Florida Water Environment Association
UTILITY COUNCIL
wef Member Association

Protecting Florida's Clean Water Environment

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May 21, 2018

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c/o

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Re: Comments Submitted by the Florida Water Environment Association Utility Council
In Response to:

Clean Water Act Coverage of Discharge of Pollutants via a Direct Hydrologic Connection to Surface Water

Request for Comments, 83 Federal Register 7126 (Tuesday, February 20, 2018)
United States Environmental Protection Agency (EPA)
Docket ID: EPA-HQ-OW-2018-0063.

Submitted Electronically at: https://www.regulations.gov

Gentlemen,

The Florida Water Environment Association (FWEA) Utility Council (UC) submits the following comments in response to EPA's *Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water*, Request for Comments, as published in the Federal Register on February 20, 2018.

The FWEA Utility Council represents Florida's domestic wastewater treatment community. Utility Council members provide essential infrastructure services to over 9 million Floridians. Member utilities operate domestic wastewater collection, treatment, disposal, and reuse facilities.

Many Utility Council members hold NPDES permits issued by the Florida Department of Environmental Protection (FDEP or Department) under FDEP's EPA-approved NPDES permitting program. As NPDES permittees, member utilities are directly affected by any change in EPA policy, guidance or rulemaking that alters the jurisdictional reach of the NPDES program as promulgated in 1972 as section 402 of the Federal Water Pollution Control Act (FWPCA, more commonly referred to as the Clean Water Act or CWA). Consequently, the FWEA Utility Council and its members are affected to a much greater degree than the "potentially affected entities" as described in EPA's Request for Comments published February 20, 2018.

As directly affected parties as to any change in the scope of the NPDES program, the FWEA UC submits the following comments on behalf of its members. It is the position of the Utility Council that:

- EPA has no authority to regulate discharges of pollutants to or through groundwater under the CWA;

- The CWA leaves the regulation of discharges to or through groundwater to the states;

- FDEP's existing groundwater program regulates discharges to surface waters through groundwater;

- Any EPA policy or guidance asserting NPDES jurisdiction over discharges through groundwater would federalize state programs and result in regulatory chaos making any discharge of pollutants to groundwater through land application, reuse or deep well injection subject to the requirement of the NPDES permitting program due the mere potential of a pollutant to eventually reach a surface water;

- EPA must retract any prior statements claiming NPDES jurisdiction over discharges to surface waters through groundwater and advise all Regional Administrators and state NPDES authorities that NPDES jurisdiction applies only to direct discharges of pollutants from point sources to surface water consistent with EPA's contemporaneous interpretation of the Section 402 of the CWA in 1973 and 1975.

In the following comments, the FWEA UC describes Florida's existing program regulating the disposal and reuse of treated domestic wastewater followed by a response to each question set out in EPA's February 20, 2018, Request for Comments.

The State of Florida Implements a Comprehensive Program Regulating the Reuse and Disposal of Domestic Wastewater and Residuals

In Florida, treated domestic wastewater (commonly referred to as "reclaimed water") may be disposed by direct discharge to surface waters, or it may be beneficially reused, including agricultural and residential irrigation, land application, or aquifer recharge. Domestic wastewater residuals may also be land applied depending where the facility is located in Florida. Since the creation of the NPDES program in 1972, only direct discharges of treated domestic wastewater directly to surface waters has been regulated under the NPDES program.

In 1995 EPA approved FDEP's NPDES permitting program. The Department integrated the NPDES program into its then existing state permitting process which included the regulation of discharges to *and through* groundwater. With the integration of NPDES permitting into the existing state program, all means of domestic wastewater disposal became regulated by FDEP.

FDEP rules, formally adopted under Florida's Administrative Procedure Act, regulate discharges to surface waters, discharges to groundwater, land application of treated domestic wastewater, land application of domestic wastewater residuals and the discharge of treated wastewater to underground injection wells. Table 1 summarizes the core regulatory components of FDEP's comprehensive domestic wastewater disposal and reuse program.

