ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA–HQ–OW–2019–0166; FRL–9991–72–OW]

Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of interpretive statement and request for comment.

SUMMARY: The Environmental Protection Agency (''EPA'') is issuing an Interpretative Statement addressing whether the Clean Water Act (''the CWA'' or ''the Act'') National Pollutant Discharge Elimination System (''NPDES'') permit program applies to releases of a pollutant from a point source to groundwater. This Interpretative Statement reflects the EPA's consideration of the public comments received in response to its February 20, 2018 **Federal Register** notice, as summarized immediately below. Informed by those comments and based on a holistic analysis of the statute, its text, structure, and legislative history, the Agency concludes that the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water. The Interpretive Statement provides the EPA's full analysis and rationale supporting its interpretation and is available below and at *https://www.epa.gov/npdes/releases-point-source-groundwater*. Concurrently with issuing its interpretation of the CWA, the Agency is soliciting additional public input regarding what may be needed to provide further clarity and regulatory certainty on this issue.

DATES: Comments must be received or postmarked on or before June 7, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2019–0166, at *https://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: Scott Wilson, Office of Wastewater Management, Water Permits Division (MC4203M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–6087; email address: *wilson.js@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me? Tribes, states, local governments, the regulated community, and citizens interested in federal jurisdiction over activities that may release pollutants to groundwater may be impacted by this Interpretive Statement. Potentially affected entities include:

Category	Examples of potentially affected entities
States, Tribes, and Territories	State, Tribal, and Territorial water quality agencies and NPDES permitting authorities that may need to determine whether sources of pollutants should be addressed by standards or permitting actions.
Federal Agencies	Federal agencies with projects or other activities that may have releases that affect groundwater with connections to surface waters.
Industry	Industries that may have releases that affect groundwater with connections to surface waters.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by EPA's interpretation of the scope of the CWA NPDES program. Other types of entities not listed in the table could also be affected. If you have questions regarding the effect of this action on a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How can I get copies of this document and other related information? You may access this document electronically at *https://www.epa.gov/npdes/releases-point-source-groundwater* or at *https://www.federalregister.gov*. EPA has established an official public docket for receiving comments under Docket ID No. EPA–HQ– OW–2019–0166 which is accessible electronically at *http://www.regulations.gov* that will also contain copies of this **Federal Register** notice and the Interpretive Statement. The public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

II. February 2018 Request for Public Comment

On February 20, 2018, EPA requested public comment regarding whether EPA should review and potentially revise or clarify its previous statements concerning the applicability of the CWA NPDES permit program to pollutant releases from point sources that reach jurisdictional surface waters via groundwater that has a direct hydrologic connection to a jurisdictional surface water (the ''direct hydrologic connection theory''). 83 FR 7126, 7128 (Feb. 20, 2018). EPA asked for specific comment on questions related to CWA authority, other programs that address these releases, what issues needed further clarification, and what format EPA should pursue if it chose to revise or clarify its position. *Id.* EPA received over 50,000 comments in response to its request. Comments addressed the

specific questions raised by EPA as well as other pertinent topics. EPA received comments from a wide audience representing state governments, local governments, tribes, industry, environmental organizations, academia, and private citizens. *See* EPA Docket No. EPA–HQ–OW–2018–0063, *available at https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0063*.

Some commenters opposed the direct hydrologic connection theory on programmatic and legal grounds. These comments raised concerns regarding the activities that might be impacted if a NPDES permit is required for a release to groundwater with a direct hydrologic connection to jurisdictional surface water, including aquifer recharge, leaks from sewage collection systems, septic system discharges, treatment systems such as constructed wetlands, spills and accidental releases, manure management and coal ash impoundment seepage. These commenters also raised implementation concerns, including how a direct hydrologic connection would be defined and where monitoring or the point of compliance would be determined. Commenters opposed to the direct hydrologic connection theory raised a range of legal arguments, including that the theory was not grounded in the statutory text, pointing in particular to the absence of the term ''groundwater'' from sections authorizing the NPDES program and providing excerpts from the Act's legislative history.

Other commenters supported the direct hydrologic connection theory, raising concerns based on the prior examples of environmental impacts from releases to groundwater with a direct hydrologic connection to jurisdictional surface water, and the importance of the authority to regulate or prevent those releases pursuant to the CWA. These commenters asserted that the CWA's goal of protecting surface waters encompassed releases to groundwater that could reach jurisdictional surface waters, and that groundwater itself does not need to be jurisdictional under the CWA in order to regulate discharges that pass through groundwater and ultimately may reach surface water.

EPA has considered these comments, as well as the text, structure and legislative history of the CWA, and concludes that the interpretation expounded in the Interpretative Statement below is the best, if not the only, reading of the CWA, is more consistent with Congress's intent than other interpretations of the Act, and best addresses the question of NPDES permit program applicability for pollutant releases to groundwater within the authority of the CWA.

III. Interpretive Statement

Interpretive Statement

Subject: Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater.

From: Matthew Z. Leopold (signed and dated April 12, 2019), General Counsel.

David P. Ross (signed and dated April 12, 2019), Assistant Administrator for Water.

To: Regional Administrators, Regions I–X.

This Interpretive Statement sets forth the Environmental Protection Agency's (''EPA'' or ''the Agency'') interpretation of the Clean Water Act (''the CWA'' or ''the Act'') National Pollutant Discharge Elimination System (''NPDES'') permit program's applicability to releases of pollutants from a point source to groundwater that subsequently migrate or are conveyed by groundwater to jurisdictional surface waters. For the reasons explained below, EPA concludes that the Act is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water. *See* 33 U.S.C. 1311(a), 1342.

This Interpretive Statement is the first instance in which the Agency has issued guidance focused exclusively on whether NPDES permits are required for releases of pollutants to groundwater that reach surface water. As described further below, there is a mixed record of prior Agency statements addressing this issue and a split in the federal circuit courts regarding the application of the NPDES permit program to releases of pollutants to groundwater that reach jurisdictional surface waters. Recent judicial decisions addressing this issue contribute to an evolving and increasingly confusing legal landscape in which permitting and enforcing agencies, potentially regulated parties, and the public lack clarity on when the NPDES permitting requirement set forth in sections 301 and 402 of the CWA may be triggered by releases of pollutants to groundwater. The absence of a dedicated EPA statement on the best reading of the CWA has generated confusion in the courts and uncertainty for EPA regional offices and states implementing the NPDES program, regulated entities, and the public. This Interpretive Statement is intended to advise the public on how EPA interprets the relevant provisions of the CWA.

This Interpretive Statement conveys to EPA's regional offices, states, and the public the Agency's reading of the applicability of sections 301 and 402 of the CWA to releases of pollutants to groundwater. It contains the Agency's most comprehensive analysis of the CWA's text, structure, legislative history, and judicial decisions that has been lacking in prior Agency statements on this issue. EPA thus herein provides clear guidance that balances the statute, case law, and the need for clarity on the scope of the CWA NPDES coverage, which has been recently expanded by judicial decision to potentially reach a new set of releases to groundwater that EPA has not historically regulated in the NPDES program. This Interpretive Statement provides important clarity to inform future permitting decisions and other actions; it neither alters legal rights or obligations nor changes or creates law.

In February 2018, the Agency sought public comment on whether the NPDES permit program applies to releases of pollutants to groundwater and whether the Agency should revise or clarify its position on this issue. *See* 83 FR 7126, 7128 (Feb. 20, 2018). Informed by those comments and based on a holistic analysis of the statute, its text, structure, and legislative history, the Agency concludes that the best, if not the only, reading of the CWA is that Congress intentionally chose to exclude *all* releases of pollutants to groundwater from the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater. Congress purposely structured the CWA to give states the responsibility to regulate such releases under state authorities. And, as discussed further below, other federal statutes contain explicit provisions that regulate the release of pollutants into groundwater to provide significant federal authority to address groundwater pollution not provided by the NPDES permitting program. In accordance with Congress's intent, state and federal authorities are collectively available to provide protection for ground and surface water quality in those instances where direct CWA permitting authority is not applicable.

During the pendency of EPA's review of the public comments received, two petitions for certiorari were filed with the Supreme Court which posed the question of whether the CWA applies to releases of pollutants from a point source to groundwater that migrates to surface water. *See* Petition for Writ of

Certiorari, *Cty. of Maui* v. *Hawai'i Wildlife Fund, et al.* (''*County of Maui*''), No. 18–260 (Aug. 27, 2018); Petition for Writ of Certiorari, *Kinder Morgan Energy Partners, L.P.* v. *Upstate Forever* (''*Kinder Morgan*''), No. 18–268 (Aug. 28, 2018). Consistent with the United States' recommendation set forth in an amicus brief filed at the Court's request, the Supreme Court recently granted the petition for writ certiorari in *County of Maui,* an appeal of the Ninth Circuit's broad reading of the CWA. *Cty. of Maui,* No. 18–260 (S. Ct. cert granted on Feb. 19, 2019). Issuing this statement provides necessary clarity on the Agency's interpretation of the statute given the mixed record of prior Agency statements and a split in the federal circuit courts regarding this issue.

The interpretation contained herein differs from the direct hydrological connection theory, expressed in the United States amicus brief filed in the Ninth Circuit *County of Maui* proceeding, and the theories advanced by the parties in that case. The Agency does not agree with the respondents' and Ninth Circuit's view that the CWA's NPDES requirements can apply when a pollutant released from a point source migrates to navigable waters through groundwater. The differences between the direct hydrological connection theory and today's interpretation, and EPA's explanation for why the Agency is modifying and clarifying its interpretation, are detailed below. While the Agency disagrees with the reasoning of the Ninth Circuit's decision in *County of Maui,* as well as the reasoning of the Fourth Circuit in its *Kinder Morgan* decision, for reasons discussed further below, it will nonetheless apply the decisions of those courts in their respective circuits until further clarification from the Supreme Court. *See Hawai'i Wildlife Fund* v. *Cty. of Maui,* 886 F.3d. 737 (9th Cir. 2018); *Upstate Forever* v. *Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637, 652 (4th Cir. 2018). Thus, the Agency's interpretation set forth herein applies at this time only outside of the Fourth and Ninth Circuits.[1]

[1] Neither the Ninth Circuit decision nor Fourth Circuit decision prohibits application of the Agency's interpretation expressed in this action in those circuits. *See National Cable Telecomms Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 982 (2005) (''A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.''). As explained herein, by not applying this interpretation in the Ninth and Fourth Circuits, the Agency is simply choosing to maintain the status quo pending further clarification by the Supreme Court, after which time the Agency intends to follow with notice and comment rulemaking.

I. Factual Background

It is a fundamental principle of hydrology that many groundwaters and surface waters are linked through the hydrologic cycle. As the Agency has previously explained, the ''hydrologic cycle involves the continual movement of water between the earth and the atmosphere through evaporation and precipitation.'' EPA 440/6–90–004, *Citizen's Guide to Ground-Water Protection* (1990). Rain and snow fall to the earth, and the resulting water runs into surface waters, evaporates, is absorbed by plant roots, or infiltrates the ground's surface and moves downward to the saturated zone, ''the area in which all interconnected spaces in rocks and soil are filled with water,'' also known as groundwater. *Id.* at 1. In areas where the saturated zone occurs at the ground's surface, groundwater discharges into surface waters, eventually evaporating into the atmosphere to form precipitation and begin the hydrologic cycle again. *Id.*

The nature of the connection between groundwater and surface water is highly dependent on local climate, topography, geology and the type of groundwater formation at issue. Because of the often-slow movement of groundwater, pollutants tend to remain concentrated in the form of a plume. The speed and concentration at which pollutants move through groundwater depend on the amount and type of pollutant, its solubility and density, and the speed of the surrounding groundwater. The amount of a pollutant that is released into groundwater that will eventually reach surface water also varies and is dependent on both the characteristics of the pollutant itself as well as site-specific factors. In addition, the travel time and distance between polluted groundwater and surface water can allow for the reduction of the impacts of contamination on the surface water due to natural processes. These processes include, for example, dilution, oxidation, biological degradation (which can render pollutants less toxic), and the binding of materials to soil particles such that pollutants are adsorbed by surrounding soil before reaching surface water.

