June 7, 2019

Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460


Dear Mr. Wilson:

On behalf of itself and the 73 undersigned organizations, the Southern Environmental Law Center submits the following comments to EPA in response to the agency’s request for additional comment on its attempt to categorically exempt point source discharges through groundwater to navigable waters from the protections of the Clean Water Act. 84 Fed. Reg. 16,810 (April 23, 2019). EPA’s new position abandons how it has understood and applied the Clean Water Act for decades, and ignores the plain text of the statute. EPA must withdraw this interpretation and restore its longstanding application of the law to protect rivers, lakes, streams, and drinking water reservoirs across the country.

Introduction

For forty years, EPA has recognized that the Clean Water Act prohibits unpermitted discharges of pollutants from a point source to navigable waters that travel through groundwater with a direct hydrological connection to surface water. Now, EPA has proposed to rewrite the Clean Water Act, purporting to create an exemption just for pollutants that travel any distance from a point source to navigable waters through groundwater. By reversing itself abruptly and without dealing with the well-established permits and regulations implementing this aspect of the Act, EPA threatens to throw into confusion a key protection for the country’s waterways.

EPA’s longstanding application of the plain language of the Clean Water Act, like that of courts across the country, acknowledged simply that the Clean Water Act means what it says: a prohibited “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12) (emphasis added). This prohibition is not limited to “additions” directly into navigable waters, and thus it encompasses pollutants that travel from a point source to navigable waters through other media, including groundwater. Id.

At the prompting of industry and while litigation is pending before the Supreme Court, EPA has abandoned the plain text of the Clean Water Act and adopted a convoluted misreading instead. The agency’s newly created “groundwater exception” to the definition of discharge
contradicts the statutory text and invites further weakening of protections for other types of indirect discharges. Rivers, lakes, streams, drinking water reservoirs, and the communities who depend on them will suffer from EPA’s about-face.

Now, the agency has asked in its interpretive statement “what may be needed to provide further clarity and regulatory certainty on this issue.” 84 Fed. Reg. at 16,810. But EPA’s announcements over the past two years have provided confusion, not clarity, and have upended rather than fostered regulatory certainty. EPA has attempted to reverse an interpretation it held for decades and has long carried out through guidance, permits, and regulations. EPA has rushed out an empty and litigation-driven “interpretive statement” to coincide with the Supreme Court’s review in County of Maui. Cnty. of Maui v. Haw. Wildlife Fund, No. 18-260. But that interpretive statement fails to disclose or grapple with the realities of unraveling EPA’s decades-long interpretation and practice.

Instead, EPA has issued this vague request for comment and announced in a footnote that it intends to conduct notice-and-comment rulemaking. But EPA has not explained what purpose this second comment period serves, given that EPA has announced its new interpretation. And EPA has given no indication what any future notice-and-comment rulemaking might cover. EPA’s announcement hides from the Supreme Court and the public the true impact of its reversal.

Indeed, EPA has failed to address the central consequence of its about-face: EPA’s rewriting of the Act would allow a polluter to move its pipe—or any other point source—any distance from the water’s edge, dump pollutants through groundwater to the navigable water, and do the exact same harm to the waterway as a pipe that drops the pollutants directly into the navigable water. EPA provides no way to avoid the gaping hole that its new litigation position will blast into the Clean Water Act.

At this point, only one action can provide the clarity and regulatory certainty EPA seeks: EPA must withdraw its interpretive statement and continue applying the plain language of the Clean Water Act as it has done for decades.

**EPA’s decision will harm communities and the clean water they depend on.**

As we detailed in our comment letter responding to the agency’s February 2018 notice, EPA’s attempt to erase protections against surface water pollution that travels through groundwater will have serious consequences for communities across the Southeast and the country. See comment letter from Frank Holleman, Southern Environmental Law Center, to Scott Wilson, Environmental Protection Agency (April 18, 2018), attached as Attachment 1 (“2018 Comment Letter”). These discharges threaten streams, lakes, rivers, and drinking water reservoirs with pollution from all kinds of industries, from mining to coal-fired power plants to industrial agriculture to petroleum pipelines. EPA’s reversal is a giveaway to those industries and an abandonment of its mission to protect people and clean water.

EPA’s interpretive statement has no response to comments warning that excluding coverage of discharges through groundwater creates a dangerous loophole in the Clean Water Act. Under the reading EPA has adopted at the request of industry polluters, anyone could spill or dump unlimited pollution into a navigable lake, river, or stream just by burying their discharge
EPA’s new, absolute exception would leave out pollution that travels through the smallest amount of groundwater, or through groundwater conduits like karst systems featuring underground tunnels and streams. This loophole defies common sense and threatens communities and natural resources—yet EPA has not even considered the risks involved in its new interpretation.

**EPA’s announcement frustrates public understanding and regulatory certainty.**

The timing of EPA’s interpretive statement confirms that EPA’s abrupt reversal is intended to support industry in pending litigation. Unfortunately, EPA’s incomplete announcement hides the impact that any actual implementation of its new interpretation would have. The only step that can minimize public confusion and foster regulatory certainty is for EPA to withdraw this politically-motivated interpretive statement until EPA is willing to grapple with the practical implications of the exemption it has invented—or, preferably, to abandon this mistaken interpretation entirely and return to the position the agency held for decades.

**EPA’s politically-motivated timing harms the public.**

As we pointed out to EPA in our first comment letter, it started this reconsideration process to aid industry allies just as citizens were holding them accountable for pollution through groundwater. See 2018 Comment Letter.

On May 31, 2016, when *County of Maui* was before the Ninth Circuit, EPA filed an amicus brief with the Ninth Circuit supporting Hawai‘i Wildlife Fund. In that brief, EPA laid out its “longstanding position” that point sources discharges that travel through groundwater to navigable waters are discharges of a pollutant subject to the Clean Water Act. Brief for the United States as Amicus Curiae, 9th Cir. No. 15-17447 (Dkt. Entry 40) (“9th Circuit U.S. Amicus Brief”).

In February 2018, the Ninth Circuit, like a long chain of courts before it, reached the same conclusion as EPA. See Hawai‘i Wildlife Fund, 886 F.3d 737, 748 (9th Cir. 2018).

Weeks later, and after the 2016 election and change in administrations, EPA issued its request for comment, announcing that it was reconsidering its longstanding position. This announcement came on the heels of the Ninth Circuit court decision adverse to industry and while the Fourth Circuit’s decision was pending. *Hawai‘i Wildlife Fund, 886 F.3d at 749; Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). EPA did not mention any new policy or scientific development that sparked its reconsideration; instead, it specifically mentioned the Hawai‘i Wildlife Fund and Upstate Forever cases as prompting its action.

