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U.S. Environmental Protection Agency
Office of Water

Re: Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrological Connection to Surface Water, 83 Fed. Reg. 7,126 (Feb. 20, 2018), Docket ID No. EPA-HQ-OW-2018-0063

To Whom It May Concern:

Earthjustice submits these comments on behalf of the Hawai'i Wildlife Fund, Sierra Club, Surfrider Foundation, West Maui Preservation Association, Kentucky Waterways Alliance, Prairie Rivers Network, Clean Wisconsin, Minnesota Center for Environmental Advocacy, Puget Soundkeeper, Environmental Integrity Project, Clean Water Action, and Earthworks in response to the U.S. Environmental Protection Agency's (EPA's) request for public comment on whether the EPA should clarify or revise its longstanding position that “pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrological connection to the jurisdictional water may be subject to [Clean Water Act (CWA)] permitting requirements.” 83 Fed. Reg. 7,126, 7,127 (Feb. 20, 2018). As discussed more fully below, we respectfully submit that EPA's current position is compelled by the CWA's plain language and, accordingly, the agency lacks the authority to adopt a contrary position. Moreover, even if EPA were at liberty to alter its longstanding position, it should not, as regulation of such discharges is necessary to carry out congressional intent in enacting the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a).

EPA should continue its current emphasis on fact-specific enquiry regarding point source discharges that reach surface water via a groundwater connection to ensure that all discharges of pollutants that reach jurisdictional waters are subject to CWA requirements. EPA should not adopt any position that forecloses a determination that such a discharge falls within the jurisdiction of the Clean Water Act. Rather, EPA should continue to allow such decisions to be made on a case-by-case basis.

I. THE PLAIN LANGUAGE OF THE CLEAN WATER ACT MANDATES PERMIT COVERAGE FOR POINT SOURCE DISCHARGES TO NAVIGABLE WATERS VIA HYDROLOGICALLY CONNECTED GROUNDWATER.

Congress directed that the biological, chemical and physical integrity of the Nation's waters must be restored and protected and that the goal of the CWA was complete elimination of discharges of pollutants to the Nation's waters by the mid-1980s. 33 U.S.C. § 1251. To that end, CWA section 301(a) mandates that "the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a). The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "This prohibition is '[t]he "cornerstone" and "fundamental premise" of the Clean Water Act.'" *Nw. Envt'l. Advocates v. Envt'l Prot. Agency*, 537 F.3d 1006, 1020 (9th Cir. 2008) (citation omitted).

CWA section 402 provides an exception to section 301(a)'s general prohibition through the issuance of a permit under the National Pollutant Discharge Elimination System (NPDES) "for the discharge of any pollutant or combination of pollutants." 33 U.S.C. § 1342(a)(1). NPDES permitting is key to achieving Congress's goal to "abate and control water pollution." *Envt'l Prot. Agency v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203 (1976); *see also Am. Iron & Steel Inst. v. Envt'l Prot. Agency*, 115 F.3d 979, 990 (D.C. Cir. 1997). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations ... of the individual discharger" and makes those obligations enforceable. *Envt'l Prot. Agency*, 426 U.S. at 205. By and through this strict control of pollutant discharges, and a steady reduction in those allowances, the CWA will achieve its stated purpose of restoring and protecting the Nation's waters.

In recent months, two federal courts of appeals have addressed the issue that is the subject of EPA's Notice and held that the CWA's plain language prohibits point source discharges to navigable waters via hydrologically connected groundwater, unless authorized and controlled by an NPDES permit. In February, the Ninth Circuit held that the County of Maui has been violating the CWA by operating injection wells that discharge, without an NPDES permit, millions of gallons of treated effluent each day into groundwater that transports the effluent into the Pacific Ocean. *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 739 (9th Cir. 2018). The Ninth Circuit subsequently rejected the County's petition for rehearing *en banc*, with none of the court's judges even requesting a vote on whether to rehear the case. *Id.* at 741.

