

May 21, 2018

**VIA ELECTRONIC FILING**

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Office of Wastewater Management  
Water Permits Division (MC4203M)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**RE: Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126 (Feb. 20, 2018); Docket No. EPA-HQ-OW-2018-0063; FRL-9973-41-OW**

Dear Mr. Wilson:

We, the undersigned organizations (collectively, the Associations), understand the importance of responsibly managing water resources and have been working to protect clean water for decades. Consequently, we submit these comments to the U.S. Environmental Protection Agency (EPA or Agency) in consideration of its recent request for comment as to whether the Agency should revise its previous statements regarding whether releases that reach jurisdictional surface waters via groundwater or some other subsurface flow should be subject to regulation under the Clean Water Act (CWA or Act).<sup>1</sup> For the reasons set forth below, we believe it is critically important that EPA engage in notice-and-comment rulemaking to clarify that the CWA does not regulate discharges that reach surface waters via groundwater.

Many of the Associations’ members own or operate facilities throughout the country that are subject to certain requirements under the National Pollutant Discharge Elimination System (NPDES) permitting program, as well as other state and federal environmental laws governing the releases of pollutants and other substances into the environment.<sup>2</sup> As discussed in further detail below, EPA’s previous statements on the issue are inconsistent and contradictory. As such, the Associations have a significant interest in ensuring that EPA issues a clear and legally defensible position on the matter so that our members are not subject to duplicative and overly-burdensome regulation.

**I. Background**

Over the last 40 years, the Act has helped protect the rivers and lakes we use for transportation and recreation. Congress enacted the CWA in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>3</sup> The CWA is rooted in the

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<sup>1</sup> Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126 (Feb. 20, 2018).

<sup>2</sup> 33 U.S.C. § 1342.

<sup>3</sup> *Id.* at § 1251(a).

principles of cooperative federalism, expressly intending that states preserve their rights to retain their traditional role in preventing, reducing, and eliminating pollution.<sup>4</sup>

In order to achieve the goals set forth by the CWA, Congress enacted two distinct and principal programs to protect human health and the environment from releases of pollutants to water: the point source and nonpoint source programs. The point source program prohibits “any addition of any pollutant to navigable waters from any point source’ . . . or other ‘discernible, confined and discrete conveyance,’” unless authorized by a NPDES permit.<sup>5</sup> The nonpoint source programs apply to various other effluent discharges and give states the primary responsibility for developing such programs with federal support; in these cases, EPA retains certain oversight and enforcement authorities.<sup>6</sup> These programs expressly recognize the CWA’s cooperative federalism principles and the primary role of state and local communities in land use decisions.

Additionally, other statutes contain mechanisms to prevent the releases that might otherwise reach surface waters via groundwater. These statutes include the Resource Conservation and Recovery Act (RCRA),<sup>7</sup> the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>8</sup> and the Safe Drinking Water Act (SDWA).<sup>9</sup>

EPA has made previous statements both asserting and opposing the notion that releases that eventually reach surface waters via groundwater or some subsurface flow are regulated under the NPDES permitting program. This inconsistency has led to confusion in the regulated community and uneven enforcement. At the appellate level, courts have held that in some instances these releases are regulated by the CWA, and in other instances, they are regulated by other environmental statutes.

For example, in *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, the U.S. Court of Appeals for the Seventh Circuit found that “neither the Clean Water Act nor the EPA’s definition [of waters of the United States] asserts authority over groundwaters, just because these *may* be hydrologically connected with surface waters,” basing its decision on a statement in the preamble to the 1990 Final NPDES Permit Application for Storm Water Discharges.<sup>10</sup> In that rulemaking, EPA recognized that the potential for a hydrologic connection between groundwater and jurisdictional surface waters is collateral at best and not sufficient for focused attention in rulemaking or adjudication.<sup>11</sup>

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<sup>4</sup> *Id.* at § 1251(b).

<sup>5</sup> See *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, No. 16-299, 2018 WL 491526, at \*4 (U.S. Jan. 22, 2018) (quoting 33 U.S.C. §§ 1362 (12), (14)); see also 33 U.S.C. § 1311(a).

