act liability for a gasoline pipeline rupture that involve a single discharge to soil. The court held that the unremediated gasoline plume, moving slowly through soil and groundwater over the course of at least two years, eventually reached a creek and wetlands, establishing Clean Water Act jurisdiction. *Id.* at 9-10. To do this, however, the court had to re-define “discharge” in a way that would not only dramatically expand Clean Water Act liability for a discharge (to soil, no less), but would impose absurd and useless permitting requirements on a brand new class of “dischargers” that never before required a NPDES permit.

In *Upstate Forever*, a gasoline pipeline “broke six to eight feet underground” allowing “gasoline and related contaminants [to] spill[] out into soil and ground water.” *Id.* at 8. The site was remediated under the supervision of the South Carolina Department of Health and Environmental Control. *Id.* at 9. The company recovered 209,000 gallons of gasoline, but some 160,000 gallons could not be recovered. *Id.* at 8. Although the pipeline was repaired, an environmental group filed suit *two years later* alleging “ongoing violations” of the Clean Water Act because the unrecovered plume of gasoline was migrating into surface waters. *Id.* at 8-10.

The court, aware that Clean Water Act citizen suits can only be filed for ongoing violations, *id.* at 13 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987)), simply re-defined the term “discharge” to include the mere presence of pollutants in the environment. It noted that a discharge is “any addition of any pollutant to navigable waters from any point source,” 33 U.S.C. § 1362(12)(A), and declared that the company was continuing to “add” pollutants via groundwater even though years had passed since the pipeline release had stopped. *Upstate Forever*, Slip Op. at 16. According to the court, nothing in the Clean Water Act requires “that the point source continue to release a pollutant

for a violation to be ongoing” and that citizen suits may still be filed “regardless [of] whether a defendant’s conduct causing the violation is ongoing.” *Id.* at 16. Thus, the Fourth Circuit held that Clean Water Act liability may still lie, and citizen suits may still be filed after a discharge occurred so long as the pollutants discharged years ago – even decades ago – remain in groundwater or soils.

The Fourth Circuit’s view of Clean Water Act liability for soil and groundwater contamination would work incalculable mischief and provides further reason for EPA to revise and clearly state its interpretation of the Act. First, the court’s holding is inconsistent with the term “discharge of a pollutant,” as defined under the Act. A “discharge of a pollutant” means “any addition of any pollutant ... from any point source....” 33 U.S.C. § 1362(12). The court’s holding – finding Clean Water Act liability for the discharge of pollutants from ground water slowly migrating to surface water – seizes on the first condition of an “addition of any pollutant” while ignoring the second condition: that the pollutants be discharged “from any point source.” In *Upstate Forever*, the “discharge” from a point source (the pipeline) ended some two years before the suit was filed. The pipeline was repaired and no longer releasing gasoline to the soil, groundwater, or anywhere else. But under the court’s reasoning, the pipeline could have been taken out of service and removed from the site yet still “discharging” to navigable waters. The Clean Water Act’s definition of a “discharge of a pollutant” simply does not permit the regulation of point source discharges without the point source.

Second, *Upstate Forever* imposes Clean Water Act liability for accidental releases to soil or groundwater, including the potential for daily civil penalties, virtually in perpetuity. In effect, the decision expands potential liability from the *discharge* of pollutants to soil or groundwater to their mere *presence* in soil or groundwater. Indeed, under the court’s reasoning, Clean Water Act liability may not even begin until a contaminant plume contacts a surface water years after the actual release ceased. As EPA knows from its experience under CERCLA, it can take decades to remediate groundwater sites – and that not all of the groundwater contamination must be, or can be, removed. Rather, CERCLA establishes the process for EPA to decide what cleanup is necessary and what cleanup standards are sufficient to protect human health and the environment. 42 U.S.C. § 9621. Under the *Upstate Forever* decision, however, the mere presence of historic pollutants could potentially trigger Clean Water Act liability so long as the groundwater plume contacts a surface water. A company could spend years and millions of dollars remediating a groundwater site to EPA’s satisfaction under CERCLA, and still face an injunctive relief and civil penalties demand in a Clean Water Act citizen suit. This could make potentially responsible parties think twice about entering into agreements with EPA or state agencies to investigate or remediate groundwater sites as doing so may not resolve their potential Clean Water Act liability.

