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Mr. David Ross, Assistant Administrator, Office of Water
Mr. Scott Wilson, Office of Wastewater Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: EPA's Request for Comment on "Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water," 83 Fed Reg. 7126 (Feb. 20, 2018); Docket ID No. EPA-HQ-OW-2018-0063.

Dear Messrs. Ross and Wilson,

On behalf of ourselves and our millions of members and supporters, Waterkeeper Alliance, Center for Biological Diversity, Food & Water Watch, Public Justice, Johns Hopkins Center for a Livable Future, and the undersigned U.S. Waterkeeper Member Organizations and Affiliates (collectively, "Commenters"), respectfully submit the following comments[1] in response to a request for public comment published by the U.S. Environmental Protection Agency ("EPA") related to "discharges of pollutants" via a direct hydrologic connection to jurisdictional surface waters under the Clean Water Act, Docket No. EPA-HQ-OW-2018-0063. 83 Fed. Reg. 7126 (Feb. 20, 2018). In response to EPA's request, Commenters explain herein that

[1] Portions of these comments are adapted from a recent amici curiae brief filed on behalf of Waterkeeper Alliance and others by Reed W. Super and Michael DiGiulio, Esqs., of Super Law Group LLC. *Tenn. Clean Water Network v. TVA*, Case No. 17-6155, Docket No. 70-1 (6th Cir. March 22, 2018).

there is no reason or justification for EPA to reconsider or revise its longstanding interpretation that point source discharges of pollutants that pass through groundwater to a jurisdictional surface water meet the Clean Water Act's ("CWA" or the "Act") discharge prohibition and thus require National Pollutant Discharge Elimination System ("NPDES") permits if there is a direct hydrological connection between the groundwater and the surface water. Nor should EPA attempt to meddle with the rational, workable, fact-specific inquiry the agency has relied upon for decades to determine whether a discharge meets the "direct hydrological connection" standard. Amending its interpretation to categorically remove oversight and regulation of such point source discharges of pollutants to jurisdictional waters via groundwater would harm public health, water quality, and wildlife, and would be arbitrary and capricious, an abuse of discretion, and unlawful.

Waterkeeper Alliance ("Waterkeeper") is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper is comprised of 340 Waterkeeper Member Organizations and Affiliates working in 44 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in and near waterways across the country – many of which are severely impaired by pollution. The CWA is the bedrock of Waterkeeper Alliance's and its Member Organizations' and Affiliates' work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. Our work – in which we have answered the Congressional call for "private attorneys general" to enforce the CWA when government entities lack the time, willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand, and have seen firsthand, the importance of regulating point source discharges to jurisdictional waters via direct groundwater connections as a result of our extensive work to address serious water quality impacts from, e.g., coal ash impoundments and CAFOs. Preserving EPA's longstanding interpretation of the CWA, consistent with the Act's plain meaning, objective, and intent, is critical to our collective work to protect the public health and the nation's waterways from dangerous pollution.

The Center for Biological Diversity ("Center") is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. For many years, the Center has worked to protect imperiled plants and wildlife, open spaces, and air and water quality, as well as to

preserve the overall quality of life for people and animals.

Food & Water Watch ("FWW") is a non-profit, public interest organization that champions healthy food and clean water for all by standing up to corporations that put profits before people and advocating for a democracy that improves people's lives and protects the environment.

Public Justice is a non-profit, national legal advocacy organization that pursues high impact lawsuits together with advocacy, education, and outreach to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. Since 1998, Public Justice has used environmental citizen suits under the Clean Water Act and other bedrock environmental laws to protect our nation's natural resources and fight for healthy rural communities.

Johns Hopkins Center for a Livable Future ("JHCLF") is based at the Bloomberg School of Public Health in the Department of Environmental Health and Engineering. The Center engages in research, policy analysis, education, and other activities guided by an ecologic perspective that diet, food production, the environment, and public health are interwoven elements of a complex system. JHCLF recognizes the prominent role that food animal production plays regarding a wide range of public health issues surrounding that system.

I. INTRODUCTION AND SUMMARY OF COMMENTS

After decades of widespread and serious water pollution and public health problems across the nation, Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the Act explicitly prohibits the "discharge of any pollutant by any person," *id*. § 1311(a), and defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id*. § 1362(12) (internal quotation marks omitted). Since then, EPA has had responsibility for advancing the Act's objective, as well as its national goal "of eliminating all discharges of pollutants into navigable waters by 1985" and the "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water . . . by 1983." *Id*. § 1251(a).

Congress focused the NPDES permit program on protecting surface waters. In the 46 years since the passage of the Act, EPA, and the courts interpreting the Act, have followed this directive. Thousands of point sources that add pollutants to surface waters are covered by the NPDES permit program; millions of other pollution sources are not. EPA and the courts have

also encountered the relatively rare situation in which a point source discharge of pollutants to surface waters passes through groundwater. The text, purpose, and history of the Act plainly provide EPA with the authority to regulate these discharges.

Despite its consistent, longstanding, and rational interpretation regarding the applicability of the CWA's discharge prohibition and permit requirement to such discharges to surface waters through groundwater with a direct hydrological connection, EPA now requests public comment on whether it should reconsider or revise that interpretation. The answer to this question is ***no*** – not by guidance, memorandum, rulemaking, or through any other administrative process or procedure.

As discussed further herein, EPA and the federal courts have appropriately found time and again that the CWA authorizes (and, in fact, mandates) the agency to regulate the discharge of pollutants from point sources to surface waters via a direct groundwater hydrological connection, and that such authority can reasonably be exercised on a case-by-case analysis under both the Act's prohibition on the unpermitted discharge of pollutants to jurisdictional waters and through the Act's bedrock NPDES permitting program. Further, no other federal or state laws adequately and consistently act to ***prevent*** the discharge of pollution from point sources to surface waters, including through hydrologically connected groundwaters. There is, therefore, no legitimate basis for EPA to call this basic interpretation of the Act into question, and the EPA's Notice published in the Federal Register provides no meaningful support for a contrary conclusion.

It is clear that discharges to surface water which pass through groundwater may be sufficiently hydrologically connected such that the groundwater acts as a medium between the point source and the jurisdictional water. EPA's longstanding interpretation is consistent with CWA jurisprudence that a pollutant discharge which travels from a point source to surface water across some intervening medium – *e.g.*, land or air – may be subject to NPDES permitting requirements. Most courts that have considered the issue have held that discharges to surface waters are not exempt from the Act merely because they travel through groundwater or other media before they are added to jurisdictional surface waters.

This sensible interpretation of the Act covers discharges of pollution that reach surface waters while avoiding categorical rules based upon the medium through which the discharge travels. The limited jurisdiction exercised pursuant to EPA's longstanding interpretation of the Act does not mean that all discharges to groundwater that may eventually migrate to surface water are necessarily regulated under the NPDES program. Nor does this rationale upset the balance of power between the federal and state governments or the cooperative federalism

envisioned by the CWA. Rather, such an interpretation is completely consistent with the Act's plain language and unambiguous objectives of stopping the discharge of pollutants to waters for the benefit of public health, wildlife health, and resource preservation.

EPA and the courts have repeatedly rejected the prescriptive rule advanced by some stakeholders that the addition of a pollutant from a point source to a surface water is automatically exempt from the NPDES program if it passes through any amount of groundwater. Such a rule would arbitrarily and capriciously impede the ability of EPA, states, tribes and citizens to protect waterbodies and people who use them across the country. It would also create perverse incentives for polluters to evade the NPDES permitting program by discharging their wastes in basins or wells *next to* navigable waters, where the groundwater would predictably and directly convey pollutants to the adjacent or surrounding surface waters. The authority for EPA and states to require NPDES permit coverage for such groundwater-related discharges to surface waters on a case-by-case basis is critical to the administration of the Act.