<sup>6</sup> 33 U.S.C. § 1329(b)(1), (d)-(n).

<sup>7</sup> 42 U.S.C. § 6901 *et seq.* (1976).

<sup>8</sup> *Id.* at § 9601 *et seq.* (1980).

<sup>9</sup> *Id.* at § 300(f) *et seq.* (1974).

<sup>10</sup> *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962, 965 (7th Cir. 1994) (emphasis added), *cert. denied*, 513 U.S. 930 (1994).

<sup>11</sup> *Id.* at 966.

Additionally, in *Rice v. Harken Exploration Co.*, the U.S. Court of Appeals for the Fifth Circuit addressed this issue in the context of the Oil Pollution Act.<sup>12</sup> Here, the court held that a “generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater” was not intended by Congress when it enacted the Oil Pollution Act.<sup>13</sup> Rather, the court noted that Congress intended to leave the regulation of groundwater to the states.<sup>14</sup>

Most recently, in *Cape Fear River Watch v. Duke Energy Progress*, the U.S. District Court for the Eastern District of North Carolina held that “Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether groundwater is eventually or somehow ‘hydrologically connected’ to navigable surface waters.”<sup>15</sup>

Creating confusion, the U.S. District Court for the District of Idaho found in *Idaho Rural Council v. Bosma* that Congress intended to regulate the release of pollutants that reach waters of the United States, interpreting the term “discharge of a pollutant” to cover discharges that reach water over the ground and other means of flow.<sup>16</sup> As such, the court found that exempting discharges through groundwater *could* lead to confusion and unintended results, as an interpretation of liability is considered on a case-by-case basis.<sup>17</sup>

Two recent decisions issued at the appellate level also found parties liable for releases that reached navigable waters via groundwater. In *Hawaii Wildlife Fund v. County of Maui*, the U.S. Court of Appeals for the Ninth Circuit found that a point source discharge to groundwater of “more than a *de minimis*” amount of pollution that is “fairly traceable from the point source . . . such that the discharge is the functional equivalent of a discharge into a navigable water” should be regulated by the CWA.<sup>18</sup> Notably, EPA’s interpretation of “direct hydrological connection” was not given deference, and the court rejected it. Additionally, in *Upstate Forever v. Kinder Morgan Energy Partners*, the U.S. Court of Appeals for the Fourth Circuit found that a point source does not need to directly feed into navigable waters in order to require a NPDES permit.<sup>19</sup>

As further discussed below, the Associations believe that releases that reach jurisdictional surface waters via groundwater are not regulated under the CWA’s point source program. Rather, it is the Associations’ position that these releases are regulated via nonpoint source programs and by the strong protections of other federal and state statutes.

EPA should therefore take two actions. First, the Agency should clarify its previous statements and confirm that the CWA clearly does not regulate releases that eventually reach surface waters via groundwater or some other subsurface flow. This may take the form of a proposed rule, memorandum, guidance, or legal opinion. Second, in conformity with the clear statutory directive

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<sup>12</sup> *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

<sup>13</sup> *Id.* at 272.

<sup>14</sup> *Id.*

<sup>15</sup> 83 Fed. Reg. 7,126 (citing *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014)).

<sup>16</sup> *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001).

<sup>17</sup> *Id.* at 1179-80.

<sup>18</sup> *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018).

<sup>19</sup> *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018).

and Congressional intent, the Agency should engage in a notice-and-comment rulemaking to provide a durable manner of clarifying its position and provide regulatory certainty to affected industries and entities.

## II. The CWA Point Source Program Does Not Regulate Discharges that Reach Surface Waters via Groundwater

The Associations do not challenge the question of *whether* the releases that reach surface waters via groundwater are regulated, but rather *how* they are regulated. History shows that the CWA *does not* regulate these releases via point sources, but rather through other mechanisms established in the Act, as well as more directly through other environmental statutes. A plain reading of the Act’s text, as well as its structure and legislative history, make this explicit. EPA also made similar assertions when it originally interpreted the CWA.

