May 21, 2018

Via Regulations.gov Portal

Water Docket
U.S. Environmental Protection Agency
Mail Code: 4203M
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments of the American Petroleum Institute, the American Exploration & Production Council, the Association of Oil Pipe Lines, the Independent Petroleum Association of America, the Domestic Energy Producers Alliance, and the Marcellus Shale Coalition in Response to the Environmental Protection Agency's Request for Comments on Clean Water Act ("CWA") Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water; EPA-HQ-OW-2018-0063.

Dear Sir/Madam:

This letter provides comments from the American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), American Exploration & Production Council ("AXPC"), Independent Petroleum Association of America ("IPAA"), the Domestic Energy Producers Alliance ("DEPA"), and the Marcellus Shale Coalition ("MSC") – (collectively, "the Associations"), responding to the Environmental Protection Agency's ("EPA's" or "The Agency's") Request for Comments on Clean Water Act ("CWA" or "the Act") Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water.[1] The Associations appreciate that EPA opened this comment period. Our members share EPA's concern that seemingly contradictory Agency guidance and conflicting case law have blurred the Act's conspicuous delineation between those point source discharges to jurisdictional waters that require CWA permits, and releases to groundwater that do not require CWA permitting. ***Please***

[1] 83 Fed. Reg. 7126 (Feb. 20, 2018).

note that a summary of our comments begins on page 2 and includes a table of contents beginning on page 7.

Properly delineating the CWA's National Pollutant Discharge Elimination System ("NPDES") permitting framework is not merely an exercise in administrative housekeeping. EPA has an important choice to make between the following scenarios and consequences:

- Under an "appropriate action" scenario, EPA regulators would reassert the regulatory distinctions intended by Congress in drafting the CWA. This would further the CWA's goals of protecting water resources through cooperative federalism. It would provide clarity and certainty over CWA permitting obligations for all stakeholders, allowing each to use their limited resources most effectively to protect water resources.

- Under a "no action" scenario, EPA would decline to clarify the limits of NPDES permitting requirements. This would risk upending a complex framework of federal, state, and local laws and regulations, generate an unworkable permit backlog, undermine beneficial reuse and green infrastructure projects, exhaust Agency resources, and invite frivolous litigation. Allowing the pretext of statutory interpretation to expand the NPDES program to nonpoint or groundwater releases would exceed EPA's discretionary authority, and would not serve any resource protection purposes. It would also unjustifiably mandate duplicative NPDES permit coverage for activities that are already addressed by the CWA, Safe Drinking Water Act ("SDWA"), Resource Conservation and Recovery Act ("RCRA"), and other statutes.

The CWA and the NPDES permitting framework do not exist in a vacuum – they fulfill integral roles in a complex system of statutes, regulations, and programs across all levels of government. The Associations' members are well aware of this regulatory interplay because they are subject to some of the most extensive and complex environmental laws and regulations of any industry, and they devote substantial resources to ensuring compliance with those laws and regulations. We support EPA reasserting key congressional regulatory distinctions here. In order to re-establish the clarity and certainty necessary for effective enforcement under the CWA and other statutes, congressional intent must be the driving force behind EPA's interpretation of the scope of the NPDES permitting program

I. SUMMARY OF COMMENTS

The Associations support EPA's current review of the scope of the NPDES permitting program. We believe that prior interpretations of the scope of the NPDES permitting program, such as the Agency's "direct hydrological connection" theory, have improperly expanded the scope of the NPDES program beyond what the text of the CWA allows, and beyond what Congress intended.

The CWA establishes multiple programs that "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] One element of Congress' comprehensive strategy is the Act's general prohibition on the "discharge of any pollutant," except "in compliance with" other provisions of the Act.[3] "Other provisions of the Act" include the NPDES permitting program.

While Congress appropriately equipped EPA with this powerful permitting and compliance program, it expressly limited the scope of the NPDES permitting program through the Act's definition of "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source,"[4] and by Congress' chosen definitions for key terms within this phrase. Of particular relevance here is Congress' definition of "point source" as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged."[5] While the CWA does not provide a definition of nonpoint sources, nonpoint source pollution "is defined by exclusion and includes all water quality problems" that are not from point sources.[6] Because releases to groundwater and groundwater pollution generally do not involve point source discharges into navigable waters, releases to groundwater and groundwater pollution are types of nonpoint source pollution that are outside the scope of the NPDES permitting program.

Point sources and nonpoint sources are clearly different, and Congress unequivocally treated them differently in the CWA. Point source discharges, which "tended to be more notorious and more easily targeted"[7] were therefore subjected to the CWA's broad prohibition against "the discharge of any pollutant . . .,"[8] and the NPDES permitting program. Nonpoint source pollution, on the other hand, which enters regulated waters "primarily through indiscrete and less identifiable natural processes such as runoffs, precipitation and percolation,"[9] was not subjected to the CWA's NPDES permitting program. Instead, the Act addressed nonpoint source pollution through a myriad of programs, including research, funding, planning, and programs focused on the quality of receiving waters rather than the specific types of sources that can impact downstream water quality.

As it is abundantly clear that the NPDES program is limited solely to discharges of pollutants from point sources, properly delineating the scope of the NPDES permitting program requires an understanding of the circumstances where pollutants are discharged *from point sources*. According to the Supreme Court, the term "conveyance" in the CWA's definition of "point source" "makes plain" that a point source must "convey the pollutant to 'navigable waters.'"[10] Several

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[2] 33 U.S.C. § 1251(a).
[3] 33 U.S.C. § 1311(a).
[4] 33 U.S.C. § 1362(12)(A).
[5] 33 U.S.C. § 1362(14).
[6] *Nat'l Wildlife Fed.n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982).
[7] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[8] 33 U.S.C. § 1311(a).
[9] *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 220 (2d Cir. 2009) (quoting FRANK P. GRAD, TREATISE ON ENVTL LAW § 3.03 (updated 2009)).
[10] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

other courts have similarly recognized that a "discharge of a pollutant" occurs only when a point source conveys the pollutant to navigable waters. In other words, the CWA classifies pollution as a point source at the point "when the pollutant first enters navigable water."[11] A point source "need not be the original source of the pollutant," but it does "need [to] *convey* the pollutant to '*navigable waters*.'"[12] As such, according to the explicit wording of the CWA and all credible interpretations of that language, a point source can only be that which directly conveys a pollutant to navigable water. If anything other than a point source conveys a pollutant to navigable water, there is no discharge subject to NPDES permitting requirements.

Further, groundwater is not a point source regardless of whether it conveys pollutants to navigable waters. While groundwater can transport pollutants to navigable waters, the CWA's definition of "point sources" limits the NPDES program to conveyances that are "'discernable, confined, and discrete.'"[13] Therefore, EPA's previous interpretation "that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements,"[14] finds no support in the text of the Act. The CWA is clear that hydrological connections (direct or otherwise) between point sources and navigable waters are not themselves point sources. As such, releases to groundwater are outside the scope of the NPDES program, and EPA's "direct hydrological connection" theory is plainly erroneous. Even if the relevant language of the CWA were amenable to differing interpretations, EPA's "direct hydrological connection" interpretation is impermissible. Where an interpretation of the CWA "invokes the outer limits of Congress' power," it must be supported by "a clear indication that Congress intended that result," especially where the "interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[15]

The relevant legislative history does not support an expansive interpretation of the NPDES permitting program. To the contrary, the legislative history of the CWA demonstrates that Congress recognized that nonpoint sources and groundwater pollution were problems and further demonstrates that Congress knowingly and purposely declined to include nonpoint sources and groundwater in the NPDES permitting program. These decisions do not reflect congressional indifference to groundwater pollution or nonpoint sources of impairment. Congress recognized that water pollution was caused by a wide variety of sources – some discrete and some diffuse. Congress also recognized that these varied sources impacted jurisdictional surface waterbodies through different means – some directly and some through groundwater. Faced with these varied sources and conveyances, Congress provided EPA and its state and tribal partners similarly varied tools to address these sources and the means by which they impact water resources.

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[11] *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).
[12] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (emphasis added).
[13] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (quoting §§ 1362(7), (14)).
[14] 83 Fed. Reg. at 7127; See also 55 FR 47,990, 47,997 (Dec. 2, 1990); 56 FR 64,876, 64,892 (Dec 12, 1991); 66 FR 2,960, 3,017 (Jan. 12, 2001); 68 FR 7,175, 7,216 (Feb. 12, 2003).
[15] *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001*); cf. Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014).

Although EPA's "direct hydrological connection" theory provides a clear example of an overreaching interpretation of the CWA, it is by no means the most egregious example of an impermissibly expansive interpretation of the NPDES permitting program structure. Two recent appellate court decisions seemingly interpret the CWA to even more broadly apply the Act's NPDES permitting program.[16] In *Hawaii Wildlife Fund v. County of Maui*, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") adopted its own non-statutory standard – one which effectively read the words "direct" and "hydrological" out of EPA's inventive "direct hydrological connection" standard.[17] In place of the "direct hydrological connection" standard, the court imposed a "fairly traceable" standard that is similarly absent from the text of the CWA, far more subjective, and wholly undefined. The Ninth Circuit left "for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."[18]

In *Upstate Forever v. Kinder Morgan Energy Partners*, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") overturned a lower court decision and held that a spill of gasoline from a buried pipeline to dry land that then seeps through the soil to groundwater and ultimately emanated to a nearby navigable water was an unpermitted point source discharge under the NPDES program because pollutants in the river were "traceable ... *in measurable quantities*," to the spill site that the company had long since initiated remediation of pursuant to the standards of the state environmental agency. In so holding, the court held the company was liable for continuing violations long after its pipeline had been repaired, and long after the state had exercised its enforcement and response authority to mandate the cleanup of the spill. Under the majority view, the residual impacts from discharges from point sources are subject to NPDES permitting requirements, even if the point source itself is no longer discharging any pollutants.

The Associations believe that the courts' errant conclusions in these cases demonstrate why EPA's present interpretive effort is so important. Expansion of the NPDES permitting program to include nonpoint sources and releases to groundwater would "bring about an enormous and transformative expansion in EPA's regulatory authority [over point sources] without clear congressional authorization,"[19] and this transformation would demand an equally expansive intrusion into numerous regulatory programs Congress assigned to other environmental statutes. Thousands, if not millions, of additional sources would be subject to NPDES requirements so long as pollutants that reach navigable waters are "fairly traceable," to those sources, "directly connected" to those sources, or present in navigable water in "measurable quantities."

The sources that could be subject to NPDES permitting under these expansive interpretations are already regulated and addressed through different programs under the CWA, through multiple other environmental statutes, across numerous federal agencies, and at all levels

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[16] *Haw. Wildlife Fund v. Cnty. of Maui*, 2018 WL 1569313 (9th Cir. 2018) ("*Maui*"); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, slip op. (4th Cir. April 12, 2018) ("*Kinder Morgan*").
[17] *Maui*, 2018 WL 1569313, at *8 n.3
[18] *Maui*, 2018 WL 1569313, at *8.
[19] *Utility Air Regulatory Group v. EPA*, 134 U.S. at 2444 (2014).

of government. This complex regulatory framework, and the principles of cooperative federalism that are imbedded therein, would be upended through increasingly expansive interpretations of the scope of the NPDES program. This consequence is not a modest price to be paid in furtherance of improved water quality. It would impede the implementation of the CWA, create uncertainty, undermine compliance, hamper environmentally beneficial projects, and redirect limited resources from protection to paperwork.

These impacts can be avoided through EPA's present effort to craft a good faith interpretation of the scope of the NPDES permitting program. While this interpretation is important, it need not be complex. The "interpretations" necessary to clarify the scope of the NPDES permitting program are, in reality, Agency pronouncements that EPA will apply the plain meaning of the definitions already laid out in the Act.

The detailed comments that follow provide the Associations' specific recommendations. Should EPA decide to develop the clarifications described herein, the Associations strongly recommend that the Agency do so through an expedited notice-and-comment rulemaking under the Administrative Procedure Act ("APA").[20] Formal rulemaking procedures will help refine and improve EPA's ultimate clarification through robust stakeholder engagement, increase the legal defensibility of EPA's clarification, and likely result in the broad-based and enduring clarification of the scope of the NPDES permitting program that has proved elusive for too long.

[20] 5 U.S.C. § 551 et seq.

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II. THE ASSOCIATIONS' INTERESTS REQUIRE CERTAIN, COMPREHENSIVE AND EFFECTIVE PERMITTING PROCESSES

API is a national trade association representing over 640 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America before state and federal agencies, legislative bodies, and the judiciary and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the nation's refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels, through pipelines that extend approximately 211,150 miles across the United States. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, cost-effective and environmentally-friendly method of serving energy consumption demand.

AXPC is a national trade association representing 33 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in different segments of the energy industry such as refining and marketing. The AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

DEPA is a unique organization with a grassroots approach to domestic onshore energy advocacy and education. We are an alliance of producers, royalty owners, and oilfield service companies as well as state and national independent oil and gas associations representing the small business men and women of the energy industry, devoted to the survival of U.S. domestic crude oil and natural gas exploration and production. DEPA's members are leaders in developing and applying the innovative and advanced technologies that allow our nation to add reasonably priced domestic energy reserves in a fair and equitable market.

IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will most directly be impacted by the federal regulatory policies. Independent producers develop about 95 percent of American oil and natural gas wells, produce 54 percent of American oil, and produce 85 percent of American natural gas. Historically, independent producers have invested over 150 percent of their cash flow back into American oil and natural gas development to find and produce more American energy. The IPAA is dedicated to ensuring a strong, viable American oil and natural

gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

MSC was formed in 2008 and is comprised of approximately 220 producing, midstream, transmission and supply chain members who are committed to working with local, county, state and federal government officials and regulators to facilitate the safe development of natural gas resources in the Marcellus, Utica and related geological formations. MSC members represent many of the largest and most active companies in natural gas production, gathering, processing and transmission in the country, as well as the suppliers and contractors who service the industry.

The Associations' members have a substantial interest in the scope of federal jurisdiction under the CWA and, in particular, furthering cooperative federalism through an appropriate delineation of the activities subject to NPDES permitting. All segments of the oil and natural gas industry are subject to extensive water permitting and regulatory requirements at both the state and federal levels for activities such as the drilling and producing from oil and natural gas wells, refining crude oil, transporting crude oil or refined product, and operating filling stations. Protecting water resources is important, and the Associations and their members remain committed to working with federal and state regulators to ensure that water resource regulations are protective and administrable.

This commitment is reflected in the Associations' engagement on this particular issue. API, along with other industry groups, filed an *amicus curiae* brief in *Hawaii Wildlife Fund v. City of Maui*, a recent case in the Ninth Circuit that considered many of the same issues here.[21] API and AOPL also filed an amicus brief in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, a case in the Fourth Circuit which also examined the applicability of NPDES permitting requirements to releases to groundwater.[22]

Consistent with our long-standing position, the Associations' comments and recommendations reflect our support for the CWA and our interest in administering the Act in a way that gives meaningful effect to Congress' explicit directive to protect the integrity of water resources through cooperation and coordination with the states. These comments and recommendations also reflect the Associations' belief that Congress has already drafted the CWA and multiple other statutes to equip EPA, other agencies, states, tribes, and localities with a myriad of tools to address nonpoint source pollutants and to protect groundwater and water resources potentially impacted by groundwater. The Associations believe that reasonable observance of the regulatory interplay between the various jurisdictional and statutory provisions governing water resources will ensure that regulations under the CWA are clear, protective, administrable, consistent with legislative intent, and legally sound.

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[21] No. 15-17447, slip. Op. at 19 (9th Cir. Feb. 1, 2018). API brief at Doc. No. 12-2. API also filed an *amicus curiae* brief in support of an *en banc* rehearing of the Ninth Circuit's decision. See Docket No. 73-2. We are attaching these briefs as exhibits to these comments.

[22] No. 17-1640 (4th Cir. April 12, 2018).

III. DETAILED COMMENTS

A. A Release to Groundwater is Not a "Discharge of a Pollutant" Subject to the NPDES Permit Program

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[23] One element of Congress' comprehensive strategy is the Act's general prohibition on the "discharge of any pollutant," except "in compliance with" other provisions of the Act.[24] Congress defined the phrase "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source."[25] "Other provisions of the Act" that serve as exceptions to the CWA's broad discharge prohibition include the Section 402 NPDES permitting program.

Under Section 402 of the Act (the NPDES Program), EPA and authorized state agencies may issue permits for "the discharge of any pollutant."[26] NPDES permits "place limits on the type and quantity of pollutants that can be released into the nation's waters."[27] To ensure compliance, Congress created a strict liability system, enforceable by federal and state agencies, as well as private citizens.[28] Illegal discharges can trigger civil actions for penalties of up to $51,570 per violation per day.[29] The Act also provides for criminal penalties: negligent violations bring penalties of up to $25,000 per day and one year of imprisonment; "[k]nowing" violations trigger penalties of up to $50,000 per day and three years' imprisonment—or twice that amount in the case of a second violation.[30] The government has brought nearly 800 criminal prosecutions for negligent violations of the CWA since 1986.[31]

1. Congress provided clear boundaries for the NPDES program with limiting language and carefully considered definitions.

While Congress appropriately equipped EPA, the Army Corps of Engineers ("Army Corps"), tribes, and the states with a powerful permitting program and ample enforcement authority to ensure compliance with the Act's discharge prohibitions and permitting requirements, it did not structure the NPDES permitting program as a tool to be wielded in all circumstances. The boundaries of the NPDES permitting program were proscriptively circumscribed by the phrase

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[23] 33 U.S.C. § 1251(a).
[24] 33 U.S.C. § 1311(a).
[25] 33 U.S.C. § 1362(12)(A).
[26] 33 U.S.C. § 1342(a). Similarly, under Section 404, the Army Corps of Engineers ("Corps") may issue permits for "the discharge of dredged or fill material." 33 U.S.C. § 1344(a).
[27] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).
[28] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 52-53, 58 (1987).
[29] 33 U.S.C. § 1319(b), (d), 1365; 81 Fed. Reg. 43,091, 43,095 (July 1, 2016).
[30] 33 U.S.C. § 1319(c)(1)-(2).
[31] See https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm (accessed May 4, 2018).