Weeks after EPA requested comment, the Fourth Circuit—again, agreeing with the position EPA held for decades and the vast majority of circuit and district courts to consider this issue—held that the Clean Water Act does not exempt a pollutant that travels a short distance through groundwater before reaching a navigable water. *Upstate Forever, 887 F.3d at 652.*

EPA initiated this process just two years after it had definitively stated its position to the Ninth Circuit and just as the consensus among federal courts was becoming overwhelmingly clear: the Clean Water Act protects against all unpermitted discharges of pollutants from a point
source to navigable waters, even if they pass briefly through groundwater. Although EPA now disclaims its Ninth Circuit amicus brief and suggests the agency had never seriously considered the question, that amicus brief undeniably represented EPA’s settled, reasoned analysis. It is hard to believe that a federal agency would contend that its amicus brief, recently filed in a United States Court of Appeals in the name of the United States and with the imprimatur of the United States Department of Justice, did not constitute the considered position of the agency. Yet, under a new administration, and with the support of industry, EPA mounted this last-ditch effort to escape its previous position and the plain text of the Clean Water Act.

And now, in announcing its interpretation while County of Maui is pending before the Supreme Court, EPA has again delivered a well-timed gift to industry polluters. By issuing this initial “interpretive statement” just in time for the opening briefs in County of Maui, EPA has attempted to boost industry and petitioner’s legal position. EPA has also announced its new position just in time for the Solicitor General to plug it into a new amicus brief supporting the Maui petitioner before the Supreme Court—while declining, crucially, to endorse petitioner’s even more extreme legal theory. Brief for the United States as Amicus Curiae in Support of Petitioner, Cnty. of Maui, No. 18-260 (May 16, 2019). And although EPA has announced this additional comment period, the comment period timing ensured that it could not receive, let alone respond to, those comments before the Solicitor General threw its weight behind polluter groups in the Supreme Court.

At every step, EPA has structured this process not to protect the public or the environment but instead to support those pushing for more water pollution, not less.

EPA’s statement hides the upheaval its about-face will cause.

By stating a supposedly final and considered interpretation, while in the same breath reopening public comment and speculating about future rulemaking, EPA has tried to have it both ways. It has presented to the Court a purportedly settled position, while sweeping under the rug any potential problems with implementing that position. And, because EPA’s new position reverses a position that has been applied for decades, those problems will be substantial.

EPA misdirects the public by downplaying the settled and consistent nature of the position the agency held until April 23 and understating just how drastic its reversal is. Whereas EPA states only that it is “modifying and clarifying its interpretation,” in fact it has embraced the opposite view from the one it held and implemented for decades.

As EPA itself has stated, “EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities.” 9th Circuit U.S. Amicus Brief at 30. These permits are subject to notice, comment, and judicial review. In addition to its implementation of permits, EPA has repeatedly and consistently stated its prior position in multiple rulemaking preambles. See, e.g., National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (stormwater rules cover discharges through hydrologically connected groundwater); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (“the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between
groundwaters and surface waters.”); Reissue of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998) (“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”).

EPA’s insistence that its prior statements were casual or offhand harms its credibility. The repeated and consistent statement of a position, over multiple decades and multiple administrations, is not a coincidence. If EPA’s prior statements have not included multi-page interpretive memoranda, that is because following the plain text of the statute does not demand one. And the amicus brief of the United States, filed in a circuit court of appeals, stated EPA’s well-reasoned and considered application of the unambiguous text of the Clean Water Act. It is only the agency’s novel position that requires a protracted deconstruction of the statute rather than a straightforward application of the text Congress enacted.

EPA’s “interpretive statement” gives no indication what EPA will do to these longstanding permit programs or what the impacts will be to permit holders, the environment, or the public protected by these permits. It does not explain how the agency will implement this 180-degree turn or the timeline for doing so. Although it mentions the possibility of future rulemaking, 84 Fed. Reg. at 16,812 n.1, EPA says nothing about what this future rulemaking might cover—nor does it clearly acknowledge that such rulemaking is necessary.

EPA’s intention to apply this new interpretation—whatever that may mean, which EPA has not explained—“only outside of the Fourth and Ninth Circuits” makes the confusion worse. Id. First of all, it is not clear how EPA can apply this interpretation without further action like full rulemaking or revision of permits. Although EPA has said its statement will inform “future permitting decisions,” 84 Fed. Reg. at 16,811, what will happen to existing permits? And will EPA decline to enforce the Clean Water Act in these regions if polluters violate a permit covering these discharges or discharge through groundwater to surface waters without a permit?

But moreover, unlike what EPA says, this patchwork application does not “maintain the status quo” across most of the rest of the country. In many circuits, beyond the Ninth and Fourth Circuit, EPA’s longstanding position has been the settled understanding. For example, EPA- and state-issued permits in the Tenth Circuit, and state-issued permits in the Fifth Circuit, protect against discharges to surface waters through groundwater from concentrated animal feeding operations (CAFOs) and mines. And circuits other than the Fourth and Ninth Circuit have

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recognized that discharges through groundwater cannot escape the Clean Water Act. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 515 (2d Cir. 2005); Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985); U.S. Steel Corp. v. Train, 556 F.2d 822, 852 (7th Cir. 1977), overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm’n, 701 F.2d 632, 644 (7th Cir. 1983). EPA cannot maintain the status quo while undermining existing permits across the country and changing its position in other circuits that have held that the Clean Water Act applies to navigable water pollution from a point source that travels through groundwater. Across much of the country, EPA’s statement will upend, not maintain, the status quo.

EPA’s interpretive statement misleads the public and, by providing fodder for briefs of the United States and other groups supporting petitioner, misleads the Court. The agency fails to disclose or explain how completely it has abandoned a long-settled position and how disruptive carrying out its new view will be.

**EPA’s about-face rewrites the Clean Water Act.**

At the very least, the agency’s interpretive statement is grossly insufficient to undo decades of regulatory practice. But even notice-and-comment rulemaking or modification of permits will not solve the fundamental problem EPA has created: no additional procedural steps can fix an interpretation that contradicts the plain text of the Clean Water Act. EPA’s interpretation is irredeemably flawed because it invents a categorical exemption for indirect discharges through groundwater that appears nowhere in the statute—indeed, that the statute precludes. Moreover, its attempt to distinguish between these discharges through groundwater and discharges through or across other media serves only to confuse the public and the Court, and threatens further unlawful weakening of Clean Water Act protections.

The plain text of the Clean Water Act contradicts EPA’s invented groundwater exception.