In April, the Fourth Circuit agreed with the Ninth Circuit that "a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA," requiring an NPDES permit. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649 (4th Cir. 2018). Notably, while there was a dissent in *Upstate Forever*, all judges on the panel agreed that point source

discharges that reach navigable waters via groundwater require an NPDES permit. *Upstate Forever* involves claims that discharges of petroleum from a leaking pipeline reach navigable waters (tributaries of the Savannah River) via groundwater. *Id.* at 643-44. Because the pipeline has been repaired, the dissent concluded that the unpermitted discharges constitute “a wholly past violation” of the CWA, against which only EPA or a state agency can take enforcement action, rather than “an ongoing CWA violation,” which is susceptible to a citizen suit. *Id.* at 659-60 (Floyd, J., dissenting). All three judges agreed, however, on the relevant issue here, that the pipeline’s unpermitted discharges via groundwater violate the CWA.

In concluding that the CWA regulates point source discharges via hydrologically connected groundwater, both the Ninth and the Fourth Circuits relied on Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). In that opinion, Justice Scalia recognized the CWA 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.’” 547 U.S. at 743 (quoting 33 U.S.C. § 1362(12)(A); citing *id.* § 1311(a)) (emphasis in original). He further recognized that “‘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.* (citations omitted) (emphasis in original). While the Supreme Court in *Rapanos* splintered on other issues, no Justice disagreed with Justice Scalia’s plurality opinion that the CWA prohibits and holds liable those who discharge a pollutant from a point source to navigable waters, even if the discharge is not directly from the point source to the navigable waters.

The Ninth and Fourth Circuits’ decisions are in line with the overwhelming majority of district court cases that had previously concluded the CWA regulates “discharges into hydrologically connected groundwater which adversely affect surface water.” *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *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 surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit”); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) (same); *Sierra Club v. Colorado Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (“Clean Water Act’s preclusion of the discharge of any pollutant into navigable waters includes such discharges which reach navigable waters through groundwater”). *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798 (E.D.N.C. 2014), which EPA cites in its notice, does not reach a contrary conclusion. Rather, that court

focused on an entirely separate question: whether groundwater itself constitutes a water of the United States. *See id.* at 809-10.¹

The Ninth and Fourth Circuit decisions further stand as independent validation of EPA's current position, not simply as the result of that position. There is no support for any argument that the decisions of the Ninth and Fourth Circuits, based wholly on the requirements of the CWA, would or could have differed at all had EPA adopted a different policy on discharges to groundwater. Although the decisions both referenced EPA's current policy, each decision fundamentally rests on the court's own independent statutory analysis and interpretation of the CWA. The Ninth Circuit's only reference to EPA's current policy came in a footnote, where the court dismissed EPA's position as overly narrow. *Hawai'i Wildlife Fund*, 886 F.3d at 749 n.3 (declining to adopt EPA's "direct hydrologic connection" standard and finding that "[o]ur rule adopted here, by contrast, better aligns with the statutory text and requires only a 'fairly traceable' connection"). The Fourth Circuit ultimately adopted EPA's "direct hydrologic connection" interpretation, but that outcome was not compelled by deference to the agency's position. *Upstate Forever*, 887 F.3d at 651. The Fourth Circuit's discussion of EPA's policy came only after the court had already held "in agreement with the Second and Ninth Circuits that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters." *Id.* The Fourth Circuit's "respectful consideration" of EPA's position simply followed on the court's own probing statutory analysis. The decisions of the Ninth and Fourth Circuits stand as independent statutory interpretations required by the plain language of the CWA.