"any addition of any pollutant to navigable waters from any point source"[32] and by Congress' chosen definitions for key terms within this phrase.

"Navigable waters" were defined as "the waters of the United States ["WOTUS"], including the territorial seas."[33] While the precise contours of this definition are the subject of a great deal of debate, there is no question that Congress intended the definition of WOTUS, and therefore "navigable waters," to refer to a subset of surface waterbodies within the United States. So too with Congress' decision to define "point source" as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged."[34] Reasonable minds might disagree about what it means to be a discernable, confined, and discrete conveyance, but it is clear that the CWA's definition of "point source" reflects Congress' intent to limit in some way the scope and application of the Act's prohibition on "discharge" as it related to the NPDES permitting program.

Armed with an understanding that the CWA itself imposes these limits, EPA must be guided by its text. EPA's role in this rulemaking is to interpret this language as carefully and objectively as possible to give meaning to Congress' chosen language and to avoid dismissing key terms and phrases as extraneous.

The Associations also note that Congress' decision to limit the scope of the NPDES permit program does not reflect congressional indifference to groundwater pollution or nonpoint sources of impairment. While the CWA's discharge prohibition and NPDES permitting program are among the Act's most powerful tools, they are certainly not the sole mechanisms for restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."[35] Congress recognized that water pollution was caused by a wide variety of sources – some discrete and some diffuse. Congress also recognized that these varied sources impacted jurisdictional surface waterbodies through different means – some directly and others through groundwater. Faced with these varied sources and conveyances, Congress provided EPA and its state and tribal partners similarly varied tools to adequately address these sources and the means by which they impact water resources.

a) The CWA Requires NPDES Permits Only for Point Sources and it Clearly Distinguishes Between Point and Nonpoint Sources

The NPDES program is a power tool in furtherance of water quality, but its scope is limited to point source discharges to navigable waters. There are many pragmatic reasons why the

[32] 33 U.S.C. § 1362(12)(A).
[33] 33 U.S.C. § 1362(7).
[34] 33 U.S.C. § 1362(14).
[35] 33 U.S.C. § 1251(a); The Act's provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the States for water quality standards (33 U.S.C. § 1311-14), area-wide waste treatment management (id. at 1288), and nonpoint source management (id. at § 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (id. at § 1281); funding to study impacts on water quality (id. at § 1251-74); and programs targeting specific types of pollution (e.g., id. at § 257, 1321).

program does not cover nonpoint source pollution and releases to groundwater, including permitting burdens, difficulty in determining the point of compliance, and technical limitations on setting limits and measuring compliance. More fundamentally, however, point source pollution and nonpoint source pollution must be treated differently because the CWA commands this divergent treatment.

In drafting the CWA, "Congress consciously distinguished between point source and nonpoint source discharges."[36] A "point source" was defined to mean:

> . . . any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural discharges and return flows from irrigated agriculture.[37]

While the CWA does not provide a similarly explicit definition of nonpoint sources, nonpoint source pollution "is defined by exclusion and includes all water quality problems" that are not from point sources.[38] Stated differently, nonpoint source pollution is "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source."[39]

Because nonpoint and point source pollution are fundamentally different, the CWA treated them as such. This "disparate treatment" of point source and nonpoint source pollution is an "organizational paradigm of the Act."[40]

Point source discharges "tended to be more notorious and more easily targeted"[41] and were therefore subjected to the CWA's broad prohibition against "the discharge of any pollutant . . ."[42] Point source discharges were also included within the permitting programs that operate as exemptions to the CWA's discharge prohibition – the NPDES program (Section 402) or the Army Corps' "dredge and fill permit" (Section 404).

A NPDES permit "place[s] limits on the type and quantity of pollutants that can be released into the Nation's waters,"[43] and "defines, and facilitates compliance with, and enforcement of,… a discharger's obligations under the [CWA]."[44] The EPA promulgates the "effluent limitations" that "restrict the quantities, rates, and concentrations of specified substances which are discharged."[45] The states, with substantial guidance from EPA, promulgate the "water quality

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[36] *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).
[37] 33 U.S.C. § 1362(14).
[38] *Nat'l Wildlife Fed.n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982).
[39] *Swanson v. U.S. Forest Serv*., 87 F.3d 339, 342 n.2 (9th Cir. 1996).
[40] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[41] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[42] 33 U.S.C. § 1311(a).
[43] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 102 (2004).
[44] *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205 (1976).
[45] *Arkansas et al. v. Oklahoma et al.*, 503 U.S. at 101 (1992); *see* also 33 U.S.C. §§ 1311, 1314.

standards" that express the states' "desired condition of a waterway… so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels."[46]

In addition to listing the effluent limitations and water quality standards, NPDES permits also require "compliance with the inspection, reporting and monitoring requirements of the [CWA] as outlined in 33 U.S.C. § 1318."[47] To the benefit of NPDES permit holders, the CWA "shields NPDES permit holders from liability if their discharges comply with their permits."[48] The NPDES permitting program thus constitutes "[t]he primary means for enforcing these limitations and standards."[49]

Nonpoint source pollution, on the other hand, is typically caused by "rainfall around activities that employ or cause pollutants,"[50] and which thereupon enter regulated waters "primarily through indiscrete and less identifiable natural processes such as runoffs, precipitation and percolation."[51] Because nonpoint source pollution is frequently "less identifiable" and "not traceable to any single discrete source,"[52] it "is very difficult to regulate through individual permits."[53] Further to that point, *Kinder Morgan* acknowledges that "… it would be difficult to mandate compliance with inspection, reporting, and monitoring requirements given that nonpoint source pollution cannot be traced to discrete sources."[54]

Consequently, the CWA does not attempt to regulate nonpoint source pollution through the NPDES permitting program.[55] Instead, the Act addresses nonpoint source pollution through a myriad of programs, including research, funding, planning, and outcome-based programs which focus on the quality of receiving waters rather than the specific types of sources that can impact downstream water quality.[56] EPA's role in addressing nonpoint pollution under the CWA is therefore limited to largely non-regulatory actions. This limited role does not evince congressional indifference – rather, it reflects a recognition that under the NPDES program, "nationwide uniformity in controlling non-point source pollution [is] virtually impossible," and that "the control

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[46] *Id.* (internal quotation marks); *see* also 33 U.S.C. § 1313.
[47] *Menzel v. Cty. Util. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983).
[48] *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133,135 (4th Cir. 2017).
[49] *Arkansas et al. v. Oklahoma et al.*, 503 U.S. at 101 (1992).
[50] *United States v. Earth Sci., Inc.,* 599 F.2d 368, 373 (10th Cir. 1979).
[51] *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 220 (2d Cir. 2009) (quoting FRANK P. GRAD, TREATISE ON ENVTL LAW § 3.03 (updated 2009)).
[52] *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).
[53] *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).
[54] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F. Supp. 3d at 36 (D.S.C. 2017).
[55] *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (10th Cir. 2005).
[56] The Act's provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the States for water quality standards (33 U.S.C. § 1311-14), area-wide waste treatment management (id. at § 1288), and nonpoint source management (id. at § 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (id. at 1281); funding to study impacts on water quality (id. at § 1251-74); and programs targeting specific types of pollution (e.g., id. at § 257, 1321).

of non-point source pollution often depends on land use controls, which are traditionally state or local in nature."[57]

Without question, the CWA draws "a clear and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which is specifically reserved to State and local governments . . ."[58] These distinctions are explicit and intended as part of the "organizational paradigm of the Act."[59] These distinctions also demonstrate that Congress did not ignore nonpoint sources of pollution by limiting the NPDES program to point sources. The CWA clearly addressed nonpoint source pollution. Nonpoint sources of pollution were simply treated differently – by necessity.

The CWA's disparate treatment of point and nonpoint sources also reflects Congress' awareness that the federal government acting alone lacked the tools and jurisdictional reach "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[60] Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources."[61]

Grounded on principles of cooperative federalism, the CWA establishes states as the primary permitting and enforcement authorities. In fact, the primary role of states was among Congress' foremost considerations when designing the Act:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid

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[57] *Or. Nat. Desert Ass'n v. U.S. Forest Serv*., 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, *Non-point Source Pollution*, *in* ENVTL L. PRACTICE GUIDE § 18.13 (2008)).
[58] S. Rep. No. 95-370 at 8 (1977).
[59] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[60] 33 U.S.C. § 1251(a); The Act's provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the States for water quality standards (33 U.S.C. § 1311-14), area-wide waste treatment management (33 U.S.C. § 1288), and nonpoint source management (33 U.S.C. § 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (33 U.S.C. § 1281); funding to study impacts on water quality (33 U.S.C.§ 1251-74); and programs targeting specific types of pollution (e.g., 33 U.S.C. § 257, 1321).
[61] 33 U.S.C. § 1251(b).

> to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.[62]

Thus, in recognition of the states' sovereignty and the fact that states are best situated to regulate their own resources, the CWA requires EPA to coordinate its water resource protection efforts with the states.[63] Critically, this federal/state coordination was explicitly required for groundwater pollution.[64]

While it is quite clear that the CWA distinguished between point and nonpoint sources and apportioned authority between EPA and the states, it is equally clear that many groups disagree with this structure. As recent cases demonstrate, certain advocacy groups would like the NPDES program's strong compliance tools applied beyond point sources and would prefer that EPA not share regulatory and enforcement authority with states and tribes. Similar sentiments likely underlie EPA's previous interpretations of the NPDES Permit Program to include releases to groundwater with "direct hydrological connections" to navigable waters.

More precisely, the Agency has previously stated that "point sources" releasing pollutants that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements. These "interpretations" were not the product of a guidance document or rulemaking effort specifically focused on defining the scope of the NPDES permitting program under the CWA. Instead, EPA made these statements in a variety of regulatory actions where determinations of the proper scope of EPA's jurisdiction under the NPDES program were ancillary to the central focus of a rulemaking or adjudication.[65] Because the "direct hydrological connection" theory was the

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[62] 33 U.S.C. § 101(b).

[63] 33 U.S.C. § 101(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."); 33 U.S.C. § 102(a) ("The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.").

[64] 33 U.S.C. § 102(a) ("The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.").

[65] *See Final NPDES Permit Application Regulations for Storm Water Discharges*, 55 FR 47,990, 47,997 (Dec. 2, 1990) ("[T]his rulemaking only addresses discharges to water of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)."); *1991 Final Rule Addressing Water Quality Standards on Indian Lands*, 56 FR 64,876, 64,892 (Dec 12, 1991) ("Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issues have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected

product of ad-hoc interpretations across numerous regulatory contexts, it cannot be viewed as a long-standing or consistent Agency interpretation of the scope of the NPDES permit program. In fact, EPA has seemingly disavowed this more expansive authority in other rulemaking efforts. For instance, when finalizing a rule governing discharges from CAFOs, EPA declined to establish nationally applicable effluent limitation requirements related to releases to groundwater with a direct hydrologic connection to jurisdictional water and recognized that "there are scientific uncertainties and site-specific considerations with respect to regulating discharges to surface water via groundwater with a direct hydrologic connection to surface water [and] conflicting legal precedents on this issue."[66]

Even where the Agency has asserted jurisdiction based on the "direct hydrological connection" theory, EPA has never interpreted the CWA to suggest that NPDES permits are required for pollutant discharges to groundwater in all cases. Nor has the Agency ever adequately explained its "direct hydrological connection" theory beyond the fact-specific circumstances in which EPA has asserted more expansive authority. Moreover, EPA has never fully examined the validity of the "direct hydrological connection" in light of Congress' clear and purposeful distinction between point source and nonpoint source discharges. EPA simply asserted additional authority in circumstances when the Agency believed that accomplishing the CWA's goals required more expansive federal jurisdiction. These sporadic jurisdictional assertions are not Agency interpretations entitled to deference or treatment as precedent. Nor are they consistent with how Congress designed the CWA. The Agency does not have the authority to alter the statutory structure Congress provided. EPA's role here is to interpret the CWA to adhere as faithfully as possible to the structure of the Act and congressional intent.

b) The CWA Requires NPDES Permits Only When Pollutants are Introduced to Navigable Waters Through Discernable, Confined, and Discrete Conveyances

The preceding sections describe how the CWA distinguishes between point sources and nonpoint sources and further explain the policy and pragmatic reasons why the CWA's discharge prohibition and NPDES permitting requirements are limited to point sources. Having established

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groundwaters are not considered `waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters."); *Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000*, 62 FR 20,178 (1997) ("the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater. . . . [T]he permit requirements . . . are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection."). *See also Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)*, 66 FR 2,960, 3,017 (Jan. 12, 2001) ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act. The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry . . . .").

[66] Final NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 FR 7,175, 7,216 (Feb. 12, 2003).

that NPDES permits are only required for point sources, this section examines whether a release to groundwater is an "addition of any pollutant to navigable waters from any point source" subject to NPDES permitting requirements. As explained below, the text of the CWA does not allow a release to groundwater to be construed as a point source discharge even if the released pollutant is ultimately found in navigable waters.

As previously noted, the CWA's primary trigger for NPDES permitting is "the discharge of any pollutant"[67] which is defined as "any addition of any pollutant to navigable waters from any point source."[68] The CWA also defines three key words in the phrase "any addition of any pollutant to navigable waters from any point source:"

- "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water;"[69]

- "Navigable waters" are defined as "the waters of the United States, including the territorial seas;"[70] and,

- "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[71]

The Act's definition of "pollutant" is broad and therefore does not aid in understanding the scope of the CWA's prohibition on, and permitting requirements for, discharges to navigable waters. The phrases "to navigable waters" and "from any point source" do, however, serve as guideposts on the CWA's framework for regulating "the discharge of any pollutant."

i. Point Sources Convey Pollutants to Navigable Waters

As noted above, the CWA defines "point source" as "any discernible, confined and discrete conveyance" and then provides a nonexclusive list of mechanisms that can convey pollutants to

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[67] 33 U.S.C. § 1311(a).
[68] 33 U.S.C. § 1362(12).
[69] 33 U.S.C § 1362(6). The CWA's definition of "pollutant" also contains specific exclusions that are not directly relevant to the statutory interpretation at hand. Nonetheless, for sake of accuracy, we herein provide the definition's exclusions. "The term [pollutant] does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
[70] 33 U.S.C § 1362(7).
[71] 33 U.S.C § 1362(14).

navigable waters.[72] While the nonexclusive list of conveyances that follow the definition of "point source" identify some examples of possible conveyances to navigable waters, it is the definition itself ("any discernible, confined and discrete conveyance"[73]) that provides meaning to the term "point source" and establishes limitations to the scope of the NPDES permitting program.

Importantly, these are only examples, and these examples are only point sources *if* they are discernable, confined, and discrete. They do not subsume the CWA's definition of a "point source," nor do they turn groundwater releases into discrete conveyances. The meaning of the term "point source, and therefore the scope of the NPDES permit program, are not governed by the scope of the examples Congress provided – they are governed by the statutory definition "any discernible, confined and discrete conveyance."[74]

Within this statutory definition of "point source," "conveyance" is the only noun, and therefore, the sole object with which to classify the meaning of the term "point source."[75] According to the Supreme Court, the term "conveyance" "makes plain" that a point source must "convey the pollutant to 'navigable waters.'"[76]

Several other courts have similarly recognized that a "discharge of a pollutant" occurs only when a point source conveys the pollutant to navigable waters. The United States Court of Appeals for the Second Circuit ("Second Circuit") explained that the term "'point sources' [] does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate sources from which the pollutant is directly introduced to the designation water body."[77] The United States Court of the Appeals for the District of Columbia Circuit ("D.C. Circuit") has also long recognized that, "the discharge of any pollutant" does not occur, nor are NPDES permitting requirements triggered, simply because a pollutant originated from or passed through a "point source" prior to being introduced to a navigable water:

> [I]t does not appear that Congress wanted to apply the NPDES system whenever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source.[78]

In other words, the CWA classifies pollution as either point source or nonpoint source at the point "when the pollutant first enters navigable water."[79] A point source "need not be the

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[72] "including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. § 1362(14).
[73] 33 U.S.C. § 1362(14).
[74] 33 U.S.C. § 1362(14).
[75] 33 U.S.C. § 1362(14).
[76] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).
[77] *Catskill Mtns. v. City of New York*, 273 F. 3d. 481, 493 (2nd Cir. 2001).
[78] *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982).
[79] *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

original source of the pollutant," but it does "need [to] *convey* the pollutant to '*navigable waters*.'"[80] Were the Act to be interpreted to conclude otherwise:

> any non-point source pollution . . . could 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.[81]

While it seems arbitrary to so precisely define "point sources" as the mechanisms that actually convey pollutants to navigable waters, from a practical standpoint, Congress' definition makes sense. Nearly all pollution found in navigable waters likely could be traced back to something that could be characterized as a point source. But that cannot mean that all pollution in navigable waters meets the statutory definition of "discharge of any pollutant."[82] Such an interpretation would provide no reasonable limit to the universe of activities subject to the NPDES permitting program and would effectively erase Congress' "clear and precise" distinction between point source discharges and nonpoint source pollution.[83] Stated differently, such an interpretation "would eviscerate the point source requirement and undo Congress' choice"[84] to exclude diffuse pollution sources from the NPDES program.