The Clean Water Act’s prohibition on unpermitted discharges of pollutants—and the NPDES permit program that results from it—is defined by two explicit and fundamental distinctions. It applies to discharges from point sources, not pollution due to non-point sources, 33 U.S.C. § 1362(14), and it applies to navigable waters, not non-navigable waters, id. § 1362(7). Congress made both these restrictions explicit in the statute, including by stating them in the definition of “discharge of a pollutant.” See id. § 1362(12).

Nowhere in the statute, however, did Congress create the additional distinction EPA has attempted to legislate: a blanket exception for pollutants that travel through groundwater when they are added “to” the navigable water “from” a point source. Yet EPA has concocted a groundwater exception to the discharge prohibition that contradicts the plain text of the statute’s unpermitted discharge prohibition.

EPA gives lip service to the most important statutory language at issue here: the definition of “discharge of a pollutant.” As we have stated before, this language is clear: “the addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). That language unequivocally restricts a “discharge” by the source of pollutants—it must be from a point source—and the water receiving pollutants—it must be navigable (or the ocean, or the contiguous zone).

But “discharge” does not similarly restrict the way in which pollutants are added from a point source to a navigable water. Just the opposite: it says “any addition.” Because Congress did not include a narrowing definition of addition, the statutory language must be given its natural plain reading: Addition is “the act or process of adding”—that is, the act of “join[ing] or unit[ing] so as to bring about an increase or improvement.”2 Nothing in those definitions limits the means of the “act” or “process.” If it “brings about an increase,” it is an “addition.” Congress underscored this by using not just “addition” but “any addition” in the definition of discharge. If a pollutant is from a point source, and is being added to a navigable water, the pollution is within the plain statutory language. The law does not exclude any one means by which an addition can take place. As EPA does not dispute, nowhere does the Act require that the pollution be directly added to the navigable water by the point source. Having accepted that, nothing supports an unwritten exception for indirect discharges through groundwater.3

Moreover, the definition of “point source” directly contradicts EPA’s new polluter-friendly exception to the Act. Congress prohibited the unpermitted discharge of any pollutant to navigable waters from “wells”—which by their very nature discharge to navigable waters, if at all, through groundwater. 33 U.S.C § 1362(12), (14). Congress chose to include wells in the definition of covered point sources—with no limitation to production wells or wells in the ocean. By doing so, Congress expressly included such pollution discharged from a well to navigable waters in its protection against unpermitted discharges.

Indeed, the statute’s definition of “point source” encompasses a wide range of discharges that are not always added directly into navigable waters. That definition includes not only “wells,” but also “rolling stock,” “containers,” and CAFOs. None of these point sources necessarily discharges pollutants directly into navigable waters. 33 U.S.C § 1362(14). Indeed, the vast majority of these point sources are not dug, operated, or built directly in a navigable water. In each case, a pollutant may travel through some medium to the navigable water before being “added” to the navigable water. In some instances of each category—and certainly with wells—the pollutants will travel through groundwater when being added to the navigable water from the point source. EPA has recognized this fact by adopting CAFO regulations and putting in place permits that govern on a case-by-case basis the flow of pollutants from such point sources through groundwater to navigable waters. The definition of point source shows the careful intention of Congress by reinforcing that a point source is something “from which” pollutants are or may be discharged. EPA can adopt its current interpretation and its new exemption only by ignoring the plain text of the “point source” definition entirely.

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3 And indeed, even without its statutory definition the natural understanding of “discharge” includes such an addition: though EPA attempts to disavow it, the agency cannot help but describe such a process as a discharge. 84 Fed. Reg. at 16,813 n.2.
EPA distorts the statutory text, structure, and history.

Whereas EPA ignores or dismisses the above statutory provisions, it makes too much of what the rest of the Act does—or doesn’t—say. We agree that the Clean Water Act does not protect groundwater as it does navigable waters; the definition of discharge reaches only an addition of pollutants to “navigable waters.” By its plain language, the Act does not protect groundwater itself from unpermitted discharges. Accordingly, when a discharger adds pollutants without a permit from a point source to a navigable water through groundwater, the discharger need not treat the groundwater to stop violating the Act. The unpermitted discharger can leave the groundwater untreated and polluted—as long as the discharger stops adding the pollutant to the navigable water.

But EPA is wrong to read into the Clean Water Act’s different protections for groundwater and navigable waters a wholly separate and new carve-out from the Clean Water Act. The Act’s repeated references to navigable waters, rather than navigable waters and groundwater, are irrelevant because what is at stake here is protection against pollution of navigable waters, not groundwater. Nowhere in the statute did Congress allow unlimited pollution added to navigable waters from a point source simply because it travels through even the smallest amount of groundwater. By ostensibly declining to apply the Clean Water Act’s unpermitted discharge prohibition to groundwater, in fact the EPA has denied navigable waters the protection that the statute requires.

Nor can EPA support its answer by pointing to research and funding provisions in other parts of the Clean Water Act. These provisions do not purport to define the extent of the prohibitions and requirements of the Act. Congress did not refer to these funding and research provisions when it carefully designed the fundamental protections for the nation’s navigable waters. And the mention of groundwater in these sections does not suggest that elsewhere in the statute, Congress intended to define the scope of the unpermitted discharge prohibition and NPDES program, it did so explicitly, limiting it only by source and receiving water. In the context of that plain language, spelling out specific types of pollutant “additions,” like additions through groundwater, would have been redundant and confusing.

Congress did not hide a serious exception to the scope of prohibited discharges in silences and ancillary provisions in the text. See Whitman v. Am. Trucking Ass ‘ns, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”). Rather, Congress defined “discharge” and “point source” in plain view—but did not define them the way the current EPA leadership would like.

EPA’s analysis of legislative history likewise misses the point. The proposals of Representative Aspin and others to include groundwater alongside navigable waters as a protected receiving water would have gone further than the language that Congress ultimately enacted. Congress decided, with its definition of “discharge of a pollutant” as “any addition” “to navigable waters” “from any point source,” to restrict the Clean Water Act to addition of pollutants to navigable waters. But by the same token, it did not exclude pollution of navigable waters that travels any distance through groundwater or any other medium. Representative Dingell’s statement in debate over the Conference Report makes this clear:
It is quite clear that section 502(12) of the bill, in defining the term ‘discharge of a pollutant,’ does not in any way contemplate that the discharge be directly from the point source to the waterway. The situation is analogous to the court’s holding in several cases, including *United States v. Esso Standard Oil Company of Puerto Rico*, 375 F.2d 621 (CA 3, 1967), where a discharge from a shore facility flowed ‘indirectly,’ that is by force of gravity over land to a waterway.\(^4\)

Indeed, later legislative history confirms this fact, when Congress adopted the Safe Drinking Water Act. *See* H.R. Rep. No. 93-1185, at 6457 (1974) (noting the Clean Water Act already regulated underground deep water wells when there is an associated “discharge into navigable waters.”). Congress’s ultimate enactment narrowed the scope of the law to prohibit only discharges to navigable water—without further limiting it to direct discharges or discharges not through groundwater.

