To: Bodine, Susan[bodine.susan@epa.gov]
From: Smith, Brooks M.
Sent: Wed 2/21/2018 3:21:17 PM
Subject: report language
CWA report language.pdf

Just so you don't think I've lost my mind on CWA, UIC and RCRA basics, here's the version that I worked on and that reflects the latest thinking on possible report language. I'd welcome your input on substance and strategy for addressing the issue in this manner. Best! Brooks

Brooks M. Smith
Direct: 804.697.1414
brooks.smith@troutman.com

troutman sanders
1001 Haxall Point, Suite 1500
Richmond, VA 23219
troutman.com

This e-mail message (and any attachments) from Troutman Sanders LLP may contain legally privileged and confidential information solely for the use of the intended recipient. If you received this message in error, please delete the message and notify the sender. Any unauthorized reading, distribution, copying, or other use of this message (and attachments) is strictly prohibited.

Proposed Congressional report language:

Since its enactment in 1972, the Clean Water Act (CWA) has regulated impacts to navigable surface waters only, and Congress specifically rejected amendments that would have extended regulatory jurisdiction to groundwater. Congress' intent has always been that the regulation of groundwater pollution was to be left to the CWA's nonpoint source programs and other federal and state laws. For instance, releases from solid waste units are to be regulated at a federal level by the Resource Conservation and Recovery Act (RCRA); yet, recent court decisions have imposed CWA liability based on a theory of hydrological connection between groundwater and surface water. To rectify this situation, the Committee directs the Administrator to promulgate a rule reflecting Congress' intent and clarifying that (1) groundwater releases from solid waste units are regulated under RCRA and are not considered point sources under the CWA, and (2) releases of pollutants to and through groundwater into navigable waters via a hydrological or traceable connection to groundwater are not subject to regulation as point sources under the CWA.

Potential regulatory approach:

- Explain there is no overlap between RCRA and the CWA and that the new rule is intended to harmonize the two statutes with respect to releases to groundwater from CCR units.
- Explain that CCR units are not point sources, thus the new rule is not excluding a source otherwise regulated.
- 40 C.F.R. 257.50 (Scope and purpose)—releases to groundwater from CCR units are exclusively regulated under the CCR rule.
- 40 C.F.R. Part 122 (EPA Administered Permit Programs: The National Pollutant Discharge Elimination System)—if you are subject to the CCR rule for impacts to groundwater from CCR unit releases, you are not subject to this part for such releases, irrespective of any hydrological connection (direct or otherwise) or traceability to surface waters (*but* outfall where conveyance adds pollutants to navigable waters continues to be subject to Part 122).

To: Bodine, Susan[bodine.susan@epa.gov]
From: Smith, Brooks M.
Sent: Wed 2/21/2018 3:43:23 PM
Subject: RE: report language
CWA report language.pdf

I clearly need a metadata crash-course. Clean version attached. Best! Brooks

Brooks M. Smith
troutman sanders
Direct: 804.697.1414
brooks.smith@troutman.com

From: Bodine, Susan [mailto:bodine.susan@epa.gov]
Sent: Wednesday, February 21, 2018 10:30 AM
To: Smith, Brooks M. <Brooks.Smith@troutmansanders.com>
Subject: RE: report language

The document lists Michael Kafka as the author.

From: Smith, Brooks M. [mailto:Brooks.Smith@troutmansanders.com]
Sent: Wednesday, February 21, 2018 10:21 AM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: report language

Just so you don't think I've lost my mind on CWA, UIC and RCRA basics, here's the version that I worked on and that reflects the latest thinking on possible report language. I'd welcome your input on substance and strategy for addressing the issue in this manner. Best! Brooks

Brooks M. Smith
Direct: 804.697.1414

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To: Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; OECA Office Directors and Deputy Directors[OECA_Office_Directors_and_Deputy_Directors@epa.gov]
Cc: Branning, Hannah[Branning.Hannah@epa.gov]
From: Shiffman, Cari
Sent: Tue 2/13/2018 12:16:10 AM
Subject: FW: Weekly Report for 2.9.2018
Weekly Report 02.09.2018 final.pdf

Here are some highlights from the Weekly Reports to the AO. Please review the attachment for more information on these and other items.