Interpreting the term "point source" as any mechanism through which pollutants pass prior to "when the pollutant first enters navigable water"[85] requires the elimination of the word "conveyance" from the definition of "point source." "Conveyance" is the most critical term in the definition and its removal would violate the most basic standards of statutory construction. Moreover, where a statutory interpretation effectuates an unprecedented and extraordinary expansion of federal regulatory authority, courts expect a clear indication in the text that Congress intended that result.[86] Not surprisingly, the Supreme Court has "been reluctant to read into ambiguous statutory text" the "power to require permits for … thousands,… [or] millions, of small sources nationwide."[87] It has further instructed that an interpretation of ambiguous text that places "plainly excessive demands on limited governmental resources is alone a good reason for rejecting [the interpretation]."[88] Congress must "speak clearly if it wishes to assign to an agency decisions

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[80] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (emphasis added).
[81] *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 15-cv-1439, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017).
[82] 33 U.S.C. § 1362(12).
[83] See S. Rep. No. 95-370, at 8.
[84] *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 224 (2nd Cir. 2009); *see also Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, 940 F. Supp. 2d 1005, 1026 (D. Alaska 2013) ("a plaintiff seeking to establish a point source discharge, even in the context of airborne pollution, must prove more than that the pollution originated from an identifiable source;" it must also "prove that the pollutant reached the water through a confined, discrete conveyance.", *rev'd on other grounds*, 765 F.3d 1169 (9th Cir. 2014).
[85] *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).
[86] *Utility Air Regulatory Group v. EPA*, 134 U.S. at 2444 (2014).
[87] *Utility Air Regulatory Group v. EPA*, 134 U.S. at 2444 (2014).
[88] *Utility Air Regulatory Group v. EPA*, 134 U.S. at 2444 (2014).

of vast 'economic and political significance.'"[89] As such, according to the explicit wording of the CWA and all credible interpretations of that language, a point source can only be that which directly introduces pollutants to navigable waters via a discernable, discrete and confined conveyance. If anything other than a point source conveys a pollutant to navigable water, there is no discharge subject to NPDES permitting requirements.

ii. Groundwater is Not a Point Source

Having established that a NPDES permit is required only when a point source conveys pollutants to navigable waters, the Associations herein explain that groundwater is not a point source regardless of whether it introduces pollutants to navigable waters. While groundwater can also transport pollutants to navigable waters, the CWA's definition of "point sources" requires these conveyances to also be "'discernable, confined, and discrete.'"[90] Based on the plain meaning of these words, and applying the canon of *noscitur a sociis* ("it is known by its associates"), a "discernable, confined, and discrete" conveyance must be enclosed and distinguishably separate from its surroundings. Therefore, the CWA's definition of a "point source" cannot be construed to encompass the release of pollutants to navigable water through diffuse and circuitous groundwater seepage.

Indeed, courts have noted that "[g]roundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting."[91] Unlike point source pollution, nonpoint source pollution "arises from many dispersed activities over large areas, and is not traceable to any single discrete source."[92] To put it into practical terms, "…nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."[93]

Though groundwater may at times operate as a pathway for pollutants to reach navigable water, groundwater cannot credibly be viewed as "discernable, confined, and discrete."[94] Indeed, groundwater pollution, by definition, is not discernable, confined or discrete, and therefore cannot be a point source under the NPDES permitting program. Numerous courts have held as much.[95]

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[89] *Utility Air Regulatory Group v. EPA*, 134 U.S. at 2444 (2014). (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[90] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (quoting §§ 1362(7), (14)).
[91] *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).
[92] *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).
[93] *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 220 (2nd Cir. 2009) (quoting EPA Office of Water, *Nonpoint Source Guidance* 3 (1987).
[94] 33 U.S.C. § 1362(14).
[95] *Tri-Realty Co. v. Ursinus College*, No. 11-5885, 2013 WL 6164092, at *9 n.7 (E.D. Pa. Nov. 21, 2013) ("A discharge of pollutants into navigable waters occurring only through migration of groundwater and uncontrolled soil runoff represents 'nonpoint source' pollution."); *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619–20 (D. Md. 2011) ("Discharge from migrations of groundwater or soil runoff is not point source pollution, however, but nonpoint source pollution."); *Ky. Waterways Alliance v. Ky. Utils. Co.*, 2017 WL 6628917, at *10 (E.D. Ky. Dec. 28, 2017) ("Groundwater is, by its nature, 'a diffuse medium' and not the kind of discernible, confined and discrete conveyance

Moreover, the examples of "conveyances" in the definition of "point source" show that groundwater conveyances are "discernable, confined, and discrete."[96] These are examples of conveyances that may be point sources *if* they are discernable, confined, and discrete. They do not subsume the CWA's definition of a "point source" or turn groundwater into a discrete conveyance.

To be sure, "The statute says what it says—or perhaps better put here, does not say what it does not say."[97] NPDES permitting requirements are triggered by "the discharge of any pollutant." "Discharge of any pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[98] "Point Sources" are defined as the "discernable, confined, and discrete" conveyances that introduce pollutants into navigable waters.[99] The phrase "through groundwater" appears nowhere in the CWA, much less within the operative definitions that circumscribe the NPDES permit program. The text of the CWA cannot credibly be read to transform groundwater into a "discernable, defined and discrete conveyance" simply because groundwater is connected to navigable water—neither hydrogeology nor administrative interest in a CWA that was structured differently can supplant the text Congress provided. Agencies, like courts, must "apply the text of the statute, not… improve upon it."[100] Neither EPA nor the courts may "extend the scope of the statute beyond the point Congress indicated it would stop."[101] Yet that is precisely what EPA's previous statement about "direct hydrological connections" attempted to accomplish.

EPA's previous statement "that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements"[102] finds no support in the text of the Act. To the contrary, as detailed above, the CWA can only be read to require NPDES permits where point sources directly convey pollutants to navigable waters. **The CWA is clear that hydrological connections (direct or otherwise) between point sources and navigable waters are not themselves point sources.** As such, EPA's prior "direct hydrological connection" interpretation is erroneous and should be afforded no deference.[103]

Even if the relevant language of the CWA were amenable to differing interpretations (which it is not), EPA's "direct hydrological connection" interpretation is impermissible. Where an interpretation of the CWA "invokes the outer limits of Congress' power," it must be supported by "a clear indication that Congress intended that result," especially where the "interpretation

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contemplated by the [Clean Water Act's] definition of 'point source.' ") (quoting *26 Crown Assocs., LLC v. Greater New Haven Reg. Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017)).

[96] 33 U.S.C. § 1362(14).

[97] *Cyan, Inc. v. Beaver Cnty. Employees Retirement Fund*, 138 S.Ct. 1061, 1069 (2018).

[98] 33 U.S.C. § 1362(12).

[99] 33 U.S.C. § 1362(14).

[100] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).

[101] *FDA v. Brown & Williamson*, 529 U.S. 120, 121 (2000).

[102] 83 Fed. Reg. at 7127; See also 55 FR 47,990, 47,997 (Dec. 2, 1990); 56 FR 64,876, 64,892 (Dec 12, 1991); 66 FR 2,960, 3,017 (Jan. 12, 2001); 68 FR 7,175, 7,216 (Feb. 12, 2003).

[103] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

alters the federal-state framework by permitting federal encroachment upon a traditional state power."[104]

iii. Groundwater is Not Navigable Water

While it is not squarely the subject of this request for comments, we believe it is important to specifically note that, in addition to falling outside of the CWA's definition of "point source," groundwater also decidedly falls outside of the Act's definition of navigable waters. This fact is important because a release of pollutants to groundwater cannot, at the same time, constitute an "addition of any pollutant to navigable waters from any point source."[105] Accordingly, releases to groundwater are not "discharges of pollutants" subject to NPDES permitting.

"Navigable waters" are defined as "the waters of the United States, including the territorial seas."[106] Even the most expansive interpretations of the "navigable waters" have concluded that they do not include groundwater.[107] In particular, EPA's 2015 effort to define WOTUS, which the Associations objected to as overbroad, expressly excluded groundwater.[108] As EPA and the Army Corps explained, the 2015 WOTUS rule excluded groundwater because "the agencies have never interpreted [it] to be a 'water of the United States.'"[109] Indeed, even courts that have decided in favor of direct federal regulation of groundwater-derived pollution have recognized that groundwater itself is not a regulated water.[110]

There is voluminous textual support and legislative history for the proposition that the CWA's definition of "navigable waters" does not include groundwater, but that support need not be recited here because the issue is not reasonably in dispute. What matters for purposes of the statutory interpretation at hand is that Congress expressly defined both "point source" and "navigable waters" to exclude groundwater. Congress did so with the express intent of excluding groundwater from the Act's NPDES program. EPA's prior interpretation of the NPDES permitting program to allow coverage of groundwater "with a direct hydrological connection" to navigable waters therefore erred by attempting to administratively alter the statutory text to include a class

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[104] *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001*); cf. Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014).

[105] 33 U.S.C. § 1362(12)(A).

[106] 33 U.S.C. § 1362(7).

[107] See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,073 (June 29, 2015) (EPA and Army Corps rulemaking noting that "groundwater . . . ha[s] never [been] interpreted to be a 'water of the United States'"). See also *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.").

[108] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,105

[109] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,073.

[110] *See*, *e.g.,* 273 F. Supp. 3d 775 (M.D. Tenn. 2017), at 826 ("The Court agrees with those courts that 'view[] the issue not as whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater.'") (quoting *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas*, 141 F. Supp. 3d at 445 (2015)); *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d at 996 (upholding liability on a "conduit theory," but still recognizing that an "unpermitted discharge into the groundwater, without more, does not constitute a violation of the Clean Water Act").

of waters that Congress purposely excluded. That is not the proper role of an agency tasked with interpreting its governing statutes. Agencies, like courts, must "apply the text of the statute, not… improve upon it."[111] Neither EPA nor the courts may "extend the scope of the statute beyond the point Congress indicated it would stop."[112] Yet that is precisely what EPA attempted through its previous efforts to expand the NPDES program to cover groundwater with "direct hydrological connections" to navigable waters. EPA should not repeat the same error here.

2. Requiring NPDES Permits for Releases to Groundwater Undermines Congress' Intent in Drafting the CWA

While the Associations do not believe that the text of the CWA is particularly ambiguous in its delineation of the NPDES permitting program, the following will provide a discussion of the Act's relevant legislative history to show that the structure found with the plain text of the CWA was precisely the structure Congress intended. The legislative history here is powerful because the CWA was not the result of a singular congressional action. The basic framework of the current Act was established by the 1972 amendments to the Federal Pollution Control Act of 1948[113], but it has been significantly amended multiple times by Congress in efforts to address actual or perceived deficiencies or to aid in implementation. As such, the CWA today does not reflect a fleeting snapshot of congressional intent during a single legislative session but a multi-decade congressional effort to identify regulatory gaps and to improve and refine the mechanisms needed to restore "the Nation's waters."[114]

The Supreme Court of the United States has found that "[S]tatutory language must always be read in its proper context," not in isolation.[115] Understanding that the CWA today is the result of multiple and different legislative efforts is essential to properly interpreting the Act, because it sheds light on the regulatory structure that Congress intended. Each legislative revision or addition allows us to understand the regulatory gap Congress was attempting to bridge.

a) A Review of the CWA Amendments of 1972[116]

The regulatory framework for the Federal Pollution Control Act of 1948, as amended by the Water Quality Act of 1965[117], was based exclusively on ambient water quality standards that Congress anticipated would be used to develop standards for discharge to the receiving waters. In other words, the predecessor Act regulated only water quality and could only be used to regulate the discharging sources of impairment if water quality standards were not being met.[118] While this regulatory approach appeared reasonable in theory, practical application of the framework

[111] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).
[112] *FDA v. Brown & Williamson*, 529 U.S. 120, 121 (2000).
[113] Pub. L. No. 80-845, 62 Stat. 1155 (1948).
[114] *See* 33 U.S.C. § 1251(a).
[115] *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).
[116] Pub. L. No. 92-500, 86 Stat. 816 (1972).
[117] Pub. L. No. 89-234, 79 Stat. 903 (1965).
[118] *See NDRC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). Thus, a discharger needed no permit to deposit pollutants into a water that had "room to spare" in achieving its water quality standards.

demonstrated its ineffectiveness; between 1948 and 1972, the Act's enforcement framework "resulted in only one prosecution."[119] This deficiency is what informed Congress' 1972 effort to reform the Act.

Congress recognized that the existing regulatory structure was ineffective because it "focused on the tolerable effects rather than the preventable causes of water pollution"[120] and therefore developed the NPDES permitting program for those point source dischargers who were evading the predecessor Act's "harm-based" approach to enforcement.[121] Critically, however, Congress did not abandon the Act's prior focus on protection through water quality standards.[122] Congress' decision to preserve these water quality standards even after making all pollutant discharges illegal, unless permitted, speaks volumes to its intent. Congress understood that the point source discharges it was proposing to regulate most stringently were not the sole sources of impairment. Other diffuse and tangentially connected pollution sources adversely impacted water quality. While Congress did not view these nonpoint sources as amenable to inclusion in the NPDES permitting framework, it recognized them and endeavored to keep them in check through regulation of the quality of the receiving waters.

Congress' 1972 decision to preserve water quality standards was not only based on a pragmatic understanding that nonpoint pollution could not practically be permitted under its newly minted NPDES program, but was also based on a belief that cooperative federalism was essential to the success of the CWA – particularly in relation to nonpoint source pollution. This intent is reflected in the scant but persuasive legislative history available for the 1972 CWA amendments.

The Senate's sponsor of the 1972 CWA amendments, Senator Edwin Muskie, specifically noted from the Senate floor that although "a great quantity of pollutants is discharged by [nonpoint source] runoff,"[123] the Act's discharge standards pertain only to point source pollution.[124] This statement demonstrates that Congress recognized that nonpoint source pollution was a problem

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[119] *See* David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 304 (2009).

[120] *EPA v. Cal. ex rel. State Water Res. Control Bd*., 426 U.S. 200, 202 (1976). *See* Sen. Edmund S. Muskie, *A Legislator's View of Impending Amendments to the Water Pollution Control Act*, B.C. INDUS. & COMM. L. REV. 629, 631 (1972) ("Instead of proceeding through ambient water quality standards to control requirements, the bill provides directly for control requirements [which] allows immediate application of enforceable control requirements . . . ."). (noting that "harm-based enforcement scheme" of the Act's predecessor statutes had "resulted in only one prosecution").

[121] See *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1272 (5th Cir. 1980) ("The major change was the establishment of the National Pollutant Discharge Elimination System (NPDES), under which it is illegal to discharge pollutants without a permit complying with the Act.").

[122] *See* Lawrence S. Bazel, Comment, *Water-Quality Standards, Maximum Loads, and the Clean Water Act: The Need For Judicial Enforcement* 34 HASTINGS L.J. 1245, 1253–54 (1983).

[123] H. COMM. ON PUBLIC WORKS, 93D CONG., LEGIS. HISTORY OF THE WATERS POLLUTION CONTROL ACT AMENDS. OF 1972 at 1315 (Comm. Print 1973) [hereinafter LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT]; Miller, *supra* note 85, at 11131.

[124] LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 1314.

but that Congress did not believe it should be solved through inclusion in the NPDES permit program.[125]

Bolstering this understanding of congressional intent is Senator Muskie's explanation of why Congress recognized the nonpoint source pollution problem yet declined to subject it to the Act's powerful new permitting program: "There is no effective way, as yet other than land use control, by which you can intercept that [nonpoint source] runoff and control it in the way that you do a point source."[126] Stated differently, land use controls were understood to be the only effective means of mitigating nonpoint source pollution. Not only are these land use controls unsuited to a point source discharge permitting framework, they are controls which principally lie within the regulatory domain of states.

The Senate Committee on Public Works' report on the 1972 CWA amendments similarly recognized that groundwater pollution adversely impacted water quality.[127] That report also "evidences a clear intent to leave the establishment of standards and controls for groundwater pollution to the states."[128] In particular, the report explained that, "[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt th[e] recommendation" to establish specific groundwater pollution standards.[129]

Further support is provided by the House of Representatives' rejection of a similar amendment.[130] Representative Clausen (House sponsor of the 1972 CWA amendments)[131] successfully argued against an amendment that would have prohibited the "addition of any pollutant to any ground waters from any point source"[132] by explaining that "there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters."[133] Representative Clausen further explained that the 1972 CWA amendments already addressed groundwater pollution by denying the transfer of Underground Injection Control ("UIC") permitting authority if a state could not demonstrate that it had regulatory authority to control disposal of pollutants into wells.[134]

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[125] Although the "remarks of a single legislator, even the sponsor, are not *controlling* in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (emphasis added), the floor statement of a sponsor is among "the most authoritative and reliable materials of legislative history," *Disabled in Action of Met. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000).

[126] LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 1315.

[127] S. REP. NO. 92-414, at 3739 ("The importance of groundwater in the hydrological cycle cannot be underestimated . . . . Groundwater pollution is not as serious a national problem at present as is surface water pollution, but groundwater availability and quality is deteriorating.").

[128] *Exxon Corp. v. Train*, 554 F.2d 1310, 1325 (5th Cir. 1977).

[129] S. REP. NO. 92-414, at 3739.

[130] LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 597.

[131] *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1319 (D. Or. 1997). *See supra* note 87 (on the weight to be given to a sponsor's views).

[132] LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 589.

[133] LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 591.

[134] LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 591.

Again, the legislative history demonstrates that Congress recognized that nonpoint source and groundwater pollution were problems, demonstrates that Congress knowingly and purposely declined to include nonpoint sources and groundwater in the NPDES permitting program, and provides some explanation of the practical, technical, and policy rationales that informed this decision.

b) A Review of the 1987 Amendments to CWA[135]

To be sure, many groups are dissatisfied with the regulatory framework Congress constructed in the 1972 CWA amendments, but it was the framework Congress provided and intended to provide. Valid or not, concern over the sufficiency and protectiveness of the 1972 CWA does not provide an invitation to creatively interpret the Act to ignore legislative intent in favor of agency or judicial preferences. Only Congress can amend the CWA. And importantly, it did so again in 1977[136] and 1987. While both legislative efforts significantly strengthened the CWA, the 1987 amendments directly addressed nonpoint source and ground water pollution.