EPA's notice inaccurately suggests that other circuit courts disagree with the Ninth and Fourth Circuits regarding the CWA's requirement for discharges via groundwater to secure NPDES permit coverage. As the Ninth Circuit correctly noted in *Hawai'i Wildlife Fund*, in both *Rice v. Harken Expl.*, 250 F.3d 264 (5th Cir. 2001), and *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), "our sister circuits ... concluded that groundwater is not a navigable water," which is a different issue than whether CWA "liability may attach when a point source discharge is conveyed to a navigable water through groundwater." 886 F.3d at 746 n.2; *see also id.* (Ninth Circuit assumed, without deciding, "the groundwater here is [not] a navigable water"); *Upstate Forever*, 2018 WL 1748154, at *4 n.5 (Fourth Circuit did not address whether "ground water, of itself, falls within the meaning of navigable waters"). Indeed, the Ninth and Fourth Circuits' holdings are entirely "consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*, where the Seventh Circuit only considered allegations

¹ Of course, to the extent that anything in *Cape Fear River Watch* conflicts with the Fourth Circuit's decision in *Upstate Forever*, the Fourth Circuit's holding binds the district court.

of a ‘potential [rather than an actual] connection between ground waters and surface waters,’ 24 F.3d at 965.” *Hawai’i Wildlife Fund*, 886 F.3d at 746 n.2.

Because the CWA’s plain language encompasses all discharges of pollutants from point sources *to* navigable waters, not only point-source discharges “*directly* to navigable waters,” EPA is not at liberty to adopt an interpretation that exempts from the NPDES permit requirement discharges that reach navigable waters through hydrologically connected groundwater. *Rapanos*, 547 U.S. at 743; *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (agency “must give effect to the unambiguously expressed intent of Congress”). EPA’s proposal, therefore, should be withdrawn.

II. NPDES PERMITTING IS NECESSARY TO ACHIEVE CONGRESS’ INTENT TO PROTECT OUR NATION’S WATERS.

Even if EPA otherwise had discretion to exempt from the NPDES permit requirement point-source discharges that reach navigable waters through groundwater (and it does not), it should not do so. Exempting such discharges would create a gaping loophole in the regulatory structure Congress created to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” allowing polluters to circumvent the CWA’s mandates simply by designing their point sources to discharge just short of the water’s edge, rather than directly into the water itself. 33 U.S.C. § 1251(a). Examples abound of where it is necessary to regulate discharges through groundwater in order to ensure that the requirements of the CWA are implemented and met.

A. Injection Wells.

The injection wells at the center of the dispute in *Hawai’i Wildlife Fund* abundantly illustrate the catastrophic environmental harm that flows from an artificially narrow and limiting interpretation of the CWA’s NPDES permitting requirement. When Maui County opted to use injection wells rather than a deep-ocean outfall to dispose of millions of gallons of wastewater each day from the Lahaina Wastewater Reclamation Facility, it knew the effluent would travel with the groundwater beneath the facility and discharge into the Pacific Ocean off West Maui. 886 F.3d at 742. In the decades following the Lahaina facility’s opening in 1982, nutrients and other pollutants from the Lahaina facility’s discharge into the ocean through the groundwater have devastated the once-pristine coral reef at Kahekili Beach, a popular recreational spot for local residents and tourists alike. The State of Hawai’i’s Division of Aquatic Resources reported a 40% decline in coral cover from 1994 to 2006 (*Hawai’i Division of Aquatic Resources* 2014), while a recent, peer-reviewed study by U.S. Geological Survey scientists and other experts concluded that nutrient-laden wastewater from the Lahaina

injection wells contributes to bioerosion rates to the Kahekili reef that are nearly an order of magnitude above the rate at reefs unaffected by human activities (Prouty et al. 2017).

EPA has long been concerned about harm to the ocean environment associated with the Lahaina facility's injection wells. In 2011, EPA funded a tracer dye study that confirmed that the effluent the injection wells discharge into groundwater beneath the Lahaina facility reaches the Pacific Ocean in only 84 days. *Hawai'i Wildlife Fund*, 886 F.3d at 743. The tracer study also revealed that the millions of gallons of effluent the injection wells discharge each day constitute one of every seven gallons of groundwater entering the ocean at Kahekili Beach. *Id.* at 742. In light of the conclusive evidence that groundwater is conveying effluent from the Lahaina injection wells into the Pacific Ocean, EPA properly concluded Maui County must secure NPDES permit coverage to ensure against further damage to the ocean environment (EPA 2015).²

As the Ninth Circuit observed in *Hawai'i Wildlife Fund*:

At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. 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.