As the United States and EPA aptly explained to the Ninth Circuit Court of Appeals less than two years ago:

> Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water. Ascertaining whether there is a direct hydrological connection is a fact-specific determination. 66 Fed. Reg. at 3017. To qualify as "direct," a pollutant must be able to proceed from the point [source] to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. These factors will be affected by the type of pollutant, geology, direction of groundwater flow, and evidence that the pollutant can or does reach jurisdictional surface waters. *Id*.[2]

Consistent with EPA's longstanding interpretation and rationale, the determination of whether the Act's discharge prohibition is triggered by point source discharges of pollutants to groundwaters that are hydrologically connected to jurisdictional surface waters should remain "a factual

[2] Brief for the United States as Amicus Curiae, 9th Cir. No. 15-17447 (Dkt. Entry 40) (May 31, 2016) ("U.S. Amicus Br.") (Exhibit A to these comments).

inquiry like all point source determinations."[3]

In sum, EPA's longstanding interpretation constitutes a necessary, workable, flexible, and practical approach to administration of the Act. Regulated entities' fears articulated in recent litigation and in response to EPA's request for comment that maintaining EPA's consistent and longstanding interpretation of the Act will lead to soaring compliance costs, an unwieldy administrative burden on regulatory agencies, and an uncertain regulatory landscape for industry, are factually unsupported and utterly unfounded. For over 30 years, EPA has consistently interpreted the Act in this manner, and for over 30 years the sky has not fallen. EPA should immediately withdraw and abandon its proposal to review or revise its commonsense and longstanding interpretation of the Act.

II. EPA'S SELF-DESCRIBED "LONGSTANDING INTERPRETATION" OF THE CWA.

The longstanding interpretation by EPA – the agency charged by Congress with implementing the CWA – is that a discharge of pollutants from a point source to navigable waters are subject to NPDES permitting if the pollutants travel through groundwater that bears a direct hydrological connection with surface water. EPA's interpretation clearly supports the Act's coverage of such discharges and belies the notion that EPA's decades-old policy will suddenly create uncertainty throughout the regulatory landscape, impose unforeseen costs on industry, and be unworkable. As is recounted below, EPA has acted clearly, consistently, and rationally for decades, explaining its interpretation when acting in a rulemaking capacity (on multiple occasions), in issuing NPDES permits around the country that carry the force of law, and as amicus curiae before the Ninth Circuit.

A. EPA's 1990s Statements in the Federal Register.

In 1990, when promulgating a final rule addressing municipal and industrial stormwater pollution that was subject to notice and comment, EPA stated:

> 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…).

[3] EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations; Proposed Rule, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001).

55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (citations omitted).

The following year, in the context of a final rule on water quality standards for Indian reservations, again subject to notice and comment, EPA offered more detail:

> EPA and most courts addressing the issues have recognized …, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. … [T]he 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 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.***

56 Fed. Reg. 64876, 64892 (Dec. 12, 1991) (emphasis added).

In 1998, again in the stormwater pollution context involving notice and comment, EPA reiterated:

> EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection....
>
> …
>
> [Construction General Permit] coverage can extend to discharges to surface water via hydrologically connected groundwater and CGP applicants, like any other NPDES applicant, should consider those types of discharges when applying for permit coverage.

63 Fed. Reg. 7858, 7881 (Feb. 17, 1998).

B. EPA's 2001 "Formal Agency Interpretation" and Legal Analysis.

In 2001, EPA issued a "formal agency interpretation" and articulated the legal basis for its position at considerable length in a notice of proposed rulemaking for concentrated animal feeding operations ("CAFOs"). 66 Fed. Reg. 2960, 3018 (Jan. 12, 2001). Under the heading "Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to

Ground Water," EPA stated:

> Because of its relevance to today's proposal, EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water.

Id. at 3015. In a 22-paragraph legal analysis, EPA discussed its authority to "determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act," and why "the Act is best interpreted to cover such discharges." *Id*.

Instead of asking whether groundwater is regulated under the CWA as a point source or as a water of the United States, EPA astutely framed the issue before it, "whether a discharge to surface waters via hydrologically connected ground water is unlawful." *Id.* EPA noted:

> ***[T]he question of whether Congress intended the NPDES program to regulate ground water quality … is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water.***

Id. at 3015-16 (emphasis added). Exercising its authority to fill "an interpretive gap in the statutory structure," *id.* at 3018, EPA reasoned:

> An interpretation of the CWA which excludes regulation of point source discharges to the waters of the U.S. which occur via groundwater would, therefore, be inconsistent with the overall Congressional goals…. ***[T]here is no evidence that Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water***.

Id. at 3015-16 (emphasis added). To reach this conclusion, EPA "utilized its expertise in environmental science and policy to determine the proper scope of the CWA," its "knowledge of the hydrologic cycle and aquatic ecosystems," and the policymaking authority delegated by Congress. *Id.* at 3018. EPA then explained:

> The determination of whether a particular discharge to surface waters via ground water which has a direct hydrological connection which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations. The time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site specific factors, such as geology, flow, and slope.

Id. at 3017. EPA also found support for its interpretation in the legislative history: "Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters.'" *Id*. at 3016 (citing legislative history). EPA then accepted comment on the proposed rule and issued a final CAFO regulation in 2003. 68 Fed. Reg. 7176 (Feb. 12, 2003).

In its final rule, EPA determined that groundwater-related requirements should be implemented in CWA permits, as necessary, on a case-by-case basis due to site-specific variables such as topography, climate, and distance to surface water, among others. 68 Fed. Reg. at 7229. This differed from the proposed rule only in that the proposed rule would have categorically subjected CAFOs covered by the rule to groundwater-related requirements in NPDES permits, whereas the final rule left the imposition of such requirements to site-specific determinations. This is abundantly clear, not only from the CAFO rule itself, but also from *Waterkeeper Alliance, Inc. v. EPA*, a Second Circuit decision that reviewed the 2003 final CAFO regulation. 399 F.3d 486 (2d Cir. 2005). As the Second Circuit explained, the shift from uniform national requirements governing discharges to surface waters via groundwater to a case-by-case approach did not alter EPA's position on the scope of the CWA:

> The EPA did not … mean to suggest that NPDES authorities lacked the power to impose groundwater-related requirements on a case-by-case basis, where necessary.

Id. at 514, n.26. The Second Circuit upheld EPA's determination and that aspect of the regulation. *Id*. at 514-15.

Moreover, EPA's subsequent statements from 2008, when it reissued a final CAFO rule after remand from the Second Circuit, foreclose any argument that EPA disavowed its position. EPA said in the preamble:

> [N]othing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water.

73 Fed. Reg. 70420 (Nov. 20, 2008).[4]

[4] *See also* EPA, *Clean Water Rule Response to Comments – Topic 10: Legal Analysis*, (*available at* https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf (2015) (last visited May 15, 2018) ("[T]he agency has a longstanding and

C. The United States' Amicus Brief in the Ninth Circuit Advocating EPA's "Longstanding Interpretation" of the CWA.

In 2016, the United States, representing EPA's interest "in the proper interpretation of the NPDES permit provisions," filed an amicus brief in the Ninth Circuit case, *Hawai'i Wildlife Fund v. County of Maui*. The brief reasserts EPA's longstanding interpretation and persuasively articulates why and under what circumstances discharges to surface water via hydrologically connected groundwater are covered by the CWA:

> Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water. Ascertaining whether there is a direct hydrological connection is a fact-specific determination. To qualify as "direct," a pollutant must be able to proceed from the point of injection to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source.

U.S. Amicus Br. at 26.

D. EPA's Longstanding and Consistent Interpretation is Reasonable, Administrable, and Adjudicatable.

For decades, regulators and courts have capably applied CWA permitting requirements to point source discharges of pollutants that travel through groundwater to surface waters. Recent claims of administrative infeasibility are belied by history. "EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, [CAFOs], mines, and oil and gas waste-treatment facilities." U.S. Amicus Br. at 30 (citing permits). EPA uses the direct hydrological connection standard to identify discharges that are subject to permitting under the Act. To qualify as "direct," EPA explains, "[t]he time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters" is relevant. 66 Fed. Reg. at 3017. Pollutants must be traceable from point source to surface water, "[i]t is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters." *Id.* (quotation omitted).