Third, subjecting accidental releases of pollutants to Clean Water Act jurisdiction would be meaningless from a permitting perspective. In *Upstate Forever*, the citizen suit alleged that the pipeline operator violated the Clean Water Act by “polluting navigable waters without a permit....” Slip Op. at 4. Yet, the pipeline only released pollutants due to an unplanned, accidental rupture. The holding in *Upstate Forever* could mean that thousands of industrial sources that could conceivably release a pollutant to *soil or groundwater* would have to obtain a prophylactic NPDES permit in the event of a future accidental release. Further, all facilities with a current NPDES permit would be required to amend their permits to obtain coverage for accidental releases. Of course, obtaining NPDES permit coverage in this situation would be an empty bureaucratic exercise. Permitting agencies could not impose any types of effluent limitations or pollution controls for unforeseen future accidents or discharges to soil or groundwater. Thus,

there would be no productive purpose to this type of permitting coverage, such as reducing pollutant loading to jurisdictional waters.

IV. EPA Should Interpret Clean Water Act Jurisdiction Consistent with the Act and Not Supersede State Groundwater Regulatory Programs

EPA should also act to revise its interpretation of the Act to avoid interfering with the States' traditional role of regulating groundwater. Advocates of expanded jurisdiction have claimed that the Clean Water Act merely regulates the source of groundwater contamination not the groundwater itself. *See, e.g., Bosma*, 143 F. Supp. 2d at 1180. However, that is a distinction without a difference. In reality, to regulate the “discharge” from a point source through groundwater would provide Clean Water Act jurisdiction over the groundwater itself, despite the absence of such authority in the Clean Water Act and Congress' explicit refusal to grant it. Instead, EPA should properly interpret Clean Water Act jurisdiction to exclude groundwater in order to avoid conflicting with long established state authority over groundwater.⁴ Accepting the “indirect discharge” or “hydrological connection” theory would put the Clean Water Act squarely at odds with State groundwater regulatory programs that have occupied this field since before the Water Pollution Control Act Amendments of 1972. *See* S. Rep. No. 414, 92d Cong., 1st Sess. at 73 (1972) (noting existing State jurisdiction over groundwater).

States continue to regulate groundwater, commonly by establishing their own requirements for groundwater monitoring, reporting, well construction standards, groundwater classification, health-based pollutant-specific groundwater quality limitations, and standards for requiring corrective action. *See, e.g.* N.J. Admin. Code, Title 7, Chapter 9C (New Jersey groundwater quality standards); 15A NCAC, Subchapter 2L (North Carolina groundwater classification and standards); Or. Admin. R. Chap. 340, Division 40 (Oregon groundwater quality protection). State groundwater regulations have always been a necessary adjunct to other environmental matters left largely to State jurisdiction, such as the regulation of underground petroleum storage tanks, mining operations, landfills, septic tanks, oil and gas operations, wastewater impoundments, and drinking water wells.

Viewing groundwater as a conduit to channel pollutants could improperly shift significant monitoring and management of that groundwater from State regulations to the federal Clean Water Act and its expansive permitting requirements. Doing so could effectively preempt State groundwater management regulations, “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States....” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Here, not only does the Clean Water Act lack such a “clear and manifest” statement, the statute disclaims it. *See* 33 U.S.C. § 1370 (the Act states that it may not “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”). Here, Congress declared no such intent. On the

⁴ Unlike navigable waters, which are waters of the United States, States have long viewed groundwaters as exclusively waters of the State. *See, e.g., Minnesota Min. & Mfg. v. Travelers Indem.*, 457 N.W.2d 175, 182 (Minn. 1990) (in Minnesota, “[p]ollution of the groundwater is damage to public property” with the Minnesota Pollution Control Agency acting as “the named trustee of the waters of the state.”); *State Dep’t of Ecology v. Campbell & Gwinn*, 43 P.3d 4, 8-9 (Wash. 2002) (ground waters are waters of the State and their beneficial use are subject to State regulatory program); *Bausch & Lomb Inc. v. Utica Mutual*, 625 A.2d 1021 (Md 1993) (groundwaters within Maryland’s boundaries are “waters of the State”).

contrary, the legislative history discussed above demonstrates that Congress sought to *avoid* regulating groundwater. Moreover, the Supreme Court has directed that “conflicts between state and federal regulation” should be avoided “where none clearly exists.” *English v. Gen’l Elec. Co.*, 496 U.S. 72, 90 (1990) (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)). Extending Clean Water Act jurisdiction over “indirect” discharges through groundwater, and by necessity regulating discharges to the groundwater, actively creates a conflict with State regulations where none existed before. Interpreting the Clean Water Act to effect such a dramatic shift of regulatory authority from State law to federal law through judicial interpretation of the Act’s goals and purposes – and in the face of both a statutory disclaimer and a contradictory legislative history – is contrary to law. “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” *Whitman v. Amer. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001).