TABLE 1: Statutory Authority and Rules Comprising FDEP's Comprehensive Domestic Wastewater Disposal and Reuse Program

Type of Discharge	Legislative Authority, Florida Statutes (F.S.)	Rule Chapter, Florida Administrative Code (F.A.C.)
Direct Discharges Surface Waters (NPDES)	403.051, 403.061, 403.062, 403.087, 403.088; 403.0885	62-4; 62-302; 62-620; 62-650
Discharges to/through Groundwater	403.061, 403.087	62-520; 62-550
Reuse Of Reclaimed Water & Land Application	403.061, 403.087	62-610
Domestic Wastewater Residuals (Biosolids)	373.043, 403.051, 403.061, 403.062, 403.087, 403.088, 403.704, 403.707	62-640
Underground Injection of Domestic Wastewater	373.309, 403.061, 403.087, 403.704, 403.721	62-528

Florida's groundwater standards, as set forth in Chapters 62-520 and 62-550, F.A.C., include specific numeric concentrations applicable to a long list of metals, inorganic compounds, and other constituents, as well as narrative groundwater standards that prohibit concentrations that

are toxic, carcinogenic or cause nuisance conditions.[1] Recognizing that discharges to groundwater may ultimately interact with down gradient surface waters, Florida's groundwater program mandates that a "discharge to groundwater shall not impair the designated use of contiguous surface waters."[2] (Emphasis added). Specific to the reuse of reclaimed water, FDEP implements a comprehensive set of best practices, engineering standards, and water quality-based requirements, including a directive that "reuse and land application projects shall not cause or contribute to violations of water quality standards in surface waters."[3]

In sum, Florida's existing regulatory program specifically addresses the discharge of pollutants to surface waters *through* groundwater.

II. Response to Questions Provided in the February 20, 2018, Request for Comments

The FWEA Utility Council submits the following responses to each of the questions set out in EPA's Request for Comments.

1. Whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA.

No reading of the 1972 amendments to the Federal Water Pollution Control Act suggests that Congress intended to regulate point source discharges that *pass through* groundwater to hydrologically connected surface waters.

The 1972 Amendments Addressed Direct Discharges to Surface Waters

The CWA defines the terms "discharge of a pollutant" and "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source [and] any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."[4] "Navigable waters" are defined as "waters of the United States, including the territorial seas."

Inland and coastal navigable surface waters were clearly the focus when Congress defined "discharge of a pollutant(s)" in 1972. Subsurface waters are not navigable and it is clear from the plain language of the CWA that direct discharges to surface waters was the context in which the 1972 amendments were adopted.

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[1] Section 62-550, Tables 1-6, and Section 62-520.440, F.A.C.

[2] Subsection 62-520.310(2), F.A.C.

[3] Rule 62-610.850, F.A.C.

[4] 33 U.S.C. § 1362(12)

EPA subsequently promulgated a definition of waters of the U.S. that included adjacent wetlands but omitted any reference to groundwater as jurisdictional waters or as a pathway to jurisdictional waters.

EPA's Definition of Waters of the U.S.

Until 2015, EPA defined "waters of the United States" at 40 C.F.R. 122.2 as:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
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> (b) All interstate waters, including interstate "wetlands;"
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> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands,"' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
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> (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
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> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
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> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Absent from EPA's expansive definition of waters of the U.S. is any mention of groundwater.[5]

[5] Wetlands are defined at 40 C.F.R. 122.2 as areas inundated or saturated by surface or groundwater sufficient to maintain vegetation typical of saturated soils, such as swamps, marshes and bogs. However, groundwater is not included within EPA's broad definition of waters of the U.S.

Groundwater is Not Included in the Definition of Point Source

The 1972 amendments define "point source" as "any discernible, confined, and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[6] EPA adopted the same definition by rule at 40 C.F.R. 122.2. The statutory definition of point source was promulgated by Congress in the context of a policy of eliminating discharges of pollutants to navigable waters.