### a. The CWA Statutory Text Supports this Assertion

A plain reading of the CWA shows that Congress intended the point source program to only regulate discharges that are released into navigable waters by a “discernible, confined and discrete” conveyance. The point source program only allows pollutants to be discharged when authorized by a NPDES permit.<sup>20</sup> The CWA defines “point source” as “any *discernible, confined and discrete* conveyance . . . from which pollutants are or may be discharged.”<sup>21</sup> To that end, a discharge under this program includes only the “addition of any pollutant *to* navigable waters *from*” “any discernible, confined and discrete *conveyance . . . from which pollutants are or may be discharged.*”<sup>22</sup> The CWA also defines “navigable waters” as “waters of the United States, including the territorial seas.”<sup>23</sup> The statute *does not* include groundwater in its definition of navigable waters.<sup>24</sup>

EPA should continue to apply the CWA’s point source program *only* in situations where pollutants are released into navigable waters by something that is “discernible, confined and discrete.” The CWA’s NPDES program expressly applies to pollutants “from” a “conveyance” “from which pollutants are or may be discharged” “to navigable waters.”<sup>25</sup> Consequently, only something that both carries *and* discharges pollutants into navigable waters should be regulated – limiting the point source program to only instances in which that occurs via something that is “discernible, confined and discrete.”

The Supreme Court makes plain that in order to be covered by the NPDES program, point sources must convey the pollutant to navigable waters.<sup>26</sup> Moreover, the point source “need not be the original source of the pollutant,” but does “need to convey the pollutant to ‘navigable waters.’”<sup>27</sup>

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<sup>20</sup> 33 U.S.C. § 1311(a).

<sup>21</sup> *Id.* at § 1362(14) (emphasis added).

<sup>22</sup> *Id.* at § 1362(12), (14) (emphasis added).

<sup>23</sup> *Id.* at § 1362(7).

<sup>24</sup> 40 C.F.R. § 122.2.

<sup>25</sup> 33 U.S.C. § 1362(14).

<sup>26</sup> *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

<sup>27</sup> *Id.* at 105.

The distinction that a pollutant be both conveyed and directly added to the navigable water by a point source is the only thing that separates regulation by a point source versus regulation by a nonpoint source. As noted in *26 Crown Associations, LLC v. Greater New Haven Regional Water Pollution Control Authority*, “any non-point-source pollution . . . could [otherwise] invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through non-point sources to come to rest in navigable waters.”<sup>28</sup> As such, the Associations believe that Congress has written into the CWA a clear and easily administrable limitation on the point source program.

#### **b. The CWA’s Structure Supports this Jurisdictional Demarcation**

The CWA is constructed so that the point source program does not regulate releases that reach surface waters via groundwater. The CWA has other provisions that only make sense if the point source program is limited to those instances when pollutants are carried into navigable waters by a “discernible, confined and discrete conveyance.”

For example, point source releases are subject to effluent limitations – restrictions on quantities, rates, or concentrations of chemicals or other substances – “which are discharged from point sources *into* navigable waters.”<sup>29</sup> The inclusion of the word “into” clearly shows that Congress intended for pollutants to be *added* to navigable waters by point sources. Moreover, effluent limitations are dependent on identifiable discharge points where pollutants can be measured.

A number of other CWA provisions demonstrate that not all pollution, including pollutants released into groundwater, is point source pollution that is measurable by effluent limitations. One such example is Congress’ requirement that states separately develop waste management plans. These plans are to include “a process to control the disposal of pollutants on land or in *subsurface excavations* within such area to protect *ground and surface water quality*.”<sup>30</sup>

Additionally, EPA’s Nonpoint Source Management Program requires state development and EPA review of nonpoint source control plans. EPA has issued guidelines and provides federal grants to support those plans.<sup>31</sup> These guidelines list “landfills,” “lagoons, basins, and pits” similar to “subsurface excavations” that can cause groundwater contamination, and note that “polluted ground water” from certain facilities also “cause surface water pollution.”<sup>32</sup> In this instance, EPA recommended that states employ control measures, rather than EPA actions under the NPDES program.<sup>33</sup> Jurisdictional demarcation between various federal and state programs must be clear to help ensure compliance and prevent the waste of federal and state administrative resources from overlapping jurisdiction.