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consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation….").

By way of example, in 2011, EPA issued an NPDES permit to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site "has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtillotte Creek."[5] EPA explained:

> Based on the modeling and the porosity of the soil, the first of the new discharge plume would take 3 to 5 years to reach the creek and 13 to 21 years before the entire breadth of the plume reaches the creek. However, since the existing facility had been discharging to the groundwater since the facility began operations in the 1970's, the existing discharge plume is already reaching Tourtillotte Creek.

Id. at 2. EPA has issued other individual NPDES permits on a similar basis. *See, e.g.,* EPA Region 6, NPDES No. NM0022306 Fact Sheet for Questa Mine (May 2006) at 4-6; *see also id*. at 7 (describing other similar permits issued). In 2012, EPA issued a General NPDES Permit for CAFOs in Idaho, with specific conditions applicable to discharges from CAFOs to groundwater with a direct hydrological connection to surface water.[6]

The courts have also proven capable of making these case-by-case determinations. For example, in the district court in *Hawai'i Wildlife Fund v. County of Maui*, plaintiffs established at summary judgment that the pollutants defendants had injected into underground wastewater wells were reaching the Pacific Ocean near a popular swimming beach, relying in part on a study by EPA and other agencies that used tracer dye to show that pollutants were reaching the ocean in less than three months. 2015 U.S. Dist. LEXIS 8189 at *3-5. (D. Haw. Jan. 23, 2015). Similarly, in March 2017, a plaintiff proffered expert testimony and the defendant's own data to show at trial that the defendant was discharging arsenic from its coal ash impoundments into a nearby surface water. *Sierra Club v. VEPCO*, 247 F. Supp. 3d 753, 756-61 (E.D. Va. 2017). Likewise, in *Tenn. Clean Water Network v. TVA*, the district court found, after trial, that the plaintiff in this case had proven that coal ash pollutants "migrated along a generally traceable" path through groundwater and after only a "short trip" discharged into Tennessee's Cumberland River. *Tenn. Clean Water Network v. TVA*, 273 F. Supp. 3d at 841-42.

By contrast, in *McClellan Ecological Seepage Situation v. Cheney*, the district court held

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[5] EPA Region 5, NPDES No. WI0073059 Fact Sheet (April 2011) at 2.

[6] EPA, Authorization to Discharge under the National Pollutant Discharge Elimination System For Concentrated Animal Feeding Operations at 30 (NPDES No. IDG01000) (May 8, 2012), (*previously available at* https://www3.epa.gov/region10/pdf/permits/npdes/id/cafo_fp_idg010000_wapps.pdf (last visited 10/30/2017)).

that discharges to surface water through groundwater *may* be subject to the CWA, but declined to regulate based on evidence that it would take "literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters." 763 F. Supp. 431, 437 (E.D. Cal. 1989). And in *Greater Yellowstone Coalition v. Larson,* the court held that because groundwater would take 60 to 420 years to reach surface water, the hydrological connection was not direct. 641 F. Supp. 2d at 1140-41. EPA and the Courts have applied this interpretation for decades and, depending on the facts presented, evaluated whether the CWA applied. It is clear from this record developed under EPA's longstanding interpretation that the horribles recently paraded by regulated entities will not come to pass.

Industry stakeholders have also argued in recent lawsuits that EPA's continued implementation of its longstanding interpretation would extend the NPDES permitting program to millions of small sources never previously regulated under this program. These slippery slope arguments are simply wrong.[7] Millions of points sources of pollution remain outside the NPDES program because their discharges do not reach, or cannot be traced to, a surface water. As noted previously, the generalized assertion that groundwater connects to surface water, without proof that pollutants in fact reach surface water, is insufficient to create liability under the Act. *See Rice v. Harken Exploration*, 250 F.3d 264, 272 (5th Cir. 2001) (finding no liability because there was no "evidence of a close, direct and proximate link between [the defendant's] discharges … and any resulting actual, identifiable oil contamination of a … surface water."). Despite the litany of industry concerns – *e.g.,* uncertainty in the business community, disincentives for investment in water infrastructure – there is no indication that EPA's decades-old position, repeatedly endorsed by courts, has caused any of these problems.

To the contrary, the slippery slope runs the other way. EPA's adoption of a categorical rule exempting discharges to surface water via hydrologically connected groundwater would, in EPA's words, effectively create a "ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water." 66 Fed. Reg. at 3016. The CWA is the primary, comprehensive statutory program for regulating the discharges of pollutants to waters of the United States. Circumventing it would plainly thwart Congress's intent. As one court noted:

> It would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some

[7] For example, fears that parking lots could be subject to the CWA's stormwater regulations are wholly unfounded. The CWA requires that only a specific class of industrial facilities obtain stormwater permits for point source discharges. 33 U.S.C. § 1342(p)(2)(B). Parking lots are not a covered industry. *See* 40 C.F.R. § 122.26(b)(14).

distance short of the river and then allows the pollutants to seep into the river via the groundwater.

N. Cal. Riverwatch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, *7-8 (N.D. Cal. Sept. 1, 2005). And as the Ninth Circuit recently explained, the Act does not allow a polluter to do "indirectly that which it cannot do directly," i.e., discharge pollutants into surface waters. *Haw. Wildlife Fund*, 881 F.3d at 768. Any other reading "would make a mockery of the [Act's] prohibitions." *Id.*

Discharges of pollutants from point sources that reach navigable waters through groundwater – such as the dumping of toxic coal ash from power plants or animal waste from CAFOs into unlined basins adjacent to rivers – can be regulated under the CWA where a site-specific (and factually intensive) determination shows that such coverage is warranted. The efforts of EPA, states, tribes, environmental organizations, and concerned citizens to implement and enforce the CWA's prohibitions against such pollution would be imperiled, if not precluded entirely, if EPA were to now attempt to reverse decades of precedent, breach its duty to the public interest, and provide a perverse gift to polluting industries at the expense of all Americans.

III. CONTRARY TO INDUSTRY ARGUMENTS, EPA'S LONGSTANDING POSITION IS CONSISTENT WITH THE LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE CWA.

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation." *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). In section 301 of the CWA, Congress prohibited the "discharge of any pollutant" except in compliance with an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The NPDES permitting system is the "cornerstone of the [CWA]'s pollution control scheme." *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).

Thus, when Congress prohibited the unpermitted "discharge of ***any*** pollutant," it defined this term broadly as "***any*** addition of ***any*** pollutant to navigable waters from ***any*** point source." 33 U.S.C. §§ 1311, 1362(12)(A) (emphasis added). The Supreme Court has frequently observed that the word "any" in statutory text indicates Congress' intent to give its words expansive meaning – an intent "underscore[d]" through the "the repeated use of the word 'any'." *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007) (citing *HUD v. Rucker*, 535 U.S. 125, 131

(2002)). The Act reaches "***any*** addition … from ***any*** point source," not just those "point sources" adjacent to, submerged in, or that discharge directly to, surface water. Such restriction should not be grafted onto the statute contrary to the language Congress chose.