Many commenters responding to EPA's February 2018 **Federal Register** notice identified activities that have not generally been required to obtain an NPDES permit and might be impacted if a permit were required for a release to groundwater with a hydrologic connection to jurisdictional surface waters. Activities listed by commenters included aquifer recharge, leaks from sewage collection systems, septic system discharges, treatment systems such as constructed wetlands, spills and accidental releases, manure management, and coal ash impoundment seepage.

Septic systems, for example, generally operate by discharging liquid effluent into perforated pipes buried in a leach field, chambers, or other special units designed to slowly release the effluent into soil. The soil accepts, treats, and disperses wastewater as it percolates through the soil, but can in certain circumstances ultimately enter groundwater. Over 26 million homes in the United States employ septic systems to treat and dispose of household waste. As the Agency has explained, ''[r]ecycled water from a septic system can help replenish groundwater supplies; however, if the system is not working properly, it can contaminate nearby waterbodies.'' *See* EPA, *Septic Systems and Surface Water, https://www.epa.gov/septic/septic-systems-and-surface-water.* But even well-functioning septic systems can contribute pollutants such as nutrients to groundwater. In addition to household waste disposal, releases to groundwater are also employed as part of green infrastructure projects, including the management of stormwater. These projects release stormwater and recycled wastewater to the ground to recharge depleted aquifers and prevent or reduce runoff to surface waters. In arid western states experiencing low rainfall, states and municipalities use such surface infiltration of recycled wastewaters not only to replenish groundwater supplies, but also to mitigate salt water intrusion or abate land subsidence that can occur where groundwater is overly depleted.

To date, neither EPA nor states have generally required NPDES permits for these types of activities, and in the select instances where NPDES permits have been required for discharges from a point source that reach jurisdictional surface waters via groundwater, they have been based on site-specific factors.

II. The Clean Water Act

The objective of the CWA is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) ''that the discharge of pollutants into the navigable waters be eliminated by 1985;'' and (2) ''that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish,

shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. . . .'' *Id.* § 1251(a)(1)–(2). The CWA approaches restoration and protection of the Nation's waters as a partnership between states and the federal government, assigning certain functions to each in striking the balance of the statute's overall regulatory scheme. Congress expressly recognized the role that states would continue to exercise in preventing, reducing, and eliminating pollution: ''It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, reservation, and enhancement) of land and water resources[.]'' *Id.* § 1251(b). As the Supreme Court has explained, the statute ''anticipates a partnership between the States and the Federal Government,'' toward a shared objective of restoring and maintaining the integrity of the Nation's waters. *Arkansas* v. *Oklahoma,* 503 U.S. 91, 101 (1992).

To accomplish the Act's broad national objective, Congress established respective roles for the federal government and for states. As one means of accomplishing the Act's objective, Congress prohibited any ''discharge of any pollutant'' to ''navigable waters'' or to the ''contiguous zone or the ocean'' unless it is authorized by the statute, generally by a NPDES permit. 33 U.S.C. 1311(a) (''Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.''). The Act defines navigable waters as ''the waters of the United States, including the territorial seas.'' *Id.* § 1362(7). EPA's regulations have never defined ''waters of the United States'' to include groundwater.

The statute defines ''discharge of a pollutant'' as ''any addition of any pollutant to navigable waters from any point source'' or ''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.'' 33 U.S.C. 1362(12). A point source is defined as ''any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.'' *Id.* § 1362(14).

Where there is a discharge of a pollutant from a point source to a water of the United States, termed herein a jurisdictional surface water, NPDES permits generally require permittees to meet numeric or narrative effluent limitations. *Id.* §§ 1311(a), 1342(a). Effluent limitations are defined as ''any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.'' *Id.* § 1362(11).

Courts have observed that nonpoint source pollution—the broad category of other forms of water pollution that do not fall within the point source definition and not defined under the Act—can be understood as ''all water quality problems not subject to Section 402,'' the portion of the statute requiring NPDES permits. *Nat'l Wildlife Fed'n* v. *Gorsuch,* 693 F.2d 156, 166 (D.C. Cir. 1982). In addition to the NPDES permitting program, as another means of accomplishing the Act's objective, Congress reserved to states their exclusive role in regulating nonpoint source pollution. *Am. Farm Bureau Fed'n* v. *EPA,* 792 F.3d 281, 289 (3rd Cir. 2015) (''States in turn regulate nonpoint sources. There is significant input and oversight from the EPA, but it does not regulate nonpoint sources directly.''); *see also Or. Natural Desert Ass'n* v. *U.S. Forest Serv.,* 550 F.3d 778, 780 (9th Cir. 2008) (''The CWA's disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act.'').

While the point and nonpoint source distinction is the quintessential inquiry related to the discharge of pollutants to surface waters, as explained further below, this inquiry is not relevant as applied to groundwater. Rather, the text, structure, and legislative history of the CWA demonstrate Congress's intent to leave the regulation of groundwater wholly to the states under the Act. *See, e.g., Village of Oconomowoc Lake* v. *Dayton Hudson Corporation,* 24 F.3d 962, 965 (7th Cir. 1994) (''[T]he Clean Water Act does not attempt to assert national power to the fullest . . . . Congress elected to leave [regulation of groundwaters] to state law[.]''); *Tenn. Clean Water Network* v. *TVA,* 905 F.3d 436, 439 (6th Cir. 2018) (''[T]he CWA is restricted to regulation of pollutants discharged into navigable waters . . . leaving the states to regulate pollution of non-navigable waters'' such as groundwater.).

III. EPA's Interpretation of the Clean Water Act National Pollutant Discharge Elimination System Program's Applicability to Releases of Pollutants to Groundwater That May Reach Jurisdictional Surface Waters

The CWA's definition of the ''discharge of [a] pollutant,'' 33 U.S.C. 1311(a), includes ''any addition of any pollutant to navigable waters from any point source,'' 33 U.S.C. 1362(12)(A). Because groundwater is not a ''navigable water[],'' *see* 33 U.S.C. 1362(7), the CWA does not regulate discharges to groundwater as such. But the question of whether a ''discharge'' within the statute's meaning has occurred when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable waters has generated confusion and uncertainty.[2]

Commenters to EPA's February 2018 **Federal Register** notice rely primarily on one of two interpretive possibilities for addressing this question. One approach is reflected in the court of appeals' decisions in *County of Maui* and *Kinder Morgan.* In those cases, the courts interpreted Section 1362(12)(A) as applying to discharges from a point source to navigable waters where the pollutant has travelled to the navigable water over or through another medium. On this view, to qualify as a discharge ''to navigable waters,'' a discharge via groundwater must, in the Ninth Circuit, be ''fairly traceable'' back to the point source and more than *de minimis, Cty. of Maui,* 886 F.3d at 746 n.2, and in the Fourth Circuit, ''must be sufficiently connected to navigable waters,'' *Kinder Morgan,* 887 F.3d at 651. Those courts and commentators who have endorsed these variations on a similar approach have differed in describing the type of connection that qualifies under the CWA, but they generally agree that a ''discharge of a pollutant'' may occur when a pollutant has been added to a navigable water via groundwater with some connection to the navigable water.

A second interpretive approach is reflected in the Sixth Circuit's decision in *Kentucky Waterways Alliance* v. *Kentucky Utilities Co.,* 905 F.3d 925 (6th

[2] This Interpretative Statement addresses the applicability of the CWA NPDES permitting requirements to the release of pollutants from a point source to groundwater that reach jurisdictional surface waters through hydrologically connected groundwater. It describes the movement of pollutants to and through groundwater as having been released from a point source. When the term ''discharge'' is used herein to reference pollutants being added to a surface water by or through groundwater, this does not connote or imply that a ''discharge of a pollutant'' or ''discharge'' has occurred under the CWA. *See* 33 U.S.C. 1362(12) (''discharge of a pollutant''), 1362(16) (''discharge'').

Cir. 2018). In that case, the court read the relevant statutory language as applying only where pollution has been added *directly* to navigable waters ''by virtue of a point-source conveyance,'' rather than through some other mechanism (such as groundwater). *Id.* at 934. Under this interpretation, sometimes described as the ''terminal point source'' theory, any intermediary between the point source and the navigable water means that a pollutant has not been discharged ''to [the] navigable water[] from [the] point source.''

EPA's interpretation differs from these two theories. The Agency's view is that the best, if not the only, reading of the statute is that all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater. This interpretation is appropriately tailored to releases to groundwater. On this view, because the CWA clearly evinces a purpose not to regulate groundwater, and because groundwater is extensively regulated under other statutory regimes, discussed further below in section VI.B, any circumstance in which a pollutant is released from a point source to groundwater is categorically excluded from the CWA's coverage. The interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two, or alternatively may be described as an intervening cause. 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.

In the Agency's view, the text, structure, and legislative history of the CWA, as well as the better-reasoned judicial decisions, support the legal conclusion that Congress intended to exclude *all* releases of pollutants to groundwater from NPDES program coverage, regardless of a hydrologic connection or conveyance to jurisdictional surface water. When attempting to interpret a statute, a court or agency cannot look to one single word or phrase, but instead must look to the text as a whole. *See Star Athletica, LLC* v. *Varsity Brands, Inc.,* 137 S. Ct. 1002, 1010 (2017); *Dole* v. *United Steelworkers of Am.,* 494 U.S. 26, 35 (1990) (''[W]e are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.''). While no single provision of the CWA expressly addresses whether pollutants discharged from a point source that reach jurisdictional surface waters through groundwater are subject to NPDES permitting requirements, when analyzing the statute in a holistic fashion, Congress's intent becomes evident: Congress did not intend for the NPDES program to address any pollutant discharges to groundwater, even where groundwater may be hydrologically connected to surface waters. Relevant legislative debate confirms that Congress fully understood the hydrologic connections that exist between groundwater and surface water, yet chose this jurisdictional line to strike the balance between state and federal responsibility for protection of the Nation's waters.

Congress was explicit where it intended the Act to apply to groundwater. It included references to groundwater in provisions aimed at providing information, guidance, and funding to states, to enable them to regulate pollutant discharges to groundwater. Explicit reference to groundwater, by contrast, is absent in the operative regulatory sections of the Act. Further, Congress refers to groundwaters exclusively as one unified category of waters; the Act is devoid of any indication that Congress viewed releases of pollutants to groundwater as susceptible to different treatment under the Act based on the presence or absence of a connection to surface water. The legislative history is unambiguous that Congress was aware of the potential for releases to groundwater to reach surface water, and nonetheless rejected proposed amendments seeking to require NPDES permits for discharges to groundwater. As with nonpoint source pollution, the statute's structure and references to groundwater therein are reflective of Congress's intent to leave regulation of releases of pollutants to groundwater with the states.

A. The operative, enforceable provisions of the Clean Water Act that make up the NPDES permitting program neither reference nor contemplate releases to groundwater.

The foundational definitional terms and provisions that establish the NPDES program extend *only* to discharges of pollutants to navigable waters, waters of the contiguous zone, and the ocean, *i.e.,* discharges to jurisdictional surface waters. The Act provides that a NPDES permit may be issued ''for the discharge of any pollutant.'' 33 U.S.C. 1342(a). The definition of discharge of a pollutant refers to ''any addition of any pollutant to *navigable waters* from any point source,'' or ''any addition of any pollutant to the *waters of the contiguous zone or the ocean* from any point source.'' *Id.* § 1362(12) (emphasis added). The Act thus explicitly refers to the addition of any pollutant to three of the four categories of waters referred to throughout the statute; the addition of any pollutant to groundwater—the fourth category—is notably absent. Congress specified which sections of the Act applied to which categories of waters: groundwater, navigable waters, contiguous zone waters, and the ocean. *See, e.g., id.* § 1254(a)(5) (setting forth provisions aimed at monitoring the quality of ''the navigable waters and ground waters and the contiguous zone and the oceans''); § 1314(a)(2) (requiring that the Administrator shall publish information on the ''factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans''). In other words, ''when Congress wanted certain provisions of the CWA to apply to groundwater, it stated so explicitly.'' *Umatilla Waterquality Protective Ass'n.* v. *Smith Frozen Foods,* 962 F. Supp. 1312, 1318 (D. Or. 1997).