**EPA cannot legislate a groundwater exception to the Clean Water Act’s prohibition on unpermitted discharges.**

EPA may believe there are policy reasons for categorically excluding discharges through groundwater from the Clean Water Act’s protections—but EPA cannot legislate this on its own. Only Congress can. And Congress clearly stated that “any addition” without a permit from a point source to navigable waters, without exception, is prohibited.

EPA only makes matters worse by hastily tying its new groundwater exception to an “intervening cause” analysis. 84 Fed. Reg. at 16,814. EPA insists, with no substantiation or analysis, that any “interposition of groundwater” between a point source and a navigable water “break[s] the causal chain” and is an “intervening cause.” *Id.* But EPA does not even attempt to connect its intervening cause theory to the statutory text Congress enacted. Nowhere in the Clean Water Act, much less in the key definition of “discharge,” did Congress state that it intended such an analysis to apply. Moreover, EPA’s apparent and justified reluctance to exclude other types of indirect discharges to navigable waters from the Clean Water Act’s unpermitted discharge prohibition undermines this absolute “intervening cause” exception: There is no reason why a short stretch of groundwater categorically breaks the causal chain, but a pollutant’s passage through air or over land may not. In reality, all these types of discharges, including discharges through groundwater, should be subject to the same case-by-case analysis EPA has long applied, not a blanket “intervening cause” exception theory.

And though EPA elsewhere parses the legislative history for clues—because the plain statutory language precludes its preferred interpretation—the agency points to nothing in the legislative history to support this causation theory. Instead, EPA has not only picked a rationale that has no basis in the Clean Water Act, it has morphed that rationale into a categorical rule that a discharge through any amount of groundwater automatically defeats the Clean Water Act’s protections. Only Congress could impose such a rule.

EPA attempts to evade the clear definition of “discharge of a pollutant” and bolster its idea of a categorical groundwater exception, by saying that its exception is “carefully tailored to

the specific issue of releases to groundwater.” 84 Fed. Reg. at 16,819. But a statutory interpretation is not correct because it is tailored to an issue currently in litigation. It is correct if it follows the text. EPA’s new preferred interpretation does not. EPA has no authority to create any exemption to the Clean Water Act, whether carefully tailored or not. That role is reserved to Congress.

Because EPA’s reading unlawfully excludes discharges through groundwater from the Clean Water Act’s protections, no amount of administrative procedure, and no second or third public comment periods, can render it lawful. The only permissible step is for EPA to withdraw this interpretation.

EPA’s contradictory position invites further undermining of Clean Water Act protections.

As we have explained before, EPA has long understood the Clean Water Act to protect against additions of pollutants from point sources to navigable waters that are not direct but that happen through air, through soil, or over land.5 The Clean Water Act prohibits these discharges without a permit just as it prohibits additions of pollutants that travel through groundwater—they are “addition[s]” of a pollutant “to” navigable waters “from” a point source. Should EPA back away from its existing protections against indirect discharges—as Maui and their industry supporters would like, and as EPA’s “intervening cause” theory threatens—communities would lose a key safeguard against surface water pollution.

Although EPA insists its interpretive statement applies only to discharges through groundwater, its logic opens the door to creating additional loopholes in the Clean Water Act’s Congressionally mandated protections. Its interpretation is not “carefully tailored” but muddled and potentially dangerous to communities and navigable waters threatened by all kinds of indirect discharges.

First, EPA has refused to clearly reaffirm that it still understands the Clean Water Act’s prohibition on unpermitted discharges and NPDES permitting requirements to apply to discharges that travel to navigable waters over or through soil and through air. EPA’s interpretive statement leaves its position on this question unclear. EPA has stated that its position differs from the extreme position—found nowhere in the Clean Water Act and contradicted by Justice Scalia—taken by petitioners in County of Maui: that the Clean Water Act

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5 See Revised NPDES Regulation and Effluent Limitations Guidelines for CAFOs in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,417, 70,420 (Nov. 20, 2008) (“[N]othing in the 2003 [final] rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the [Act] over discharges to surface water via groundwater that has a direct hydrologic connection to surface water”); NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs, 66 Fed. Reg. 2,960, 3,016 (Jan. 12, 2001) (Far from “creat[ing] a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water …. Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the ‘navigable waters.’”); Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998) (“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”); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (“the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters.”); NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (stormwater rules cover discharges through hydrologically connected groundwater).
protects against only direct discharges and nothing else. See Rapanos v. United States, 547 U.S. 715, 743–44 (2006) (op. of Scalia, J.) (plurality opinion); 84 Fed. Reg. at 16,814, 16,819. But EPA has carefully refrained from saying that the “terminal point source” theory, as it calls that extreme position, is wrong.

And for its practices going forward on discharges that travel through some medium other than groundwater, but not directly to navigable water, EPA has said only that:

Today’s interpretation pertains to releases to groundwater and thus leaves in place the Agency’s case-by-case approach to determining whether pollutant releases to jurisdictional surface waters that do not travel through groundwater require an NPDES permit. Whether a permit is required for such a release is necessarily a fact-specific inquiry, informed by the point source definition and an analysis of intervening factors.


Though this should mean EPA’s practices will not change, and EPA has not adopted industry’s suggestion that the Clean Water Act categorically excludes all discharges that travel through some medium to navigable waters, EPA now introduces the same “intervening factors” analysis it has invented to support its groundwater exception. If EPA will be applying new and more restrictive reasoning to its case-by-case analysis of these discharges, then the result may be little better than if it had interpreted the Clean Water Act to exclude them entirely. To provide needed clarity, EPA should unambiguously state that the types of discharges it has found covered before will continue to be covered.

**Conclusion**

EPA cannot usurp Congress’s role at the request of industry polluters. The law Congress enacted forbids the glaring exception to Clean Water Act protections that EPA’s interpretive statement would create. EPA should abandon this misguided, destructive interpretation and reaffirm protections for clean water across the country.