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<sup>28</sup> *26 Crown Assocs., LLC v. Greater New Haven Reg’l Water Pollution Control Auth.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at \*8 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017).

<sup>29</sup> 33 U.S.C. § 1362(11) (emphasis added).

<sup>30</sup> *Id.* at § 1288(b)(2)(K) (emphasis added).

<sup>31</sup> *Id.* at § 1329(b)(1), (d)-(n).

<sup>32</sup> EPA, Ground Water Pollution from Subsurface Excavations, EPA-430/9-73-012 (1973), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000Z6YZ.TXT>.

<sup>33</sup> *See* 118 Cong. Rec. 1, 123-135, 151-177 (1972).

### **c. The CWA's Legislative History Supports this Assertion**

The CWA's legislative history further supports that the point source program does not regulate releases that reach navigable waters via groundwater or some other subsurface flow. When Congress first debated the provisions of what would ultimately become the CWA, it deliberately chose not to extend the point source program to pollutants entering groundwater, despite being well aware that some pollutants could eventually migrate through groundwater and enter navigable waters.

Notably, Congress went on to *reject* a House amendment, introduced by Representative Leslie Aspin, as well as other proposals, which would have extended the point source program to releases into groundwater. In rejecting that amendment, the House Committee on Public Works stated that there was not enough information on ground waters to justify the same type of regulation required for navigable waters.<sup>34</sup> Further, the Senate rejected the same notion “because the jurisdiction regarding groundwaters is so complex and varied from State to State.”<sup>35</sup>

As such, Congress made it clear that it did not want to extend the point source program to cover releases that reach navigable waters via groundwater. Rather, it chose to regulate pollutants entering groundwater through nonpoint source programs and other federal and state environmental laws and regulations.

### **d. EPA Has Made Assertions Confirming Its Original CWA Interpretation**

EPA has historically interpreted the CWA in a manner that renders the releases to groundwater outside the scope of the point source program. Shortly after the CWA was enacted, EPA's Office of General Counsel stated that the term “discharge of pollutants” includes only those discharged into navigable waters, and that “discharges into ground waters are not included.”<sup>36</sup>

Later, in *Kelley ex rel. People of the State of Michigan v. United States*, the United States argued that the CWA does not regulate discharges onto soil or into underlying groundwater.<sup>37</sup> The United States was successful with this argument, noting that “the statutory language, the legislative history, the case law, and EPA's interpretation of the Act” all indicate that releases to groundwater allegedly hydrologically connected to nearby navigable waters *are not* regulated by the point source program.<sup>38</sup>

EPA continued to support its original interpretation of the jurisdictional limits of the NPDES program. For example, in 2004, EPA stated that “national [NPDES] regulations apply to . . . existing facilities that discharge *directly* to surface waters” and to “newly constructed facilities that discharge *directly* to surface water.”<sup>39</sup> In 2011, EPA further confirmed that “the Clean Water Act's

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<sup>34</sup> *Id.* at 10,667 (statement of Rep. Clausen).

<sup>35</sup> S. Rep. No. 92-414, at 73 (1971), *reprinted* in 1972 U.S.C.C.A.N. 3668, 3739.

<sup>36</sup> *In re E.I. DuPont de Nemours & Co.*, Op. No. 6, 1975 WL 23850, at \*3 (E.P.A.G.C. Apr. 8, 1975).

<sup>37</sup> United States Mem. in Supp. of Rule 12(b) Mot. & In the Alt. for Summ. J. at 5, *Kelley ex rel. People of the State of Michigan v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985) (No. G83-630).

<sup>38</sup> *Id.* at 1107.

<sup>39</sup> EPA, Office of Inspector General, Effectiveness of Effluent Guidelines Program for Reducing Pollutant Discharges Uncertain, Report No. 2004-P-00025, at 2 (Aug. 24, 2004) (emphasis added).