Congress also elected to leave groundwater out of the definition of ''effluent limitations'' and related provisions. Effluent limitations are defined as ''any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources *into navigable waters, the waters of the contiguous zone, or the ocean,* including schedules of compliance.'' 33 U.S.C. 1362(11) (emphasis added). Similarly, section 304(g), establishing the requirement that EPA publish certain guidelines to assist states in implementing their NPDES program, provides that these guidelines will apply to control discharges to every form of water *except* groundwater. *See id.* § 1314(g) (providing that, for the purposes of assisting states in carrying out NPDES programs, EPA shall publish guidelines ''to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean'').

The absence of groundwater in the sections of the statute foundational to the NPDES permitting program is meaningful: ''[a] familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one

statutory provision that is included in other provisions of the same statute.'' *Hamdan* v. *Rumsfeld,* 548 U.S. 557, 578 (2006). Here, Congress elected not to include groundwater in the definition of ''discharge of a pollutant''—the critical definition in determining whether a NPDES permit is required—nor did Congress include groundwater in the definition of ''effluent limitations,'' a primary vehicle in implementing the NPDES permitting requirement. *See Umatilla,* 962 F. Supp. at 1318 (''[T]hroughout the CWA, Congress appeared to have four categories of waters in mind—'navigable waters,' the contiguous zone, the ocean, and 'ground waters.' Only the first three of these . . . are included within the definition of 'discharge of a pollutant,' indicating that Congress did *not* consider discharges to groundwater to be discharges that would trigger the NPDES requirement.'').

Congress's intent to deliberately leave groundwater out of the definition of ''discharge of a pollutant'' is confirmed by the legislative history of the Act. In a hearing before the House Public Works Committee, Representative Leslie Aspin recommended that the term ''ground water'' be added to the operative NPDES provisions so that discharges to groundwater also would be covered by the statute, explaining that ''[s]ometimes a navigable water and ground-water source run into each other, or come close to each other, so that seepage from polluted ground-water source could pollute the navigable water[;] . . . [t]o say that the Federal Government can regulate the ecology of one, but not the other, is silly and counterproductive.'' Water Pollution Control Legislation–1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. on Pub. Works, 92nd Cong. 793 (1971) (remarks of Rep. Aspin) (emphasis added).

Representative Aspin went on to propose an amendment to regulate groundwater under the NPDES program by amending Title IV of the statute to include explicit references to groundwater and adding the term ''ground waters'' to the definition of ''discharge of pollutant'' found in Section 502(12). He explained that these amendments were necessary given the likelihood that polluted groundwater would contaminate jurisdictional surface waters:

> The amendment brings ground water into the subject of the bill, into the enforcement of the bill. Ground water appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study ground water. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, *ground water gets into navigable waters,* and to control only the navigable water and not the ground water makes no sense at all.

118 Cong. Rec. 10,666 (1972), 1 Leg. Hist. 589 (remarks of Rep. Aspin) (emphasis added). The amendments were rejected by a vote of 86 to 34. *Id.* at 597. The failure of a proposed amendment ''strongly militates against a judgment that Congress intended a result that it expressly declined to enact.'' *Gulf Oil Corp.* v. *Copp Paying Co.,* 419 U.S. 186, 200 (1974).

The only section in the extensive NPDES permitting provisions where discharges to groundwater are contemplated is section 402(b)(1)(D), which sets forth the requirements for EPA approval of state programs to assume NPDES authority. This section requires that to approve a state-submitted NPDES program, the Administrator must determine that adequate authority exists *within the state* to ''control the disposal of pollutants into wells.'' 33 U.S.C. 1342(b)(1)(D). The Fifth Circuit found this provision significant in rejecting EPA's prior view that it had authority to regulate groundwater pollution resulting from deep-well disposal, observing that ''[t]he simple requirement of § 402(b)(1)(D) that *state* permit programs have adequate authority to issue permits which control the disposal of pollutants into wells, which is not fleshed out elsewhere in the Act or mirrored in any of the sections setting forth the Administrator's powers, is entirely consistent'' with Congress's intention to ''stop short of establishing federal controls over groundwater pollution.'' *Exxon Corp.* v. *Train,* 554 F.2d 1310, 1324 (5th Cir. 1977).

The legislative history of 402(b)(1)(D) illuminates Congress's intent in the CWA to require states, but not the federal government, to regulate deep well disposal, which is consistent with its intent to leave regulation of *all* pollutant discharges to groundwater to states. The Senate Committee on Public Works report explains that, like the House, the Senate Committee rejected amendments to impose federal regulation over groundwater but included the provision in section 402(b)(1)(D) requiring states to maintain programs to regulate deep well disposal to encourage states to carry out such regulation. Specifically, the report explained 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. *Thus the Committee bill requires in section 402 that each State include in its program for approval under section 402 affirmative controls over the injection or placement in wells of any pollutants that may affect ground water.* This is designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control.
>
> The importance of groundwater in the hydrological cycle cannot be underestimated. Although only about 21.5 percent of our domestic, industrial[,] [and] agricultural supply comes directly from wells, it must be remembered that rivers, streams and lakes themselves are largely supplied with water from the ground—not surface runoff.

S. Rep. No. 414, 92d Cong., 1st. Sess. at 73 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1491 (emphasis added); *see also* 118 Cong. Rec. 10667 (1972), 1 Leg. Hist. 591 (remarks of Rep. Clausen) (opposing amendment to require NPDES permits for discharges to groundwater and stating that the House committee had ''recognized the need for control of disposal of pollutants into wells in order to protect our ground waters. Therefore, in section 402(b)(1)(D) we provided that the Administrator shall approve a State program unless he determines that authority does not exist to control the disposal of pollutants into wells.'').

The legislative history makes evident that Congress declined to extend coverage of the NPDES program to discharges to groundwater and did so with the understanding that releases of pollutants to groundwater often reached jurisdictional surface water and could affect its quality. For example, at a 1971 hearing before the Senate Public Works Committee, then EPA Administrator William Ruckelshaus requested that EPA be granted authority to regulate groundwater quality, explaining the basis for that request as follows:

> The only reason for the request for Federal authority over ground waters was to assure that we have control over the water table in such a way as to insure that our authority over interstate and navigable streams cannot be circumvented, so we can obtain water quality by maintaining a control over all the sources of pollution, be they discharged directly into any stream or *through the ground water table.*

Water Pollution Control Legislation–1971 (Proposed Amendments to

Existing Legislation): Hearings before the H. Comm. on Pub. Works, 92nd Cong. 230 (1971) (statement of Hon. William Ruckelshaus, Administrator, EPA) (emphasis added). This statement, before the same Senate Committee that rejected amendments to extend the scope of the NPDES program at the time of the passage of the Act, supports the conclusion that Congress was aware that contaminated groundwater could reach jurisdictional surface waters and nonetheless chose to leave releases to groundwater to state regulation in the CWA paradigm. As the Fifth Circuit observed in analyzing this legislative history, throughout the ensuing debate ''there is not the slightest hint that any Member thought the bill would grant the Administrator any power to regulate deep-well disposal or *any other form of groundwater pollution*. Instead, all the evidence points to precisely the opposite understanding.'' *Exxon,* 554 F.2d at 1329; *see also Kelley on behalf of Michigan* v. *United States,* 618 F. Supp. 1103, 1107 (W.D. Mich. 1985) (acknowledging the ''unmistakably clear legislative history . . . demonstrat[ing] that Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination'').

B. Explicit references to groundwater are found in sections of the Act that serve to provide information, guidance, assistance, or funding to states in regulating groundwater, and in sections of the Act addressing state programs to control nonpoint source pollution.

The Act's provisions explicitly addressing groundwater can be placed into two groups. Analysis of these two groups of statutory references reinforces Congress's intent to leave regulation of groundwater—no matter how hydrologically connected to surface water—to the states. First, the Act contains forward-looking sections aimed at gathering information that could inform subsequent legislation and current state efforts to regulate discharges to groundwater. Indeed, ''a clear pattern of congressional intent with respect to groundwaters emerges upon close examination of those sections of the Act that deal with the subject. That pattern is one of information gathering and encouragement of state efforts to control groundwater pollution—but not of direct federal control over groundwater pollution.'' *See Exxon,* 554 F.2d at 1322. Second, the Act contains sections addressing state programs to manage nonpoint source pollution, evidencing Congress's intent to retain states' lead role with respect to both nonpoint source and groundwater pollution. The provisions described below are reflective of Congress's intent that states retain responsibility for addressing groundwater pollution, and that the federal government's role would be to provide resources, both in the form of information, funding or other support, for states to take on this issue. These resources and incentives for state programs, like the NPDES program, are an important component of the CWA, but one in which states retain regulatory decision-making and authority and elect to what extent they chose to utilize federal support.

Groundwater is first mentioned in the statute in Title I, setting forth ''Research and Related Programs.'' This Title contains several provisions directing EPA to address groundwater pollution through information gathering and coordination with states, as opposed to through binding regulatory requirements found elsewhere in the Act. *See, e.g.,* 33 U.S.C. 1252, 1254. During the debate on the amendment to regulate discharges to groundwater through the NPDES program, Representative Donald H. Clausen, a member of the House Committee on Public Works and sponsor of the House bill, noted in explaining his opposition to the amendment that ''it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.'' 118 Cong. Rec. 10667 (1972), 1 Leg. Hist. 591 (remarks of Rep. Clausen). He explained that the Committee recognized the need for additional information and research ''both in determining the effect of underground disposal of pollutants and the migration of such pollutions.'' *Id.* Thus, the Committee drafted ''broad research'' powers for EPA under Title I of the statute, and, based on that research, *in the future,* ''Congress might have a basis for determining the need and appropriately extending the controls of H.R. 11896 as they apply to navigable waters to ground waters if needed.'' *Id.*

Congress also included non-regulatory provisions focused on the protection of groundwater in Title II of the Act, in which Congress authorized EPA to make grants to states for the construction of publicly owned treatment works (POTWs). Of relevance here, Congress included a provision in section 202 authorizing increased funding for construction of POTWs if states provide a certificate indicating that the quantity of available groundwater will be ''insufficient, inadequate, or unsuitable for public use, including the ecological preservation and recreational use of surface water bodies,'' unless effluents from POTWs, after adequate treatment, are returned to the groundwater. 33 U.S.C. 1282(b)(2). This is an example of ''Congress employ[ing] the power of the federal purse to encourage protection by the states of underground waters.'' *Exxon,* 554 F.2d at 1323. Notably, this provision also links the quantity of available groundwater to ''ecological preservation and recreational use of surface water bodies,'' 33 U.S.C. 1282(b)(2), indicating Congress's decision to explicitly acknowledge and account for the connection between groundwater and jurisdictional surface waters when it chose to do so.