Sincerely,

Leslie Griffith
Megan Kimball
Nick Torrey
Frank Holleman
Southern Environmental Law Center

Additional organizations on following pages
With:

Alabama Rivers Alliance
Birmingham, AL

Altamaha Riverkeeper
Macon, GA

Appalachian Voices
Boone, NC

Audubon Naturalist Society
Chevy Chase, MD

Black Warrior Riverkeeper
Birmingham, AL

Broad River Alliance
Lawndale, NC

Cahaba River Society
Birmingham, AL

Cape Fear River Watch
Wilmington, NC

Carolina Wetlands Association
Raleigh, NC

Catawba Riverkeeper Foundation
Charlotte, NC

Center for Biological Diversity
Tucson, Arizona

Charleston Waterkeeper
Charleston, SC

Chattahoochee Riverkeeper
Atlanta, GA

Clean Water Action
Washington, DC

Coastal Conservation League
Charleston, SC

Congaree Riverkeeper
Columbia, SC

Coosa River Basin Initiative
Rome, GA

Coosa Riverkeeper
Mt. Laurel, AL

Creation Justice Network, Southern Conference, United Church of Christ
Asheville, NC

Flint Riverkeeper
Albany, GA

French Broad Riverkeeper
Asheville, NC

Friends of Accotink Creek
Springfield, VA

Friends of the Rappahannock
Fredericksburg, VA

Georgia Canoeing Association
Winston, GA

Georgia Interfaith Power and Light
Decatur, GA

Glynn Environmental Coalition
Brunswick, GA

Good Stewards of Rockingham
Rockingham County, NC

Harpeth Conservancy
Brentwood, TN

Haw River Assembly
Bynum, NC

James River Alliance
Richmond, VA

The Lilies Project
Walnut Cove, NC

Lumber Riverkeeper
Conway, SC
Lynnhaven River NOW
Virginia Beach, VA

Mobile Baykeeper
Mobile, AL

MountainTrue
Asheville, NC

North Carolina Council of Churches
Raleigh, NC

North Carolina Conservation Network
Raleigh, NC

North Carolina Environmental Justice Network
Rocky Mount, NC

North Carolina Interfaith Power & Light
Raleigh, NC

Obed Watershed Community Association
Crossville, TN

Ogeechee Riverkeeper
Savannah, GA

One Hundred Miles
Brunswick, GA

Pamlico-Tar Riverkeeper
New Bern, NC

Potomac Riverkeeper Network
Washington, DC

Protect Our Aquifer
Memphis, TN

Rappahannock League for Environmental Protection
Washington, VA

Satilla Riverkeeper
Nahunta, GA

Save Our Saluda
Marietta, SC

Shoals Environmental Alliance
Sheffield, AL

Sierra Club
San Francisco, CA

Sound Rivers
New Bern, NC

SouthWings
Asheville, NC

South River Watershed Alliance
Decatur, GA

Statewide Organizing for Community eMpowerment
Knoxville, TN

Stokes County Chapter of the NAACP
Walnut Cove, NC

Suwannee Riverkeeper
WWALS Watershed Coalition
Hahira, GA

Tennessee Citizens for Wilderness Planning
Oak Ridge, TN

Tennessee Conservation Voters
Nashville, TN

Tennessee Environmental Council
Nashville, TN

Tennessee Riverkeeper
Decatur, AL

Tennessee Scenic Rivers Association
Nashville, TN

Tennessee Scenic Rivers Association
Nashville, TN
Upstate Forever
Greenville and Spartanburg, SC

Virginia Conservation Network
Richmond, VA

Virginia Interfaith Power & Light
Richmond, VA

Virginia League of Conservation Voters
Richmond, VA

Waccamaw Riverkeeper
Conway, SC

Waterkeeper Alliance
New York, NY

Wild Virginia
Charlottesville, VA

Winyah Rivers Alliance
Conway, SC

Yadkin Riverkeeper, Inc.
Winston-Salem, NC
ATTACHMENT 1
April 18, 2018

Mr. Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comment on “Pollution of Surface Waters by Pollution Transmitted From a Point Source through Groundwater with a Direct Hydrological Connection to the Surface Water” (Docket ID No. EPA-HQ-OW-2018-0063)

Dear Mr. Wilson:

On behalf of the Southern Environmental Law Center (SELC) and the undersigned organizations, please consider these comments in response to the above-styled request (“Notice”) of the Environmental Protection Agency (“EPA”) for comment on the EPA’s previous statements regarding the Clean Water Act and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrological connection to the jurisdictional surface water may be subject to Clean Water Act jurisdiction. We believe that there is no good reason for the EPA to reverse its previously stated position. The determination of whether subsurface discharges are subject to Clean Water Act jurisdiction by way of hydrological connection to surface water should remain a case-by-case, fact-specific inquiry.

For decades since the enactment of the Clean Water Act, the EPA has repeatedly—during administrations of both parties—followed the plain language of the Clean Water Act and stated that the Act forbids unpermitted pollution of the nation’s rivers, lakes, oceans, and streams when
the polluter’s unlawful contamination travels from a point source to the jurisdictional surface water via groundwater that has a direct hydrological connection to the jurisdictional surface water. The EPA can reach no other conclusion because the plain language of the Clean Water Act requires this conclusion. The EPA has no authority to create a loophole in the Clean Water Act for polluters who dump their unpermitted pollution short of the water’s edge, because the EPA cannot defensibly disregard the plain language of the Act.

It should be emphasized at the outset that citizens across the Southeast and the rest of the country rely upon this important Clean Water Act protection to guard their communities and clean water from dangerous pollution. Arsenic, mercury, selenium, lead, and other dangerous pollutants are leaking from unlined coal ash pits across the Southeast and elsewhere into rivers, lakes, and drinking water reservoirs. Petroleum pipelines have repeatedly cracked open and spilled thousands of gallons of gasoline and diesel fuel into waterways. Other polluters have allowed unpermitted flows of contaminants to reach our waterways through flows of directly hydrologically connected groundwater. Repeatedly, federal and state environmental agencies have not taken effective action. Citizen enforcement of this aspect of the Clean Water Act was expressly provided for by Congress and is essential to protecting the clean water of the Southeast and the United States. The EPA should not take any action to stymie this citizen enforcement.

It is apparent that the EPA’s Notice is intended to reduce the rights of citizens and hinder their work to shield their communities and their clean water from harmful pollution.

**Questionable Timing of the EPA’s Notice.** To date, the EPA has followed the plain language of the Clean Water Act, correctly recognizing that the Act protects the nation’s waters from unpermitted pollution dumped short of the banks of a waterway and transmitted over or under the earth or through hydrologically connected groundwater to surface water. There is no
legitimate reason for the EPA to call into question what it has repeatedly said over the course of almost half a century, and the EPA’s Notice gives none.