Justice Scalia's plurality opinion in *Rapanos v. United States* makes clear that EPA's longstanding interpretation of the Act is completely consistent with the Act's plain language: "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Rapanos v. United States*, 547 U.S. 715, 743 (2006). In other words, if pollutants that are added to surface water can be traced back to a particular point source, CWA liability is not defeated simply because the pollution is conveyed from the point source to surface water by way of an intervening media – through the air, over the surface of the land, or with the flow of groundwater. *See, e.g., Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188-89 (2d Cir. 2010) (holding that the spraying of aerosol pesticides into the air column from trucks and aircraft was a discharge of pollutants to navigable waters and covered by the CWA); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) ("[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law"); *Hawai'i Wildlife Fund v. City of Maui*, 881 F.3d 754, 765 (9th Cir. 2018) (holding a polluter liable for discharging pollutants injected into the ground to surface water through ground water); *No Spray Coalition, Inc. v. City of N.Y.*, No. 00-Civ.-5395 (GBD), 2005 WL 1354041 (S.D.N.Y. June 7, 2005) ("Moreover, it would be unreasonable to distinguish between a sprayer releasing a fine mist pollutant into the atmosphere over the water and a pipe that released the same single flow of pollutant directly into water. Violators of the CWA would then need only to attach an airborne mist blower or hydraulic sprayer to their pipe to discharge a pollutant over the water in order to escape liability or regulation."); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981) ("[T]here is no requirement that the point source need be directly adjacent to the waters it pollutes.").

Applying a similar concept, the 6th Circuit rejected a "temporal requirement to the 'discharge of a pollutant'" because it "is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program." *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009). In this regard, CWA liability is not thwarted simply because some period of time passes between when the pollution is discharged from a point source and when it reaches surface waters. *Id.* (explaining that to create a temporal link between the "'addition' (or 'discharge') of the pollution to the 'point source' does not follow the plain language of the Clean Water Act."). The same principle applies here. The plain language of the Act does not support grafting additional requirements onto the definition of "discharge of a pollutant" – *i.e.,* that the pollutants not pass through intervening media before entering a navigable water. It simply

requires that the pollutants, which come from an identifiable point source, be added to waters of the United States.

In recent litigation, industry parties and amici have acknowledged that the CWA prohibits indirect discharges into navigable waters, but argued that such discharges must proceed from one distinct point source into another point source in order to be covered by the Act.[8] These arguments are unsupported. Justice Scalia, and the plurality in *Rapanos*, espoused a narrower view of the "scope of 'navigable waters'" than the other five justices, but vigorously denied that his interpretation would allow polluters "to evade the permitting requirement … simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." 547 U.S. at 742-43.[9] The cases Justice Scalia cited in support of this rationale make clear that, while the intervening conveyances may themselves constitute point sources, they need not. *Id*. at 743-44 (citing *inter alia*, *Southview Farm*).

In an effort to distinguish their positions on this issue from cases involving discharges to other types of media that later reach surface waters, some industry parties have also argued that Congress "carefully distinguished between navigable waters and ground waters" and that "[t]here is no textual basis for interpreting 'navigable waters' to cover groundwater." *See* TVA Br. at 26. This was a proverbial attack on a strawman, as plaintiffs in that case did not take the position that TVA's argument sought to disprove. Neither do Commenters take that position here, nor are we aware that EPA has ever taken that position. EPA's longstanding interpretation is that the NPDES program regulates the addition of pollutants from a point source to a surface water even where those pollutants first pass through directly hydrologically connected groundwater – an interpretation with which Commenters agree.

Any Industry arguments that the statute's structure supports their reading of the text are similarly misguided. Industry Amici Br. at 8. For example, it has been contended that the "point source program makes sense only" if it is "limited to circumstances where pollutants are carried into navigable waters by a 'discernible, confined and discrete conveyance,'" because only these

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[8] Commenters refer herein for illustrative purposes to briefs filed by parties and amici in *Tenn. Clean Water Network v. TVA*, Case No. 17-6155, (6th Cir.), as follows: Brief of Defendant-Appellant Tennessee Valley Authority (Dkt. 31) ("TVA Br."); Brief of Amicus Curiae the Chamber of Commerce of the United States of America, et al. (Dkt. 45-1) ("Industry Amici Br.") and Brief of Amicus Curiae the State of Alabama, et al. (Dkt. 38) ("State Amici Br.").

[9] Any argument that because groundwater is not a point source, any discharge into groundwater whether or not it reaches surface water is not a point source discharge to surface water and thus not covered by the Act, cannot be reconciled with the Supreme Court's statement in *Rapanos* that discharges into "noncovered" waters, which are not point sources themselves but flow into covered waters, are covered by the Act.

conveyances are amenable to "effluent limitation" regulation. *Id.* Commenters agree that the point source requirement is crucial to the NPDES program's regulation of discharges, but it is not true that such an approach requires that the pollutants be "carried into navigable waters" directly from a point source. The statutory definition of "effluent limitation," upon which Industry Amici lean, does not bear weight. The definition refers to *"*any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11). While discharges subject to effluent limitations must be "from point sources into navigable waters," the definition does not say, as Industry implies, that the discharges subject to effluent limitations must be "*carried by* points sources into navigable waters," nor must the discharges be "from point sources *directly* to navigable water." Again, as Justice Scalia recognized in *Rapanos*, when interpreting the very similar language found in the definition of "discharge of a pollutant," "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" As a practical matter, compliance with effluent limitations is measurable and enforceable at point sources, regardless of whether the pollutant that leaves the point source first passes through groundwater, or some other medium of exchange before reaching surface water. *See supra* § II.E. (describing EPA's repeated permitting of point sources discharging to surface water via groundwater).

Industry have also contended that "many CWA provisions recognize that not all pollution is point source pollution, … including the release of pollutants into groundwater." Industry Amici Br. at 9. Here, Industry Amici seem to be conflating non-point source pollution with groundwater pollution. While the Act distinguishes between point sources and non-point sources of pollution, both kinds of sources may discharge either to surface water or to groundwater. To be clear, Commenters' position is not that all pollution of groundwater is point source pollution. Rather, Commenters' position is identical to EPA's longstanding position, *i.e.*, that a point source discharge of pollutants to surface water, that first passes through groundwater, may be subject to NPDES regulation.

Industry have also cited section 304(f) of the CWA in an attempt to argue that discharges that pass through groundwater, whether they reach surface water or not, are non-point source pollution exempt from NPDES regulation. Amici Br. at 9. This argument requires misreading the statute and ignoring Supreme Court precedent. In section 304(f)(1) and (2), EPA directed congress to issue "guidelines for identifying and evaluating the nature and extent of ***nonpoint*** sources of pollution," as well as "processes, procedures, and methods to control pollution" from a variety of sources that the Supreme Court has recognized are not necessarily exempt from NPDES regulation. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004) ("We note, however, that [section 304 (f)(2)(F)] does not explicitly exempt nonpoint

pollution sources from the NPDES program if they *also* fall within the 'point source' definition.").

Indeed, the one pollution source from section 304(f)(2) that Industry refers to is "the disposal of pollutants in wells or in subsurface excavations," which they say "potentially discharge pollutants to groundwater." 33 U.S.C. § 1314(f)(2)(D). But this further cuts against the argument that discharges into groundwater are necessarily non-point pollution, for the Clean Water Act defines "point source" to include "well[s]," 33 U.S.C. § 1362(14). The fact that wells are defined as point sources only serves to reinforce Commenters' position that Congress intended the NPDES program to cover surface water discharges, even when the pollution first passes through a well or other point source that first enters into groundwater.

Finally, Industry reliance on the Act's legislative history is misplaced. The legislative history cited by TVA and its supporting amici focuses on Congress' decision not to categorically subject discharges to groundwater to the NPDES program. *See* TVA Br. at 29-31; Industry Br. at 11-12. While Congress debated regulating groundwater under Section 402 as a means of protecting surface water, *see* TVA Br. at 31, and recognized "the essential link between ground and surface water and the artificial nature of any distinction," Congress decided against a categorical rule because "the jurisdiction regarding groundwaters is so complex and varied . . . ." S. Rep. No. 92-414 at 73 (1971). Congress' recognition that groundwater is complex and varied supports EPA's lonstanding, fact specific, interpretation of the Act: that, without drawing categorical rules, when discharges to groundwater in fact reach surface waters, sections 301 and 402 may applyin order to protect surface water quality.

In sum, the Act covers every identifiable point source discharge of pollutants to surface waters, regardless of the medium the pollutants pass through before entering surface waters.