More specifically, the 1987 CWA amendments established the National Nonpoint Source Program which empowered EPA to provide states, territories, and tribes with guidance and grant funding to implement their nonpoint source programs. As described further in Subsection III.C.1 below, these programs consist of a variety of regulatory and non-regulatory programs, technical assistance, financial assistance, education, training, technology transfer, watershed projects, monitoring, and ongoing assessment.

While the National Nonpoint Source Program has certainly not, in and of itself, solved the nation's nonpoint source and groundwater pollution problem, there is no question it has been successful. This program has directed billions of dollars to efforts to address nonpoint source pollution, leveraged billions more in state, tribal, local, and private funding, and restored thousands of miles of rivers that were impacted by nonpoint source pollution.

Here again, Congress' visitation and repeated return to the nonpoint source pollution issue in sequential amendments to the CWA demonstrates Congress' recognition of the nonpoint source pollution problem, and proves that Congress acted knowingly and purposely in deciding how to address the issue. Some may disagree with Congress' decisions in this respect but they cannot credibly deny that Congress' actions were purposeful and deliberate.

3. EPA Must be Guided by the Readily Ascertainable Intent of Congress

With this understanding that Congress acted knowingly and deliberately in treating nonpoint and point sources differently, there is no credible basis to suggest that Congress also intended the NPDES program to cover nonpoint sources or groundwater. Such interpretations are

[135] Pub. L. No. 100-4, 101 Stat. 76 (1987).
[136] Pub. L. No. 95-217, 91 Stat. 1567 (1977).

largely informed by dissatisfaction with congressional decision-making and an incorrect assumption that pollution sources outside the NPDES permitting program remain unaddressed.

There is no question that Congress drafted and repeatedly amended the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[137] This broad objective, however, does not issue the federal government unlimited regulatory authority to take any measure necessary to improve water quality.

To begin with, it ignores that, as a general matter of statutory interpretation, "it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal."[138] In other words, a statute does not always pursue its stated objectives "at all costs."[139] Secondly, this approach fails to recognize that "clean water is not [the Clean Water Act's] *only* purpose"—also relevant "is the preservation of primary state responsibility for ordinary land-use decisions."[140] Indeed, Congress' decision to not regulate all waters in the country, or all sources of pollution, was precisely because it would require an unprecedented federal intrusion into land-use regulation,[141] an area traditionally reserved for the states.[142] By elevating one statutory purpose over another, EPA's prior "direct hydrological connection" theory impermissibly overrides the delicate balance between federal and state control that the CWA codifies.[143]

The CWA's delicate balance is described and delineated in the multiple sections of the Act that follow its broad goal. These sections confer to the federal government the precise tools and mechanisms "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[144] and these sections of the CWA make clear that the Act's permitting regimes are not the sole means of protecting waters. The CWA also makes clear that Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources."[145]

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[137] 33 U.S.C. § 1251(a).
[138] *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982), *quoted in United States v. Plaza Health Labs., Inc*., 3 F.3d 643, 647 (2d Cir. 1993).
[139] *Rapanos*, 547 U.S. at 752.
[140] *Id.* at 755–56. *See* Smith, *supra* note 70, at 460 ("The Act bears the scars of years of legislative wrangling and compromise . . . ."); *Ky. Waterways Alliance*, 2017 WL 6628917, at *12.
[141] *See Or. Nat. Res. Ass'n*, 550 F.3d at 784. As Professor Andreen memorably put the point, "What was the EPA supposed to do, tell farmers how to farm?" William A. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 562 (2004).
[142] *Solid Waste Ag. of N. Cook Cnty.*, 531 U.S. at 174.
[143] *See* Jones, *supra* note 133, at 118 (arguing that "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address," and therefore rejecting a purpose-based justification for direct Clean Water Act regulation of groundwater pollution) (quoting Bd. of *Governors of Fed. Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 373–74 (1986)). *Cf.* Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1710 (2006) (noting that "the strongest argument against the purposive approach [is] that it tends to override legislative compromises").
[144] 33 U.S.C. § 1251(a).
[145] 33 U.S.C. § 1251(b).

As EPA considers how it will interpret the scope of the NPDES permitting program, the Agency must be guided by the CWA framework Congress deliberately constructed and intended. As an executive agency, EPA's role is to interpret its governing statutes faithfully and with constraint. It is not an agency's role to leverage its interpretive discretion to undermine congressional intent. Every regulatory extension of federal jurisdiction readjusts the federal-state balance that Congress sought to preserve.[146] It was likely the Agency's fundamental misunderstanding of this role that underlies its previous interpretation of the NPDES permitting program to cover releases to groundwater with direct hydrological connections to navigable waters. This request for comments provides EPA an opportunity to correct that fundamental error.

4. Discussion of Recent Case Law and Interpretations of the CWA That Are Inconsistent with Congressional Intent: *Maui and Kinder Morgan*

While the Associations believe that the forgoing explanation of how the text of the CWA and Congress' intent in drafting the Act demonstrates that releases to groundwater (with direct hydrological connections to navigable water or otherwise) are outside of the scope of the NPDES permitting program, we recognize that two recent appellate court decisions seemingly interpret the CWA to include groundwater under the Act's NPDES permitting program.[147] The Associations believe that the courts' conclusions in these cases demonstrate why EPA's present interpretive effort is so important.

In the first case, *Maui*, the Ninth Circuit upheld a lower court ruling that the county violated the CWA by allowing pollutants from four wastewater injection wells to be released into the Pacific Ocean. The wells in question were regulated under the UIC program and permitted by the county under authority delegated through the UIC program. Based on evidence that a majority of wastewater was released into the ocean shortly after injection, and further evidence that these releases *were part of the well design that the county permitted*, the court ruled that the "discharges" from the wells were point source discharges subject to NPDES permitting requirements.[148]

In the second case, *Kinder Morgan*, the Fourth Circuit overturned a lower court decision and held that a spill of gasoline from a buried pipeline to dry land that then seeped through the soil to the groundwater and ultimately emanated to a nearby navigable water was a continuing, unpermitted point source discharge under the NPDES program. In this case, the Fourth Circuit allowed the citizen suit under the CWA's NPDES program to proceed against Kinder Morgan even though the state has been fully engaged in enforcement and remediation activities in response to

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[146] *Shanty Towns Assocs. Ltd. P'ship*, 843 F.2d at 791.

[147] *Maui*, 2018 WL 1569313.; *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, slip op. (4th Cir. April 12, 2018).

[148] The county was exercising permitting authority delegated under the UIC program. Based on the limited recital of facts presented in the case, the Associations cannot say whether the county properly exercised its UIC permitting and enforcement authority in this instance. It may be the case that the facts of this case warrant a closer examination of the county's permitting decisions. It is not the case, however, that circumstances presented in Maui warranted a decision that risks entirely restructuring the CWA's NPDES permitting program.

the incident, and the pipeline was repaired months before the suit was originally initiated. Moreover, under the logic the court applied, any entity that could potentially spill or have a release to soil would have to get a NPDES permit in place in anticipation of the potential for that spill or release. Under an expansive reading of this holding, entities could be required to obtain NPDES permits for historic spills and releases that have already been remediated to meet applicable cleanup standards simply because residual pollution in soil could migrate to navigable water.

Unfortunate as they may be, these two decisions do not undermine the Associations' conclusions about the explicit and intended scope of the NPDES permitting program. To begin with, these two decisions (in the U.S. Courts of Appeals for the Fourth and Ninth Circuits) conflict with appellate court holdings in the Second, Fifth, Seventh, Tenth and D.C. Circuits.[149] The Associations also believe these decisions conflict with the Supreme Court's holding that NPDES permitting coverage is triggered only when "point sources" "convey the pollutant to 'navigable waters.'"[150] Notably, these conflicts may yet be resolved as petitions for *certiorari* have already been filed in *Maui* and may soon be filed in *Kinder Morgan*.[151]

Maui and *Kinder Morgan* are the inevitable progeny of EPA's prior efforts to expand the CWA's NPDES permitting program through unsupported interpretation of the statute. EPA's creation of a "direct hydrological connection" standard that Congress purposely omitted from the CWA invited the Ninth Circuit to adopt its own unmoored and atextual standard – one which effectively read the words "direct" and "hydrological" out of EPA's inventive "direct hydrological connection" standard.[152] Ironically, although the Ninth Circuit declined to "read[] two words into the CWA ('direct' and 'hydrological') that are not there,"[153] it just as quickly stepped into Congress' role and saddled the Act with a "fairly traceable" standard that is similarly absent from the CWA.[154]

Not only is the "fairly traceable" standard an impermissible construction of the CWA, it is undefined and subjective. The Ninth Circuit stated that this phrase means the addition of "more than *de minimis*" levels of pollution to groundwater, but left "for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."[155] This subjective standard and the Ninth Circuit's apparent interest in rewriting the CWA through fact-specific jurisprudence is the product of EPA's own efforts to administratively reach beyond the bounds of the Act. And it could have been avoided had EPA constrained its interpretation of the scope of the NPDES permitting program, as

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[149] *Catskill Mtns. v. City of New York*, 273 F. 3d. 481 (2nd Cir. 2001); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994); *Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005); Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

[150] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

[151] Kinder Morgan filed a Petition for Rehearing and Petition for Rehearing *En Banc* on April 26, 2018.

[152] *Maui*, 2018 WL 1569313, at *8 n.3.

[153] *Maui*, 2018 WL 1569313, at *8 n.3.

[154] *Maui*, 2018 WL 1569313, at *8 n.3.

[155] *Maui*, 2018 WL 1569313, at *8.

Congress did, to those "discernable, defined, and discrete" point sources that actually convey pollutants into navigable waters.

EPA's "direct hydrological connection" theory is at the heart of the expansive and subjective standard in *Kinder Morgan* as well. Where the Ninth Circuit casts aside EPA's "direct hydrological connection" standard, a divided panel of the Fourth Circuit embraced a variant of the standard.[156] Under the Fourth Circuit's "fact-specific" version of EPA's "direct hydrological connection," pollutants that are "traceable ... in *measurable quantities*," can weigh in favor of NPDES permitting coverage while pollutants "diluted while passing through a labyrinth of underground tunnel geology" would weigh against coverage through the NPDES permitting program.[157]

Not only does the Fourth Circuit's standard create an untenably subjective standard, it does so without regard for the text of the Act or the congressional intent underlying that text. Notably, the Fourth Circuit decision and dissent reveal a particularly problematic impact of the majority's expansive interpretation of the scope of the NPDES permitting program. By interpreting the NPDES program to cover releases that are not conveyed to navigable waters via point sources, the majority extended coverage to the soil impacted by the spill even after the pipeline was repaired and ceased releasing pollutants. In other words, because the majority read the term "point source" out of the Act, the majority held that a NPDES permit was required for "discharges" from the impacted soil based on evidence of seepage to navigable water.

This expansive interpretation of the scope of the NPDES program caused an even larger expansion of the CWA's citizen suit provision. Under the citizen suit provision, "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of" the CWA.[158] However, "the citizen suit is meant to supplement rather than to supplant governmental action . . ."[159] One important jurisdictional limit is that citizens may only bring a suit for an ongoing CWA violation but not for a past violation.[160] The text of the CWA authorizes a citizen suit only against someone "alleged to be in violation of" the CWA.[161] The Supreme Court concluded that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either *continuous* or *intermittent* violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future."[162] "Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose

[156] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, slip op. (4th Cir. April 12, 2018).
[157] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, slip op. at 31 (4th Cir. April 12, 2018).
[158] 33 U.S.C. § 1365(a)(1).
[159] *Gwaltney*, 484 U.S. at 60.
[160] *Gwaltney*, 484 U.S. at 57.
[161] 33 U.S.C. § 1365(a)(1).
[162] *Gwaltney*, 484 U.S. at 57 (emphasis added).

this readily available option."[163] In other words, Congress did not authorize a citizen to enforce the CWA for "wholly past violations."[164]

The majority decision in *Kinder Morgan* essentially shrugged off CWA's prohibition on citizen suits for "wholly past violations" and allowed a suit against Kinder Morgan long after its pipeline had been repaired and long after the state had exercised its enforcement and response authority. Under the majority view, the soil impacted by Kinder Morgan's "wholly past" violation became a point source subject to NPDES permitting requirements. And because Kinder Morgan (quite reasonably) did not seek out and obtain a NPDES permit for the soil surrounding its spill area, it was committing an ongoing CWA violation amenable to a citizen suit.

In so holding, the majority effectively nullified any meaningful limits on the CWA's citizen suit provisions, erased any distinction between past and present violations, and subjected the regulated community to unbounded risks of liability for historic releases that have long been abated, addressed, and prosecuted. The CWA does not permit such an absurd and unmanageable result. Yet, this expansive rewrite of the CWA's citizen suit provisions was effectively compelled by the majority's similarly expansive interpretation of the scope of NPDES permitting program. That interpretation of the NPDES program was not only based on a flawed interpretation of the CWA but also on the court's interpretation of EPA's flawed interpretation of the CWA.

Again, this expansive jurisprudential interpretation is the inevitable result of EPA's own unsupported interpretation of the statute. Even modest departures from the text of the Act upset the CWA's regulatory framework and therefore necessitate more numerous and more expansive reinterpretations of the CWA to accommodate and apply those initial departures. The only way to avoid this inevitable cascade of interpretations is to exercise restraint in the first instance. EPA failed to "apply the text of the statute, not… improve upon it."[165] The Agency's "direct hydrological connection" reflects EPA's knowing decision to "extend the scope of the statute beyond the point Congress indicated it would stop."[166] And the progeny of that decision has come home to roost in the increasingly expansive interpretations in *Kinder Morgan* and *Maui.*

It is not too late, however, for administrative constraint. EPA is not bound by its prior interpretations of the CWA, particularly where, as here, the text of the Act so effectively defines the boundaries of the NPDES program. EPA need only be guided by the language Congress supplied in order to re-anchor the scope of the NPDES program to the statute. "The statute says what it says . . ."[167] NPDES permitting requirements are triggered by "the discharge of any pollutant."[168] "Discharge of any pollutant" is defined as "any addition of any pollutant to navigable

[163] *Gwaltney*, 484 U.S. at 57 (emphasis added).
[164] *Gwaltney*, 484 U.S. at 57 (emphasis added).
[165] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).
[166] *FDA v. Brown & Williamson*, 529 U.S. 120, 121 (2000).
[167] *Cyan, Inc. v. Beaver Cnty. Employees Retirement Fund*, 138 S.Ct. 1061, 1069 (2018).
[168] 33 U.S.C. § 1311(a).

waters from any point source."[169] And "point source" is defined as a "discernable, defined, and discrete conveyance" that actually introduces pollutants into navigable water.[170]

B. Requiring NPDES Permitting for Releases to Groundwater Would be Administratively Unworkable

Not only is an expansion of the NPDES permitting program to include nonpoint sources and releases to groundwater an impermissible construction of the CWA and counter to congressional intent, it is administratively unworkable. In fact, pragmatism and administrative necessity were key components in Congress' decision to limit the scope of the NPDES permitting program. Unless EPA acts to curtail increasingly expansive interpretations of the scope of the NPDES permitting program, it will face the precise administrative adversities that Congress predicted. It would also upend a longstanding, established and effective regulatory framework.

1. Millions of additional sources would require NPDES permitting, without logical limit to the types of releases implicated.

Indeed, requiring NPDES permitting for releases to groundwater would "bring about an enormous and transformative expansion in EPA's regulatory authority [over point sources] without clear congressional authorization,"[171] and this transformation would demand an equally expansive intrusion into numerous regulatory programs Congress assigned to other environmental statutes and state programs. Thousands, if not millions, of additional sources would be subject to NPDES requirements so long as pollutants that reach navigable waters are "fairly traceable," to those sources, "directly connected" to those sources, or present in navigable water in "measureable quantities." And under the *Kinder Morgan* and *Maui* decisions, this expansion of permitting requirements could occur regardless of how distant, geographically or temporally, the source may be.

Once EPA and the courts decide to depart from the constrained approach that Congress crafted in the CWA, there is no clear limit to the number or type of releases that might require an NPDES permit. NPDES permitting could be required for residential septic tanks; pipelines; any vessel or impoundment that could conceivably leak or spill pollutants (including aboveground and underground storage tanks, stormwater ponds, farm ponds, surface impoundments, cooling water ponds, and water supply reservoirs); injection wells; infiltration pits and basins, and any number of green infrastructure projects specifically designed to retain, percolate, and/or infiltrate stormwater. NPDES permitting could be required at any location where such facilities were once located if there is contamination that might be hydrologically connected to navigable waters.

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[169] 33 U.S.C. § 1362(12).
[170] 33 U.S.C. § 1362(14).
[171] *Utility Air Regulatory Group v. EPA*, 134 U.S. at 2444 (2014).

Consider the impact on just septic systems - there are over 22.2 million homes in the United States with septic systems[172] that EPA has never required NPDES permitting. Because those systems collect and disperse wastewater into soil and groundwater, in many instances these expansive interpretations could subject them to NPDES permit requirements. Not only would this impose an enormous permitting burden, it would impose this burden as a barrier to deployment of systems that EPA considers protective of public health and necessary for the preservation of water resources.[173]

Additionally, unlined impoundments—such as stormwater ponds, farm ponds, surface impoundments, cooling ponds, and water supply reservoirs—are used in numerous industries. Many of these structures and facilities do not currently require NPDES permits. For those that do, NPDES permits focus primarily on regulating pollutants that reach jurisdictional surface waters from a discernible, confined, discrete conveyance. Under increasingly expansive interpretations of the CWA, however, owners and operators of those impoundments may need to seek new or modified permits and identify additional NPDES discharge points.