However, a number of fossil fuel companies, coal-burning utilities, and petroleum pipeline companies are facing liability across the country for their pollution of the nation’s waters with gasoline, diesel fuel, and coal-ash pollutants like arsenic, selenium, and mercury. They and their trade associations are political allies of this administration, and their executives (including the CEOs of Duke Energy and the Tennessee Valley Authority (“TVA”)) have met and talked with Administrator Pruitt.¹

Today, these powerful polluters with close ties to the administration are facing accountability for their unlawful pollution in numerous courts across the country. The United States Courts of Appeals for the Fourth and Ninth Circuits² recently rejected their arguments and held that the Clean Water Act, by its clear terms, protects the Savannah River watershed and the Pacific Ocean from unpermitted pollution that is spilled above the waterway or injected on the shore and that flows into the waterway or the ocean under the land’s surface through hydrologically connected groundwater. The Ninth Circuit’s decision was recommended by the EPA itself in an amicus brief presented by the U.S. Department of Justice but was opposed by amici representing petroleum companies, the coal-fired utilities, and mining companies.³

In Tennessee, a federal district court found that TVA has for years violated the Clean Water Act at its Gallatin coal-fired plant by polluting the Cumberland River with coal ash and

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heavy metals that flow into the river with groundwater through sinkholes, seeps, and leaks in its coal ash lagoons on the river’s banks.\textsuperscript{4} That case is on appeal to the Sixth Circuit, and TVA will face the EPA’s longstanding position based on the plain text of the statute, as did the polluters in the Fourth and Ninth Circuit cases. Once more, the usual polluter amici—coal-fired utilities and mining companies—have shown up to support TVA in its defiance of the text of the Clean Water Act and the EPA’s established position based thereon.

In Virginia, another federal district court found that Dominion Energy is violating the Clean Water Act at its Chesapeake coal-fired plant by polluting the Elizabeth River with arsenic flowing out of its riverfront coal ash lagoon via groundwater into the river.\textsuperscript{5} An appeal of that case is pending before the U.S. Court of Appeals for the Fourth Circuit, and, as usual, trade associations representing coal-fired utilities have filed amicus briefs. In all the briefs, Dominion and other polluters struggle to deal with the EPA’s many statements that contradict the polluters’ attempt to create a counter-textual loophole in the Clean Water Act.

In the Fourth Circuit case, Kinder Morgan, the nation’s largest pipeline company, is responsible for one of the largest petroleum pipeline spills in South Carolina history. That spill continues to discharge pollutants from thousands of gallons of gasoline and diesel fuel into a tributary of the Savannah River. In that appeal, the coal-fired utilities, petroleum pipeline companies, and mining companies again appeared to urge the creation of an exception to the Clean Water Act, and once more the polluters struggled to deal with the EPA’s reiteration of the plain language of the Clean Water Act in the Ninth Circuit case and for decades before.


Across North Carolina, Duke Energy faces significant liabilities for its dangerous, leaking, and polluting disposal of coal ash in riverfront unlined pits. Citizen groups have repeatedly enforced the Clean Water Act against Duke Energy in federal court for coal ash pollution (including arsenic, mercury, and selenium) that flows with subsurface groundwater into North Carolina’s waterways from nearby unlined coal ash pits. Duke Energy companies have pleaded guilty to federal coal ash Clean Water Act crimes across the state and currently face three Clean Water Act enforcement actions pending in federal court. Duke Energy created unlined waterfront pits and dumped millions of tons of coal ash into those pits despite the EPA’s warnings in the 1970s that this irresponsible behavior risked pollution of ground and surface waters. At eight of its fourteen North Carolina coal ash sites, Duke Energy has been required by state court orders and a settlement agreement of a federal Clean Water Act suit to remove its coal ash from these leaking pits to eliminate the ongoing source of this pollution. Duke Energy must contemplate the possibility of further Clean Water Act enforcement against its leaking unlined coal ash pits.

The EPA’s Notice comes at a conspicuously convenient time to align with the litigation strategies of these polluters. This request serves the litigation needs of some of the administration’s closest and most powerful friends and some of the nation’s most notorious and legally vulnerable polluters, at the expense of clean water and the communities that rely on it.

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Indeed, Dominion has already made use of the EPA’s Notice, filing it as purportedly “supplemental authority” with the U.S. Court of Appeals for the Fourth Circuit in its pending appeal. Dominion quotes the carefully crafted phraseology of the EPA’s new political leaders in a thinly veiled attempt to undercut the force of the EPA’s decades-long bipartisan position.

To stay true to its legitimate mission\(^9\) of protecting human health and the environment by safeguarding the nation’s waters, the EPA should withdraw this dubious request and focus its attention on protecting communities and natural resources from pollution. The EPA should end this effort to help the polluters who damage those resources and threaten those communities and to facilitate the pollution that contaminates the nation’s surface waters.

**Plain Language of the Clean Water Act.** The current political leadership of the EPA has no power or discretion to change the EPA’s past position because the Clean Water Act is unambiguous. The plain language of the Act bans unpermitted discharge of pollutants from a point source to surface water and contains no exclusion for the situation when the pollution is dumped short of the water’s edge and travels over or under the ground or through groundwater to the surface water. The EPA has no authority to create a loophole for polluters that is not contained in the language of the Clean Water Act itself.

The language of the Clean Water Act is clear and unqualified: except as otherwise in compliance with Clean Water Act requirements, “the discharge of any pollutant by any person shall be unlawful.”\(^{10}\) A “discharge” is “any addition of any pollutant to navigable waters from


\(^{10}\) 33 U.S.C. § 1311(a).
any point source. “11 The Clean Water Act does not provide, as some polluters would like, that a discharge is an addition of a pollutant “directly” to navigable waters, or “by” a point source. The language contains no such limitation or loophole. Instead, the language is intentionally written broadly to encompass “any” addition of “any” pollutant “to” navigable waters “from” any point source.12

If Congress had intended to exclude discharges of pollutants that leave a point source some distance short of the river’s bank but then flow over or under the surface of the ground or via groundwater to surface water, then the Clean Water Act would contain such exclusionary language. Such a remarkable gap in the Act’s prohibition against unpermitted pollution would have to be much more clearly stated, in this statutory context. In part, it would create a huge loophole in the Act’s coverage, allowing any polluter to avoid the Clean Water Act by simply moving its point source back from the water’s edge. Congress did not include such a remarkable exclusion in the Clean Water Act and, to the contrary, plainly provided that “any” discharges “to” surface waters are within the Act’s jurisdiction.

This administration and the current political leadership of the EPA have looked to former Supreme Court Justice Scalia as their guide on Clean Water Act measures. The administration has proposed to use Justice Scalia’s plurality opinion in *Rapanos v. United States*13 as the definition of the waters of the United States, even though a majority of the Supreme Court had rejected his definitional approach. President Trump’s Executive Order on Waters of the United States (Feb. 28, 2017) Section 3.