IV. THE VAST MAJORITY OF COURTS THAT HAVE ADDRESSED THE ISSUE HAVE HELD THAT POINT SOURCE DISCHARGES OF POLLUTANTS TO SURFACE WATER VIA GROUNDWATER REQUIRE NPDES PERMITS.

Federal circuit and district courts in at least 24 states have agreed with EPA's longstanding interpretation.[10] The reasoning behind these decisions is straightforward: Congress

[10] *E.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. April 12, 2018), available at http://www.ca4.uscourts.gov/opinions/171640.P.pdf (last visited May 18, 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005) (embracing EPA's authority to regulate discharges "via groundwater"); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (flows carrying pollutants "through underground aquifers ... into navigable-in-fact streams"); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977)

did not intend to exempt from the CWA "the introduction of pollutants into the groundwater [that] adversely affects the adjoining surface waters." *Idaho Rural Council*, 143 F. Supp. 2d at 1180.

The Ninth Circuit in *Hawai'i Wildlife Fund v. County of Maui* recently reaffirmed this interpretation in a case involving discharges of sewage waste into underground wells which reached the Pacific Ocean. 881 F.3d at 758-61. There the court held that the defendant was liable under the Act because, among other things, "the pollutants are fairly traceable from the point source to navigable water such that the discharge is the functional equivalent of a discharge into navigable water." *Id.* at 765. The court correctly focused on whether there was a discharge to surface water, regardless of whether it traveled through another medium. *Id.* at 762-65 (citing *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) and *Sierra Club v. Abston Construction*, 620 F.2d 41 (5th Cir. 1980)). The court rejected the defendant's argument that a point source itself must convey pollutants "directly" to a navigable water in order for liability to attach under the Act, reasoning that this argument requires "reading into the statute at least one term that does not appear on its face." *Id.* at 765 (citing *Rapanos*, 547 U.S. 715 (2006)). In concluding, the court noted that the Act's language prohibits a polluter "from doing indirectly that which it cannot do directly," because "[t]o hold otherwise would

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(discharges through underground injection wells), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983); *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1367 (M.D. Ga. 2017), *cert. denied*, 261 F. Supp. 3d 1345 (M.D. Ga. 2017); *Va. Elec. & Power Co.*, 247 F. Supp. 3d at 761; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445; *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-11333, 2015 WL 2144905, at *8 (S.D. W. Va. May 7, 2015); *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 (JAP), 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013); *Tenn. Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, at *5–6 (N.D. Ala. Aug. 20, 2013); *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009); *Coldani v. Hamm*, No. Civ. S-07-660 RRB EFB, 2007 WL 2345016, at *7 (E.D. Cal. Aug. 14, 2007); *N. Cal. Riverwatch*, 2005 WL 2122052, at *2; *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715, at *10 (D. Colo. Nov. 15, 2002); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Mutual Life Ins. Co. v. Mobil Corp.*, No. Civ. A. 96-CV1781, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195–96 (E.D. Cal. 1988), *vacated on other grounds sub nom McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985); *O'Leary v. Moyer's Landfill*, Inc., 523 F. Supp. 642, 647 (E.D. Pa. 1981).

make a mockery of the CWA's prohibitions." *Id.* at 768.

While a few decisions have found groundwater-related claims to be outside the jurisdiction of the CWA, these contrary cases typically arose in situations where either a direct hydrological connection to surface water had not been pled, was remote or entirely unproven, or the plaintiff claimed that the CWA applies to *all* discharges to groundwater or the court construed the issue as such.[11]

For example, in *Rice v. Harken Exploration*, the Fifth Circuit first rejected the plaintiff's claim that all groundwater that "affects interstate commerce" is covered by the Act. 250 F.3d at 269-79 (5th Cir. 2001). The *Rice* court then found the plaintiff's proof of a hydrological connection insufficient because it lacked "evidence of a close, direct and proximate link between [the defendant's] discharges … and any resulting actual, identifiable oil contamination of a … surface water," and instead depended on an expert's "generalized assertion that that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater." *Id.* at 272. Such a showing would not pass muster under the longstanding direct hydrological connection standard repeatedly articulated by EPA.

In *Oconomowoc Lake*, the court explained that the mere "possibility" of a hydrologic connection between groundwater and surface water was insufficient to justify regulation under the NPDES program. *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962, 965 (7th Cir. 1994). Likewise, in *Kelley*, the plaintiffs alleged only that the "plume of contamination is migrating … and *eventually* discharging into [a surface water]." *Kelley on behalf of Michigan v. United States,* 618 F. Supp. 1103, 1105 (W.D. Mich. 1985). These cases are distinguishable on the basis that it was speculative that the discharges were, in fact, reaching surface waters.

The other recent cases that rejected a discharge to surface water via groundwater theory incorrectly framed the issue to be whether groundwater is itself "navigable water," or incorrectly analyzed the plain language of the statute.[12] These outlier cases are inconsistent with the great

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[11] *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *Allegany Environmental Action Coalition v. Westinghouse Electric Corp.*, No. 96-2178, 1998 U.S. Dist. LEXIS 1838, *6 (W.D. Pa. Jan. 30, 1998); *U.S. v. ConAgra, Inc.*, No. CV 96-0134-S-LMB, 1997 U.S. Dist. LEXIS 21401, *8-18 (D. Id. Dec. 31, 1997); *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1316-20 (D. Or. 1997); *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962 (7th Cir. 1994), *cert. denied* 513 U.S. 930 (1994); *Kelley on behalf of Michigan v. United States,* 618 F. Supp. 1103 (W.D. Mich. 1985).

[12] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 2017 U.S. Dist. LEXIS 85053 (D.S.C. Apr. 20, 2017); *Chevron U.S.A. Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807 (D. Md. 2015); *Cape Fear River*

weight of judicial authority and EPA's longstanding interpretation of the Act.

V. POLLUTANTS DISCHARGED TO SURFACE WATERS VIA GROUNDWATER PRESENT SERIOUS THREATS TO PUBLIC HEALTH.

Clean and safe water is an important part of not only a healthy environment but also protecting public health and safety. While by no means comprehensive, contamination to surface waters due to groundwater pollution from animal feeding operations (AFOs) and coal combustion residuals (coal ash) sites illustrate this concern.

A. Animal Feeding Operations.

Contamination of surface and groundwater by manure from AFOs poses numerous risks to human health, including exposure to nitrates, drug residues, and other hazards, and infections resulting from transmission of harmful microorganisms from animal operations. These risks are described in more detail below.

1. Contaminated Groundwater and Surface Water.

The increase in concentration of livestock and poultry and transition to large, high-density, confined animal feeding operations over the last several decades has resulted in the concentration of animal waste over small geographic areas with serious adverse impacts on water quality.[13] For example, in eastern North Carolina, "The land application of waste (wet and dry) is contributing to runoff of nutrients to the nutrient sensitive waters of the Neuse as well as from contaminated groundwater" and many swine CAFOs are located "in an area of the coastal plain where the groundwater table is high which requires ditching or tile drains in order to allow for crop harvesting and waste application. These are direct conveyances for the highly nutrient laden water to reach surface waters. These operations are having a significant negative impact on the Neuse River water quality."[14] Without regulatory oversight over these waters that feed North

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Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798 (E.D.N.C. 2014); *Tri-Realty Co. v. Ursinus College,* No. 11-5885, 2013 U.S. Dist. LEXIS 165471, at *28 (E.D. Pa. Nov. 21, 2013).

[13] United States Environmental Protection Agency. Literature review of contaminants in livestock and poultry manure and implications for water quality. July 2013:1-137. Link: http://ow.ly/mTDw308qwbZ

[14] North Carolina Department of Environment and Natural Resources, Division of Water, Neuse River Basin, Water Quality Plans, Cycle 4 - July 2009, at p. 360, *available at* https://files.nc.gov/ncdeq/Water%20Quality/Planning/BPU/BPU/Neuse/Neuse%20Plans/2009%20Plan/NR%20Basinwide%20Plan%202009%20-%20Final.pdf (last visited May 21, 2018); *see also*, USGS, Scientific Investigations Report 2004–5123**,** Ionic Composition and Nitrate in Drainage Water From

Carolina's rivers and coastal estuaries, we are likely to be unable to restore water quality and fisheries that are severely impaired by pathogens, nitrogen and phosphorus.