Title III of the CWA, ''Standards and Enforcement,'' also contains several provisions related to groundwater, each of which set forth non-regulatory information gathering requirements and provisions for guidance or funding to states. Section 304(a)(1) of the statute requires that the Administrator develop and publish water quality criteria, on, in pertinent part, the kind and extent of identifiable effects on health and welfare ''which may be expected from the presence of pollutants in any body of water, including ground water.'' 33 U.S.C. 1314(a)(1). Section 304(a)(2) requires that the Administrator develop and publish information on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters and ground waters. *Id.* § 1314(a)(2). Neither Section 304(a)(1) nor section 304(a)(2), however, create compliance obligations for individual dischargers. *E. I. Du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 119 n.6 (1977) (''There is no provision for compliance with § 304, the guideline section.''). Rather, EPA's role in executing Section 1314(a) is to provide guidance to states. *City of Albuquerque* v. *Browner,* 865 F. Supp. 733, 738 (D.N.M. 1993) (''Section 304(a) of the Act requires EPA to develop criteria for water quality that reflect the latest scientific knowledge, and to provide those criteria to the States as guidance.''). As the Fifth Circuit observed, ''the absence of other provisions in the Act . . . for transforming this information into enforceable limitations, strongly suggests that Congress meant to stop short of establishing federal controls over groundwater pollution, at least for the time being.'' *Exxon,* 554 F.2d at 1325.

These provisions providing for support to states to regulate groundwater arise in the context of general informational support to states (sections 102, 104, and 304) and funding tied to protection of groundwater related to discharges from a specific type of

facility (section 202). 33 U.S.C. 1252, 1254, 1282, 1314. Significantly, Congress also explicitly included groundwater in provisions addressing states' programs for control of nonpoint source pollution. These provisions, including sections 208, 304(f), and 319, together make up the portions of the Act in which Congress addressed nonpoint source pollution—not through regulatory requirements, but through support for state programs. *Id.* §§ 1288, 1314(f), 1329.

Section 208 of the statute is an example of a provision where Congress was concerned about nonpoint source pollution impacting groundwater, which it was aware could also reach surface water. That section requires that states submit to EPA ''areawide waste treatment management plans,'' which must include a process to control the disposal of pollutants on land or in subsurface excavation to ''protect *both* ground and surface water quality.'' *Id.* § 1288(a), (b)(2)(K) (emphasis added). The statute provides that areawide waste treatment management plans shall include a process to identify mine-related sources of pollution, such as surface and underground mine runoff, and the plans must also set forth procedures and methods to control those sources of runoff. *Id.* § 1288(a), (b)(2)(G). Thus, Congress viewed underground mine runoff, *i.e.,* seepage to groundwater that could reach jurisdictional surface waters, as best dealt with for CWA purposes through an areawide waste treatment management plan for controlling nonpoint source pollution, rather than through the regulatory program under NPDES. *See also id.* § 1314(f) (directing the Agency to issue guidelines for identifying and evaluating types of nonpoint sources of pollutants, including ''the disposal of pollutants in wells or in subsurface excavations'').

Congress's intent to treat releases to groundwater as analogous to nonpoint sources, subject to control by states, is further evidenced by analyzing section 319 of the statute, entitled ''Nonpoint source management programs.'' Section 319 was added to the statute in 1987 and includes requirements and related funding provisions directed at states to control pollution from nonpoint sources to navigable waters. *Id.* § 1329 (codifying Water Quality Act of 1987, Pub. L. 100–4, 319, 100 Stat. 7, 52). Section 319 authorizes the Administrator to give priority in making grants where States have implemented or are proposing to implement programs to ''carry out ground water quality protection activities which the Administrator determines are part of a comprehensive nonpoint source pollution control program.'' *Id.* § 1329(h)(5)(D). In addition, section 319 contains a groundwater-specific grant provision in 319(i), ''Grants for Protecting Groundwater Quality,'' for the purpose of assisting states in ''carrying out groundwater quality protection activities'' that will ''advance the State toward implementation of a comprehensive nonpoint source pollution control program.'' *Id.* § 1329(i)(1). Activities that could be supported by the grants include activities ''to protect the quality of groundwater *and* to prevent contamination of groundwater from nonpoint sources of pollution.'' *Id.* (emphasis added). This and the other provisions discussed in this section, aimed at equipping states with information and funding needed to enact programs to protect groundwater quality, stand in contrast to the sections of the statute, discussed above, that set forth enforceable limitations as well as the NPDES permitting and related provisions and contain no explicit mention of groundwater.

IV. Comments Regarding Prior Agency Statements

The Agency has for the first time conducted a public process, initiated by EPA's February 2018 **Federal Register** notice, regarding prior Agency statements addressing this issue, and, in conjunction with that process, has conducted a more-substantial review of its prior statements than previously undertaken by the Agency. As the Agency stated in that notice, ''most of these statements were collateral to the central focus of a rulemaking or adjudication.'' 83 FR at 7127. In fact, most of these statements do not include any explanation for the Agency's previous interpretation of the Act. As described above, EPA is now clearly stating its position on this issue in a comprehensive manner that is consistent with the text and legislative history of the CWA.

As commenters pointed out, there have been a range of prior statements by the Agency that align with the legal position articulated in this Interpretive Statement. For example, in a number of documents discussed below, the Agency has stated simply that discharges to groundwater are not subject to the CWA, without any qualification. The Agency has reexamined these statements in light of what the Agency views as the more appropriate legal question at issue here—whether the CWA categorically excludes releases of pollutants to groundwater from coverage under the Act—without drawing a distinction between isolated groundwater and groundwater with a direct hydrologic connection to jurisdictional surface waters. Viewed through this legal lens, the statements discussed below in section (A) are highly relevant, and supportive of the interpretation of the statute explained in this Interpretive Statement.

A selection of these prior statements identified by commenters are summarized below. Many commenters observed that lack of consistent and comprehensive direction from EPA on this issue has led to inconsistent interpretation across the country and has created uncertainty for regulated entities and the public. Even where the Agency stated an interpretation, the Agency has not issued regulations or guidance focused clearly on this issue. Thus, courts have attempted to fill this void, but have issued conflicting decisions about whether these releases are covered by the CWA. EPA's adoption of a precise position on this issue and thorough explanation of the reasons why the Agency's position is the best, if not the only, reading of the CWA will provide certainty to EPA staff, state permitting authorities, and regulated entities as to how EPA interprets the statute.

A. Commenters' Citation of Examples of Prior Agency Statements Indicating Discharges to Groundwater Are Outside the Scope of the NPDES Program

In addressing EPA's request for comment on potential clarification of the Agency's prior statements, commenters pointed to certain instances in which the Agency stated that discharges to groundwater are not subject to the CWA, without any qualification. For example, in a 1973 EPA Office of General Counsel memorandum, EPA considered whether certain discharges to wells are subject to the NPDES program and stated that ''[u]nder § 502(12) the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters (or the contiguous zone or the ocean). Discharges into ground waters are not included.'' Memorandum from the U.S. EPA Acting Deputy Gen. Counsel to the U.S. EPA Region IX Reg'l Counsel 2–3 (Dec. 13, 1973). The Agency did not include any language indicating that, at that time, it viewed groundwaters as distinguishable based on their connection to jurisdictional surface waters. Notably, this memorandum was issued close-in-time to the passage of the CWA amendments creating the NPDES program and reflects the Agency's initial view of the statute's text, which has not been amended in

pertinent part since that time. *See also Ground Water Pollution from Subsurface Excavations,* EPA–430/9–73–012 at 131–35 (1973) (EPA report explaining that subsurface excavations, *e.g.,* lagoons, pits, basins, etc., used to store or dispose of pollutants can contaminate groundwater and that contamination can reach surface waters, without mentioning regulation under NPDES as one of several identified methods to address this contamination).

Commenters also pointed out that, in its brief in *Kelley on behalf of Michigan* v. *United States,* the United States argued that discharges to groundwater, *per se,* are excluded from the CWA, and applied that view to discharges to groundwater with a direct hydrologic connection to jurisdictional surface waters. 618 F. Supp. 1103 (W.D. Mich. 1985). In that case, Michigan alleged that certain toxic chemicals were released into the ground at a U.S. Coast Guard facility, that the chemicals contaminated the groundwater underlying the facility, and that the plume of contamination migrated and was discharged to a jurisdictional surface water. In its brief, the United States argued that ''Michigan cannot make these claims under the Clean Water Act since the Act does not regulate pollutant discharges onto soil or into underlying ground water.'' U.S. Mem. In Supp. of Rule 12(b) Mot. & In The Alternative for Summ. J. at 5, *Kelley on behalf of Michigan* v. *United States,* No. G83–630, 618 F. Supp. 1103 (W.D. Mich. 1985).

Commenters also pointed to a policy document issued during the Clinton administration which explicitly stated that it was unclear whether the CWA regulated discharges to groundwater with a direct hydrologic connection to jurisdictional surface water. President Clinton's Clean Water Initiative sought to update the CWA and stated that it was ''presently unclear whether a discharge to the ground or to ground water that rapidly moves into surface water through a 'direct hydrologic connection' between the point of discharge and the surface water is subject to NPDES regulation.'' *President Clinton's Clean Water Initiative* at 104, EPA 800–R–94–001 (Feb. 1994). To address this, EPA suggested that the ''CWA should be amended to . . . [c]onfirm and clarify that a point source discharge to ground or to ground water that has a direct hydrological connection with surface waters is subject to regulation as a NPDES point source discharge . . . .'' *Id.* at 105; *see also* EPA 100–R–93–001 at 1–27, *Final Comprehensive State Ground Water Protection Guidance* (Dec. 1992) (stating that ''[w]hile a number of States have incorporated ground water discharges into their NPDES permits and pretreatment requirements, there is no national requirement to do so'').

Commenters also cited to instances in permitting proceedings where EPA indicated that NPDES permits are not required for discharges to groundwater, without also referring to the direct hydrologic connection theory. In a response to comments document on an NPDES pesticide general permit, EPA explained that one commenter requested that the permit ensure that discharges do not affect groundwater. EPA, *Response to Public Comments, EPA NPDES Pesticide General Permit* at xxii (Oct. 31, 2011). EPA responded and clarified that ''the Clean Water Act's NPDES program, under which EPA issued the [pesticide general permit], is for the control of discharges to waters of the United States. Generally, discharges to groundwater are not regulated under the NPDES program; rather, discharges to groundwater are regulated under Safe Drinking Water Act along with any additional protections that may be incorporated in FIFRA regulations.'' *Id.* EPA did not qualify this statement with any discussion of discharges to groundwater with a direct hydrologic connection to surface water. *See also* EPA, Fact Sheet, Draft General Permits for Stormwater Discharges Systems from Small Municipal Separate Sewer Systems in Massachusetts at 18 (Sept. 30, 2014) (''NPDES permits are applicable for point source discharges to waters of the U.S.; discharges to groundwater are not addressed in the NPDES program and as such are not addressed by this permit.'').

Finally, commenters also noted that EPA has not comprehensively explained its previous interpretation in a key document that permit writers and regulated entities frequently look to for guidance on the NPDES program. EPA's NPDES Permit Writers' Manual (NPDES Manual) describes the statutory and regulatory framework of the NPDES program and examines technical considerations for developing NPDES permits. U.S. EPA, NPDES Permit Writers' Manual vii (2010). While the NPDES Manual is designed as a comprehensive reference on the program for permit writers, it only briefly mentions EPA's prior interpretation:

> The CWA does not give EPA the authority to regulate ground water quality through NPDES permits. If a discharge of pollutants to ground water reaches waters of the United States, however, it could be a discharge to the surface water (albeit indirectly via a direct hydrological connection, *i.e.,* the ground water) that needs an NPDES permit.

Id. at 1–7. The NPDES Manual does not elaborate on this statement or provide guidance on how this interpretation should be implemented.