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11 Id. § 1362(12).
12 Id.
However, Justice Scalia’s opinion rejects this effort of the EPA’s political leadership to rewrite the Clean Water Act through re-examination of the EPA’s longstanding position on discharges via hydrologically connected groundwater. As Justice Scalia explained in *Rapanos*, “[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.’”14 In this respect, unlike the plurality opinion’s approach to the definition of the “waters of the United States,” Justice Scalia’s opinion was accepted by the entire Court. If this administration embraces Justice Scalia’s opinion for a point that was rejected by a majority of the Court, it certainly cannot disavow his opinion on a point to which no member of the Court objected.

In trying to dodge the plain language of the Clean Water Act, polluters have constructed arguments from scattered pieces of legislative history – when in fact the legislative history cannot support the polluters’ efforts to create a loophole that the Act itself does not contain. Again, Justice Scalia—whom this administration has favorably cited—has condemned exactly this kind of statutory interpretation: “[I]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.”15

The text of the Clean Water Act is clear. When unpermitted pollution travels from a point source to a river or lake via hydrologically connected groundwater, there is an illegal “addition of any pollutant to navigable waters.”16

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14  547 U.S. at 743 (citing 33 U.S.C. § 1362(12)(A) and § 1311(a)) (emphases in original).
This conclusion is also dictated by the statutory purposes of the Clean Water Act, set out by the Congress in the Act itself. The Clean Water Act was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”\textsuperscript{17} by setting a goal to “eliminate[]” “the discharge of pollutants into the navigable waters.”\textsuperscript{18} Allowing irresponsible industries to pollute the nation’s waters with abandon as long as they pulled their point sources back from the water’s edge would blast a huge hole in the protections of the Clean Water Act and these fundamental statutory purposes would be entirely undercut. Instead of a landmark protection of the nation’s waters, the Clean Water Act would become a porous requirement subject to easy manipulation by polluters, their lawyers, and friendly regulators.

In short, the current political leadership of the EPA can reverse course only by running away from the plain language of the Clean Water Act, the Act’s central purposes, and Justice Scalia. Instead, the EPA’s leadership should in this instance live up to their oath and uphold the law.

\textbf{Overwhelming Authority}. In the Notice, the EPA has misleadingly described the supposed “mixed case law.” In an endeavor to downplay the fact that the current political leadership is attempting to go against the massive weight of authority, the Notice begins its discussion of federal court decisions by citing the small minority that have misinterpreted the Clean Water Act. In fact, an overwhelming majority of federal courts have held that the Clean Water Act protects the nation’s waters from unpermitted pollution transmitted from a point source to surface waters by groundwater with a direct hydrologic connection.

Here is a list of some of those decisions, the great bulk of which are disregarded by the EPA’s Notice:

\begin{itemize}
  \item Id. § 1251(a).
  \item Id. § 1251(a)(1).
\end{itemize}

2. *Haw. Wildlife Fund v. Cnty. of Maui*, --- F.3d ----, 2018 WL 1569313 (9th Cir. 2018), denying rehearing en banc and amending opinion reported at 881 F.3d 754 (9th Cir. 2018).


5. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (The Clean Water Act “authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee’s discharges into surface waters.”), *overruled on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 644 (7th Cir. 1983).


17. *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) (“[T]here is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to” the Clean Water Act.).


underground storage tank failures three years prior was hydrologically connected to navigable waters).

22. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997) (where groundwater flows toward surface waters, there is “more than the mere possibility that pollutants discharged into groundwater will enter ‘waters of the United States,’” and discharge of petroleum into this hydrologically-connected groundwater violates the Clean Water Act).

23. *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (“[S]ince the goal of the [Clean Water Act] is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation.”).


As the EPA well knows, at the time of the notice the leading case was *Hawaii Wildlife Fund v. County of Maui*.19 This was the most recent decision on the issue, and a directly on-point

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19 881 F.3d 754 (9th Cir. 2018).
decision by a federal court of appeals. This unanimous decision was rendered after the issue was squarely presented and briefed. The Ninth Circuit reached the outcome urged by the EPA itself in an amicus brief filed by the U.S. Department of Justice less than two years ago, concurrently rejecting the arguments of the usual industry amici. Yet, the Notice mentions this case only in passing, in the final sentence of the last paragraph in the discussion of the decisions of the federal courts.

As the Ninth and Fourth Circuits noted, other circuits have also concluded that the Clean Water Act forbids unpermitted pollution from point sources that travels on or under the ground or through groundwater to surface water. While the Notice acknowledges the Fifth Circuit’s decision in *Sierra Club v. Abston Construction*, the EPA omits *Concerned Area Residents for Environment v. Southview Farm*. The EPA’s Notice cites *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, in which the plaintiffs alluded only to the “possibility” of a hydrological connection, but it overlooks the Seventh Circuit’s decision in *U.S. Steel Corp. v. Train*, where the Seventh Circuit upheld the Clean Water Act’s jurisdiction over surface-water impacts from injections into wells. Nor does the Notice recognize that the Tenth Circuit has upheld the Clean Water Act’s coverage of surface water pollution conveyed to a point source by groundwater flow.

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20  620 F.2d 41, 45 (5th Cir. 1980).
21  34 F.3d 114, 119 (2d Cir. 1994).
22  24 F.3d 962, 965 (7th Cir. 1994).
23  556 F.2d 822, 852 (7th Cir. 1977) (emphasis added), overruled on other grounds by *City of W. Chicago v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 644 (7th Cir. 1983), *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126, 130 (10th Cir. 1985) ("[T]he flow continues regularly through underground acquifers [sic] fed by the surface flow of the San Mateo Creek and Arroyo del Puerto [where uranium mining waste was regularly discharged] into navigable-in-fact streams."); see also *Friends of Santa Fe Cnty. v. LAC Minerals Inc.*, 892 F. Supp. 1333, 1357–59 (D.N.M. 1995) (applying *Quivira* to find that
Finally, the notice cites Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., without recognizing that it has been specifically disavowed by other courts, including another federal district court in North Carolina. As set out in Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, the court in Cape Fear, like some of the other courts in the small minority, mistakenly declined to exercise jurisdiction over hydrologically connected groundwater “under the theory that the groundwater is not itself ‘water of the United States.'” The protection afforded by the Act applies to pollution of surface waters via groundwater flows from a point source. And now, of course, Cape Fear has been rendered invalid by the Fourth Circuit’s contrary ruling.