Although animal manure is an invaluable fertilizer, waste quantities of the magnitude produced by AFOs represent a public health and ecological hazard through the degradation of surface and ground water resources.[15] Manure from these operations can contaminate ground and surface waters with nitrates, drug residues, and other hazards,[16,17,18,19] and studies have demonstrated that humans can be exposed to waterborne contaminants from livestock and poultry operations through the recreational use of contaminated surface water and the ingestion of contaminated drinking water.[20,21,22] Exposure to elevated levels of nitrates in drinking water is

Fields Fertilized with Different Nitrogen Sources, Middle Swamp Watershed, North Carolina, August 2000 – August 2001 (2004), available at http://pubs.usgs.gov/sir/2004/5123/ (last visited May 21, 2018).

[15] Ibid.

[16] Spencer JL, Guan J. Public health implications related to spread of pathogens in manure from livestock and poultry operations. *Public Health Microbiology: Methods and Protocols*. 2004:503-515. Link: https://www.ncbi.nlm.nih.gov/pubmed/15156064

[17] Graham JP, Nachman KE. Managing waste from confined animal feeding operations in the United States: The need for sanitary reform. *Journal of Water and Health*. 2010;8(4):646-670. Link: https://www.ncbi.nlm.nih.gov/pubmed/20705978

[18] Showers WJ, Genna B, McDade T, Bolich R, Fountain JC. Nitrate contamination in groundwater on an urbanized dairy farm. *Environ Sci Technol*. 2008;42(13):4683-4688. Link: https://www.ncbi.nlm.nih.gov/pubmed/18677991

[19] Relation between nitrates in water wells and potential sources in the lower Yakima Valley, Washington state. U.S. Environmental Protection Agency, Washington, D.C., 2012. Link: https://Www3.epa.gov/region10/pdf/sites/yakimagw/nitrate_in_water_wells_study_9-27-2012.pdf

[20] Ibid Showers et al. 2008

[21] Ibid "Relation between…" 2012

[22] Burkholder J, Libra B, Weyer P, et al. Impacts of waste from concentrated animal feeding operations on water quality. *Environ Health Perspect*. 2007:308-312. Link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817674/

associated with adverse health effects, including cancer,[23,24,25,26] birth defects and other reproductive problems,[27,28,29,30] thyroid problems,[31,32] and methemoglobinemia.[33,34]

Nutrient runoff and leaching (including nitrogen and phosphorus) has also been implicated in the growth of harmful algal blooms,[35,36] which may pose health risks for people who swim or fish in recreational waters, or who consume contaminated fish and shellfish.

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[23] Ward MH. Too much of a good thing? Nitrate from nitrogen fertilizers and cancer. *Rev Environ Health*. 2009;24(4):357-363. Link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3068045/

[24] Chiu H, Tsai S, Yang C. Nitrate in drinking water and risk of death from bladder cancer: An ecological case-control study in Taiwan. *Journal of Toxicology and Environmental Health, Part A*. 2007;70(12):1000-1004. Link: https://www.ncbi.nlm.nih.gov/pubmed/17497410

[25] Ward MH, Kilfoy BA, Weyer PJ, Anderson KE, Folsom AR, Cerhan JR. Nitrate intake and the risk of thyroid cancer and thyroid disease. *Epidemiology*. 2010;21(3):389-395. Link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2879161/

[26] Gulis G, Czompolyova M, Cerhan JR. An ecologic study of nitrate in municipal drinking water and cancer incidence in Trnava district, Slovakia. *Environ Res*. 2002;88(3):182-187. Link: https://www.ncbi.nlm.nih.gov/pubmed/12051796

[27] Ibid Burkholder et al. 2007

[28] Ibid Ward, M.H. 2009

[29] Manassaram DM, Backer LC, Moll DM. A review of nitrates in drinking water: Maternal exposure and adverse reproductive and developmental outcomes. *Environmental Health Perspectives*. 2006. Link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1392223/

[30] Brender JD, Weyer PJ, Romitti PA, et al. Prenatal nitrate intake from drinking water and selected birth defects in offspring of participants in the national birth defects prevention study. *Environ Health Perspect*. 2013;121(9):1083-1089. Link: https://www.ncbi.nlm.nih.gov/pubmed/23771435

[31] Ibid Burkholder et al. 2007

[32] Ibid Ward, M.H. 2009

[33] Ibid Burkholder et al. 2007

[34] Knobeloch L, Salna B, Hogan A, Postle J, Anderson H. Blue babies and nitrate-contaminated well water. *Environ Health Perspect*. 2000;108(7):675-678. Link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1638204/

[35] Ibid United States Environmental Protection Agency 2013

[36] Heisler J, Glibert PM, Burkholder JM, et al. Eutrophication and harmful algal blooms: A scientific consensus. *Harmful algae*. 2008;8(1):3-13. Link: http://www.sciencedirect.com/science/article/pii/S1568988308001066

Exposure to algal toxins has been linked to neurological impairments, liver damage, gastrointestinal illness, severe dermatitis, and other adverse health effects.[37,38]

2. Disease Transmission.

The poor conditions characteristic of AFOs, including crowding, present opportunities for disease transmission among animals and between animals and humans.[39,40] Nearby residents, especially if they live in close proximity to multiple operations, may have an increased risk of infection from the transmission of harmful microorganisms from operations via contaminated water.[41,42,43,44]

Of additional concern is exposure to pathogens that are resistant to antibiotics used in human medicine. Administering antibiotics to animals at levels too low to treat disease (non-therapeutic use) fosters the proliferation of antibiotic-resistant pathogens, and this practice is common in AFOs. Resistant infections in humans are more difficult and expensive to treat[45]

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[37] Carmichael WW. Health effects of toxin-producing cyanobacteria: "The CyanoHABs". *Human and ecological risk assessment: An International Journal*. 2001;7(5):1393-1407. Link: http://www.tandfonline.com/doi/abs/10.1080/20018091095087

[38] Paerl HW, Fulton RS,3rd, Moisander PH, Dyble J. Harmful freshwater algal blooms, with an emphasis on cyanobacteria. *Scientific World Journal*. 2001;1:76-113

[39] Gomes A, Quinteiro-Filho W, Ribeiro A, et al. Overcrowding stress decreases macrophage activity and increases salmonella enteritidis invasion in broiler chickens. *Avian Pathol*. 2014;43(1):82-90. Link: https://www.ncbi.nlm.nih.gov/pubmed/24350836

[40] Rostagno MH. Can stress in farm animals increase food safety risk? *Foodborne pathogens and disease*. 2009;6(7):767-776. Link: http://online.liebertpub.com/doi/pdf/10.1089/fpd.2009.0315

[41] Rule AM, Evans SL, Silbergeld EK. Food animal transport: A potential source of community exposures to health hazards from industrial farming (CAFOs). *Journal of Infection and Public Health*. 2008;1(1):33-39. Link: https://www.ncbi.nlm.nih.gov/pubmed/20701843

[42] Price LB, Graham JP, Lackey LG, Roess A, Vailes R, Silbergeld E. Elevated risk of carrying gentamicin-resistant *Escherichia coli* among US poultry workers. *Environ Health Perspect*. 2007:1738-1742. Link: https://www.ncbi.nlm.nih.gov/pubmed/18087592

[43] Spencer JL, Guan J. Public health implications related to spread of pathogens in manure from livestock and poultry operations. *Public Health Microbiology: Methods and Protocols*. 2004:503-515. Link: https://www.ncbi.nlm.nih.gov/pubmed/15156064