Legislators could have easily added a provision to include groundwaters as a point source or include, within the definition of point source, discharges to groundwaters that reach a point source. They did not. Indeed, after much debate, it was affirmatively decided by members of Congress not to address groundwaters within the scope of the NPDES permitting program under section 402 of the CWA.

A Senate Report[7] addressing the 1972 amendments notes that:

> Several bills pending before the Committee provided authority to establish federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.
>
> The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction.[8]

(Emphasis added). The House of Representatives also rejected an amendment that would have brought groundwater within the jurisdiction of the Clean Water Act, leaving groundwater regulation to the states.[9]

As noted in the February 20, 2018, Request for Comments, EPA has openly acknowledged "the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution in groundwaters…."[10]

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[6] 33 U.S.C. § 1362(14)

[7] S. Rep. No. 92-414 at 73 (1971).

[8] *Id.*

[9] 118 Cong. Rec. 10666-69 (1972) (rejecting an amendment to the Clean Water Act that would have included the regulation of groundwater); *see also* 33 U.S.C. §§ 1254(a), 1256(e), 1288(b), 1314(a), and 1314(e) (referencing state activities to assess, monitor and protect groundwater quality).

[10] 83 Fed.Reg. 7126, 7127 (February 20, 2018) *quoting* 56 Fed.Reg. 64,876, 64,892 (December 12, 1991).

The plain language of the CWA and a detailed Legislative history makes clear that the NPDES program regulates discharges of pollutants *to* surface waters and not discharges of pollutants *to* or *through* groundwater.

No Jurisdiction Over Groundwater Means No Jurisdiction Through Groundwater

Some courts have concluded that they need not decide whether EPA has jurisdiction over groundwater to regulate discharges to surface waters through groundwater.[11] Such an argument is a distinction without a difference. Nothing in the CWA provides EPA with jurisdiction over discharges to groundwater and nothing in the CWA provides EPA authority to regulate discharges to groundwater that may ultimately reach surface waters. Neither EPA nor any court can point to any such language in the 1972 amendments to the FWPCA.

The text and context of the 1972 amendments to the FWPCA are unambiguous—to address the traditional end-of-pipe discharge of industrial and domestic wastewater from a point source to navigable waters.[12]

This conclusion is consistent with contemporaneous statements made by EPA's General Counsel in 1973 and 1975.[13] An often quoted memorandum from EPA's Office of the General Counsel, dated December 13, 1973, states:

> Section 402 [33 U.S.C. § 1342] authorizes the Administrator to issue a permit "for the discharge of a pollutant." Under § 502(12) the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters (or the contiguous zone of the ocean). Discharges into ground waters are not included. Accordingly, permits may not be issued, and no application is required, unless a discharge into navigable waters is proposed or is occurring.

(Emphasis added). EPA did not stray from this interpretation until 1990 and then, as a parenthetical in the preamble to a stormwater rule, gratuitously stating—as if long standing fact—that discharges to surface water through groundwater trigger NPDES liability.[14] From this unsupported declaration in 1990, and subsequent statements reiterating its new theory, EPA has

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[11] *Yadkin Riverkeeper, Inc., and Waterkeeper Alliance, Inc. v. Duke Energy Carolinas, LLC.*, Case No.: 1:14-cv-753-LCV-JEP (M. D. NC, October 20, 2015).

[12] The 1972 amendments are said to have been, at least in part, a response to the Cayuga River catching fire in June of 1969 as a result of industrial discharges into the river. Direct point source discharges to surface waters were the focus of national attention in 1972. *See*, *About Cayuga River AOC*, located at: https://www.epa.gov/cuyahoga-river-aoc/about-cuyahoga-river-aoc (last visited March 27, 2018).