-

Region 1:

Ex. 5 - Deliberative Process

Region 2:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Region 3:

Ex. 5 - Deliberative Process

Region 4:

Ex. 5 - Deliberative Process

Region 5:

Ex. 5 - Deliberative Process

Region 6:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Region 7:

Ex. 5 - Deliberative Process

Region 8:

Ex. 5 - Deliberative Process

Region 9:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

-

OARM:

Ex. 5 - Deliberative Process

OCFO:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

OW:

Ex. 5 - Deliberative Process

Thanks,

Cari Shiffman, Chief of Staff

U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

Office: (202) 564-2898 | Mobile: Ex. 6 - Personal Privacy

Begin forwarded message:

From: "Carroll, Carly" <Carroll.Carly@epa.gov>
Date: February 9, 2018 at 12:16:41 PM EST
Subject: Weekly Report for 2.9.2018

To: Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; OECA Office Directors and Deputy Directors[OECA_Office_Directors_and_Deputy_Directors@epa.gov]
Cc: Branning, Hannah[Branning.Hannah@epa.gov]
From: Shiffman, Cari
Sent: Tue 2/20/2018 11:08:58 PM
Subject: FW: Weekly Report 02.16.2016
Weekly Report template 0216.2018 final.pdf

Here are some highlights from the Weekly Reports to the AO. Please review the attachment for more information on these and other items.

Region 1:

Ex. 5 - Deliberative Process

Region 2:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

-

Region 3:

Ex. 5 - Deliberative Process

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Region 4:

Ex. 5 - Deliberative Process

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Region 5:

Ex. 5 - Deliberative Process

Region 6:

Ex. 5 - Deliberative Process

Region 7:

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Region 8:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Region 9:

Ex. 5 - Deliberative Process

Region 10:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

OCFO:

Ex. 5 - Deliberative Process

OLEM:

Ex. 5 - Deliberative Process

ORD:

Ex. 5 - Deliberative Process

OW:

Ex. 5 - Deliberative Process

-

Thanks,

Cari Shiffman, Chief of Staff

U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

Office: (202) 564-2898 | Mobile: Ex. 6 - Personal Privacy

From: Burton, Tamika
Sent: Friday, February 16, 2018 3:05 PM
Subject: Weekly Report 02.16.2016

Good Afternoon,

Please see the attached report for the week ending 02.16.2016

Tamika Burton

Staff Assistant to the Deputy Administrator

Immediate Office of the Administrator

MC 1104A Room 3412 WJC North

(202) 564-4771 (d)

Ex. 6 - Personal Privacy

burton.tamika@epa.gov

To: Bowman, Liz[Bowman.Liz@epa.gov]; Block, Molly[block.molly@epa.gov]; Konkus, John[konkus.john@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]
Cc: Dennis, Allison[Dennis.Allison@epa.gov]; McMichael, Nate[McMichael.Nate@epa.gov]
From: Drinkard, Andrea
Sent: Fri 2/16/2018 7:52:51 PM
Subject: FW: OW Weekly Report -- OPA Edition
OW Weekly Report_021518.docx
ATT00001.htm

Hi all—

Happy Friday! Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Hope everyone has a great long weekend.

-Andrea-

Begin forwarded message:

From: "Ross, David P" <ross.davidp@epa.gov>
Date: February 15, 2018 at 6:06:07 PM EST
To: Weekly Report Group <Weekly_Report_Group@epa.gov>
Cc: "Campbell, Ann" <Campbell.Ann@epa.gov>, "Best-Wong, Benita" <Best-Wong.Benita@epa.gov>, "Forsgren, Lee" <Forsgren.Lee@epa.gov>
Subject: OW Weekly Report

All,

Here is the OW weekly report.

Dave

OW Weekly Report
February 15, 2018

Hot Issues

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Hydrologic Connection Request for Comment: This week, the agency sent to the Federal Register a notice requesting comment on the Agency's previous statements interpreting the CWA that discharges of pollutants from point sources to jurisdictional surface waters that occur via groundwater or other subsurface flow that has a direct hydrologic connection to the surface water are subject to CWA regulation. We are requesting comments on whether the Agency should consider clarification or revision of this interpretation and if so, comments on how clarification or revision should be provided. The comment period will remain open for 90 days after it is posted in the Federal Register.

Upcoming Public Events

Deliberative Process / Ex. 5

To: Bowman, Liz[Bowman.Liz@epa.gov]; Block, Molly[block.molly@epa.gov]; Abboud, Michael[abboud.michael@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]
Cc: Dennis, Allison[Dennis.Allison@epa.gov]
From: Drinkard, Andrea
Sent: Fri 2/9/2018 9:12:19 PM
Subject: FW: OW Weekly Report OPA Edition
OW Weekly Report_020818.docx

Hi OPA,

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Thanks so much and I hope everyone has a great weekend.

-Andrea-

From: Ross, David P
Sent: Thursday, February 08, 2018 7:42 PM
To: Weekly Report Group <Weekly_Report_Group@epa.gov>
Cc: Forsgren, Lee <Forsgren.Lee@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: OW Weekly Report

All,

Here is OW's weekly report.

Regards,

Dave

OW Weekly Report
February 8, 2018

Hot Issues

Hydrologic Connection Request for Comment: As early as this week, OW anticipates sending forward to OP for Federal Register publication a request for input from states and stakeholders on how pollutants that are released into groundwater and flow through a direct hydrologic connection into a jurisdictional surface water should be treated under the Clean Water Act. EPA is requesting comments on whether the Agency should consider clarification or revision of previous statements and if so, comments on how that clarification or revision should be provided.