2. Many of these sources are already adequately covered under other statutes or regulations.

Many of the projects described above are already sufficiently covered by other statutory and regulatory programs. Aquifer recharge and aquifer storage and recovery projects, for example, involve the underground injection or infiltration of water via surface spreading, infiltration pits and basins. Generally, any wastewater discharges to such shallow infiltration systems or Class V injection wells with a potential to contact a potential source of drinking water must meet a list of drinking water standards. Many additional projects that utilize injection wells are currently subject to SDWA and UIC requirements for Class I, II, and V wells.[174] Protecting groundwater from wastewaters injected into such wells generally does not require the imposition of stringent treatment requirements. Instead, the regulations protect groundwater through well design, permitting, construction and mechanical integrity monitoring and testing requirements to ensure compliance with these requirements.

In a similar fashion, RCRA and associated waste management transportation, storage, treatment and disposal regulations require all hazardous wastes to be managed in a way that minimizes the likelihood of contact with any potential sources of drinking water or the surfacing of any wastes that could enter nearby receiving water. An expansive interpretation of the NPDES program would therefore not further protect groundwater from sources regulated under the UIC and hazardous waste management programs and would only add duplicative or even inconsistent requirements.

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[172] *See* U.S. Dep't of Housing & Urban Devel. & U.S. Census Bureau, American Housing Survey for the United States: 2011, Current Housing Reports, H150/11, at 14 Tbl. C-04-AO (Sept. 2013), *available at* https://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf.

[173] See https://www.epa.gov/septic/septic-systems-overview (accessed May 4, 2018).

[174] 42 U.S.C. § 300h-2.

The impact of an impermissibly expansive interpretation of the NPDES permitting program are particularly conspicuous as applied to pipelines, which are extensively regulated under multiple statutes. In 2015, pipeline operators safely delivered over 18 billion barrels of petroleum products by transmission pipeline.[175] For the rare "significant"[176] pipeline incidents that occur, most are totally contained on operator-controlled property or are small in volume.[177] Notwithstanding the extensive existing regulation of pipelines and their strong safety record, expanding the NPDES permitting program to include releases to groundwater could potentially require pipeline operators to obtain NPDES permits for thousands of miles of pipelines. These permits would not improve the safety of the pipelines and would cause pipelines to file needless applications as the permits would likely be used only to shield against NPDES citizen suits in the unlikely event of a release.

3. Expanding NPDES coverage could have unintended consequences, including deterring green infrastructure.

Ironically, these expansive interpretations would also discourage any number of public and private treatment and pollution control measures designed specifically to protect and preserve water resources. NPDES permits could, for instance, be required for green infrastructure designed to retain, percolate, and infiltrate stormwater into the ground to minimize discharges of industrial and municipal stormwater.[178] Permits could also be required for groundwater recharge systems that use spreading basins, percolation ponds, infiltration basins, and injection wells to convey stormwater or recycled wastewater into subsurface aquifers. These systems provide a host of ecological benefits including, among others, augmenting public water supplies, creating seawater intrusion barriers, and eliminating surface outfalls.[179] Moreover, these systems are already regulated under the SDWA's UIC program and through other statutes.

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[175] Total number of barrels delivered calculated by industry compilation of pipeline operating company submissions to FERC through Form 6/6-Q - Annual/Quarterly Report of Oil Pipeline Companies, available at https://www.ferc.gov/docs-filing/forms/form-6/data.asp.

[176] "Significant" incidents are those reported by pipeline operators when any of the following specifically defined consequences occur:

1. fatality or injury requiring in-patient hospitalization;
2. $50,000 or more in total costs, measured in 1984 dollars;
3. highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more; or
4. liquid release resulting in an unintentional fire or explosion.

[177] See *id*.; American Petroleum Institute and Association of Oil Pipe Lines, 2017 Annual Liquids Pipeline Report Pipeline Safety Excellence Performance Report & Strategic Plan 2017–2019, p. 56-58, available at http://www.aopl.org/wp- content/uploads/2017/04/2017-API-AOPL-Pipeline-Safety-Report_low-1.pdf.

[178] *See generally* EPA, Green Infrastructure, *available at* https://www.epa.gov/green-infrastructure.

[179] See U.S. EPA, 2012 Guidelines for Water Reuse, at 4-25 (Sept. 2012). Available at https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411

4. In addition to the increased volume of permits, expanding the NPDES program would create new governmental challenges – including writing, monitoring, and enforcing these permits – that would increase uncertainty for stakeholders.

Even assuming EPA and the states could manage the volume of permits that would inevitably result from an unrestrained view of the NPDES permitting program, it is not at all clear how NPDES permits could be written to cover nonpoint source pollution and releases to groundwater. The NPDES permitting program relies upon effluent limitations that are monitored and enforced at the point of discharge.[180] This technological limitation is not inconsequential nor was it beyond Congress' ability to predict. Congress excluded nonpoint sources from the NPDES permitting program, not just because they "were far more numerous," but also because they were "more technologically difficult to regulate" relative to "point sources [which] tended to be more notorious and more easily targeted."[181]

Importantly, what was concerning to Congress in 1972 remains a concern to state regulators today. Thus, eighteen State *amici* in a Sixth Circuit action considering NPDES permit coverage for releases to groundwater have urged restraint because, beyond the "massive expansion of NPDES programs" that would result from requiring NPDES permits for releases to groundwater, "the degree of precision necessary to draft permits with clear compliance requirements would be nearly impossible to replicate with respect to groundwater discharges."[182]

The CWA's legislative history shows that Congress "did not intend to interfere with or displace the 'complex and varied' state jurisdictions over groundwaters" despite the '"essential link between ground and surface waters and the artificial nature of any distinction.'"[183] This history shows Congress understood "the importance of groundwater in the hydrological cycle" and "that rivers, streams and lakes themselves are largely supplied with water from the ground" but excluded groundwater migration from coverage.[184] Congress understood that the Act's lofty goals could only be accomplished through maximum cooperation with the states, and explicitly established a "cooperative federalism" framework "to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…."[185]

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[180] See 33 U.S.C. § 1362(11); 40 C.F.R. §§ 122.41-122.45.

[181] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008); see also S. Rep. No. 92-414, at 39.

[182] *Tennessee Clean Water Network v. TVA*, No. 17-6155 (6th Cir. 2017). See State *Amici* brief.

[183] *Exxon Corp. v. Train*, 554 F.2d 1310, 1326 (5th Cir. 1977). (quoting S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739).

[184] S. Rep. No. 92-414, at 73.

[185] 33 U.S.C. § 1251(b) (emphasis added).

5. The CWA Recognizes that States are Effective Stewards of Water Quality.

Recognizing the ability of states to regulate their own waters, EPA has delegated to nearly every state broad permitting and enforcement authority through the NPDES program. State authority to implement the NPDES program is not delegated freely – it is earned through the development of programs that EPA reviews and determines to be adequately protective. In fact, many state permitting programs are considered more stringent or restrictive than federal permitting programs and criteria.

Significantly, even though activists have petitioned EPA many times to withdraw the Agency's delegation of authority to various states, EPA has never done so. Without question, states are already capable stewards of water quality and proven partners in furtherance of the CWA's objectives.

Given the recognized effectiveness of state efforts to protect water quality, EPA must use this opportunity to stem its prior encroachment on the jurisdiction the CWA preserved for the states. The Associations believe – as Congress did – that federal jurisdiction should only encroach on the "primary" responsibilities of states where the source of that jurisdiction is clear and its exercise appropriate. Failure to abide by these jurisdictional limitations will trigger the precise practical and technological consequences Congress foresaw. These consequences are not modest prices to be paid in furtherance of improved water quality. They impede the implementation of the CWA, create uncertainty, undermine compliance, and redirect limited resources from protection to paperwork.

C. Releases to Groundwater Are Already Subject to Complex Regulation

As noted above, Congress' decision to exclude groundwater releases from the NPDES permitting program does not mean that groundwater releases are unregulated or unprotected. Indeed, what some view as a lapse in NPDES permit coverage is, in reality, the intended result of informed congressional decision-making. Congress understood the practical and technological difficulties that EPA would face if groundwater releases were regulated under a permitting program like NPDES. As such, it included within the CWA multiple tools to protect groundwater.

Congress, however, also did not envision that groundwater would be protected through the CWA alone. It therefore provided additional authority under multiple statutes. As a result, groundwater is protected many different ways under the CWA and other statutes and at all levels of government.

1. Multiple CWA Provisions Address Nonpoint Source Pollution and Releases to Groundwater.

In crafting the CWA, Congress understood that the Act's lofty goals could only be accomplished through maximum cooperation with the states, and explicitly established a "cooperative federalism" framework "to recognize, preserve, and protect the primary

responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…."[186] With these goals in mind, Congress developed the following CWA programs to protect groundwater and address nonpoint sources of pollution.

a) CWA Section 208 and 303(e): Continuous Planning for Each Water in a State, as Part of EPA's Water Quality Management Plan

Congress crafted Section 208 as part of the CWA in 1972. It reflects Congress' first direct attempt to address nonpoint source pollution. Pursuant to Section 208, state and local planning agencies analyzed nonpoint source pollution and developed water quality management programs targeting these nonpoint sources. The federal government, through EPA, provided funding for those planning and management programs. Funding for the Section 208 program was terminated in the 1980s as Congress' new amendments to the CWA brought new tools to address nonpoint source pollution.

Under Section 303 of the 1972 CWA, states were required to implement a continuous planning process for each navigable water in the state. Section 303(e) specifically required each state to incorporate the nonpoint source elements of the plans states developed under Section 208. Accordingly, Section 303(e) made nonpoint source controls plans part of each state's continuous planning process for all navigable waters.

EPA then incorporated the state plans developed under Section 208 and 303(e) into its overall national Water Quality Management Plan.[187] EPA's Water Quality Management Plan serves as a guide for the multijurisdictional approach to nonpoint source and groundwater pollution that Congress envisions.

b) CWA 303(d): Impaired Waters and TMDL Program

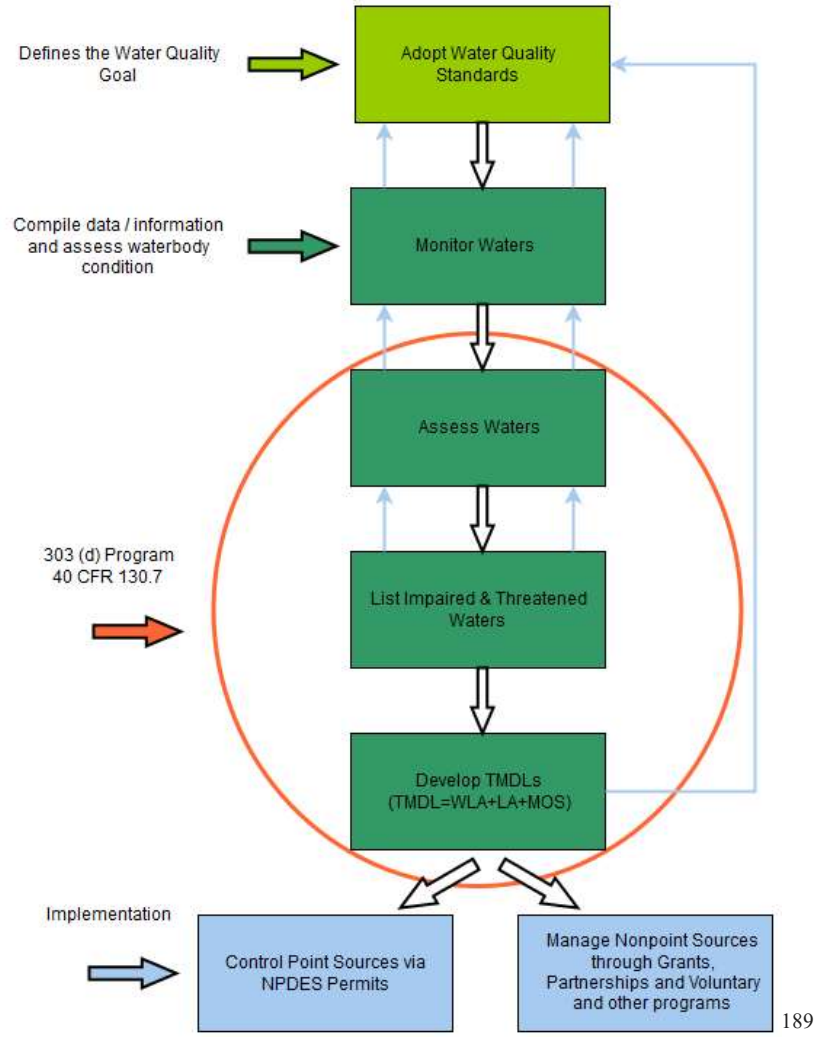
The Impaired Waters and Total Maximum Daily Load ("TMDL") Program under CWA Section 303(d) plays an important role in the Act's framework to restore and protect water resources. The essential aspects of the TMDL program were put in place by Congress in the 1965 Amendments to the CWA. More importantly, when Congress amended the Act again in 1972 to, *inter alia*, establish the NPDES permitting program for point sources, it purposely retained the core elements of the TMDL program in order to address nonpoint sources of pollution.

The TMDL program is comprised primarily of a two-part process under which states and tribes identify waters that are impaired or in danger of becoming impaired (threatened),[188] and then develop and implement plans to bring these waters into compliance with water quality standards. As such, unlike the NPDES program, which regulates sources of pollution as a means to address

[186] 33 U.S.C. § 1251(b) (emphasis added).
[187] 40 C.F.R. pt. 130.
[188] 33 USC § 1313(c)(2)(A).

receiving water quality, the TMDL regulates receiving water quality as a means to address sources of pollution. The broad contours of the program are provided in the schematic below.

Water Quality-Based Approach of the Clean Water Act



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Once a waterbody has been added to a state's "impaired" list, it remains listed until the state develops an EPA-approved TMDL. A TMDL provides the amount of a specific pollutant that may be discharged into a waterbody from all sources – including point and nonpoint sources – without exceeding the applicable water quality criteria for that pollutant.[190] TMDLs have two components: a Waste Load Allocation ("WLA") and a Load Allocation (LA"). WLA is the portion of the TMDL attributed to point sources and LA is the portion of the TMDL attributed to nonpoint

[189] See https://www.epa.gov/tmdl/program-overview-impaired-waters-and-tmdls. (accessed Mar. 30, 2018).
[190] 33 U.S.C. § 1313(d)(1)(C).

and natural background sources.[191] WLA allocations are imposed on a point source's numeric limit in their NPDES permits and frequently increase the stringency of a point source's permitted discharge limits. Significantly, even though TMDLs can mandate more stringent discharge limits or technological controls only for point sources through the NPDES program, the stringency of those allocations can be driven in whole or in part by the impairment caused by nonpoint sources. In fact, the CWA requires TMDLs and WLA even if a waterbody is impaired based solely on nonpoint source pollution.[192] Impairment is therefore addressed through point source discharge limits which are adjusted for pollution from nonpoint sources.

In addition to requiring point source pollution reductions to compensate for pollution from nonpoint sources, TMDLs can result in direct reductions from nonpoint sources. LA from nonpoint sources are addressed through state rules and programs, funding mechanisms, voluntary source actions, and watershed-based approaches.[193]

c) CWA Section 311 and the SPCC Program

Section 311 of the CWA required that,

> as soon as practicable after Oct. 18, 1972, and from time to time thereafter, the president shall issue regulations consistent with maritime safety and with marine navigation laws … establishing procedures, methods, and equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.[194]

Shortly thereafter, EPA promulgated regulations applicable to facilities that can store more than 1,320 gallons of oil above ground (or 42,000 gallons in underground tanks).[195] These regulations established the program that is now known as the Spill Prevention Control and Countermeasure ("SPCC") program.

Under the SPCC program, regulated facilities must develop SPCC plans that include a description of containment, drainage control and diversionary structures; proper liquid storage

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[191] 40 C.F.R. § 130.2(h). When possible, the LA must quantify the proportionate loadings from natural and nonpoint sources. 40 C.F.R. § 130.2(g).

[192] *Pronsolinoz v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).

[193] The TMDL program is not only an effective program for addressing groundwater pollution, it is a powerful example of the potentially absurd consequences of expansively interpreting the scope of the CWA's NPDES permitting program. If releases to groundwater were regulated by individual NPDES permits, the TMDL program would require an accurate WLA allocated to each of these "point sources." The impracticality of this approach is plainly evident. Not only would the loading released at each potential pollution source need to be calculated, but the portion of that loading that reaches the specific surface water in question would need to be determined. WLAs for potential groundwater pollution sources any distance at all from the surface water would be impossible to calculate.

[194] 33 U.S.C. § 1321(j)(1)(C). The president then delegated the authority and responsibility for those regulations to the EPA administrator, which was reaffirmed in 1991. Exec. Order No. 11,735, § 1(4), 38 Fed. Reg. 21, 243 (Aug. 7, 1973); Exec. Order No. 12,777, § 2(b)(1), 56 Fed. Reg. 54,757, 54,760 (Oct. 22, 1991).

[195] 40 C.F.R. Part 112.

areas, container materials and secondary containment; drainage for raw material storage areas; control for other site features that could produce runoff; secondary containment and treatment processes for truck and railcar liquid loading and unloading areas; and equipment that prevents discharges for in-plant transfer, processing and materials handling areas. SPCC plans must also address such issues as preventative maintenance, facility security and training. Most plans must be reviewed and certified by a registered professional engineer. In addition, they must be updated every five years and more frequently if material changes are made to the facility or its oil storage capacity.

These rigorous requirements thereby positively impact nonpoint source and groundwater pollution by addressing the sources of that pollution. This is an important aspect of the CWA's organizational paradigm. Addressing nonpoint source pollution requires not only measures to address existing groundwater pollution and its impact on receiving waters, but the potential future sources of pollution.