NPDES program . . . is for the control of discharges to waters of the United States” and that “discharges to groundwater are not regulated under the NPDES program” in response to a comment regarding a final NPDES pesticide general permit.<sup>40</sup> Moreover, as recent as last year, EPA clearly stated that “discharges to groundwater are not regulated by the NPDES permit program.”<sup>41</sup>

Recently, however, EPA has made a handful of confusing remarks that should be rescinded, including its position taken in *Maui*. The CWA is unambiguous on the matter and EPA must ensure that its original interpretation, made in connection with notice-and-comment rulemakings, are not undermined by inconsistent agency statements made outside of the rulemaking process.

### **III. Nonpoint Source Programs and Other Environmental Statutes Regulate Discharges that Reach Surface Waters via Groundwater**

Congress intended for releases that reach surface waters via groundwater to be regulated by nonpoint source programs as well as mechanisms in other statutes that address the issue. A number of other statutes already address these releases in a manner that would render CWA coverage duplicative and overly burdensome.

#### **a. An Interpretation that the CWA Regulates the Discharges that Reach Surface Waters via Groundwater Lacks Clear Statutory Authorization**

The CWA does not support an interpretation of the statute to regulate the discharges that reach surface waters via groundwater. When addressing expansive statutory interpretations that extraordinarily expand regulatory jurisdiction, courts typically proceed with caution.<sup>42</sup> Indeed, the Supreme Court has “been reluctant to read into ambiguous statutory text” the “power to require permits for . . . thousands, and the operation of millions, of small sources nationwide” and “excessive demands on limited governmental resources is . . . a good reason for rejecting [an interpretation of an ambiguous statute].”<sup>43</sup> As such, the Supreme Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>44</sup>

In this instance, such an interpretation should be viewed with that caution, as it essentially would extend the NPDES permitting program to millions of situations that Congress never clearly intended to be regulated under the program. This, in turn, would require states to devote a significant amount of time and money, among other resources, to creating new or modifying existing regulatory and permitting programs that they would otherwise not need to address, placing “excessive demands on limited governmental resources,” something the Supreme Court would ultimately reject.

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<sup>40</sup> EPA, Response to Public Comments, EPA NPDES Pesticide General Permit, at xxii (Oct. 31, 2011).

<sup>41</sup> EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, at 7 (undated).

<sup>42</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

<sup>43</sup> *Id.* at 2444.

<sup>44</sup> *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

**b. An Interpretation that the CWA Regulates Discharges that Reach Surface Waters via Groundwater is Unreasonable**

It is unreasonable to interpret the CWA to regulate the discharges that reach surface waters via groundwater under the point source program as it creates a great deal of regulatory uncertainty, would exponentially increase permitting costs, and diverts scarce government resources to create a redundant regulatory regime. It is often not obvious whether or how groundwater connects to navigable water, as the control of nonpoint source pollution is so “dependent on . . . site specific factors,” which is why Congress decided, “uniform federal regulation was virtually impossible.”<sup>45</sup>

To that end, when determining how point source effluent limitations and monitoring, which require identifiable discharge points to measure the pollutant entering navigable water, would apply to the migration of pollution via groundwater, it is infeasible, if not virtually impossible, to make those determinations.<sup>46</sup> NPDES permitting regulations are an “end of pipe” program, which would be extremely hard to apply in a groundwater context.<sup>47</sup> This level of uncertainty would potentially expose millions of additional sources to litigation and liability. As Justice Kennedy noted, “the reach and systemic consequences of the [CWA] remain a cause for concern.”<sup>48</sup>

The real-world effects of this uncertainty is contrary to Congress’ intent that the CWA protect the environment and would have substantial implications that would impact private and public infrastructure investment, including systems that augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls, among other benefits. As a result, the uncertainty would create obstacles to and disincentivize the use of those investments.

Moreover, the cost to obtain a permit under the NPDES program would increase exponentially. Virtually any discharge to groundwater *in any amount* would have to undertake a detailed technical assessment of hydrologic and geologic conditions to determine whether to apply for a permit under the program. Even with a conservative estimation, the total cost to stakeholders would be in the billions of dollars.

**c. Other Statutes Already Regulate the Discharges that Reach Surface Waters via Groundwater**

A number of other environmental statutes and related regulations already protect groundwater quality. Using the CWA’s point source program would create duplicative coverage of the discharges that reach surface waters via groundwater. Additional regulation under the CWA’s point source program could even preclude the protections of other more specific statutes, undermine their success, and undercut state nonpoint source programs.