A candid review of the decisions of the federal courts can only conclude that the vast majority of federal courts—including all the courts of appeals that have squarely faced the issue—have enforced the Clean Water Act according to its plain terms and upheld the Act’s application to surface-water pollution that flows over and under the surface of the earth and through groundwater.

The EPA’s Longstanding Position. Since the enactment of the Clean Water Act and through every administration up to the present one, the EPA has recognized the clear words of the Act and stated that the Clean Water Act applies to surface-water pollution flowing from a point source with groundwater that has a direct hydrologic connection to the surface water. The current political leadership of the EPA must know the long history of the EPA’s consistent

“discharges into groundwaters that eventually move into surface waters are prohibited” by the Clean Water Act).

27 141 F. Supp. 3d at 445.
28 Id. (internal quotation omitted).
interpretation of the Clean Water Act, since the EPA laid out that history in its own amicus brief in the Ninth Circuit less than two years ago.

The EPA has set out that position in formal policy positions, in regulation, in response to public comments, and in federal court. The EPA’s application of the Clean Water Act to such discharges reaches back forty years to its 1977 injection-well permitting and has been crystal clear for decades. In 2001, the EPA set forth its most comprehensive analysis—a “general jurisdictional determination” and an “agency policy determination.”\textsuperscript{29} The EPA clarified subsequently that “nothing in the 2003 [final] rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the [Act] over discharges to surface water via groundwater that has a direct hydrologic connection to surface water.”\textsuperscript{30} In 2015, the EPA again reaffirmed its “longstanding and consistent interpretation” and noted that it is unaffected by “the exclusion of groundwater from the definition of ‘waters of the United States.’”\textsuperscript{31}

The EPA has implemented its approach consistently by issuing individual and general National Pollutant Discharge Elimination System (“NPDES”) permits subject to notice, comment, and judicial review. The “EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities.”\textsuperscript{32} For example, an EPA permit prohibits concentrated animal feeding operations from discharging “manure, litter, or process

\textsuperscript{30} 73 Fed. Reg. 70,418, 70,420 (Nov. 20, 2008).
wastewater from retention or control structures to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters” and requires a liner for these structures where such connections exist.33

Since the EPA first acknowledged that the Clean Water Act addresses pollution carried from a point source to surface waters by groundwater with a direct hydrologic connection, Congress has amended the Clean Water Act on several occasions, yet, notably, it has never acted to change the plain meaning of the statutory language.34

For the EPA to reverse course by now choosing to disregard the plain language of the Act would be arbitrary and capricious—all the more so as it is plainly a response by the current administration to the Ninth Circuit Court of Appeals decision affirming the EPA’s longstanding position that has been based on the clear statutory text.

**Importance of Clean Water Act Protection of Navigable Waters.** The EPA cannot escape the unambiguous language of the Clean Water Act protecting against these discharges. But even if such a reversal were legal, it would be contrary to the EPA’s mission and leave crucial gaps in environmental protection that other regulatory programs cannot fill.

The Clean Water Act provides comprehensive, nationwide protection of our waters, working to ensure they are drinkable, swimmable, and fishable. It provides for robust citizen enforcement in federal court to hold polluters accountable for unpermitted discharges when government agencies cannot or will not take action. As the wide range of past and pending

enforcement actions shows, pollution through hydrologic connection to jurisdictional waters happens across different industries and different sources, from pipelines to coal ash ponds. A patchwork of state programs and narrowly focused regulatory schemes, like the underground injection-control regulations, cannot adequately make up for the crucial role the Clean Water Act plays in regulating these discharges. Moreover, relying on state regulatory programs to control these pollution sources would cut off citizen access to courts and undermine federal enforcement of federal law.

**Conclusion.** There is no need for the EPA to reconsider its position or take any further action. It should adhere to its longstanding, correct position, as it did in its Ninth Circuit amicus brief. As the EPA has stated, the determination of whether groundwater is hydrologically connected to surface water is “a factual inquiry like all point source determinations.” The courts are well able to apply the plain language to the facts of particular cases, as the Ninth Circuit has recently done. Indeed, the Fourth Circuit in its opinion was careful to underscore that the specific facts of the case determine the application of the Clean Water Act. The type of pollutant, the geology, the direction of groundwater flow, and the fact that the pollutant can or does reach jurisdictional surface water can all help a court determine whether there is a qualifying connection, as the EPA has itself recognized.

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36 See supra; see also Greater Yellowstone Coal. v. Larsen, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009) (connection too attenuated where movement to surface water could take up to 420 years and pollutants would have to travel underground up to four miles).
38 See, e.g., 66 Fed. Reg. at 3,017.
Any action by the EPA to reverse its longstanding position, which to date has been faithful to the requirements of the plain statutory text, would be unlawful. Further, it would only disrupt the enforcement of the law, create uncertainty, sow unhelpful confusion, foster increased litigation, and serve powerful polluting interests at the expense of the EPA’s core mission to protect public health and the environment.

Sincerely,

Frank S. Holleman, III
Senior Attorney
Southern Environmental Law Center

Alabama Rivers Alliance
Birmingham, AL

Altamaha Riverkeeper
Macon, GA

American Rivers
Washington, DC

Appalachian Voices
Boone, NC

Black Warrior Riverkeeper
Birmingham, AL

Cape Fear River Watch
Wilmington, NC

Catawba Riverkeeper
Charlotte, NC

Chattahoochee Riverkeeper
Atlanta, GA

Coosa Basin River Initiative
Rome, GA

Coosa Riverkeeper, Inc.
Mt. Laurel, AL

Flint Riverkeeper
Albany, GA

Friends of Hurricane Creek
Tuscaloosa, AL

Friends of the Locust Fork River
Cleveland, AL

Glynn Environmental Coalition
Brunswick, GA

James River Association
Lynchburg, VA

Mobile Baykeeper
Mobile, AL
MountainTrue
Asheville, NC

Ogeechee Riverkeeper
Savannah, GA

Potomac Riverkeeper Network
Washington, DC

Roanoke River Basin Association
Danville, VA

Save Our Saluda
Marietta, SC

Shoals Environmental Alliance
Sheffield, AL

Sierra Club
San Francisco, CA

Sound Rivers
New Bern, NC

Stokes County Branch, NAACP
Walnut Cove, NC

Suwannee Riverkeeper
Hahira, GA

Tennessee Riverkeeper
Decatur, AL

Upstate Forever
Greenville, SC

Virginia Conservation Network
Richmond, VA

Waccamaw Riverkeeper
Conway, SC

Winyah Rivers Foundation, Inc
Conway, SC

Yadkin Riverkeeper
Winston Salem, NC

c: The Honorable Scott Pruitt, Administrator, U.S. Environmental Protection Agency