While SPCC regulations are currently limited to facilities that store significant amounts of oil and petroleum products, EPA recently agreed to initiate a rulemaking to broaden the SPCC program beyond oil to address potentially hundreds of additional hazardous substances.[196] Regardless of whether the SPCC program is applied to oil or all hazardous substances, it is an important regulatory mechanism that addresses nonpoint source and groundwater pollution. The SPCC program is focused on the prevention of discharges to navigable water, and it also reduces the risks of spills and leaks that significantly contribute to nonpoint source and groundwater pollution through contingency planning, monitoring, and the use of countermeasures. These requirements are already widespread and likely to be expanded further.

d) CWA Section 319: National Nonpoint Source Program

Many of the forgoing programs provided states, tribes, and territories with tools to address nonpoint source pollution; the assistance provided is largely part of the CWA's overall approach to reducing pollution of all kinds. When Congress amended the Act in 1987, however, it added powerful new tools specifically targeting nonpoint source pollution. These provisions, known as the National Nonpoint Source Program, are found within Section 319 of the CWA.

The National Nonpoint Source Program allowed EPA to provide states, territories, and tribes with guidance and grant funding to implement their nonpoint source programs. These programs consist of a variety of regulatory and non-regulatory programs, technical assistance, financial assistance, education, training, technology transfer clearing houses, watershed projects, monitoring frameworks, and oversight through ongoing assessments.

These management programs were developed through a three-stage process. First, under Section 319(a), each state is required to submit to EPA an assessment report identifying navigable

[196] *Environmental Justice Health Alliance for Chemical Policy Reform, et al. v. U.S. Environmental Protection Agency*, Case No. 1:15-cv-05705 (S.D.N.Y. Feb. 16, 2016).

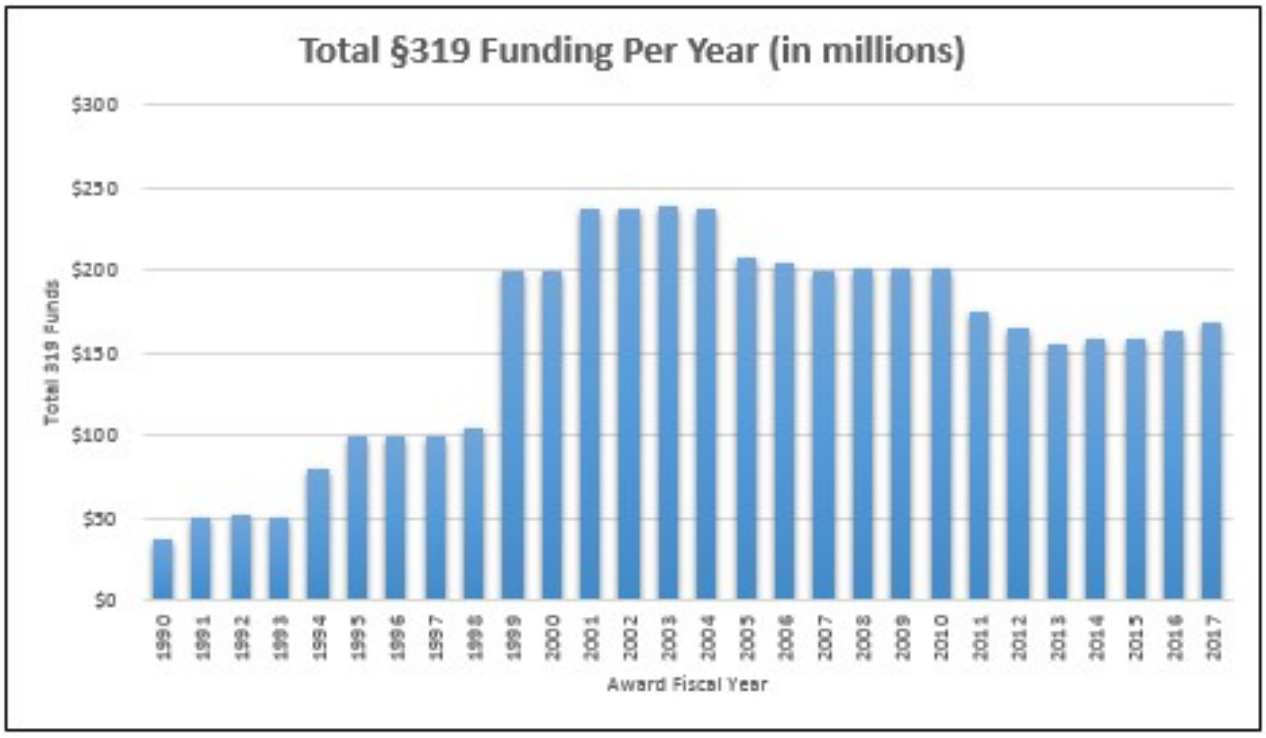
waters within the state that cannot meet applicable water quality standards without nonpoint source controls. Assessment reports must identify categories, subcategories, and individual nonpoint sources that significantly contribute to impairment and must describe controls and best management practices necessary to address the nonpoint sources contributing to impairment.

Then, under Section 319(b) (the second step of the Nonpoint Source Management Program), states are required to submit management programs to EPA that must identify the specific controls, best management practices, and other measures the state will use to address the nonpoint sources contributing to impairment of navigable waters within the state. States must provide a schedule of identifiable and measurable milestones, and, where applicable, identify the regulatory authorities they will utilize.

Finally, once EPA approves the management program states submit to EPA under Section 319(b), Section 319(h) provides EPA a mechanism to issue grants to states, territories, and tribes on an annual basis. The grant program utilizes a competitive process based on states' own fiscal commitments to programs addressing nonpoint source pollution and a demonstration of progress toward the milestones states identified under Section 319(b).

This National Nonpoint Source Program has been tremendously successful. Since 1990, EPA has provided states, tribes, and territories nearly $4.4 billion in funding for their nonpoint management programs.[197]

[197] See https://www.epa.gov/nps/319-grant-program-states-and-territories (accessed Mar. 30, 2018).



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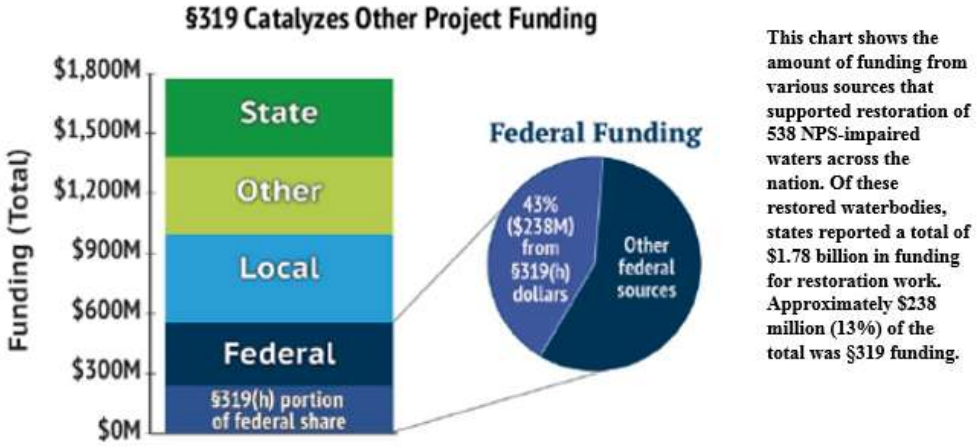
While these federal funding levels are impressive, they do not reflect the full value generated through the National Nonpoint Source Program. Because Section 319(n) issues grants on a competitive basis based in part on the state, tribe, or territories' own financial commitment, it is able to leverage far greater funding from all levels of government. The chart below provides an example of the multiplicative power of federal funding through Section 319(n). EPA recently examined 538 nonpoint source-impaired waters that were restored using funds from the National Nonpoint Source Program. It found that the Agency's $238 million funding contribution leveraged over $1.54 billion in funding from state, local, and other sources – a total of $1.78 billion.[199]

[198] Table from https://www.epa.gov/nps/319-grant-program-states-and-territories (accessed Mar. 30, 2018) (Edited to update annual funding to include FY2017.
[199] See https://www.epa.gov/nps/319-grant-program-states-and-territories (accessed Mar. 30, 2018).



Importantly, these funds are having a positive and measurable impact. Between 2005 and 2017,[200] the National Point Source Program helped restore 725 waterways that were previously impaired by nonpoint source pollution.[201] These 725 waterways represent over 6,000 miles of rivers and streams and over 164,000 acres of lakes.[202] In addition to these completed projects, there are more than 2,000 ongoing National Point Source Program projects underway that are helping to protect even more waters from groundwater nonpoint source pollution.

The existence and implementation of these programs demonstrate that Congress did not ignore nonpoint source or groundwater pollution when it drafted and amended the CWA. Congress provided powerful tools and funding mechanisms that have achieved far-reaching results. These mechanisms are different – by necessity – than the permitting system Congress provided for point sources under the NPDES program.

2. In Addition to the CWA, Multiple Federal Statutes Regulate Nonpoint Source Pollution and Releases to Groundwater.

The CWA is far from the only statute to address nonpoint source or groundwater pollution. In fact, one article identified sixteen different federal statutes that authorize programs to address nonpoint or groundwater pollution in some way.[203] Given that groundwater and nonpoint source

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[200] See https://www.epa.gov/nps/nonpoint-source-success-stories#co (accessed Apr. 10, 2018).
[201] See https://www.epa.gov/nps/319-grant-program-states-and-territories (accessed Mar. 30, 2018).
[202] See https://www.epa.gov/nps/319-grant-program-states-and-territories (accessed Mar. 30, 2018).
[203] Lawrence Ng, A Drastic Approach to Controlling Groundwater Pollution, 98 Yale L. J. 773, 792 (1989); Some programs protect water resources, although not groundwater explicitly, *e.g.*, Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986) (authorizes construction of sewage works and use of alternative waste treatment techniques, establishment of effluent standards, and regulation of point source discharge of pollutants); Reclamation Act, 43 U.S.C. § 390 (1982) (funds projects for restoration of underground water supplies contaminated due to natural leaching). Other programs regulate the handling of substances that could expose groundwater to contamination, e.g., Atomic Energy Act, 42 U.S.C. §§ 2011-2022 (1982 & Supp. IV 1986) (authorizes regulation of storage and disposal of radioactive wastes); Hazardous Materials Transportation Act, 49 U.S.C. app. § 1801 (1982) (requires establishment

pollution are, by definition, widespread and diffuse, it is appropriate that Congress provided mechanisms to address nonpoint source and groundwater pollution across multiple statutes and agencies with varying jurisdiction over sources of pollution. What follows are a few of the most important examples of the way statutes other than the CWA address nonpoint source and groundwater pollution.

a) The Safe Drinking Water Act ("SDWA")

The primary purpose of the SDWA and its amendments is the establishment of state programs to protect all Underground Sources of Drinking Water ("USDWs") through regulation of "public water systems." In furtherance of their drinking water protections however, the SDWA also provides multiple mechanisms to address potential impacts from groundwater and nonpoint source pollution.

(1) National Drinking Water Regulations

A key component of SDWA is the requirement that EPA promulgate national primary drinking water regulations for contaminants that may pose health risks and are likely to be present in public water supplies. Section 1412 instructs EPA on the selection of contaminants for regulation and specifies how and the means by which EPA must establish regulations once a contaminant has been selected.

The scope of the regulations is incredibly broad. They apply to privately and publicly owned "public water systems" that provide piped water for human consumption to at least 15 service connections or that regularly serve at least 25 people. The Agency has issued regulations for more than 90 contaminants, including regulations setting standards or treatment techniques for drinking water disinfectants and their byproducts, microorganisms, radionuclides, organic chemicals, and inorganic chemicals.

These standards, while designed to protect drinking water, necessarily impact groundwater and nonpoint source discharges that could pollute drinking water sources. EPA (and states and territories with primacy over the drinking water) utilize a combination of funding, research, and enforcement powers to help address these potential sources of drinking water contamination.

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of regulations for commercial transportation of hazardous materials). Still other programs protect the environment generally, *e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1982 & Supp. IV 1986) (directs federal agencies to prepare environmental impact statements for major federal activities significantly affecting quality of human environment); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1982) (authorizes regulation of mining operations).

(2) Underground Injection Control Programs

Because most public water systems rely on groundwater as a source of drinking water,[204] Congress focused a significant part of the SDWA (Part C) on groundwater protection. Section 1421 of Part C authorized the establishment of state underground injection control ("UIC") programs to protect USDWs. In 1977, utilizing this authority, EPA issued regulations that contained requirements for state UIC programs to prevent underground injection that endangers drinking water sources and required states to prohibit any underground injection not authorized by state permit.

In addition to Section 1421's baseline requirements, Section 1422 of the SDWA authorized affected states to submit plans to EPA for implementing UIC programs. If approved, the submitting states were allowed to assume primary enforcement responsibility for the UIC program. If a state's plan has not been approved, or the state has chosen not to assume program responsibility, then EPA remains the implementer and enforcer of the UIC program.[205]

For oil and gas injection operations, states with UIC programs are delegated primary enforcement authority if they can demonstrate that they have an effective program that prevents underground injection that could potentially endanger drinking water sources.[206] EPA has delegated primacy for all classes of wells to 35 states, shares implementation responsibility with seven states and two Indian tribes, and implements the UIC program for all well classes in nine states. To aid the implementation of this program, EPA has established six classes of UIC wells based on similarity in the fluids injected, construction, injection depth, design, and operating techniques and has issued regulations that establish performance criteria for each class.[207]

Protecting USDWs involves well design, monitoring, and construction requirements that require, for example, installation of a series of conductor casings to prevent the migration of fluids up the well bore, packers to keep the injection fluids within a permitted injection zone, annular fluid monitoring systems to detect the intrusion of any injection fluids into the annular space between the injection tubing and well casing, and annular pressure testing and other mechanical checks to ensure the integrity of the injection well casing and injection tubing assembly for any leaks.

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[204] EPA reports that, of roughly 152,700 public water systems, 138,053 rely on ground water and 14,576 rely on surface water. Among 51,356 community water systems, 39,624 rely on ground water and 11,721 rely on surface water. EPA, Fiscal Year 2011, Drinking Water and Ground Water Statistics, March 2013, p. 8.

[205] 42 U.S.C. § 300h-2

[206] 42 U.S.C § 300h-4, added in 1980.

[207] The wells are classified as follows: Class I (inject hazardous wastes, industrial non-hazardous liquids, or municipal wastewater beneath the lowermost USDW); Class II (inject brines and other fluids associated with oil and gas production and hydrocarbons for storage); Class III (inject fluids associated with solution mining of minerals beneath the lowermost USDW); Class IV (inject hazardous or radioactive wastes into or above USDWs and are generally banned); Class V (all injection wells not covered under other classes—many of these wells inject non-hazardous fluids into or above USDWs and are typically shallow, on-site disposal systems), and Class VI (inject carbon dioxide [CO_2] for long-term geologic sequestration to reduce atmospheric emissions of CO_2 from industrial sources).

As the Associations' members know firsthand, significant investment is required to design, construct and operate injection wells that meet the above standards. If wastewater is injected into shallow geologic zones where the wastewater may contact a potential USDW, then the wastewater must be treated to a more significant extent to meet drinking water quality standards (drinking water Maximum Contaminant Levels). Examples of this type include smaller industrial operations or groundwater remediation projects.

(3) Sole Source Aquifer Protection Program

Section 1424(e) of the SDWA authorizes EPA to make determinations—either on EPA's initiative or in response to a petition—that an aquifer is the sole or principal drinking water source for an area. In areas that overlie a designated sole-source aquifer, no federal funding may be committed for projects that EPA determines may contaminate such an aquifer. Any person may petition for sole source aquifer designation. Nationwide, EPA has designated 77 sole source aquifers.[208]

(4) Sole Source Aquifer Demonstration Program

Section 1428 of the SDWA established a state program for protecting wellhead areas around public water system wells. If a state established a wellhead protection program by 1989 and EPA approved the state's program, then EPA grants awards covering between 50% and 90% of the costs of implementing the program.

(5) State Groundwater Protection Grants

Section 1429 of the SDWA, added in 1996, authorizes EPA to make 50% grants to states to develop programs to ensure coordinated and comprehensive protection of groundwater within the states.

(6) Source Water Assessment and Protection Programs

The 1996 amendments to the SDWA expanded the Act's pollution prevention focus to embrace protection of surface water as well as groundwater. In particular, Section 1453 required EPA to publish guidance for states to implement source water assessment programs that delineate the boundaries of the areas from which systems receive water and to identify the origins of regulated contaminants (and also any contaminants selected by the state) in those areas to determine systems' susceptibility to contamination. States with approved assessment programs may adopt alternative monitoring requirements for water systems as provided for in Section 1418.

Additionally, Section 1454 authorized the creation of source water petition programs based on voluntary partnerships between state and local governments. Under Section 1454, states may establish a program through which a community water system or local government may submit a petition to the state requesting assistance in developing a voluntary source water quality protection

[208] 42 U.S.C. §300j-12.

partnership to: (1) reduce the presence of contaminants in drinking water; (2) receive financial or technical assistance; and, (3) develop a long-term source water protection strategy.

b) The Resource Conservation and Recovery Act ("RCRA")

Through RCRA, Congress established a comprehensive federal program for regulating solid and hazardous waste "from cradle to grave." As such, the Act defines solid and hazardous waste; authorizes EPA to set standards for facilities that generate or manage wastes; establishes a permit program for hazardous waste treatment, storage, and disposal facilities; and authorizes EPA to set criteria for disposal facilities that accept municipal solid waste. As relevant here, groundwater (among other natural resources) is specifically protected by this statute from potential impacts from the improper disposal of solid and hazardous wastes.

RCRA's regulatory structure varies depending on whether the material to be regulated is a "solid waste" or a "hazardous waste." Hazardous wastes are primarily regulated in accordance with federal standards. The management of non-hazardous solid waste is left primarily to individual states. RCRA defines solid waste broadly as:

> …any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources [regulated under the Clean Water Act]…or special nuclear, or byproduct material as defined by the Atomic Energy Act.[209]

A solid waste becomes a hazardous waste in one of two ways: (1) by being specifically listed as hazardous; or (2) by exhibiting certain hazardous characteristics (ignitability, corrosivity, reactivity, or toxicity).[210] Hazardous wastes are regulated under Subtitle C and solid wastes are regulated under Subtitle D.