Conferring Clean Water Act jurisdiction over the sources of groundwater contamination could eviscerate State regulatory programs as new NPDES requirements governing groundwater monitoring, source control, clean up levels, and remediation would supplant existing State groundwater standards. Where States are actively regulating a groundwater corrective action, Clean Water Act jurisdiction would allow federal citizen suits to subvert State law administrative processes and obtain injunctive relief potentially contradictory to State clean-up orders.⁵ This was the very rationale behind environmental groups filing a citizen suit in the *Upstate Forever* litigation: “Following an investigation and review of Kinder Morgan’s proposed corrective action plan, the Conservation Groups concluded that Kinder Morgan had not controlled its gasoline spill after almost two years and that future recovery and remediation efforts would not be effective,” prompting “the Conservation Groups [to] initiate[]this Clean Water Act enforcement action.” Opening Brief for Plaintiffs-Appellants Upstate Forever and Savannah Riverkeeper, *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, Case No. 17-160, Doc. 14 (4th Cir. filed July 12, 2017) at 6-7.

Groundwater contamination, especially in older industrial areas, may include dozens of different contaminants from hundreds of sources, current and historic (*e.g.*, abandoned industrial sites, military facilities, gas stations, septic tanks, wastewater impoundments, fields receiving biosolids, road salts, applied pesticides, landfills, naturally occurring sources, *etc.*). Instead of states managing groundwater contamination sites through existing state schemes, a citizen group could pick any existing potential sources, allege a hydrological connection with a navigable water, file a citizen suit, and force those defendants to exculpate themselves from Clean Water Act liability for groundwater contamination reaching back decades. Although these defendants might be able to establish that they are not responsible for the addition of pollutants to groundwater, or that the groundwater does not interact with a navigable water, this often cannot be done until the summary judgment stage. Instead of negotiating with State agencies to study an area of groundwater contamination and moving towards a corrective action plan, defendants would be hiring expert witnesses for litigation and postponing any action until the citizen suit was resolved.

The prospect of subjecting groundwater contamination to Clean Water Act citizen suits and enforcement actions is especially troublesome given that some courts have held that Clean Water Act

⁵ Most State corrective actions are handled administratively. The Clean Water Act only bars citizen suits where a “State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order,” 33 U.S.C. § 1365(b)(2).

liability attaches even to passive landowners that did nothing to contaminate groundwater themselves or where the contamination occurred long ago. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) (Clean Water Act liability may accrue against “a passive landowner” that purchased former mining property which continued to discharge mine drainage); *United States v. Sea Bay Develop. Corp.*, 2007 U.S. Dist. LEXIS 33734, at *9-10 (E.D. Va. May 8, 2007) (imposing Clean Water Act liability on former site owner); *North Carolina Wildlife Fed’n v. Woodbury*, 1989 WL 106517, at *1-2 (E.D.N.C. Apr. 25, 1989) (Clean Water Act liability for discharge of fill material six years prior to citizen suit); *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) (unpermitted discharge is a continuing violation so long as the pollutant remains); *Marrero Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 597 F. Supp. 2d 272, 276 (D.P.R. 2009) (failure to remediate leaks from underground storage tank is a continuing violation even after the tank was removed). Such an approach would effectively convert the Clean Water Act into another CERCLA, imposing active duties to remediate groundwater contamination even on innocent landowners, but with the addition of potential civil and criminal penalties. There is no statutory evidence (or any other kind of evidence) that Congress intended to make the Clean Water Act into a major tool for remediating contaminated groundwater sites.

V. EPA Should Issue an Interpretive Guidance Document Expressly Foreclosing Clean Water Act Jurisdiction Over Point Source Discharges Through Groundwater

Based on the Clean Water Act’s text, legislative history, and the practical effects of attempting to permit and/or regulate groundwater contamination that may be linked to jurisdictional surface waters, EPA should interpret the terms “point source” and “discharge” and the obligations under 33 U.S.C. §§ 1311 and 1342 as foreclosing Clean Water Act jurisdiction over groundwater contamination regardless of whether it can be directly linked with a jurisdictional surface water. This would provide clarity to both regulated entities and courts, avoids the potential preemption of State groundwater regulations, and defuses the potential regulatory and litigation morass described above.

EPA should fashion this as an interpretive guidance document expressly stating that, while the Agency’s previous statements on the question may not have been authoritative, 83 Fed. Reg. at 7,127, it is changing its position and adopting a new interpretation of the Clean Water Act. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio*....”). EPA should address specifically the statements in the United States’ 2016 *Amicus* brief, *supra* filed in the *Hawaii Wildlife Fund v. County of Maui* litigation, among other positions and arguments on the issue.

GPA Midstream appreciates the opportunity to submit these comments in response to EPA's request and is standing by to answer any questions that it may have.

Respectfully submitted,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive, flowing style.

Matt Hite
Vice President of Government Affairs
GPA Midstream Association