[13] *In Re Dupont De Nemours & Co.*, Op. No. 6, 1975 WL 23850 (E.P.A.G.C. Apr. 18, 1975).

[14] 55 Fed.Reg. 47990, 47997 (November 16, 1990).

recently claimed a "longstanding and consistent interpretation" that the CWA may cover discharges from point sources to surface waters through groundwater.[15] This theory was presented as fact to the Ninth Circuit Court of Appeals in *Hawai'i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018).[16]

The amicus brief filed on behalf of EPA by U. S. Department of Justice made no reference to the contemporaneous interpretation of EPA's General Counsel from 1973 but repeated the "longstanding policy" mantra representing to the court that EPA's hydrologic connection theory—the product of the legal equivalent of spontaneous generation in the preamble to EPA's 1990 stormwater rule—was at all times EPA's interpretation of the CWA. EPA's representation to the Court was, in its very best light, inaccurate and could be interpreted as an intentional misrepresentation. However, the Court was not persuaded.

The Ninth Circuit failed to find any statutory authority for EPA's direct hydrologic connection theory of CWA liability stating:

> The EPA as *amicus curiae* proposes a liability rule requiring "direct hydrological connection" between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA ("direct" and "hydrological") that are not there.

(Emphasis added). Rejecting EPA's theory, the Ninth Circuit panel created its own "liability rule" reading in additional terms that also cannot be found in the Clean Water Act "fairly traceable" and "functional equivalent." Nowhere in the text of the 1972 amendments does Congress state that a discharge of pollutants from a point source includes a discharge that is "fairly traceable" to a point source or is the "functional equivalent" of a point source.

Congress could have very easily addressed indirect discharges, via groundwater, to surface waters but did not. Some courts have concluded that regulated industries have "read in" a requirement that NPDES discharges must be direct discharges from the point source to the receiving water.[17] To the contrary, in the context of the 1972 amendments, designed to address traditional end-of-pipe domestic and industrial discharges—direct discharges—the courts have "read out" the direct discharge requirement and "read in" an indirect discharge provision that does not appear in the CWA.

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[15] Clean Water Rule Response to Comments—Topic 10: Legal Analysis, at page 383. Full text available at: https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

[16] *Brief of the United States as Amicus Curiae*, Case No. 15-17447 (Docket Entry 40, May 31, 2016).

[17] "Justice Scalia's plurality opinion demonstrates the County is reading into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged 'directly' to navigable waters from a point source." *Hawai'i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018).

2. If EPA has the authority to permit such releases, EPA seeks comment on whether those releases would be better addressed through other federal authorities as opposed to the NPDES permit program.

EPA does not have the authority to regulate the discharge of pollutants to or through groundwater and that the CWA reserves that authority to the states. As noted, Florida's groundwater program directly addresses the discharge of pollutants to surface waters through groundwater. State groundwater programs, especially those that operate in conjunction with EPA-approved state NPDES programs, as in Florida, are more than sufficient—and have the legal authority—to regulate the discharge of pollutants to and through groundwater.

Other federal programs developed under the federal Safe Drinking Water Act (SDWA) and the Resource Conservation and Recovery Act (RCRA) address groundwater pollution. However, like the NPDES program, most federal programs under the SDWA and RCRA are implemented by federally approved state programs.[18]

As detailed above, FDEP implements a comprehensive permitting program regulating the discharge of pollutants to jurisdictional surface waters, under its EPA-approved NPDES permitting program, as well as the discharge of pollutants to and through groundwater. All aspects of the reuse and disposal of treated domestic wastewater is regulated by the State of Florida through a combination of stand-alone state programs and federally approved state programs implementing federal environmental initiatives (e.g., NPDES, SDWA, UIC).

There is no problem that must be fixed by implementation of EPA's direct hydrologic connection theory of liability and no provision in law that authorizes any such action by EPA.