(1) Hazardous Wastes

Subtitle C confers to EPA broad authority to regulate hazardous waste from its generation to its ultimate disposal (and beyond, if disposal leads to contamination of air, soil, or water). More specifically, under Subtitle C, EPA was directed to:

- establish standards applicable to hazardous waste generators and transporters;

[209] See 42 U.S.C. §6903(27).
[210] See 42 U.S.C. 6921(a), and implementing regulations at 40 C.F.R Part 261, "Subpart B—Criteria for Identifying the Characteristics of Hazardous Waste and for Listing Hazardous Waste."

- establish minimum national standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDFs);

- establish a permit program applicable to TSDFs; and

- establish criteria for states to administer and enforce their own hazardous waste program.

In respect to these directives, EPA has promulgated a number of standards and regulations to protect the integrity of groundwater.[211] Almost all TSDF facilities must install monitoring wells and test the groundwater regularly for toxic leachates which might have escaped from the facility.[212] If monitoring reveals that the level of any hazardous substance exceeds groundwater protection standards specified by EPA, the facility operator must take corrective action.[213]

EPA has primary responsibility for implementing the hazardous waste program. However, states can implement their own hazardous waste management programs (including the TSDF permitting program as well).[214] EPA will authorize states to implement a hazardous waste management program under RCRA that is at least as stringent as the federal program. Currently, EPA implements the hazardous waste management program in Iowa, Alaska, Indian Country, and in each of the territories, except Guam. All other states implement their own programs. Some of which are more stringent than the federal program. Regardless of authorization, EPA maintains oversight over RCRA programs nationwide.

As EPA develops new regulations, each state-implemented program must be reviewed to determine whether the state has authority to enforce comparable requirements.[215] As a result, many states are also authorized to implement individual RCRA program elements that EPA promulgated after 1984 (*e.g.*, Corrective Action, Landfill Disposal Restrictions, and Recycled Used Oil Management Standards).

EPA and the states also share significant enforcement authority to compel compliance with RCRA, regulations implementing RCRA, and state analogs to those regulations. Criminal violations of Subtitle C requirements are punishable by fines of up to $50,000 for each day of violation and/or imprisonment for as long as five years. Knowingly endangering human life can result in fines of up to $250,000 ($1 million for a company or organization) and prison terms of up to 15 years.

For cases not involving criminal conduct, RCRA authorizes civil and administrative penalties of as much as $25,000 per day of violation. EPA is authorized both to issue administrative compliance orders and to seek injunctive relief through the courts. Similar civil and administrative penalties (but not criminal penalties) apply to violations of the underground

[211] *See, e.g.,* 40 C.F.R. § 264.97-.99 (1987) (general groundwater monitoring requirements).
[212] 40 C.F.R. § 264.97-.99 (1987).
[213] 40 C.F.R § 264.100 (1987).
[214] 42 U.S.C. § 6926.
[215] If the new EPA standard is *less* stringent than a state's existing standard, the state may choose not to adopt it.

storage tank requirements in Subtitle I (discussed below). This significant enforcement authority demonstrates that Congress provided multiple statutes with powerful tools to address groundwater pollution. The federal government's ability to protect groundwater is therefore not dependent on whether releases to groundwater are subject to NPDES permitting requirements.

(2) Solid Waste

Subtitle D establishes state and local governments as the primary planning, regulating, and implementing entities for the management of non-hazardous solid waste, such as household garbage and non-hazardous industrial solid waste.[216] EPA's role is largely limited to guidance and oversight. As such, in sections 1008(a)(3) and 4004 of RCRA, EPA promulgated "Criteria for Classification of Solid Waste Disposal Facilities and Practices."[217] These regulations established minimum national performance standards necessary to ensure that "no reasonable probability of adverse effects on health or the environment" will result from solid waste disposal facilities or practices. Practices not complying with regulations specified under 40 C.F.R. § 257 constitute "open dumping" and are prohibited under RCRA.

Under Subtitle D, EPA also promulgated "Criteria for Municipal Solid Waste Landfills."[218] Those regulations apply to landfills that receive household waste, that are not a "land application unit, surface impoundment, injection well, or waste pile."[219] The requirements include location restrictions, operational and design criteria (*e.g.*, liner, leachate collection, run-off controls), groundwater monitoring and corrective action requirements, closure and post-closure care, and financial assurance criteria.

Pursuant to these requirements, states ordered upgrades or closures for thousands of noncompliant landfills. Of the 20,000 municipal landfills existing nationwide in 1978, just 6,000 remain today. This reduction, largely due to requirements of Subtitle D, therefore, eliminated a tremendous number of sources of nonpoint and groundwater pollution.

(3) Citizen Suits and Imminent Hazard Provisions

As mentioned above, open dumping prohibitions, specified under the sanitary landfill regulations,[220] are enforced by states or through citizen suits. Citizen suit provisions specified under Section 7002 of RCRA allow for civil action against any entity that is alleged to be in violation of any "permit, standard, regulation, condition, requirement, prohibition, or order."[221]

Further, citizen suits are allowed where the disposal of any solid or hazardous waste may present "an imminent and substantial endangerment to health or the environment."[222] In addition

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[216] See EPA's "Hazardous Waste: RCRA Subtitle D" website at http://www.epa.gov/region02/waste/dsummary.htm.
[217] 40 C.F.R. § 257.
[218] 40 C.F.R. § 258
[219] 40 C.F.R. Part 258.2.
[220] 40 C.F.R. 257
[221] 42 U.S.C. § 6972.
[222] 42 U.S.C. § 6972(a)(1)(B).

to citizen suit provisions, EPA is authorized to take action if past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous wastes may present an imminent and substantial endangerment to health or the environment.[223] Under Section 7003 of RCRA, EPA can initiate judicial action or issue an administrative order to any past or present waste generator or owner of a disposal facility who has contributed or is contributing to the disposal – including releases to groundwater. Section 7003 is available for use in several situations where other enforcement tools may not be available, including sites that are not subject to Subtitle C of RCRA or other environmental laws.

(4) Underground Storage Tanks ("USTs")

According to EPA estimates, some 1.2 million USTs remain buried at 500,000 sites across the country, a substantial number of which have leaked (perhaps as many as 400,000). UST leaks are primarily the result of improper installation and corrosion. Half of all confirmed UST releases have resulted in groundwater contamination.[224]

To address this problem, Congress established a leak prevention, detection, and cleanup program through the 1984 RCRA amendments and the 1986 Superfund Amendments and Reauthorization Act ("SARA"). The 1984 RCRA amendments created a federal program to regulate USTs to limit corrosion and structural defects, and thus minimize future tank leaks. The law directed EPA to set operating requirements and technical standards for tank design and installation, leak detection, spill and overfill control, corrective action, and tank closure.

The UST program (RCRA Subtitle I) is administered primarily by states. It requires registration of most underground tanks, bans the installation of unprotected tanks, sets federal technical standards for all tanks, coordinates federal and state regulatory efforts, and provides for federal inspection and enforcement.

Additionally, in 1986, Congress created a petroleum UST response program by amending Subtitle I of RCRA through SARA (P.L. 99-499). Prior to SARA, EPA lacked explicit authority to clean up contamination from leaking underground petroleum tanks. The 1986 provisions authorized the federal government to respond to petroleum spills and leaks, and created a Leaking Underground Storage Tank ("LUST") Trust Fund to fund the remediation of leaks from petroleum USTs in cases where the UST owner or operator is unknown or otherwise unable to remediate a site. The LUST Trust Fund provides money for EPA to administer the program and for states to oversee cleanups, take enforcement actions, and undertake cleanups themselves when necessary. The money in the fund is derived primarily from a 0.1 cent-per-gallon federal tax on motor fuels and several other petroleum products.

The 1986 amendments also directed EPA to establish financial responsibility requirements for UST owners and operators to cover costs of taking corrective action and to compensate third

[223] 42 U.S.C. § 6973.
[224] National Water Quality Inventory: 1994 Report to Congress (Dec. 1995), pp. 104-106; 472-73.

parties for injury and property damage caused by leaking tanks. The law required EPA to issue regulations requiring tank owners and operators selling petroleum products to demonstrate minimum financial responsibility. The regulations require insurance coverage of $1 million, or alternatively, owners and operators may rely on state assurance funds to demonstrate financial responsibility.

Congress revisited the issue of UST contamination of groundwater again through the Energy Policy Act of 2005 (P.L. 109-58) which included in Title XV, Subtitle B, The Underground Storage Tank Compliance Act ("USTCA"). This act amended Subtitle I of the Solid Waste Disposal Act to add new leak prevention and enforcement provisions to the UST regulatory program and impose new requirements on states, EPA, and tank owners. The USTCA requires EPA and states that receive funding under Subtitle I to conduct compliance inspections of all USTs at least once every three years. It also requires states to comply with EPA guidance prohibiting fuel delivery to ineligible tanks; develop training requirements for UST operators and individuals responsible for tank maintenance and spill response; prepare compliance reports on government-owned tanks in the state; and implement groundwater protection measures for UST manufacturers and installers. The act also directed EPA to develop and implement a strategy to address UST releases on tribal lands. Measures such as these once again demonstrate that Congress' decision to exclude nonpoint source releases and releases to groundwater from the NPDES program does not mean that Congress failed to address these issues.

c) Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), otherwise known as Superfund, was enacted to remediate thousands of waste disposal sites abandoned across the country. These contaminated sites are a significant source of groundwater and nonpoint source pollution. In a 1994 report to Congress, EPA reported that of 1,121 sites for which remedies then had been selected, 702 involved groundwater contamination.[225] Under CERCLA, EPA was required to prepare a national contingency plan establishing criteria for hazardous waste site cleanup and to rank sites eligible for cleanup on a national priority list. CERCLA also authorized the EPA to remediate sites listed on the national priority list, consistent with national contingency plan criteria; to undertake emergency removal actions at any site, whether listed or not; and to recover the costs of doing so from statutorily defined responsible parties. Although CERCLA and state analogs to CERCLA have successfully remediated thousands of sites, the unfortunate legacy of prior disposal practices means that many more sites remain. Diligent pursuit of remedies at these sites will not only benefit Superfund sites and adjacent properties, it will benefit downstream receiving waters by reducing the nonpoint and groundwater sources of pollution that cause and contribute to impairment.

CERCLA also conferred EPA authority to respond to and address "a release or threat of release into the environment of a hazardous substance, or a release or threat of release into the

[225] National Water Quality Inventory, pp. 476-77.

environment of a pollutant or contaminant which may present an imminent and substantial danger to public health or welfare."[226] EPA can do short or long-term cleanups at a site and later recover cleanup costs from potentially responsible parties ("PRPs") under Section 107. In order to fully exercise this authority, EPA can also gather information, obtain access to a site, and seek penalties for non-compliance with orders and agreements. This authority to quickly and effectively respond to releases and even threats of releases is a powerful Agency tool for protecting groundwater and surface waters.

d) Coastal Zone Act Reauthorization Amendments of 1990

Congress passed the Coastal Zone Management Act ("CZMA") in 1972 with a goal to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone."[227] To achieve those goals, Congress provided the National Oceanic and Atmospheric Administration ("NOAA") with multiple tools to manage and protect coastal waters and the Great Lakes. Like the CWA Section 319 programs, the 1972 CMZA provided states incentive-based planning programs aimed at regulated water and land uses and development which contributed to the impairment of coastal waters. While nonpoint sources were included within these planning programs, the 1972 CMZA did not specifically address groundwater pollution and pollution from nonpoint sources. When Congress reauthorized the CMZA in 1990, however, it created the Coastal Nonpoint Pollution Control Program, which specifically targeted polluted runoff to coastal waters.[228]

Under the Coastal Nonpoint Pollution Control Program, which is jointly administered by EPA and NOAA, 29 coastal states were required to establish nonpoint control programs to protect coastal waters. These programs were intended to augment the nonpoint source control programs developed under CWA Section 319 and to supplement existing incentive-based programs developed under the 1972 CZMA.

More specifically, the Coastal Nonpoint Pollution Control Program required the coastal states to establish programs necessary to ensure attainment with EPA-issued water quality standards. State programs must implement 56 separate management measures across multiple nonpoint source categories, and must do so through enforceable policies and mechanisms. These programs are reviewed and approved by EPA and NOAA and are frequently reevaluated pursuant to the Coastal Nonpoint Pollution Control Program's requirement that state programs be monitored and tracked to ensure that each management measure is being implemented. States with plans that fail to adequately implement EPA-mandated measures risk loss of grant funding under CWA Section 319.

Significantly, several of the management measures required under the CZMA's Coastal Nonpoint Pollution Control Program, such as limits on removal of vegetation and reduction of

[226] 42 U.S.C. § 9604.
[227] 16 U.S.C. § 1452(1).
[228] 16 U.S.C. § 1455b.

impervious surfaces like pavement and roofs, are aimed at reducing runoff into coastal waters. In doing so, these measures – by design – direct states to divert potentially contaminated flows to groundwater. EPA and NOAA therefore recognize that natural attenuation and soil percolation are far superior to surface runoff and yet these beneficial diversions to groundwater are precisely the types of releases that could be subject to burdensome permitting requirements if EPA were to take an expansive interpretation of the CWA's NPDES permitting requirements.

e) Pipeline Safety Act ("PSA")

The operation and maintenance of a liquid pipeline is regulated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") pursuant to its authorization under the PSA. 49 U.S.C. §§ 60101, et seq.[229] PHMSA's regulations govern pipeline operations, including design, specifications, operation, and maintenance.[230] PHMSA regulations, for example, dictate the design and material specifications for all segments of a pipeline,[231] and the pressures at which such pipelines may be operated.[232] The PHMSA regulations further establish the frequency with which operators must conduct internal and external investigations to identify potential integrity threats, including the timelines under which even potential threats must be inspected and repaired.[233]

PHMSA regulations further address releases, establishing the procedures under which an operator is to control a pipeline, including responding to alarms or triggers that may be indicative of a release,[234] and the placement of valves that may be remotely closed to minimize a potential release.[235]

Pipeline professionals work with PHMSA in ensuring safety and reliability. The PHMSA regulations incorporate consensus engineering standards, including those developed originally as an API standard or recommended practice.[236] PHMSA regulations address pipe and component manufacturing, shipping of manufactured pipe, construction techniques, operating procedures and operator training, emergency response, and, ultimately, abandonment at the end of the pipeline's economic life. PHMSA enforces these regulations by utilizing various inspection and enforcement processes, including civil penalties.

3. States and Tribes Regulate Releases to Groundwater.

As noted in the foregoing sections, the CWA and other statutes that address nonpoint source pollution and releases to groundwater either preserve state authority to regulate nonpoint

[229] 49 U.S.C. §§ 60101, *et seq.*
[230] *See, e.g.,* 49 C.F.R. Part 195.
[231] 49 C.F.R. § 195.200, *et seq.*
[232] 49 C.F.R. § 195.406.
[233] 49 C.F.R. § 195.452.
[234] 49 C.F.R. § 195.446.
[235] 49 C.F.R. § 195.116.
[236] *See e.g.*, 49 C.F.R. § 195.591, incorporating by reference the requirements and recommendations of API Std 1163, Inline Inspection Systems Qualification Standard (Aug. 2005).

sources and groundwater or provide mechanisms under which the federal government and the states work cooperatively to address groundwater and nonpoint source pollution. Because state regulations pursuant to this authority are too voluminous to summarize, the following provides the broad contours of states' exercise of the regulatory authority over groundwater and nonpoint sources that Congress purposely preserved for the states. These broad contours are taken from a national survey of state agency officials involved in groundwater management that was taken in 2012 to 2013.[237]

The vast majority of states identify water quality/contamination as the top priority of their groundwater oversight efforts.[238] Critically, states have ample authority to conduct that oversight and address groundwater issues. "Survey results indicate that a significant majority of states, or 90% of state laws, explicitly address groundwater quality. They do so through water-quality and groundwater-quality standards and rules."[239] Moreover, the study found that "some 75% of state respondents indicate that there are water conservation regulations applicable to groundwater use in the state law. Fifty-four percent of respondents note that state law considers the water needs of groundwater dependent ecosystems." [240]

As the table below indicates, states use a variety of tools and management strategies to protect groundwater quality.

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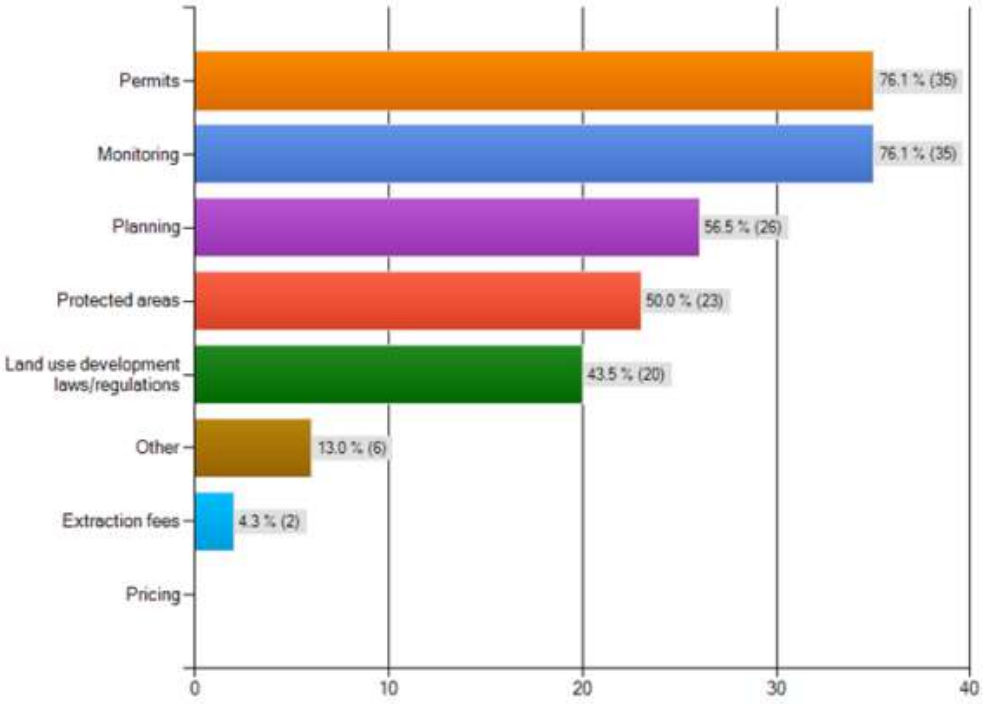
[237] Andrea K. Gerlak et al., *Groundwater Governance in the U.S.- Summary of Initial Survey Results*, The University of Arizona (2013),
https://wrrc.arizona.edu/sites/wrrc.arizona.edu/files/pdfs/Groundwater GovernanceReportFINALMay2013.pdf.
The Associations recognize that this data is somewhat dated, but this is the most recent high-level overview we could identify. If anything, this survey data underrepresents the level of state regulation of groundwater. As the Associations' members can say first-hand, there has been a substantial increase in state regulation of groundwater through oil and natural gas extraction regulations. See
http://www.gwpc.org/sites/default/files/State%20Regulations%20Report%202017%20Final.pdf.