886 F.3d at 752.

B. Coal Ash Disposal.

Requiring NPDES permits for point sources that discharge via groundwater is also vital to prevent severe environmental harm from disposal of the toxic ash left from coal-burning at power plants around the nation. That coal ash has been (and at many sites, still is) dumped into

² EPA's notice seeks input on whether releases via groundwater "are addressed adequately through" other regulatory programs, such as "EPA's underground injection control ["UIC"] regulations promulgated pursuant to the Safe Drinking Water Act." 83 Fed. Reg. at 7,128. They are not. As its name suggests, the Safe Drinking Water Act focuses on protecting sources of drinking water, not navigable waters like the Pacific Ocean and its extraordinary coral ecosystem that is on the receiving end of discharges from the Lahaina injection wells. For decades, Maui County received UIC permit coverage for its Lahaina injection wells, the same period of time during which the coral reefs at Kahekili have been devastated by the pollutants the UIC permit allows. Plainly UIC controls are not a substitute for protections under the Clean Water Act.

pits, often mixed with water, at approximately 1,400 sites around the country and poses threats to drinking water, surface water, neighborhoods, and air quality. Coal ash waste is filled with some of the deadliest known toxic chemicals, including heavy metals like arsenic, lead, mercury and chromium. Most of these coal ash pits are unlined and located very close to rivers, lakes, or streams, so that the toxics to leach into groundwater that then conveys the pollutants to navigable waters. Dozens of power plants around the country have already been documented as discharging toxic coal ash pollutants to rivers, lakes, and streams via hydrologically connected groundwater – typically in violation of NPDES requirements – and there are likely dozens more such plants that have yet to be identified.

For example, the Vermilion Power Station, owned by Dynegy Midwest Generation, LLC (“Dynegy”), is a retired coal-fired power plant that sits on the west bank of the Middle Fork of the Vermilion River (“Middle Fork”), in a 17-mile section designated as Illinois’ only National Scenic River. A popular spot for recreation, the Middle Fork is a vital ecological, scenic, and economic resource for the State of Illinois. The Middle Fork and its surrounding area are home to 20 threatened or endangered species, 57 types of fish, 46 different mammal species, and 270 different bird species. From the mid-1950s until 2011, the Vermilion plant burned coal and generated millions of tons of coal ash, which contains heavy metals and other toxic pollutants that are harmful and at times deadly to people, aquatic life, and animals. The plant’s operators disposed of that coal ash – approximately 3.3 million tons of it – in three unlined pits that sit right next to the Middle Fork. For years, Dynegy has been illegally discharging toxic contaminants, including arsenic, chromium and manganese, into the Middle Fork of the Vermilion River through groundwater seeps that stain the riverbank an unnatural orange-red color. Reports from Dynegy’s own consultants, as well as the company’s own filings with the Securities Exchange Commission, acknowledge that coal ash contaminated groundwater discharges to the Middle Fork.³ The harmful pollution is flowing into the river in amounts exceeding both state and national water quality standards set to protect human health and the environment. The river is a popular site for kayaking and tubing, and body contact for recreation is one of the uses of water that Congress specifically directed EPA to ensure was protected through the Clean Water Act. 33 U.S.C. § 1251. Dynegy could not discharge the same pollutants directly into the Middle Fork from a pipe without securing an NPDES permit and

³ Kelron Environmental, *Hydrogeology and Groundwater Quality of the North Ash Pond System, Vermilion Power Station* (Mar. 15, 2012); Kelron Environmental, *Hydrogeology and Groundwater Quality of the Old East Ash Pond, Vermilion Power Station* (Mar. 15, 2012); Natural Resources Technology, Inc., *Revised Corrective Action Plan: North Ash Pond System* (April 2, 2014); Natural Resources Technology, Inc., *Revised Corrective Action Plan: Old East Ash Pond* (Apr. 2, 2014); Dynegy Form 10-K (fiscal year ending Dec. 31, 2016) at 22, https://www.dynegy.com/sites/default/files/Dynegy_2016_Annual_Report.pdf.

complying with the limits in that permit; the company should not be able to evade those requirements simply by directing the pollutants into the Middle Fork through the ground.