B. Commenters' Citation of Examples of Prior Agency Statements Indicating Discharges to Groundwater With a Direct Hydrologic Connection to Surface Water are Subject to NPDES Requirements

As described in the February 2018 **Federal Register** notice soliciting public comment on this issue, EPA has articulated its previous position that discharges to groundwater with a direct hydrologic connection to jurisdictional surface waters are subject to the CWA. 83 FR at 7127 (''EPA has previously stated that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements.''). Commenters noted that the Agency has, in several public documents, including rulemakings, permits, letters, and briefs filed on EPA's behalf by the Department of Justice, indicated that NPDES permits are required for discharges to groundwater that have a direct hydrologic connection to jurisdictional surface waters. *See, e.g., id.* (listing Agency statements in several rulemaking preambles); Federal Appellees' Response Brief at 48, *Greater Yellowstone Coal.* v. *Lewis,* No. 09–35729, 628 F.3d 1143 (9th Cir. 2010) (''Groundwater is not directly regulated by the Clean Water Act . . . . Nonetheless, EPA has consistently interpreted the Act to cover discharges into groundwater that have a direct hydrologic connection to surface water.''); Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID–G–01–0000, 62 FR 20,178 (1997) (''[T]he Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater . . . the permit requirements . . . are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection.''); EPA, Memorandum from Director, Office of Solid Waste to Waste Management Division Directors (1995) (''In addition, such groundwater discharges are subject

to CWA jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges, and thus are subject to the NPDES permitting requirements.''); EPA, *In the Matter of Bethlehem Steel Corp,* UIC Appeal Nos. 85–8 & 86–13 (1989) (EPA ''declines to exercise CWA jurisdiction over injection wells (except those that inject into ground water with a physically and temporally direct hydrologic connection to surface water).''). However, each of these statements is included in preambles to rules or in permits where the complex jurisdictional issue of releases of pollutants to groundwater were not the central focus. In other words, these statements were collateral to the central issues addressed in the documents in which they are included.

Commenters highlighted one preamble—to a proposed rule that applied to only one category of dischargers—in which EPA discussed its prior interpretation in some detail. In a proposed rule revising the NPDES permit requirements and effluent limitation guidelines for CAFOs, EPA proposed national requirements for certain CAFOs to address potential discharges to jurisdictional surface waters via groundwater that has a direct hydrologic connection to jurisdictional surface waters. 66 FR 2960 (Jan. 12, 2001). In the preamble to this proposed rule, EPA explained its interpretation of the Act as applying to these types of discharges. *Id.* at 3015–20. Notably, EPA did not engage in a detailed analysis of the Act's text, structure, and legislative history in the 2001 preamble that has now led the Agency to the position articulated in this Interpretive Statement. Moreover, EPA *did not finalize* these proposed requirements for certain CAFOs and explained in the preamble to the final rule that ''the factors affecting whether such discharges are occurring . . . are so variable from site to site that a national technology-based standard is inappropriate.'' 68 FR 7176, 7216 (Feb. 12, 2003).[3]

C. Rationale for the Agency's Rejection of Commenters' Alternative Interpretations of the CWA

Commenters to EPA's February 2018 **Federal Register** notice offered extensive legal arguments both supporting the Agency's previous direct hydrologic connection theory, and as a basis for rejecting that theory. Some commenters recommending the Agency retain the direct hydrologic connection theory cited to the purpose of the statute and the definition of ''discharge of a pollutant'' as requiring that the Agency construe the statute as covering releases of pollutants to groundwater that reach jurisdictional surface waters through a direct hydrologic connection. They argued that the definition of ''discharge of a pollutant'' is broad, and asks only whether the pollutant travels from a point source to a jurisdictional surface water; if so, a NPDES permit is required. Commenters in favor of the Agency's rejection of the direct hydrologic connection theory asserted that the theory is atextual and inconsistent with the overall statutory scheme and legislative history of the Act. Some of these commenters offered an alternative theory of jurisdiction that limits the scope of the CWA to discharges of a pollutant from a point source or series of point sources that carry the pollutant directly into the water of the United States. In other words, they asserted that pollution must pass through an unbroken chain of point sources for a ''discharge of a pollutant'' to have occurred, sometimes referred to as the ''terminal point source'' theory. The Agency's position articulated herein differs from both the direct hydrologic connection theory and the terminal point source theory, as explained below. EPA believes its reading of the statute—which is based on the statute as a whole and not a single definition viewed in isolation—is most consistent with Congress's intent. It is also carefully tailored to the specific issue of releases of pollutants to groundwater which has generated confusion among courts, states, regulated entities, and the public.

Many environmental organizations that commented on EPA's February 2018 **Federal Register** notice urged the Agency to retain the direct hydrologic connection theory articulated in prior Agency statements. The Agency notes that it is maintaining several elements of that position—that groundwater is not a water of the United States and that groundwater is not a point source. The Agency's brief before the Ninth Circuit in the *County of Maui* proceeding stated that it ''[did] not contend that groundwater is a point source, nor [did it] contend that groundwater is a water of the United States regulated by the Clean Water Act.'' Brief for the United States as Amicus Curiae at 2, *Cty. Of Maui,* No. 15–17447, 886 F.3d. 737.

EPA's interpretation here departs from the position the Agency took in the *County of Maui* amicus brief on the application of the definition of ''discharge of a pollutant'' to releases of pollutants into groundwater. The amicus brief, as well as the commenters urging the Agency to retain the direct hydrologic connection theory, failed to take into account Congress's unique treatment of groundwater in the CWA when interpreting the definition of discharge of a pollutant. The Agency's previous interpretation that a release of a pollutant from a point source to groundwater that is conveyed to jurisdictional surface waters could be the functional equivalent of a release to jurisdictional surface waters thus was premised on viewing releases of pollutants to groundwater through the NPDES point source paradigm rather than viewing such releases in light of Congress's specific approach to groundwater under the CWA.

In arguing that the direct hydrologic connection theory is consistent with the Act, the Agency's *County of Maui* amicus brief, like some commenters, recognized that Congress drew a line between regulation of discharges to groundwater and regulation of discharges to jurisdictional surface water. EPA's amicus brief asserted that *Maui* ''emphatically is not a case about the regulation of groundwater'' and ''[i]nstead it is about the regulation of discharges of pollutants to waters of the United States.'' Brief for the United States as Amicus Curiae at 21. However, this approach takes insufficient account of the explicit treatment of groundwater under the CWA, as reflected in the statute's text, structure, and legislative history. In the Agency's view, releases to groundwater should not be distinguished based on the connection (or lack thereof) between groundwater and jurisdictional surface waters. The text, a holistic analysis of the statute, and the legislative history indicate that Congress's intent was to categorically exclude groundwater from coverage of the permitting provisions of the Act and to leave regulation of groundwater to the states, irrespective of the type of groundwater formation and whether it allows for discharge to jurisdictional surface waters or the directness of such a conveyance. The direct hydrologic connection theory upsets the careful balance that Congress struck between the states and the federal government by pushing a category of pollutant discharges from the state-regulated paradigm to the point source, federally controlled, program.

The *County of Maui* amicus brief, and some commenters urging that EPA

[3] In reviewing this regulation, the Second Circuit did note that NPDES authorities still had the power to impose groundwater related requirements on a case-by-case basis. *Waterkeeper Alliance* v. *EPA,* 399 F.3d 486, 514 & n. 26, 515 (2d Cir. 2005).

retain the direct hydrologic connection theory, also erred by improperly equating releases of pollutants to groundwater with releases of pollutants from a point source to surface water that occur above ground. The statute and its legislative history indicate that Congress intended for all discharges to groundwater to be left to state regulation and control, ending any potential for federal permitting obligations once the pollutant enters groundwater, regardless of any future contribution of any modicum of pollutants to jurisdictional surface waters. Thus, the statute does not support analogizing pollutants discharged from a point source to groundwater that migrate to jurisdictional surface water to ''discharges of pollutant[s] [that] have moved from a point source to navigable waters over the surface of the ground or by some other means.'' Brief for the United States as Amicus Curiae at 14, *Cty. Of Maui,* No. 15–17447, 886 F.3d. 737.

As the Act's legislative history in particular demonstrates, Congress recognized the complex and highly-localized nature of releases to groundwater, that additional research and understanding of the interactions between surface and groundwater are needed, and determined that states, rather than EPA, are best positioned to regulate such releases. 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. EPA and authorized states have exercised that judgment on a case-by-case basis.[4] It is unnecessary to posit a categorical rule with respect to fact patterns such as those described in footnote 4 in this Interpretive Statement because, as explained above, the statute categorically excludes releases to and from groundwater from the permitting requirements of the Act irrespective of the directness of the hydrological connection.[5]

Finally, the *County of Maui* amicus brief and some commenters improperly rely on the broad goal of the Act to justify applying the definition of ''discharge of a pollutant''—which exclusively addresses point source discharges to navigable, ocean, and contiguous zone waters—to releases of pollutants to groundwater. The brief argues that reading the statute as excluding discharges from a point source to groundwater ''would allow dischargers to avoid responsibility simply by discharging pollutants from a point source into jurisdictional surface waters through any means that was not direct.'' Brief for the United States as Amicus Curiae at 20. This position fails to give sufficient weight to the structure and legislative history of the statute indicating that Congress intended in the CWA to leave regulation of all releases of pollutants to groundwater to states, in pursuit of the overall objective of the statute. In addition, views about the general purpose of the Act should not override Congress's evident intent not to regulate discharges to groundwater of any kind. As the Supreme Court has explained, ''the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations.'' *Rapanos* v. *United States,* 547 U.S. 715, 752 (2006) (plurality op.). Further, excluding these releases from the scope of the NPDES program does not equate to no protection for ground and surface waters; rather, as described further below, states will continue to exercise their authority over these waters as will other federal programs.

Some commenters placed significance on a statement in the government's *County of Maui* amicus brief that the direct hydrologic connection theory was the Agency's ''longstanding position.'' Brief for the United States as Amicus Curiae at 5. However, as the full suite of public comments reveal, there have in fact been a range of prior statements by the Agency, some of which align with this Interpretive Statement, that the Agency has now considered in its analysis for the first time. Lack of consistent and comprehensive direction from EPA on this issue has led to inconsistent interpretation across the country and has created uncertainty for regulated entities. Even where the Agency has stated an interpretation, the Agency has not issued regulations nor formal guidance focused on and explaining the basis for the position. As noted above, this Interpretive Statement contains the Agency's most comprehensive analysis of the CWA's text, structure, legislative history and judicial decisions that has been lacking in prior Agency statements on this issue. In so doing, today's statement establishes a firm legal foundation for regulatory decisions by EPA and states administering CWA programs and clear guidance for the courts.

Some commenters to EPA's February 2018 **Federal Register** notice highlighted certain factual scenarios, such as movement of groundwater through a sub-surface lava tube or karst network that may resemble formations which courts have found to be point sources. *See* Nat'l Groundwater Assoc. Comments at 2 (describing certain groundwater formations, such as ''lava tube openings, cave or conduit openings (including karst conduit networks), or other geologic features'' that ''function as natural pipelines capable of transporting water, effluents, and

[4] For example, in the 2012 criminal case against Robert Armstrong and RCA Oil and Gas LLC, the indictment states that the defendant ''using a backhoe, breached the wall of the reservoir causing the wastewater to flow into Rockcamp Run.'' *United States* v. *Armstrong,* No. 2:12–cr–243, ECF–1, at *4 (S.D. Ohio 2013). In the 2012 criminal case against Chamness Technology Inc., Attachment A to the Plea Agreement states that a hose from a lagoon to a rotating water irrigator became unhooked and was observed ''discharging dark, foamy, and odiferous liquid into a wooded draw which flowed downward into the Palestine Creek.'' *United States* v. *Chamness Tech., Inc.,* No. 4:14–cr–149, ECF–8–1, at *2 (S.D. Iowa 2013). In the 2014 criminal case against Freedom Industries, the Stipulation of Facts in the Plea Agreement states that the chemical at issue leaked from a tank, ''breached containment, including a dike wall, ran down the riverbank and discharged into the Elk River at two discernible, confined and discrete channels or fissures.'' *United States* v. *Freedom Industries, Inc.,* No. 2:14–cr–275, ECF–9, at *23–*24 (S.D. W.Va. 2016). EPA's regulations for concentrated animal feeding operations (CAFOs) prohibit discharges from manure storage lagoons unless the lagoon is properly designed and the discharge is the result of a 24-hour, 25-year storm. *See* 40 CFR part 412. EPA has taken action against CAFOs with discharges that do not satisfy these requirements. *See United States* v. *Meadowvale Dairy,* No. 5:16-cv-4016, ECF–2, at *10 (N.D. Iowa 2017) (Complaint alleging that an ''inspection at Meadowvale North . . . observed manure laden process wastewater flowing from the northern portion of [the basin] into Unnamed Tributary East'').