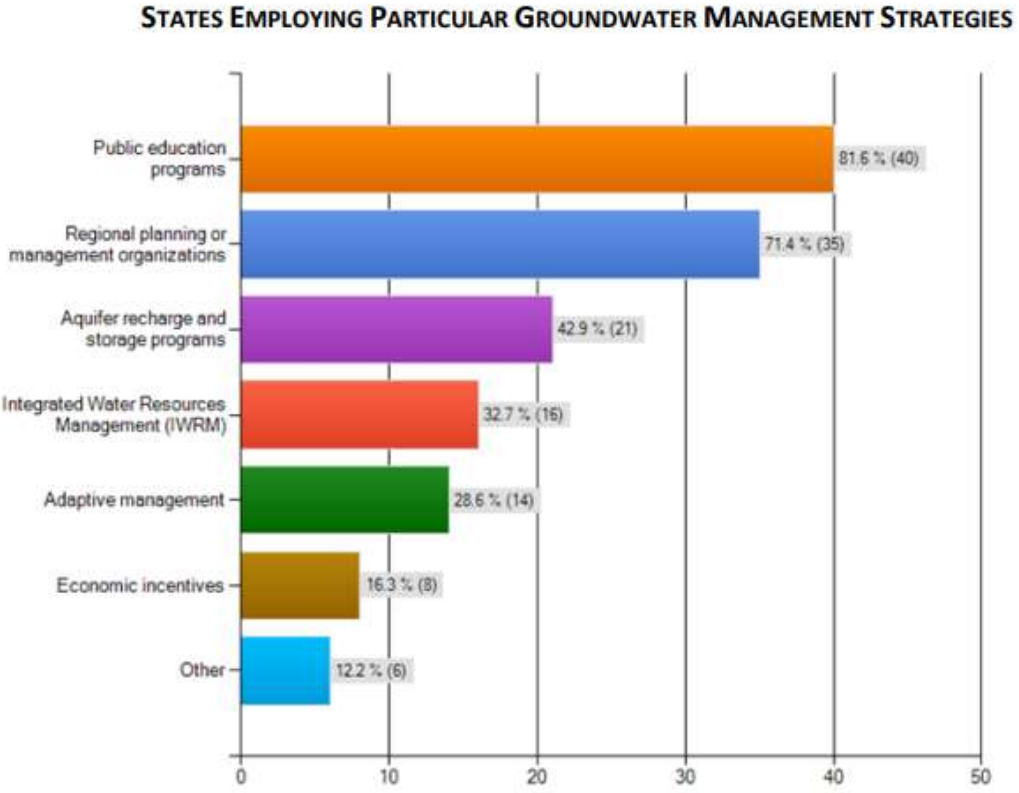
[238] Gerlak et al., at 10.

[239] *Id.* at 7.

[240] *Id.* at 7.

STATES EMPLOYING PARTICULAR GROUNDWATER QUALITY MANAGEMENT TOOLS





Groundwater oversight and enforcement is also largely shared between state and local entities. For the 98% of states with state-level enforcement and oversight, authority generally rests in, or is shared among, state environmental and natural resource agencies and departments, water resource boards and departments, and health departments. For the 67% of states reporting localized enforcement authority and oversight over groundwater, the authority generally rests in health and environmental departments, and municipal and county governments.

While this information is necessarily presented at a high-level, we believe it is important to note that states not only have the primary authority to regulate nonpoint source and groundwater pollution, but that they are actually exercising that authority. Indeed, that precisely what the state of South Carolina was doing in *Kinder Morgan*. Additional federal oversight is not warranted.

D. Recommended Clarifications

EPA's interpretation of the scope of the NPDES permitting program needs to be clear, administrable, and defensible. Fortunately, each of these goals are easily accomplished through disciplined adherence to the text of the CWA. Indeed, the present need for clarity was brought about by past Agency and judicial interpretations that did not attempt to adhere as closely as possible to the text Congress provided in the Act.

1. EPA should clarify the scope and definitions under the NPDES permitting program, consistent with Congressional intent and the text of the CWA.

As noted throughout these comments, Congress supplied several key definitions that precisely delineate the scope of the NPDES permitting program. Therefore, the "interpretations" necessary to clarify the scope of the NPDES permitting program are, in reality, Agency pronouncements that **EPA will apply the plain meaning of the definitions already laid out in the Act.**

Specifically, EPA should explicitly clarify the following:

- A NPDES permit is required only for the "discharge of any pollutant" which is defined as "any addition of any pollutant to navigable waters from any point source."[241]

- The phrase "any addition of any pollutant to navigable waters from any point source"[242] should be interpreted to confirm that the addition of the pollutant must be directly "from any point source" "to navigable" waters, without intervening groundwater or other conveyances;

- The term "point source" should be interpreted to mean the mechanism that actually conveys the pollutant to navigable water – the determination of whether a pollutant is from a point source or nonpoint source is determined at the point when the pollutant first enters navigable water;

- The term "point source" should be interpreted so that it applies to sources that are readily discernable, fully confined, and discrete;

- If anything other than a "point source," as defined above, conveys a pollutant to navigable water, there is no discharge subject to NPDES permitting requirements;

- "Nonpoint sources" should be defined as all sources of pollution other than point sources;

- Nonpoint sources" should be explicitly defined to include groundwater.

A robust and defensible clarification should also be informed by prior misinterpretations and should therefore affirmatively identify areas of misinterpretation that have been used improperly to broaden the scope of the NPDES permitting program.

- No mechanism through which pollutants pass prior to when the pollutant first enters navigable water can be considered a point source;

[241] 33 U.S.C. § 1362(12)(A).
[242] 33 U.S.C. § 1362(12)(A).

- The definition of "point source" does not include groundwater or nonpoint sources;

- The examples within the definition of "point source" are point sources only if they are "discernable, confined, and discrete conveyances." These examples do not subsume the CWA's definition of a "point source," nor do they turn groundwater into a discrete conveyance;

- The definition of "navigable water" does not include groundwater;

- Once a point source ceases discharging pollutants (*e.g.*, a pipeline is repaired or the conveyance is plugged), there is no ongoing violation of the CWA; and

- "Direct hydrological connections" between point sources and navigable water, or pollutants in navigable water that are either "fairly traceable" to specific sources or "in measureable quantities" do not alone trigger NPDES permitting requirements. Unless a point source (as defined above) directly conveys the pollutant to navigable water, there is no discharge subject to NPDES permitting requirements regardless of the directness, traceability, or quantity of the pollutant.

These recommended interpretations are grounded in the text of the CWA. They also eliminate the need for subjective and fact-specific analyses that undermine regulatory certainty and administrative accountability. Increasing jurisdictional certainty in this manner therefore improves regulatory compliance, preserves the Act's framework of cooperative federalism, and reduces costs for both regulators and regulated entities.

2. EPA should promulgate clarification through rulemaking.

Should EPA decide to develop the clarifications described above, the Associations strongly recommend that the Agency do so through an expedited notice-and-comment rulemaking under the Administrative Procedure Act ("APA").[243] Formal rulemaking procedures will help refine and improve EPA's ultimate clarification through robust stakeholder engagement, will increase the legal defensibility of EPA's clarification, and can result in the broad-based and enduring clarification of the scope of the NPDES permitting program that has proved elusive for too long.

Indeed, EPA has never offered a clear and consistent interpretation of the NPDES permitting program's coverage of releases to groundwater with connections to jurisdictional waters. For instance, EPA advanced its questionable "direct hydrological connection" theory incrementally through numerous ancillary rules, permits, and guidance documents – none of which were focused on the central jurisdictional questions to be clarified through this effort.[244] And as

[243] 5 U.S.C. § 551 et seq.

[244] *See* Final NPDES Permit Application Regulations for Storm Water Discharges, 55 FR 47,990, 47,997 (Dec. 2, 1990) ; *See also* 1991 Final Rule Addressing Water Quality Standards on Indian Lands, 56 FR 64,876, 64,892 (Dec 12, 1991); *See also* Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000, 62 FR 20,178 (1997); *See also* Proposed NPDES Permit Regulation and Effluent Limitations Guidelines

we have seen, the inevitable result of these disjointed and haphazard clarification efforts is a body of case law that is equally disjointed and unclear.[245] A singularly focused and well-supported interpretive rule on the NPDES permitting program's coverage of releases to groundwater could address this longstanding inconsistency. Not only is such a rule long overdue, it is well within EPA's authority to provide.

The APA governs the manner under which federal agency actions are promulgated and reviewed.[246] For those statutes, like the CWA, that do not contain their own standards for reviewing regulations promulgated pursuant to the statute, the APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[247] On the other hand, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."[248]

Of particular relevance here is the standard of review that underpins the U.S. Supreme Court's three primary decisions on EPA and the Army Corps' efforts to define WOTUS. The Supreme Court's unanimous decision in *Riverside Bayview* to uphold the Agencies' discretion to interpret WOTUS to delineate the often blurry line dividing waters subject to federal jurisdiction and dry land was based on *Chevron* deference.[249] Conversely, disagreement over the outer limits of *Chevron* deference led to the split decision in *SWANCC* and the *Rapanos* plurality. These decisions provide important and directly relevant guidance on the bounds of the EPA's regulatory discretion, and they guided the Associations in developing our recommended interpretation above. If EPA were to adopt our recommended approach, it would be entitled to deference because it is consistent with the explicit language of the CWA, and because it is in harmony with Congress' intent in drafting the Act.

The primary guideposts for our interpretation come from the Supreme Court's discussion of the APA in *Riverside Bayview, SWANCC* and *Rapanos*. In *SWANCC*, the majority and minority disagreed whether it violated Congress' express intent to interpret WOTUS to include isolated wetlands that may be used by migratory birds.[250] The majority in *SWANCC* held that the Corps

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and Standards for Concentrated Animal Feeding Operations (CAFOs), 66 FR 2,960, 3,017 (Jan. 12, 2001); *See also* Final NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 FR 7,175, 7,216 (Feb. 12, 2003).

[245] *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 965 (7th Cir. 1994), *cert. denied*, 513 U.S. 930 (1994); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001); *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001); *N. Cal. River Watch v. Mercer Fraser Co.*, No. 04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005); *Haw. Wildlife Fund v. Cty. of Maui*, No. 15-17447, slip. op. at 19 (9th Cir. Feb. 1, 2018); *Kinder Morgan Energy Partners*, No. 17-1640, slip op. (4th Cir. Apr. 12, 2018).

[246] 5 U.S.C. § 551 et seq.

[247] 5 U.S.C. § 706.

[248] *Riverside Bayview*, 474 U.S. 121, 131.

[249] *See Riverside Bayview*, 474 U.S. 121.

[250] *See SWANCC*, 531 U.S. 159.

was entitled to no deference when an "administrative interpretation of a statute invokes the outer limits of Congress' power," absent a clear indication from Congress that it intended that result.[251] As the Court further noted, "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power."[252]

This is precisely the issue at hand; an expansive interpretation of the scope of the NPDES permitting program (such as that espoused in EPA's "direct hydrological connection" theory) would require a massive restriction of the CWA's regulatory structure and would rewrite the jurisdictional boundaries between EPA and the states. Far from any clear indication that Congress intended such a result, all available evidence suggests that this type of interpretation is directly at odds with the black and white text of the CWA, and with Congress' intent in selecting that text.

In *Rapanos*, the Supreme Court once again confronted an impossibly broad interpretation of EPA's jurisdiction under the CWA.[253] As Chief Justice Roberts explained in his concurrence rejecting EPA's interpretation:

> Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.
>
> The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.[254]

Chief Justice Robert's concurrence provides clear guidance – the courts will defer to an agency interpretation that reflects a good faith consideration of the text of the CWA, reasonable adherence to the meaning of the text, and appropriate respect for the decisions Congress made. Conversely, those interpretations that pursue expansive jurisdiction rather than respectful and precise interpretations of the CWA reflect knowing decisions to sacrifice legal and regulatory certainty and will be rejected as abuses of Agency discretion. The Associations' recommended interpretation fits squarely within this capacious "room to operate" and avoids testing the outer bounds of the Agency's authority that EPA traversed with its "direct hydrological connection" theory. It therefore would be entitled to deference.

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[251] *SWANCC*, 531 U.S. at 172 (citations omitted).
[252] *SWANCC*, 531 U.S. at 173.
[253] *Rapanos*, 547 U.S. at 715.
[254] *Rapanos*, 547 U.S. at 758.

3. Recommended Interpretation and Policy Shift are Permissible under the APA.

Given the previous and often contradictory interpretations of the scope of the NPDES permitting program, it is important to note that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."[255] There is therefore "no basis in the Administrative Procedure Act . . . for a requirement that all agency change be subjected to more searching review."[256] Rather, the same arbitrary-and-capricious standard applies to both an agency's initial decision to issue a regulation and its later decision to rescind or modify the regulation.[257]

It is therefore enough for an agency to give "a reasoned explanation for [its] change."[258] Under this standard, an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[259] This is not an "especially 'demanding burden of justification.' "[260]

Critically, an example of an agency's reasoned explanation for its shift can be that, with a change of administrations, the agency's view as to the public interest has changed. The D.C. Circuit has held that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."[261] So long as "the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."[262] That evaluation may include the current agency head's determination that a new statutory interpretation is superior to the interpretation reached by a previous administration.[263]

More fundamentally, EPA is entitled to abandon its "direct hydrological connection" theory because it was based on an incredibly deficient interpretation of the CWA that removed distinctions that Congress erected, disregarded terms Congress had precisely selected, and evaded the organizational paradigm that Congress constructed. An earnest and respectful effort to correct

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[255] *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).
[256] *Id.*; *see also Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) ("[N]o specially demanding burden of justification ordinarily applies to a mere policy change.").
[257] *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. at 515 (2009).
[258] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[259] *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. at 515 (2009). (emphasis in original).
[260] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (citation omitted).
[261] *National Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).
[262] *National Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).; *see also Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").
[263] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (upholding an agency's conclusion that its new statutory interpretation was "more consistent with [the] statutory language" than its previous one).

this prior misstep is therefore entitled to deference – particularly where, as here, EPA is soliciting and utilizing public comment to aid its decision-making and improve the outcome of its interpretive efforts.

4. Expedited Clarification in Addition to Rulemaking is Needed.

The Associations strongly believe that EPA should provide its interpretation through notice-and-comment rulemaking, however, we recognize that rulemaking under the APA can be time-consuming – even if conducted on an expedited process. While the rulemaking process is essential for a legally defensible and enduring interpretation, it will likely cause EPA's ultimate interpretation to be finalized too late to be utilized by those parties currently defending against previous expansive interpretations of the scope of the NPDES permitting program. In order to aid those parties and provide courts, states, and other stakeholders an early indication of EPA's interpretation of the NPDES permitting program, the Associations request that the Agency also quickly provide near-term guidance on the scope of the program.

IV. CONCLUSION

Appropriately delineating the scope of the NPDES permitting program is important to our members and others in the regulated community. The Associations therefore appreciate EPA's interest in clarifying the scope of this program, and further appreciate the opportunity to provide these comments in support of that effort.

As noted throughout these comments, it is important that EPA provide, through notice-and-comment rulemaking, a rational and legally defensible interpretation of the scope of the NPDES permitting program. While this interpretation is important, it need not be difficult because the scope of the NPDES program is already clearly defined within the actual text of the CWA. Congress created and refined the Act to create a regulatory framework to protect water resources through multiple tools and across multiple jurisdictions. The NPDES program is an important part of that framework, but it is far from the only part. Congress knowingly and deliberately limited the NPDES permitting requirements to those discrete and confined point sources directly conveying pollutants to navigable water. Nonpoint discharges and releases to groundwater were not ignored – Congress addressed them through different mechanisms within the CWA and several other environmental statutes.

EPA's role here is, in reality, to reassert what Congress already wrote into the CWA. Indeed, in reasserting the statutory limits that Congress imposed, the Agency will need to abandon the "direct hydrological connection" theory and other expansive interpretations of the NPDES program. Given the clear text of the CWA, this reversal is not only permissible, it is EPA's obligation. Failure to reassert Congress' limits to the NPDES program, on the other hand, risks upending an established and effective regulatory framework, creating confusion and uncertainty, and undermining water resource protection under unworkable and ineffective permitting obligations. Such an outcome is undesirable and impermissible. The Associations therefore support EPA's present efforts to avoid these unwelcome outcomes.

Thank you in advance for your consideration of our comments. Please do not hesitate to reach out to us if we can be of further assistance on this important issue.

Respectfully submitted,

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