3. Whether some or all such releases are addressed adequately through existing state statutory or regulatory programs or through other existing federal regulations and permit programs, such as, for example, state programs that implement EPA's underground injection control regulations promulgated pursuant to the Safe Drinking Water Act.

As stated, Florida's groundwater program directly addresses the discharge of pollutants to surface waters through groundwater. EPA approved FDEP's NPDES permitting program in 1995 after which FDEP began issuing dual purpose Industrial Wastewater Facility Permits addressing both surface water and, when appropriate, groundwater discharges expressly prohibiting discharges to groundwater that impair the designated use of contiguous surface waters as mandated by FDEP rule. FDEP implements the federal UIC and safe drinking water

[18] FDEP has a federally approved drinking water program and hazardous waste program. *See*, Source and Drinking Water Program: https://floridadep.gov/water/source-drinking-water; and Hazardous Waste/RCRA: https://floridadep.gov/waste/permitting-compliance- assistance/content/hazardous-waste-management-main-page.

programs for the state of Florida and these programs include conditions, limitations and restrictions that protect groundwater and complement Florida's core groundwater program.

As detailed in Table 1, hereinabove, FDEP regulates all aspects of domestic wastewater treatment, reuse and disposal whether disposal is by discharge to surface waters, discharge to groundwater after land application, beneficial reuse (e.g. irrigation) or deep well injection.

It is the position of the Utility Council that no federal agency has been granted the authority under the CWA to regulate the discharge of pollutants to surface waters through groundwater and that the regulation of groundwater, to the extent addressed by the CWA at all, was reserved to the states.

4. Whether EPA should clarify its previous statements concerning pollutant discharges to groundwater with a direct hydrologic connection to jurisdictional water in order to provide additional certainty for the public and the regulated community. Such a clarification could address the applicability of the CWA to groundwater with a direct hydrologic connection to jurisdictional water, or could define what activities would be regulated if not a discharge to a jurisdictional surface water (i.e., placement on the land), or which connections are considered ''direct'' in order to reduce regulatory uncertainties associated with that term.

The question presented assumes that EPA has statutory authority to regulate the discharge of pollutants through groundwater to jurisdictional waters. EPA does not possess and such statutory authority—nor does any other federal agency under the CWA.

EPA should clarify that, consistent with earlier interpretations by the agency, more recent statements supporting the hydrologic connection theory are, upon further analysis, not expressly or implicitly authorized under any provision of the CWA.

EPA representatives, and a number of courts across the country, have been faced with factual scenarios that left judge and agency personnel alike looking for a way to stretch the reach of the CWA to the facts before them. However, what might seem a compelling set of facts is no substitute for express Congressional authority.

The regulatory gap complained of by a number of courts, and some at EPA, must be filled by Congress not by judicial or administrative interpretation. As noted, the regulated community is not *reading in* a direct discharge requirement into the CWA, EPA and the courts are *reading out* the direct discharge requirement and *reading in* a non-existent provision granting EPA authority to extend the reach of the NPDES program through groundwater to surface waters.

A regulatory exercise seeking to draw a jurisdictional line would not address the underlying issue as to EPA's statutory authority. If the U. S. Supreme Court ultimately ruled that EPA does indeed possess the authority under the CWA to regulate the discharge of pollutants to surface

waters through groundwater, some form of bright line guidance would be of value to provide some semblance of certainty to the regulated community.

However, even the courts that have embraced some form of hydrologic connection theory have stopped short of speculating where the jurisdictional line must be drawn for regulatory purposes. In *Hawai'i Wildlife Fund v. Cty. of Maui, 881 F.3d 754 (9th Cir. 2018)*, the Ninth Circuit Court of Appeals refused to adopt the lower court's conclusion that CWA liability is triggered once pollutants enter a navigable water "regardless of how they get there." Writing for a three judge panel, Judge Dorothy Nelson wrote on behalf of the Court:

> We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.