[5] The Agency recognizes that the Sixth Circuit recently adopted and applied a rationale similar to the terminal point source theory. In *Kentucky Waterways Alliance,* the Sixth Circuit rejected environmental groups' argument that coal ash ponds that released pollutants into groundwater which flowed through a karst network to a jurisdictional surface water constituted a discharge of a pollutant under the statute. 905 F.3d 925 (6th Cir. 2018). The environmental groups argued that the releases required a NPDES permit, relying on both the direct hydrologic connection theory, which the court rejected as contrary to the text and structure of the statute, and, in the alternative, asserting that the discharge of coal ash pollutants from the karst formation was itself a point source discharge. On the latter claim, the court determined that neither groundwater itself, nor groundwater flowing through a karst network, is a point source. *Id.* at 932–33. The court recognized that groundwater ''may indeed be a 'conveyance,' '' but concluded that ''karst . . . is neither discernible, discrete, nor confined.'' *Id.* at 933. Application of the Agency's interpretation of the Act described herein—that all releases from a point source to groundwater that reach a jurisdictional surface water are, as a legal matter, categorically outside of the NPDES program—leads to the same result as the Sixth Circuit, but based on a different rationale. Nothing in the *Kentucky Waterwaters Alliance* decision would preclude application of the Agency's interpretation within the Sixth Circuit.

contaminants from one point to another point and behave similarly to manmade pipes conveying fluids''). In accordance with EPA's interpretation of the statute, because releases of pollutants from a point source to groundwater are categorically excluded from the scope of the NPDES program, even if those pollutants reach jurisdictional surface waters, it is immaterial whether pollutants subsequently travel through groundwater in a manner resembling point source discharges. EPA's position is that, in accordance with the best, if not the only, interpretation of the statute, releases to groundwater are not subject to the point source analysis, *i.e.,* the CWA Section 301(a) prohibition, because the statute does not cover such releases. Accordingly, groundwater cannot be deemed a point source.

Given the indications in both the text of the statute as well as the legislative history that Congress intended to categorically leave regulation of groundwater to the states, these factual distinctions are of no legal significance. Applying the commenters' theory that releases to groundwater are excluded because the physical characteristics of groundwater are dissimilar to what some courts have found to be point sources is unnecessary. The numerous provisions in the Act linking groundwater to nonpoint source pollution, and the absence of discussion of groundwater in any of the regulatory sections of the CWA, provide ample support that in establishing the NPDES program Congress intended to leave regulation of *all* releases of pollutants to groundwater, akin to nonpoint source pollution, to the states.[6]

V. Case Law

Over the 46-year history of the CWA, numerous courts have grappled with the question that EPA addresses with this interpretation. Many courts, including the Fifth, Sixth, and Seventh Circuit Courts of Appeals, have looked to both the language of the Act and the legislative history and determined that the Act excludes from its regulatory requirements all pollutant discharges to groundwater, regardless of whether that groundwater is hydrologically connected to jurisdictional surface waters. Other courts, including the Fourth and Ninth Circuit Courts of Appeals, have cited the broad, protective goals of the Act, and applied in isolation the definition of ''discharge of a pollutant'' to releases of pollutants from point sources to groundwater that migrate to jurisdictional surface waters. Upon this premise, these courts have then found that, upon meeting the courts' respective tests for assessing the connectedness between the groundwater and jurisdictional surface waters, such releases are subject to NPDES requirements. The Agency believes that these interpretations departed from the text and history of the CWA, and finds the decisions of the Fifth and Seventh Circuit more persuasive and true to Congress's intent in enacting the statute.

The decisions of other circuits which have taken a different approach than the Fourth and Ninth Circuit—taking a holistic view of the statute and accounting for the legislative history—are informative. In the 1977 *Exxon* v. *Train* decision, the Fifth Circuit conducted an extensive analysis of the text, structure, and legislative history of the statute, and held that the Act did not give EPA authority to regulate certain releases of pollutants into groundwater. There, EPA had asserted authority to require NPDES permits for subsurface disposal into deep wells where an entity already had a permit for surface discharge. 554 F.2d at 1319. The Agency did not argue that a permit was required because disposal was an addition of a pollutant to ''navigable waters,'' *id.* at 1318 n.17, but instead that its authority was premised on the presence of an existing jurisdictional surface water discharge, *id.* at 1320. In analyzing the question of EPA's authority over deep well disposal, the court noted that ''EPA has not argued that the wastes disposed of into wells here do, or might, 'migrate' from groundwaters back into surface waters that concededly are within its regulatory jurisdiction,'' and thus, the court ''express[ed] no opinion on what the result would be if that were the state of facts.'' *Id.* at 1312 n.1.

However, in holding that EPA's assertion of authority was unsupported by the text and legislative history of the statute, the court made two observations that are relevant to the broader question of regulation of any discharges to groundwater. First, that the court's construction was true ''to Congress' intention not to interfere with existing state controls over groundwater'' generally, given the complex, state-specific nature of groundwater regulation. And second, that the legislative history of the Act gives not ''the slightest hint that any Member thought the bill would grant the Administrator any power to regulate deep-well disposal *or any other form* of groundwater pollution.'' *Id.* at 1329 (emphasis added).

In *Rice* v. *Harken Exploration Co.,* the Fifth Circuit addressed a factual scenario where the plaintiff's Oil Pollution Act (OPA) claim was premised on pollutant discharges to groundwater migrating to and polluting jurisdictional surface waters. In analyzing the merits of that claim, the court relied on *Exxon* to determine whether the OPA's requirements governing discharges to ''navigable waters of the United States'' apply to discharges to groundwater that reach such surface waters. There, the plaintiffs alleged that groundwater under their land was contaminated by pollutants discharged by Harken Exploration's oil and gas operations, and that those pollutants seeped from the groundwater into several bodies of surface water, in violation of the OPA. *Rice* v. *Harken Exploration Co.,* 250 F.3d 264, 265–66, 270 (5th Cir. 2001).

Due to the lack of case law construing the term ''navigable waters of the United States'' in the OPA context, the court's analysis focused on cases construing the scope of the CWA, given the court's view that the use of the term ''navigable waters'' in both statute was analogous. *Id.* at 267–68 (''The legislative history of the OPA and the textually identical definitions of 'navigable waters' in the OPA and the CWA strongly indicate that Congress generally intended the term 'navigable waters' to have the same meaning in both the OPA and the CWA.''). The court recognized that ''[i]n *Exxon,* we held that the legislative history of the CWA belied any intent to impose direct federal control over any phase of pollution of subsurface waters.'' *Id.* at 269. However, acknowledging that *Exxon* addressed the specific question of CWA regulation of deep-well disposal, the court explained that ''[t]his Court has not yet decided whether discharges into groundwater that migrate into protected surface waters are covered'' under the CWA or the OPA. *Id.* at 271. Relying on its CWA analysis in *Exxon,* and the analogous absence of any indication that Congress intended to regulate any type of groundwater under the OPA, the Fifth Circuit held that ''a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater'' was outside the scope of the OPA in order ''to respect Congress's decision to leave the

[6] While not the conclusion reached herein, some courts have resolved these issues by deeming releases of pollutants that have seeped into groundwater and subsequently reached surface waters to be nonpoint source pollution. *See Sierra Club* v. *El Paso Gold Mines, Inc.,* 421 F.3d 1133, 1141 n. 4 (10th Cir. 2005) (''Groundwater seepage that travels through fractured rock would be nonpoint source pollution which is not subject to NPDES permitting.''); *Penn Environment* v. *PPG Indus., Inc.,* 964 F. Supp. 2d 429, 455–56 (W.D. Pa. 2013) (''[A] discharge occurring through the migration of groundwater and soil runoff . . . represents 'nonpoint source' pollution.'').

regulation of groundwater to the States.'' *Id.* at 272.

In *Village of Oconomowoc Lake* v. *Dayton Hudson Corporation,* the Seventh Circuit squarely addressed the issue of point source discharges that reach jurisdictional surface waters through groundwater, and concluded that ''[n]either the Clean Water Act nor the EPA's definition [of waters of the United States] asserts authority over ground waters, just because these may be hydrologically connected with surface waters.'' 24 F.3d at 965. In that case, a municipality in Wisconsin filed a CWA citizen suit claiming that a NPDES permit was required for a waste retention pond at a Target Stores distribution center, due to potential seepage of waste into groundwater, which could reach jurisdictional surface waters. *Id.* at 963, 965.

In analyzing the facts before it, the Seventh Circuit explicitly recognized the possibility that ''water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the 'waters of the United States.' '' *Id.* at 965. The court also recognized, however, that ''the Clean Water Act does not attempt to assert national power to the fullest,'' and intentionally does not apply to all waters. *Id.* Based on the text of the statute and the same compelling legislative history analyzed by the Fifth Circuit and discussed above, the court concluded that ''[t]he omission of ground waters from regulations is not an oversight,'' as ''Congress elected to leave the subject [of groundwater regulation] to state law[.]'' *Id.* Thus, there was no cognizable CWA claim based on discharges to ground water that may reach jurisdictional surface waters. *Id.*

Most recently, the Sixth Circuit concluded, in two related cases addressing pollutants from coal ash ponds that seeped into groundwater that subsequently reached jurisdictional surface waters, that the NPDES permitting requirements do not apply to releases to groundwater. In *Kentucky Waterways Alliance* v. *Kentucky Utilities Co.,* the Sixth Circuit held that the ''text and statutory context of the CWA'' make clear that the statute ''does not extend to reach this form of pollution.'' 905 F.3d at 933. In *Tennessee Clean Water Network* v. *TVA,* the court reversed a district court decision adopting the direct hydrologic theory, finding that ''any alleged leakages into the groundwater are not a violation of the CWA.'' 905 F.3d at 444. The Sixth Circuit recognized the statute's broad goal of protecting the Nation's waters, but held that this goal cannot be pursued at all costs ''because the CWA precludes federal regulation over non-navigable-water pollution and over nonpoint-source-pollution.'' *Ky. Waterways Alliance,* 905 F.3d at 937. The court explained:

> It is true that Congress sought to protect navigable waters with the CWA . . . But it also imposed several textual limitations on the means used to reach that goal. Had it wished to do so, Congress could have prohibited *all* unpermitted discharges of *all* pollutants to *all* waters. But it did not go so far. Instead, Congress chose to prohibit only the discharge of pollutants to ''*navigable* waters from any *point source*.''

Id.; see also, e.g., Prairie Rivers Network v. *Dynegy Midwest Generation, LLC,* No. 18–CV 2148, slip op. at 14 (C.D. Ill. Nov. 14, 2018) (Applying the Seventh Circuit's decision in *Village of Oconomowoc* to hold that ''[i]f the discharge is made into groundwater, and the pollutants somehow later find their way to navigable surface waters via a discrete hydrological connection, the CWA is still not implicated, because the offending discharge was made into groundwater, which is not subject to the CWA''); *Cape Fear River Watch* v. *Duke Energy Progress,* 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) (''Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters.''); *Umatilla,* 962 F. Supp. at 1318 (observing that ''the CWA's NPDES program *should* apply to groundwater to adequately protect surface water,'' but concluding that ''the law as written, as intended by Congress, and as applied in Oregon for over two decades does not regulate even hydrologically-connected groundwater''); *26 Crown Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.,* No. 3:15-cv-1439, 2017 U.S. Dist. LEXIS 106989, *24 (D. Conn. 2017) (noting that ''if the Clean Water Act were to apply as a routine matter to the discharge of pollution onto the ground that ends up seeping into the ground water, then Congress's purpose to limit the scope of the Clean Water Act [to point source discharges] would be easily thwarted.'').