C. Mine Waste Disposal.

Groundwater conveyance of pollutants to surface water is also common in mining. Mines typically store vast quantities of mineralized waste rock in unlined piles. Rain and snow can cause contaminants to leach into groundwater or subsurface flows that eventually emerge as surface water. For example, at the Buckhorn Mountain Gold Mine in north-central Washington, sulfate, nitrate, and other contaminants leach from various point sources on the mine site through groundwater to Nicholson Creek, with a further concern that acid mine drainage could eventually develop. This pollution has led to numerous CWA violations, administrative orders, and penalties. The Washington Department of Ecology is attempting to stop this problem through an NPDES permit that would establish a groundwater “capture zone” preventing further contamination of surface water.

In Minnesota, mine and tailings waste basins have been excavated out of ponds and wetlands with direct groundwater connections to streams and rivers. For example, the Minntac basins, excavated from wetlands, form the actual headwaters of the Dark and Sandy Rivers. The waste basin was designed to leach through to the two surface waterbodies and must have an NPDES permit for the pollutants that adversely affected both rivers. *See, e.g.,* <https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-28a.pdf>. It is critical that these discharges of pollutants to important wild rice and recreational waters (fishing and boating) be regulated and controlled through CWA requirements for permits and that the artificial separation of a berm not result in a wholly arbitrary loss of protections for these streams.

Preventative measures utilizing NPDES permits and CWA limits on point source solution are far superior to the alternative, which is to allow the pollution to create a permanent impairment in need of expensive clean-up. For example, before enactment of the CWA, 18 million cubic yards of waste rock were stored in six unlined dumps at the Ballard phosphate mine in Idaho. Selenium and other contaminants leached from the piles through groundwater into nearby surface waters draining into the Blackfoot River. The result was a large Superfund site that will require years of remediation at a cost of millions of dollars through a settlement among EPA, the Idaho Department of Environmental Quality, the Forest Service, the Bureau of Land Management, the Shoshone-Bannock Tribes, and the responsible parties. Nearly fifty years after closure of the mine, the site is still not cleaned up.

These three types of examples alone show how requiring NPDES permits for discharges to groundwater that is in hydrologic connection to waters of the U.S. is critical to the overall direction, purpose and goals of the Clean Water Act. Those goals include the matters at issue in

those examples, protecting human and wildlife uses of all our Nation's waters—the very promise of and reason for the Clean Water Act. Even if EPA disagrees that the Clean Water Act dictates permits for those discharges, it is plain that including them serves the purposes of Congress in the Clean Water Act of ensuring that we do not continue to use our Nation's waters as a waste and pollutant disposal system to our detriment and the detriment of wildlife relying on those waters. As Congress plainly recognized, it matters not if those pollutants reach the water through a pipe to the surface water or a pipe to groundwater connected to surface water. The pollutants do their damage in either case.

EPA's proposal to narrow that reach violates the plain requirements, indeed the very foundations, of that law, and EPA should abandon the proposed course.

III. CONCLUSION

For the foregoing reasons, we respectfully submit that EPA should neither review nor revise its current position regarding the applicability of the CWA NPDES permit program to pollutant discharges from point sources that reach navigable waters via groundwater. The CWA's plain language requires NPDES permits for such discharges. Moreover, NPDES permitting is vital to accomplish Congress' command to protect our Nation's waters.

Sincerely,

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