In the same opinion, the Court rejected EPA's articulation of the direct hydrologic connection theory of NPDES liability. As noted, the Court rejected EPA's direct hydrological connection theory only to substitute its own "fairly traceable" and "functional equivalent" test—terms also not appearing in the 1972 amendments to the CWA.

EPA must state unequivocally that the CWA does not and never has authorize the agency to impose NPDES liability for discharges to surface waters that first pass through groundwater.

5. What issues should be considered if further clarification is undertaken, including, for example, the consequences of asserting CWA jurisdiction over certain releases to groundwater or determining that no such jurisdiction exists?

Once again, the question presented assumes that EPA has statutory authority to regulate the discharge of pollutants through groundwater to jurisdictional waters. The Utility Council asserts that neither EPA, nor any other federal agency, possesses any such statutory authority under the CWA.

Imposing NPDES jurisdiction after the fact on activities that were never meant to be regulated under the CWA will brand as illegal heretofore lawful—and permitted—activities and open a floodgate of baseless citizen suits not supported by the language or intent of the 1972 amendments to the FWPCA.

Florida's comprehensive program regulating the treatment, reuse and disposal of domestic wastewater was structured based on the original—and only legitimate—interpretation of the CWA. Only direct discharges to surface waters require an NPDES permit. Applied literally, EPA's direct hydrologic connection theory of liability could make any discharge of pollutants anywhere subject to CWA jurisdiction if any pollutants could be traced back to that discharge—commandeering and disrupting state groundwater programs.

Implementation of any such theory of CWA liability would have absurd results. Reclaimed water used for residential irrigation that seeped or trickled into a nearby surface water would be

labeled an NPDES discharge. Injection of treated wastewater under properly issued UIC permits would expose the permittee to CWA liability if any of those pollutants eventually migrated to a surface water. Land application of treated wastewater—which has never required an NPDES permit—could trigger CWA liability if land applied pollutants could be argued to have the potential to pass through groundwater and ultimately reach a jurisdictional surface water.

But for after the fact rationalization, in which some at EPA and a number of courts have seemed anxious to indulge, no reading of the 1972 amendments to the FWPCA could justify such regulatory omnipotence. EPA's direct hydrologic connection theory eliminates the cooperative from cooperative federalism.

6. What format or process EPA should use to revise or clarify its previous statements (e.g., through memoranda, guidance, or in the form of rulemaking) if the Agency pursues further action in response to this request for comment.

The 1972 amendments to the FWPCA were passed by Congress over four decades ago. For nearly half that time, approximately twenty years, EPA implemented the CWA as written—NPDES permits are required for discharges *to* water of the U.S. and not through groundwater to waters of the U.S. With no public notice and unrelated to the rule under development, EPA abruptly reversed its position and began to advance its "long-standing policy" fiction.

EPA has no record of support for its 1990 turnabout in interpretation and the agency must now take whatever steps are necessary to undo the damage done by its disingenuous pursuit of a theory of liability not rooted in law.

<u>Memorandum from Headquarters to Regions Withdrawing Prior Statements</u>

As a preliminary step, EPA should issue a memorandum directed to all Regional Administrators, and the states, withdrawing all prior statements in support of imposing CWA jurisdiction based on discharges to groundwater reaching a hydrologically connected surface water.

An opinion issued by EPA's General Counsel might be considered in lieu of *or addition to* a statement from the Office of Water in Washington, D.C.—whichever is the most efficient means of an immediate and unequivocal retraction of the direct hydrologic connection theory of CWA jurisdiction.

The agency should prepare a detailed review of the contemporaneous statements that preceded the agency's spontaneous turnabout in the 1990 stormwater rule and explain that the ambiguity analysis in the CWA cited in the preamble to EPA's CAFO rule cannot stand against the unambiguous clearly articulated Legislative intent accompanying the 1972 amendments. Recent agency statements inconsistent with the direct hydrologic connection theory should be detailed as well.