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<sup>45</sup> *Shanty Town Assocs. Ltd. P’ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988).

<sup>46</sup> See generally, EPA, NPDES Permit Writer’s Manual, EPA-833-K-10-001 (Sept. 2010), <https://www.epa.gov/npdes/npdes-permit-writers-manual> (overview of permitting requirements).

<sup>47</sup> *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000).

<sup>48</sup> *U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, J., concurring).



For example, under RCRA, EPA already has regulations to control and remediate groundwater contamination from coal ash impoundments.<sup>49</sup> These regulations, known as the Federal Coal Combustion Residuals Rule (CCR Rule), reflect EPA's authority to regulate "solid wastes" under RCRA.<sup>50</sup> The goal of the CCR Rule was to impose robust requirements for groundwater monitoring and remediation, including monitoring specific constituents found in coal ash.<sup>51</sup>

Moreover, under CERCLA, Congress established the Superfund program as a means of restoring contaminated areas to beneficial use. Specifically, it includes specific groundwater provisions used to determine appropriate cleanup standards for the removal or remediation of contaminated sites.<sup>52</sup>

Similarly, under the SDWA, Congress provided enforcement provisions related to actions that imminently and substantially endanger human health via groundwater.<sup>53</sup> For example, stormwater collection systems (e.g., detention or retention ponds or basins that rely on infiltration) that are built to control point source runoff per the NPDES Construction General Permit (CGP) could require a separate NPDES permit if EPA were to expand the program to cover releases to groundwater. If those basins release to groundwater, they are already regulated by the SDWA.

Per the federal CGP and "Effluent Limitations Guidelines for Construction and Development" contractors are required to "control stormwater volume and velocity" to minimize pollutant runoff and streambank/channel erosion.<sup>54</sup> The same best management practices (BMPs) are used to capture and control process waters at concrete plants, quarries, aggregate processing operations, etc. The purpose, design, and intention of these ponds and basins is NOT to discharge via "infiltration" – but rather to capture pollutants and remove them prior to "surface" discharge. However, it is probable that some portion of the captured water will reach groundwater.

However, EPA must take note that if those ponds/basins release to groundwater, they are already regulated by the SDWA if they pose any threat to underground drinking water sources. Indeed, EPA has set minimum standards to address the threats posed by all injection wells, including stormwater drainage wells. Under the SDWA Underground Injection Control (UIC) program, the basins are considered a Class V stormwater drainage well if the infiltration BMP is deeper than its widest surface dimension or has a subsurface fluid distribution system.<sup>55</sup> It is not necessary to use the NPDES program to further regulate stormwater BMP discharges to groundwater.

Notably, there has been a recent explosion in the number of ponds, basins and related "green infrastructure" dotting the suburban landscape. Most have been created to satisfy local

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<sup>49</sup> 80 Fed. Reg. 21,302 (Apr. 17, 2015).

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 21,311; 40 C.F.R. Part 257, Appendices III & IV.

<sup>52</sup> *See* 42 U.S.C. § 6973(a); 40 C.F.R. § 300.430.

<sup>53</sup> 42 U.S.C. § 300i(a).

<sup>54</sup> *See* 74 Fed. Reg. 62996, and 40 C.F.R. 450.21 (On December 1, 2009, EPA promulgated ELGs and NSPSs to control the discharge of pollutants from construction sites).

<sup>55</sup> 40 CFR Parts 144 – 147.

government requirements to retain/infiltrate stormwater discharges (onsite) at newly developed and redeveloped sites. Requirements that municipalities (MS4s) use green infrastructure as part of their stormwater management programs are becoming more common in local and state permitting procedures and regulations, administered by the NPDES program. Stormwater infiltration practices reduce pollutant discharges by controlling (reducing and delaying) stormwater runoff volumes and also offset the effects of urbanization on groundwater recharge, as widely recognized and supported by EPA.