[44] Graham JP, Leibler JH, Price LB, et al. The animal-human interface and infectious disease in industrial food animal production: Rethinking biosecurity and biocontainment. *Public Health Rep*. 2008:282-299. Link: https://www.ncbi.nlm.nih.gov/pubmed/19006971

[45] Roberts RR, Hota B, Ahmad I, et al. Hospital and societal costs of antimicrobial-resistant infections in a Chicago teaching hospital: Implications for antibiotic stewardship. *Clin Infect Dis*. 2009;49(8):1175-1184.

and more often fatal[46] than infections with non-resistant strains. A growing body of evidence provides support that antibiotic-resistant pathogens are found on animal operations that administer antibiotics for non-therapeutic purposes[47] and are also found in the environment in and around production facilities, specifically in the litter[48,49] and flies.[50]

Manure runoff and leaching from AFOs may introduce these harmful microorganisms into nearby water sources.[51] Land application of manure presents an opportunity for pathogens contained in the manure to leach into the ground and/or reach recreational water and drinking water sources, potentially causing a waterborne disease outbreak.[52]

B. Coal Combustion Residuals (Coal Ash).

As described in more detail below, coal ash is an extremely potent and dangerous source of toxic surface water contamination by pollutants such as arsenic, chromium, selenium, lead, and other heavy metals. These pollutants readily leak from unlined impoundments into groundwaters which carry them via hydrologic connection directly into nearby surface waters at great risk to human health and the environment.

Link: https://academic.oup.com/cid/article/49/8/1175/425330/Hospital-and-Societal-Costs-of-Antimicrobial

[46] Filice GA, Nyman JA, Lexau C, et al. Excess costs and utilization associated with methicillin resistance for patients with *Staphylococcus aureus* infection. *Infection Control & Hospital Epidemiology*. 2010;31(04):365-373. Link: https://www.ncbi.nlm.nih.gov/pubmed/20184420

[47] Price LB, Lackey LG, Vailes R, Silbergeld E. The persistence of fluoroquinolone-resistant *Campylobacter* in poultry production. *Environ Health Perspect*. 2007:1035-1039. Link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1913601/

[48] Ibid United States Environmental Protection Agency 2013

[49] Graham JP, Evans SL, Price LB, Silbergeld EK. Fate of antimicrobial-resistant enterococci and staphylococci and resistance determinants in stored poultry litter. *Environ Res*. 2009;109(6):682-689. Link: https://www.ncbi.nlm.nih.gov/pubmed/19541298

[50] Graham JP, Price LB, Evans SL, Graczyk TK, Silbergeld EK. Antibiotic resistant enterococci and staphylococci isolated from flies collected near confined poultry feeding operations. *Sci Total Environ*. 2009;407(8):2701-2710. Link: https://www.ncbi.nlm.nih.gov/pubmed/19157515

[51] Ibid United States Environmental Protection Agency 2013

[52] Ibid United States Environmental Protection Agency 2013

1. Coal Ash is toxic.

There can be no reasonable scientific dispute as to the toxicity of coal combustion residuals ("CCR"), more commonly known as coal ash. EPA's own data, not to mention the data obtained from various other scientific studies, establish that coal ash poses a substantial present and potential threat to human health and the environment. Worried about the effect of more stringent air pollution controls on the toxicity of coal ash, EPA conducted a study in December 2009 to characterize the leaching potential of certain toxic constituents in coal ash from coal-fired power plants with air pollution control technology.[53] In previous studies, which relied on the test known as the Toxicity Characterization Leaching Procedure (TCLP), EPA determined that the amount of toxic material leaching from coal ash did not reach the required threshold necessary to characterize the waste as toxic. However, in response to concerns raised by the National Academy of Science and EPA's own Science Advisory Board about the accuracy of the TCLP test, the December 2009 study implemented new and improved methods that predict leaching potential "with much greater reliability."[54] This is because the new test evaluates the impact of the surrounding environment on leaching.[55] As the report itself states, "management conditions are known to affect the leaching of many metals...[.]"[56] Because CCRs are subject to a wide variety of management conditions (land disposal, surface impoundments, various beneficial uses, etc.), any test evaluating the leaching potential of toxic constituents must take into account the actual field conditions under which CCRs are stored or reused.[57] No previous research on CCRs has ever considered this wide range of conditions.[58] In fact, the report clearly states that previously relied upon leaching tests, such as the TCLP, "may be inappropriate, or are at least not optimal for evaluating the leaching potential of CCRs as they are actually managed.[59] Not surprisingly, the 2009 study, conducted with the newer, more reliable testing methods, produced quite different results regarding the toxicity and leaching potential of CCRs than EPA's former studies.

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[53] EPA Report, Characterization of Coal Combustion Residues from Electric Utilities--Leaching and Characterization Data, December 2009, p. viii.

[54] *Id.* at p. ix.

[55] *Id.* at p. viii.

[56] *Id.* at p. 17.

[57] *Id.* at p. viii-ix, 1.

[58] *Id.* at p. 1.

[59] *Id.* at p. 18.

The results of the 2009 study revealed high concentrations of toxic pollutants leaching from coal ash into the surrounding environment, as well as staggering differences between the new test methods and the TCLP. EPA found that at the highest leach level for certain CCRs:

- Arsenic was 1,800 times the federal safe drinking water standard, more than 3 times the threshold established for hazardous waste and over 76 times the level of previous leach tests;
- Chromium was 73 times the federal safe drinking water standard, over 1.5 times the threshold for hazardous waste, and 124 times the level of previous leach tests;
- Selenium was 580 times the federal drinking water standard, 29 times the threshold for hazardous waste and nearly 66 times the level of previous leach tests; and
- Barium was 335 times the federal drinking water standard and almost 7 times the hazardous waste threshold.[60]

These findings by EPA correspond with the contaminants found in the proven and potential damage cases reported in EPA's 2007 Coal Combustion Waste Damage Case Assessments, which includes cases of arsenic and selenium contamination of groundwater and surface water and ecological damage cause by selenium contamination.[61] Contamination levels exceeding federal drinking water standards for arsenic, selenium, and lead have also been found at multiple coal ash disposal sites not yet considered by EPA.[62]

In addition to arsenic, selenium, and lead, CCRs contain many other contaminants of environmental concern, including: mercury, antimony, chromium, cadmium, nickel, and beryllium.[63] By 2010, EPA itself had already recognized 67 proven and potential damage cases where maximum contaminant levels (MCLs) in drinking water have been exceeded and there has

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[60] Earthjustice report, Failing the Test: The Unintended Consequences of Controlling Hazardous Air Pollutants from Coal-Fired Power Plants, By Lisa Evans (May 2010), p. 2.

[61] *Id.* at p. 8.

[62] In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment, Thirty-nine New Damage Cases of Contamination from Improperly Disposed Coal Combustion Waste, Environmental Integrity Project, Earthjustice and Sierra Club August 26, 2010 Jeff Stant, Project Director, Editor and Contributing Author, available at: http://www.environmentalintegrity.org/news_reports/documents/INHARMSWAY_FINAL3.pdf and Earthjustice report, Failing the Test: The Unintended Consequences of Controlling Hazardous Air Pollutants from Coal-Fired Power Plants, By Lisa Evans (May 2010), p. 8.