Withdrawal of prior statements, inconsistent with the earlier contemporaneous statements of EPA's General Counsel, should include withdrawing any filings in pending litigation advancing the hydrologic connection theory of CWA jurisdiction. The *County of Maui* opinion issued by the Ninth Circuit should be use as an example as to how taking liberties with interpreting the plain language of the CWA has resulted in an unmanageable accumulation of inconsistent judicial opinions born of EPA's inexplicable about-face in position in the 1990 stormwater rule.

It should be made clear that the Ninth Circuit found no statutory authority for EPA's direct hydrologic connection theory of liability and that EPA finds the CWA equally lacking in support for the Court's "fairly traceable" and "functional equivalent" tests for liability.

The memorandum should make clear to all Regional Administrators that no permits shall be required, nor enforcement actions initiated, where discharges to surface waters occur only after passing through groundwater.

Rulemaking

Notice and comment rulemaking should be initiated immediately after EPA issues its memorandum, or opinion of its General Counsel, to formalize by rule a clear and unambiguous statement of EPA policy.

There are several existing EPA regulations that could be amended to formalize EPA's position. The definition of "Discharge of a Pollutant" under 40 C.F.R. 122.2 could be amended read:

> This term does not include: (i) an addition of pollutants by any "indirect discharger;" (ii) the addition of pollutants to groundwater or the addition of pollutants to waters of the United States that result from the addition of pollutants to groundwater.

In lieu of amending 40 C.F.R. 122.2, or in addition thereto, 40 C.F.R. 122.3 should be amended to add a stand-alone exclusion for the discharge of pollutants to groundwater and should include language that makes clear that the exclusion applies even where pollutants discharged to groundwater reach waters of the U.S. The exclusion should state:

> 122.3 Exclusions.
>
> The following discharges do not require NPDES permits:
>
> ***
>
> (h) Any discharge to groundwater or a discharge to waters of the United States that results from a discharge to groundwater.

As previously stated, formal notice and comment rulemaking should follow an initial statement of policy released as a memorandum to the Regional Administrators and states, an opinion of

EPA's General Counsel, or both. An immediate initial statement is critical to clarify the scope of NPDES liability and to prevent additional costly and needless litigation.

Statement of Position to United States Supreme Court

Due to disagreement among the federal circuit courts of appeal, the issue of CWA jurisdiction over discharges through groundwater may end up before the U.S. Supreme Court. In determining whether to accept jurisdiction and accept a case, the Supreme Court will ask the Solicitor General to state the position of the United States—in this case EPA. EPA must make it clear to the Supreme Court that it has reassessed its position regarding the direct hydrologic connection theory of CWA jurisdiction and affirmatively articulate a position that no provision of the CWA provides EPA with the jurisdiction to regulate the discharge of pollutants to waters of the U.S. through groundwater.

III. Summary and Conclusion

The CWA does not regulate the discharge of pollutants *to* surface waters *through* groundwaters. No such language or intent may be extracted from the plain text of the 1972 amendments to the FWPCA, Legislative history, or contemporaneous interpretations of the CWA by EPA. In making a distinction between groundwater and surface waters, Congress understood that it was creating a jurisdictional bright line noting in one Senate Committee report that the "[c]ommittee recognizes the essential link between ground and surface waters and the artificial nature of any distinction."[19] .

EPA's direct hydrologic connection theory of CWA liability is not rooted in law and federalizes any discharge of pollutants where some portion—even a minute portion—of those pollutants reaches waters of the U.S. No reading of the CWA supports what is tantamount to EPA's unilateral repeal of the concept of Cooperative Federalism.

The Ninth Circuit found no statutory authority for EPA's direct hydrologic connection theory of liability in its *County of Maui* opinion and EPA should make clear that the CWA is equally lacking in support for the Court's "fairly traceable" and "functional equivalent" tests for liability. It is for Congress—not EPA nor the courts—to amend the CWA.

Respectfully Submitted,

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[19] *See fn* 8.