The CWA contains other tools that address nonpoint source pollution, including the release of pollutants to groundwater, at both the federal and state level. At the federal level, section 311 of the Act prohibits the discharge of oil or hazardous substances into or upon navigable waters and adjoining shorelines.<sup>56</sup>

As for the state level, section 319, which provides grants for states and territories and is only available for nonpoint source pollution, has been implemented in states such as Tennessee.<sup>57</sup> Tennessee has used this grant program to successfully address pollution from impoundments associated with legacy mining operations and to replace failing septic systems.<sup>58</sup>

Generally speaking, a decision to regulate under the NPDES permitting program would affect a majority of the business community, including those small businesses that can ill afford to go through a complex permitting scheme. When comparing the NPDES permitting program to other provisions found in the CWA, as well as RCRA, CERCLA, and the SDWA, it is clear that Congress intended for those latter mechanisms to regulate releases into groundwater rather than the NPDES permitting program.

#### **IV. EPA Must Clarify its Previous Statements and Issue a Constitutional, Clear, and Legally Defensible Position on the Matter**

The Associations believe that EPA should clarify its previous statements on these releases and provide stakeholders with a position on the matter that is constitutional, clear, and legally defensible.

In the short-term, EPA should take the position that it no longer supports its previous statements on the “direct hydrologic connection” and should take a position that confirms the clear meaning of the CWA – that the Act does not regulate those releases that reach surface water. The Associations believe that would provide immediate clarity on the matter.

In the long-term, EPA should engage stakeholders in a notice-and-comment rulemaking on the matter. Doing so would allow EPA to confirm its position as to the clear meaning of the CWA under the “clear statement doctrine” and provide the public with an opportunity to further engage

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<sup>56</sup> See 33 U.S.C. § 1321.

<sup>57</sup> *Id.* at § 1329.

<sup>58</sup> See EPA, Section 319 Nonpoint Source Program Success Story, Tennessee, Installing Best Management Practices Abates Acid Mine Drainage in Crab Orchard Creek, EPA 841-F-14-001DD (May 2014); EPA, Nonpoint Source Success Story, Tennessee, Septic Tank Effluent Pumping Project Improves King Branch, EPA 841-F-16-001R (Aug. 2016).

the Agency on this issue. To that end, the Associations do not believe EPA needs to develop a “bright-line” test and address every circumstance in which pollutants reach surface water via groundwater, but rather simply confirm that these releases *are not* regulated under the point source program.

## **V. Conclusion**

The Associations appreciate EPA’s efforts to clarify its previous statements as to whether the CWA’s point source program covers the discharge of pollutants to groundwater and the opportunity to comment on this important matter.

Sincerely,

U.S. Chamber of Commerce  
American Forest & Paper Association  
American Fuel & Petrochemical Manufacturers  
American Road & Transportation Builders Association  
Associated General Contractors of America  
Corn Refiners Associations  
Industrial Minerals Association – North America  
National Association of Manufacturers  
National Industrial Sand Association

## Appendix A

The **U.S. Chamber of Commerce** is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

The **American Forest & Paper Association (AF&PA)** serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures about \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

**American Fuel & Petrochemical Manufacturers (AFPM)** is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make millions of products that make modern life possible.

The **American Road & Transportation Builders Association (ARTBA)** represents private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, and rail and transit systems. The transportation construction industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA.

**Associated General Contractors of America (AGC)** is the nation's leading construction trade association. It dates back to 1918, and today, it represents more than 26,000 construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, DC and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

The **Corn Refiners Associations (CRA)** is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, starch, advanced bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Industrial Minerals Association – North America (IMA-NA)** is a nonprofit trade organization representing industrial minerals producers throughout the United States. IMA-NA represents a diverse set of member companies engaged in mining and processing of ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, soda ash, talc, and wollastonite in over 20 states.

The **National Association of Manufacturers (NAM)** is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Industrial Sand Association (NISA)** is a nonprofit trade association representing the major North American producers and processors of industrial sand, sometimes called silica sand. NISA currently has 21 members and is the oldest and largest trade association representing the industrial sand industry in the United States and Canada. NISA is the sole member of the industrial sand section of IMA-NA.