In contrast, the circuit and district court decisions concluding that certain releases to groundwater *are* subject to NPDES requirement have often left unaddressed the text, structure, and legislative history of the Act pointing to Congress's intent to exclude all discharges to groundwater from the NPDES program. The Fourth Circuit recently held that point source releases to groundwater that reach jurisdictional surface waters require a NPDES program in certain instances, adopting EPA's historical direct hydrological connection approach. *Kinder Morgan,* 887 F.3d at 652. In that decision, the court did not address any of the legislative history discussed herein, nor did the court acknowledge or address the decisions of the Fifth or Seventh Circuit.

Rather, in analyzing whether gasoline from a ruptured underground pipeline that undisputedly leached from groundwater into navigable waters required a NPDES permit, the Fourth Circuit framed its inquiry as only whether, first, the discharge was from a point source, *id.* at 649–50, and second, whether there was a direct hydrological connection between the groundwater and jurisdictional surface water, a fact-specific determination. *Id.* at 651. The court cited to the broad purpose of the Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, asserting that ''the statute established a regime of zero tolerance for unpermitted discharges of pollutants.'' *Id.* at 652. The court reasoned that ''if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters.'' *Id.* The court ultimately concluded that ''an alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA.'' *Id.* at 652. In reaching this holding,[7] however, the court failed to consider Congress's intent, evident from the text, structure, and legislative history of the Act, to treat groundwater and nonpoint source discharges differently under the Act, by leaving their regulation to states.[8]

[7] One judge dissented from the panel's holding, finding that there was no Clean Water Act violation because the discharge of pollutants from the pipe had been repaired, and that the continued migration through groundwater was not a ''discharge of a pollutant'' under the Act. *Kinder Morgan,* 887 F.3d at 662–63 (Floyd, J. dissenting). The dissent recognized that ''[t]his kind of migration of pollutants through the natural movements of groundwater amounts to nonpoint source pollution,'' and that, ''[w]hile there is no doubt this kind of nonpoint source pollution affects the quality [of] navigable waters, Congress deliberately chose not to place nonpoint source pollution within the CWA's reach.'' *Id.*

[8] On September 12, 2018, in *Sierra Club* v. *Virginia Electric Power Co.,* the Fourth Circuit applied its decision in *Kinder Morgan* to another fact pattern involving the addition of pollutants to jurisdictional surface waters through groundwater.

Applying a similar analysis, in its decision in *County of Maui,* the Ninth Circuit explained:

> We assume without deciding that groundwater here is neither a point source nor a navigable water under the CWA. Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach where a point source discharge is conveyed to a navigable water through groundwater.

Cty. of Maui, 886 F.3d at 746 n.2 (citations omitted). The court also rejected the direct hydrological connection theory espoused by the United States as amicus, as ''it reads two words into the CWA ('direct' and 'hydrological') that are not there.'' *Id.* at n.3. Then, despite the court's claim of ''fidelity to the statute,'' it ultimately determined, without any grounding in the statute's text, that point source discharges to groundwater that reach jurisdictional surface water are subject to NPDES permitting requirements where they are fairly traceable back to the point source and more than *de minimis. Id.* at 749. The court also left ''for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA,'' thus expanding the scope of the Act to cover any release of pollutants to groundwater that reaches a jurisdictional surface water. *Id.*

The Ninth Circuit stated that its decision was consistent with *Rice* and *Village of Oconomowoc,* despite reaching the opposite conclusion about the proper scope of the Act. The court's basis for claiming consistency with *Rice* was that the Fifth Circuit, in its analysis of the facts in that case, ''required some evidence of a link between discharges and contamination of navigable waters.'' *Id.* With respect to the *Village of Oconomowoc* decision, the Ninth Circuit asserted that the Seventh Circuit ''only considered allegations of a 'potential [rather than an actual] connection between ground waters and surface waters,' '' while the connection in its own case was undisputed. *Id.* However, these are factual distinctions that should not affect the ultimate outcome. While it is accurate that in both *Rice* and *Village of Oconomowoc,* the courts looked to whether a connection to jurisdictional surface waters existed, this factual inquiry and observation does not alter the courts' ultimate interpretations of the CWA and OPA, and their recognition of the line Congress drew with respect to pollutant discharges to groundwater.

In *Rice,* the court observed that ''[i]n light of Congress's decision not to regulate ground waters under the CWA/OPA,'' it was ''reluctant to construe the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.' '' *Rice,* 250 F.3d at 272. However, while the court's reluctance was stated in relation to the facts in that case, its ultimate interpretation was based on Congress's intent: ''[w]e *must* construe the OPA in such a way as to respect Congress's decision to leave the regulation of groundwater to the States.'' *Id.* (emphasis added). Similarly, though the facts before the Seventh Circuit addressed only a potential hydrologic connection between groundwater and jurisdictional surface water, the court's determination was unequivocal: ''Neither the Clean Water Act nor the EPA's definition [of navigable waters] asserts authority over ground waters, just because these may be hydrologically connected with surface waters.'' 24 F.3d at 965.

The tests adopted by the Ninth and Fourth Circuits and certain district courts create a confusing patchwork of judicial interpretations, which the Agency has concluded lack support in the text, structure, and legislative history of the Act. As the Supreme Court has explained, ''an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress,'' and ''in [its] anxiety to effectuate the congressional purpose,'' an agency ''must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'' *See FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000) (internal citations omitted). While the Ninth Circuit adopted a ''fairly traceable'' standard, rejecting EPA's prior ''direct hydrologic connection'' test, and the Fourth Circuit imposed a 1,000 foot distance limitation, other courts have adopted other variations on when groundwater is sufficiently connected to jurisdictional surface water to require a NPDES permit. *See, e.g., Tenn. Clean Water Network* v. *TVA,* 273 F. Supp. 3d 775, 827 (M.D. Tenn. 2017) (holding that ''[a]s long as a connection [between groundwater and surface water] is shown to be real, direct, and immediate, there is no statutory, constitutional, or policy reason to require that every twist and turn of its path be precisely traced''), *rev'd* 905 F.3d 436 (6th Cir. 2018); *McClellan Ecological Seepage Situation* v. *Weinberger,* 707 F. Supp. 1182, 1196 (E.D. Cal. 1998) (discharges to groundwater are subject to CWA regulation if ''the groundwater is *naturally connected* to surface waters'' (emphasis added)); *vacated on other grounds, McClellan Ecological Seepage Situation* v. *Perry,* 47 F.3d 325 (9th Cir. 1995).

These decisions expand the Act's coverage beyond what Congress envisioned, potentially sweeping into the scope of the statute commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems that find their way to jurisdictional surface waters through groundwater. The interpretations adopted by the Ninth Circuit and Fourth Circuits both contravene Congress's intent to leave regulation of all releases of pollutants to groundwater to states under the CWA, and, as a practical matter, stretch the Act's carefully constructed program of regulation of point sources beyond a point that Congress would recognize. A holistic reading of the CWA leads to the conclusion that releases of pollutants to groundwater are *categorially excluded* from the NPDES program, and thus, Congress did not intend for discharges from point sources that reach jurisdictional surface waters through hydrologically connected groundwater to require a NPDES permit. It follows that neither EPA nor the courts need engage with specific factual questions of traceability via subsurface hydrogeology that are currently required by certain court decisions such as *County of Maui* and *Kinder Morgan.*

VI. Policy Considerations Supporting EPA's Interpretation

There is sufficient legal authority to address releases of pollutants to groundwater that subsequently reach jurisdictional surface waters at both the state and federal level without expanding the CWA's regulatory reach beyond what Congress envisioned. Consistent with Congress's intent in structuring the CWA, states may regulate groundwater quality in the manner best suited to their particular circumstances. This interpretation will

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In that case, the court recognized the precedent in *Kinder Morgan* that the addition of a pollutant into navigable waters via groundwater can violate Section 301(a) if the plaintiff can show a direct hydrological connection between the ground water and navigable waters. 903 F.3d 403, 409 (4th Cir. 2018). The court went on to hold that a coal-fired power plant that stored coal ash on site in a landfill and in settling ponds was not liable under CWA Section 301(a) for discharges of arsenic that leached from the coal ash into groundwater and ultimately into a nearby river because the settling ponds did not constitute ''point sources'' under the CWA. *Id.* at 411.

continue to give states primacy for regulating ubiquitous groundwater discharges from sources such as septic tanks which are known to affect jurisdictional surface water quality in some instances. Beyond state programs, three other federal statutes, the Safe Drinking Water Act (''SDWA''), the Resource Conservation and Recovery Act (''RCRA''), and the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA'') will continue to provide important protections for groundwater quality, and for surface waters impacted by releases to groundwater.

A. State Programs for Regulating Discharges to Groundwater

The CWA establishes a regulatory floor that protects the integrity of the Nation's navigable waters and provides states with broad authority to adopt laws and regulations that are more protective than the federal standards. As explained above, the Act identifies the preservation of state authority to regulate land and water resources within their borders as a primary aim of the Act and states that ''[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b). Congress also declared as a national policy that states manage the major construction grant program and implement the core permitting programs authorized by the Act, among other responsibilities. *Id.*

The Act envisions that states will take an active role in regulating discharges to waters within the state and expressly provides states with authority to regulate beyond the Act's regulatory floor. The CWA states that, except as expressly provided in the Act, nothing in the Act shall ''preclude or deny the right of any *State* . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants, or . . . any requirement respecting control or abatement of pollution; except that . . . such State or political subdivision or interstate agency may not adopt or enforce any *effluent limitation,* or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the *effluent limitation,* or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter . . . .'' *Id.* § 1370. Congress further provided that nothing in the Act shall be ''construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' *Id.*

Several commenters on the Agency's February 2018 **Federal Register** notice described state laws and regulations that prohibit or limit discharges of pollutants to groundwater. For example, the Minnesota Pollution Control Agency stated in its comments that it ''believes Minnesota has adequate authority under state law to address discharges outside the scope of the NPDES or UIC programs.'' Comments submitted by Minnesota Pollution Control Agency (May 16, 2018) (Docket ID: EPA–HQ–OW–2018–0063–0664), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0664.* MPCA further stated that ''state permits are developed to protect groundwater as a drinking water source [and] [t]hey also ensure that surface water quality standards will be met.'' *Id.* The attorneys general of West Virginia, Alabama, Arkansas, Colorado, Georgia, Kansas, Louisiana, Missouri, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Texas, and Wyoming submitted comments describing state laws that protect intrastate water, including groundwater, independent from the CWA. Comments submitted by West Virginia Attorney General, et al. (May 21, 2018) (Docket ID: EPA–HQ–OW–2018–0063–0497), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0497.*

States that have not enacted state law-based programs that comprehensively regulate discharges to groundwater continue to have wide latitude to do so under state law and the CWA. *See* 33 U.S.C. 1251(b), 1370. EPA's position that the CWA does not regulate releases of pollutants to groundwater, regardless of a connection to jurisdictional surface waters, does not preclude states from regulating these releases under state law. To the extent that there may be state laws that limit a state's ability to regulate beyond the federal floor, states remain free to modify these laws as they deem appropriate to regulate discharges in the state.