[63] EPA, Proposed Rule, Disposal of Coal Combustion Residuals From Electric Utilities, 74 Fed. Reg. 35128, 35138 (June 21, 2010) ("2010 Proposed CCR Rule").

been serious harm to human health and the environment due to CCRs.[64] Further investigation by outside organizations has identified 70 additional sites where groundwater or surface water has been poisoned by toxic pollutants from coal ash, bringing the tally up to at least 137 contaminated sites in 34 states.[65] Residents of the communities that contain these waste sites suffer from indigestion, diarrhea, nausea and vomiting, worsening eyesight, and problems with mental focus and comprehension.[66] Long-term exposure to the toxic pollutants found in coal ash can cause cancer, heart and lung damage, kidney disease, reproductive and gastrointestinal problems, birth defects, and interference with cognitive development.[67]

2. Toxic Coal Ash Discharges to Surface Waters Via Directly Hydrologically Connected Groundwater.

Coal-fired power plants discharge at least 5.5 billion pounds of a poisonous cocktail of arsenic, boron, chromium, lead, mercury, selenium and thallium into our water every year - more than the other top nine polluting industries combined. These pollutants are stored in over 1,000 coal ash pits throughout the United States. Since 2010, Waterkeeper Alliance (WKA), Waterkeeper Member Organizations, Affiliates and our partners have investigated approximately 35 coal-fired power plants in nine states and documented illegal pollution at 27 of them. When we conducted these thorough site-specific investigations, over 80 percent of the time we discovered evidence to support initiating Clean Water Act litigation.

In response to litigation and advocacy by Waterkeeper and other conservation groups in North and South Carolina, Duke Energy is now required to excavate the coal ash from 10 of its 16 coal ash storage locations in North Carolina and South Carolina. Litigation continues as to

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[64] 2010 Proposed CCR Rule, 74 Fed. Reg. at 35142-143.

[65] In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment, Thirty-nine New Damage Cases of Contamination from Improperly Disposed Coal Combustion Waste, Environmental Integrity Project, Earthjustice and Sierra Club August 26, 2010 Jeff Stant, Project Director, Editor and Contributing Author, p. vi, available at: http://www.environmentalintegrity.org/news_reports/documents/INHARMSWAY_FINAL3.pd

[66] Coal Ash: The toxic threat to our health and environment, Report from Physicians for Social Responsibility and Earthjustice, by Barbara Gottlieb with Steven G. Gilbert and Lisa Gollin Evans, September 2010, p. 18; see also Coal Ash: The Hidden Story, by Kristen Lombardi, Center for Public Integrity, February 19, 2009, available at: http://www.publicintegrity.org/articles/entry/1144/?utm_source=publicintegrity&utm_medium=related_heds&utm_campaign=related_bottom

[67] Coal Ash: The toxic threat to our health and environment, Report from Physicians for Social Responsibility and Earthjustice, by Barbara Gottlieb with Steven G. Gilbert and Lisa Gollin Evans, September 2010, p. vii

other leaking, unlined and polluting coal ash storage facilities owned by Duke in North Carolina. We continue to utilize the CWA to compel Duke Energy and other utilities to take similar steps to protect communities and rivers from coal ash pollution. Southeastern utilities are now excavating 60 million tons of coal ash from leaking, unlined pits throughout the region.

If Waterkeeper has learned anything as a result of its above-described work to address coal ash pollution at power plants, it is that unlined coal ash impoundments virtually always leak dangerous toxic metals and other pollutants into shallow groundwater from which these pollutants often travel short distances into surrounding jurisdictional surface waters. In light of all of the overwhelming scientific and anecdotal evidence establishing the toxicity of coal ash and the dangers of this pollution on human health and the environment, it would be highly irresponsible, not to mention arbitrary and capricious and utterly contrary to EPA's mission, for the agency to ignore its own data and make it virtually impossible to regulate or address point source discharges of toxic coal ash into jurisdictional surface waters via directly hydrologically connected surface waters.

VI. EPA MUST COMPLY WITH ALL RELEVANT FEDERAL LAWS AND POLICIES INCLUDING THE ENDANGERED SPECIES ACT PRIOR TO TAKING ANY FURTHER ADMINISTRATIVE ACTION.

Prior to taking any action to reconsider and revise its position regarding the coverage of "discharges of pollutants" via direct hydrologic connection to surface waters under the Clean Water Act, the agency must comply with all relevant federal laws and policies, including the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, as necessary, and any other relevant laws and policies.

With respect to the ESA, EPA must consult with the Fish and Wildlife Service ("FWS") and/or National Oceanic and Atmospheric Administration ("NOAA") under Section 7 of the Act to assess whether its action may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the action may incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects. *See* 16 U.S.C. § 1536. Before EPA takes any action that "may affect" species listed as threatened or endangered under the ESA, or modify their critical habitat, the agency must first consult with the FWS and/or NOAA pursuant to Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

Under Section 7, consultation is required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat

. . . ."[68] Agency "action" is broadly defined to include "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[69]

As FWS's consultation handbook explains, an action agency may make an initial "no effect" or "may affect" determination to assess whether or not consultation is required.[70] EPA can only avoid undertaking informal or formal consultations when "the action agency determines its proposed action will not affect listed species or critical habitat."[71] The handbook defines "may affect" as "the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat."[72] A "may affect" determination is appropriate even when the action agency believes that its actions will have either beneficial or uncertain effects because the action agency is not the expert in determining how its actions will impact threatened and endangered species.

If EPA predicts an impact on a listed species may occur, then EPA must undergo consultation with the Services.[73] If the action agency elects to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" ("NLAA") a listed species or is "likely to adversely affect" ("LAA") a listed species.[74] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[75] Discountable effects are limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[76] Discountable and insignificant impacts are rare if an agency's actions will cause harmful effects.

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[68] 16 U.S.C. § 1536(a)(2).

[69] 50 C.F.R. § 402.02.

[70] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (hereafter "Consultation Handbook") at 3-12 (1998).

[71] *Id.*

[72] *Id*. at xvi.

[73] *Id*. at xv.

[74] *Id*.

[75] *Id*.

[76] *Id*.

Under the informal consultation process, if the agency reaches an NLAA determination, and the FWS concurs in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are is likely to adversely affect listed species, than formal consultations must occur.

EPA may, of course, skip the informal consultation process and move directly to the formal consultation process. During the formal consultation process, FWS will assess the environmental baseline—"the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process[77] —in addition to the cumulative effects to the species—"those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation"—and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.[78]

The Section 7 consultation process applies to all discretionary actions,[79] and any effort by the EPA to review or revise its position here clearly represents such a discretionary action.

Further, NEPA, our "basic national charter for protection of the environment,"[80] requires that federal agencies prepare an Environmental Impact Statement ("EIS"), for any major federal action that may have significant environmental impacts.[81] An EIS must discuss: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[82] An EIS serves the statute's two key goals: (a) to ensure the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts, and (b) to guarantee that the relevant information will be

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[77] *Id.* at xiv.

[78] *Id*. at xiii.

[79] *National Association of Home Builders v. Defenders of Wildlife*, 551 US 644 (2007).

[80] 40 C.F.R. § 1500.1.

[81] 42 U.S.C. § 4332; 40 C.F.R. §1502.9.

[82] 42 U.S.C. § 4322.

made available to the public.[83]

In considering the effects of an action, an agency must consider all impacts on the environment, including, *inter alia*, "effects on air and water and other natural systems."[84] An EIS must also consider "cumulative" effects —*i.e.*, "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions."[85] Any change to the agency's longstanding position that the "discharge of pollutants" to surface waters via direct hydrologic connection is covered under the CWA is likely to cause significant effects to the human environment that must be analyzed under NEPA. Those significant effects include, but are not limited to: an increase in water quality degradation and other environmental harm; impacts to endangered or threatened species or their habitats; impacts to public health and safety, and a variety of cumulative impacts.[86]

Accordingly, EPA must comply with all relevant federal laws and policies, including the ESA and NEPA, prior to taking any further action regarding its longstanding interpretation related to the CWA coverage of "discharges of pollutants" via direct hydrological connection to surface water.

VII. CONCLUSION

For all of these reasons, EPA should not reconsider or revise its longstanding interpretation that point source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and the surface water. Nor should EPA

[83] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[84] 40 C.F.R. § 1508.8(b).

[85] *Id.* § 1508.7.

[86] See 40 C.F.R. § 1508.27.

attempt to meddle with the workable, fact-specific inquiry the agency has relied upon for decades to answer the question of whether the "direct hydrological connection" standard is met.

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