B. In Other Federal Statutes, Such as SDWA, RCRA, and CERCLA, Congress Explicitly Envisioned a Federal Role in Regulating Groundwater Quality

In addition to state programs for regulating discharges into groundwater, several federal statutes explicitly address regulation of groundwater quality. Unlike in the CWA paradigm, where the federal role is one of providing support to states to advance state regulatory programs, in the statutes below, Congress provided for a clear federal role. Review of the explicit provisions addressing discharges to groundwater in these statutes makes clear that Congress can and does directly address the issue of groundwater quality in specific federal programs. It is also equally clear that Congress tailored those programs to the concerns over specific practices posing an endangerment to groundwater, while also deferring to state regulation even in those programs. Together these statutes, along with the state programs described above, form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters.

1. SDWA

SDWA, enacted in 1974, two years after the CWA, contains provisions specifically aimed at preventing certain types of groundwater contamination. This statute is one of the vehicles through which Congress deliberately addressed the discharge of pollutants into groundwater, while also recognizing the important role for states to play in regulating groundwater pollution.

Pursuant to Section 1421 of SDWA, EPA has established requirements for state programs to regulate underground injection of fluids. *See* 42 U.S.C. 300h. Specifically, under that section Congress required EPA to establish minimum requirements for effective state programs to prevent underground injection which endangers drinking water sources, defined under SDWA to mean underground water which supplies or can reasonably be expected to supply any public water system. The underground injection control (''UIC'') program under SDWA contains regulatory requirements for four classes of wells; bans Class IV (shallow hazardous waste) wells; and by rule authorizes most Class V wells. The rule authorizing Class V wells requires certain reporting, and requires that the wells are operated in ways that do not cause movement of fluid that could endanger underground sources of drinking water, and that the wells are properly closed when they are no longer being used. *See* 40 CFR 144.24, 82.

The SDWA UIC program is one clearly designed and tailored by Congress to address and protect groundwater quality. While SDWA is targeted to a specific type of possible contamination, *i.e.,* discharges through certain types of well injection that may impact nearby drinking water sources,

consistent with Congressional deference to states in the area of groundwater regulation generally, it also is established primarily as a state program. The statute expressly requires EPA to permit or provide for ''consideration of varying geologic, hydrological, or historical conditions in different States and different areas within a State,'' and to avoid, to the extent feasible, requirements that would unnecessarily disrupt state injection programs. 42 U.S.C. 300h(b)(3).

2. RCRA

Like SDWA, in RCRA Congress chose to include provisions for federal regulation of discharges into groundwater, to protect groundwater quality from the discharge of solid and hazardous wastes. RCRA was enacted to ''reduce the generation of hazardous waste and to insure the proper treatment, storage, and disposal of that waste which is nonetheless generated, so as to minimize the present and future threat to human health and the environment.'' *Meghrig* v. *KFC W, Inc.,* 516 U.S. 479, 483 (1996). RCRA defines ''disposal'' as the ''discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, *including groundwater.*'' 42 U.S.C. 6903(3) (emphasis added).

RCRA has several provisions that expressly address groundwater monitoring and remediation at hazardous waste treatment, storage, and disposal (''TSD'') facilities. RCRA and EPA's implementing regulations explicitly require groundwater monitoring for specified categories of hazardous waste units. *See id.* § 6924(o), (p); *see also* 40 CFR 264.90–264.99. In addition, the owner and/or operator of a RCRA permitted hazardous waste facility is required to perform corrective action for all releases of hazardous waste or constituents from any solid waste management unit, including releases to groundwater. 42 U.S.C. 6924(u), (v); 40 CFR 264.100–264.101. Facilities that have or should have had RCRA ''interim status'' (*i.e.,* authorization to operate a TSD without a permit), and some facilities that had interim status, are subject to corrective action orders under RCRA section 3008(h). 42 U.S.C. 6928(h). Both RCRA permits and 3008(h) orders can thus address releases resulting in contaminated groundwater.

While these requirements may not apply to hazardous waste ''generators'' or to regulated units covered by specific exclusions or exemptions from groundwater monitoring, *see, e.g.,* 40 CFR 264.90, 264.101(d), RCRA also provides EPA with authority to address waste management activities of generators, transporters, owners or operators of treatment, storage, or disposal facilities, past or present, that ''may present an imminent and substantial endangerment to health or the environment,'' 42 U.S.C. 6973(a). The Agency has used this authority to address releases of contaminants into groundwater.

RCRA non-hazardous waste facilities are generally subject to EPA RCRA standards in 40 CFR 257 or section 258. These rules vary by unit type, and several categories (with exceptions) are subject to specific groundwater monitoring and corrective action requirements. These categories include facilities that manage coal combustion residuals in surface impoundments and landfills, as well as municipal solid waste landfill units. *See* 42 U.S.C. 6949a(c); 40 CFR 257.90–257.100 (coal combustion residuals surface impoundments and landfills); *id.* §§ 258.50–258.58 (municipal solid waste landfill units).

EPA's RCRA regulations addressing coal combustion residuals (''CCR'') were promulgated in 2015, with the impact of these facilities to groundwater as a critical consideration underlying the regulations. *See* 80 FR 21302, 21326 (Apr. 17, 2015) (Recognizing that ''approximately 63 percent of currently operating surface impoundments and landfills are unlined, and thus more prone to leach contaminants into groundwater.''). This rule specifically addresses ''groundwater contamination from the improper management of CCR in landfills and surface impoundments,'' and ''reflect[s] Congressional intent that protection of groundwater be a prime objective of any new solid waste regulations.'' *Id.* at 21396. To accomplish these objectives, the rule establishes specific requirements for groundwater monitoring and remediation. 40 CFR 257.90–257.98. If monitoring detects a statistically significant concentration of certain constituents in groundwater above background levels, the facility is required to undertake further, ''targeted'' monitoring to determine whether concentrations of specific contaminants exceed the rule's groundwater protection standards (which, for most contaminants, are based on EPA-established standards for drinking water). *Id.* §§ 257.98, 257.95. If contamination exceeding these levels is detected, corrective action is required. *Id.* §§ 257.96–257.97. The remedy selected as a result of the corrective action must be protective of human health and the environment, control the sources of the releases to reduce or eliminate further releases, remove from the environment as much of the contamination as is feasible, and otherwise comply with all applicable RCRA requirements. *Id.* § 257.97(b).

RCRA also contains corrective action requirements for releases of regulated substances from underground storage tanks (''USTs''). Releases from USTs can occur due to corrosion of tank material, faulty installation, or inadequate operating and maintenance procedures. Owners and/or operators of USTs must report releases and take corrective action in response, including releases to groundwater. *See* 42 U.S.C. 6991b(c); 40 CFR part 280, subparts E & F. The term ''release'' in relation to USTs is defined in RCRA to mean ''any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water or subsurface soils.'' 42 U.S.C. 6991(8). Unlike the CWA NPDES provisions, this provision in RCRA explicitly defines a release as being to groundwater as well as to surface water; where Congress intended for a provision to relate to both, it said so clearly.

3. CERCLA

CERCLA, also known as ''Superfund,'' is yet another example of Congress choosing to specifically address releases of hazardous substances to groundwater, which could reach and impact surface waters. CERCLA provides EPA with a number of tools to address releases of hazardous substances, pollutants and contaminants, specifically where a ''hazardous substance is released or there is a substantial threat of such a release into the environment'' or where there is a release or substantial threat of release of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. 42 U.S.C. 9604(a)(1). CERCLA defines ''environment'' broadly, to include ''ground water,'' ''subsurface strata,'' as well as ''surface water.'' *Id.* § 9601(8). Thus, under CERCLA, EPA has clear authority to address releases into *both* groundwater and surface waters.

EPA's CERCLA authorities provide a variety of mechanisms for EPA to address hazardous substances in groundwater, through the ability to address releases or threatened releases of hazardous substances to the environment, issue orders, and recover costs of clean-up. *See* 42 U.S.C. 9604,

9606, 9607, 9621. In CERCLA, Congress explicitly provided that in remedial actions, the clean-up level for groundwater must be that ''which at least attains Maximum Contaminant Level Goals established under [SDWA] and water quality criteria established under . . . the Clean Water Act'' where such goals or criteria are relevant and appropriate under the circumstances of the release or potential release.'' *Id.* § 9621(d)(2)(A). EPA's National Contingency Plan regulations implementing CERCLA also provide that ''EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site.'' 40 CFR 300.430(a)(1)(iii)(F). The determination of a ''beneficial use'' of groundwater is tied to state and local classifications (unless the state classification is less stringent than the EPA classification scheme), evidencing EPA's recognition of the state-specific nature of groundwater regulation. *See* Preamble to the National Contingency Plan, 55 FR 8733 (Mar. 8, 1990).

Finally, as the Agency has recognized, ''CERCLA cleanup levels are designed to address all reasonably anticipated routes of exposure that may pose an actual or potential risk to human health or the environment.'' EPA Office of Solid Waste and Emergency Response Directive 9283.1–33 at 9. These routes of exposure include ''groundwaters as a source of contamination to other media'' including intrusion into surface waters. *Id.* In determining clean-up standards, CERCLA and the National Contingency Plan require the identification of ''applicable or relevant and appropriate requirements,'' 42 U.S.C. 9621(d); 40 CFR 300.400(g), which, for remedying discharges to groundwater that reaching surface water, could include CWA requirements that are specifically addressed at the receiving surface water. *See* Directive 9283.1–33 at 8 (''Where groundwaters may impact surface water quality, water quality criteria under sections 304 or 303 of the Clean Water Act, may be relevant and appropriate standards[.]''). Thus, both CERCLA and EPA's regulations and guidance clearly address and provide for remediation of not only discharges to groundwater, but specifically impacts to surface water from polluted groundwater.

Dated: April 12, 2019.

David P. Ross,

Assistant Administrator, Office of Water.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 710

[EPA–HQ–OPPT–2018–0320; FRL–9992–05]

RIN 2070–AK21

Procedures for Review of CBI Claims for the Identity of Chemicals on the TSCA Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The 2016 amendments to the Toxic Substances Control Act (TSCA) require EPA to establish a plan to review all confidential business information (CBI) claims for specific chemical identity asserted in a Notice of Activity (NOA) Form A. EPA is proposing a rule to establish the plan, including the procedures for substantiating and reviewing these claims.

DATES: Comments must be received on or before June 24, 2019.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2018–0320, by one of the following methods.

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Scott M. Sherlock, Environmental Assistance Division (Mail code 7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8257; email address: *sherlock.scott@epa.gov*.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be affected by this action if you reported a confidential chemical substance under the TSCA Inventory Notification (Active-Inactive) Requirements rule (hereinafter ''Active-Inactive rule'') (Ref. 1) (40 CFR part 710, subpart B) through a Notice of Activity (NOA) Form A (Ref. 2) and sought to maintain an existing CBI claim for a specific chemical identity. The following North American Industrial Classification System (NAICS) codes are not intended to be exhaustive, but rather provides a guide to help readers determine whether this action may apply to them:

- Chemical manufacturing or processing (NAICS code 325).
- Petroleum and Coal Products Manufacturing (NAICS code 324).

The discussion in Unit III.A. and the proposed regulatory text describe in more detail the circumstances in which entities might be subject to this proposed action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Note that TSCA's statutory definition of ''manufacture'' includes importing. Accordingly, the regulatory definition of ''manufacture'' for this rule includes importation. Since ''manufacture'' is itself defined at 40 CFR 710.3(d) and at TSCA section 3(9) (15 U.S.C. 2602(9)) to include ''import,'' it is clear that importers are a subset of manufacturers. All references to manufacturing in this document should be understood to also encompass importing. Where EPA's intent is to specifically refer to domestic manufacturing or importing (both activities constitute ''manufacture''), this rule will do so expressly.

B. What is the agency's authority for taking this action?

EPA is proposing this rule pursuant to the authority in TSCA section 8(b), 15 U.S.C. 2607(b). See also the discussion in Unit II.B.

In addition, the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* requires Federal agencies to manage information resources to reduce information collection burdens on the public (including through the use of automated collection techniques or other forms of information technology);