Deliberative Process / Ex. 5

To: Press[Press@epa.gov]
From: David LaRoss
Sent: Wed 2/14/2018 8:15:44 PM
Subject: Groundwater "Conduit" comments

I've been told that EPA has posted online a document soliciting public comments on whether pollution releases that travel through a "direct conduit" of groundwater to surface waters can be regulated under the CWA -- which has been the subject of many ongoing court cases, most recently in the 9th Circuit. But I can't find any active webpage on the issue. Can you send a copy of the document or the link to where it's posted?
Thanks.

To: Weekly Report Group[Weekly_Report_Group@epa.gov]
Cc: Forsgren, Lee[Forsgren.Lee@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]
From: Ross, David P
Sent: Thur 2/22/2018 11:52:07 PM
Subject: OW Weekly Report
OW Weekly Report_022218.docx

All,

Here is OW's weekly report.

Dave

OW Weekly Report
February 22, 2018

Hot Issues

Deliberative Process / Ex. 5

Upcoming Public Events

American Iron and Steel Energy and Environment Committee**:** Next week, Lee will present comments on EPA's water priorities for 2018, including the Waters of the U.S. rulemaking effort and the agency's request for comment on hydrologic connection. This meeting is closed to press.

Deliberative Process / Ex. 5

To: Dravis, Samantha[dravis.samantha@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Mark Ryan[mr@ryankuehler.com]
From: Brown, Samuel L.
Sent: Mon 12/4/2017 1:26:55 AM
Subject: Logistics | ELI Conference: EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?
Policy and Enforcement Panel Overview (ELI-ALICLE).docx

Hi Samantha, Patrick, and Mark,

I am looking forward to seeing you tomorrow afternoon, Monday, December 4. A reminder that our panel discussion is **3:00pm-4:30pm**. If possible, please try and be there by 2:45pm so we can go over a few logistical items. The event is at the Hunton & Williams DC office at 2200 Pennsylvania Avenue, NW (on Washington Circle). When you arrive, take the elevator up to the 9th Floor.

If you have any questions tomorrow, please feel free to call or text my cell at Ex. 6 - Personal Privacy

Thank you again for your participation in this event!

- Sam

From: Brown, Samuel L.
Sent: Sunday, November 05, 2017 8:13 PM
To: Dravis, Samantha; 'Traylor, Patrick'; 'Mark Ryan'
Subject: ELI Conference | EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?

Hi Samantha, Patrick, and Mark,

Thank you again for agreeing to participate in the ELI and ALI-CLE conference on the Clean Water Act in Washington D.C. on Monday, December 4 from 3:00pm – 4:30pm.

Attached is an overview of how I am thinking to structure our panel. The attachment includes representative moderated questions that I would suggest that I tee up for discussion. Again, the thought is no slide decks, just moderated discussion and then Q&A with the audience. I welcome your input and suggestions, in particular on the moderated questions. I welcome any subject matter that you would like to highlight or discuss. Samantha/Patrick, I understand there may be subject matter that is sensitive that you would like to not discuss, so I can tailor the conversation around any concerns that you may have.

I think it makes sense to have a short call to touch base. Does Wednesday or Friday this week work for you? Samantha/Patrick, if you have schedulers I am happy to work with them to get 30 minutes on your calendars.

Thanks so much and talk to you soon! – Sam

HUNTON & WILLIAMS **Samuel Brown**

Senior Attorney

slbrown@hunton.com
p Ex. 6 - Personal Privacy
f 415.975.3775

bio | vCard

Hunton & Williams LLP
50 California Street
Suite 1700
San Francisco, CA 94105

hunton.com

Nov. 5, 2017 (DRAFT)

EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?
Clean Water Act: Law and Regulation 2017
3:00pm – 4:30pm, Monday, December 4
Washington, D.C.

1. Panel Description.

   As the Trump Administration's EPA settles into 1200 Pennsylvania Avenue it brings a new perspective, a shift in policy focus, and a different way of doing business. This panel will draw on current and former EPA personnel to explore EPA's policy and enforcement priorities in the context of the Clean Water Act and the challenges it may face. Issues to be explored include the substantive issues beyond the "waters of the United States" rulemaking that are a priority for the Agency, any changes in the focus of EPA's enforcement priorities, and any shifts in the way the Agency is organized and functions, among other issues.

2. Moderator & Panelists.

   a. *Moderator*: Samuel Brown, Senior Attorney, Hunton & Williams, LLP, San Francisco, CA
   b. Samantha Dravis, Senior Counsel and Associate Administrator, Office of Policy, U.S. Environmental Protection Agency, Washington, D.C.
   c. Patrick Traylor, Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, Washington, D.C.
   d. Mark A. Ryan, Ryan & Kuehler PLLC, former EPA attorney, Winthrop, WA

3. Panel Format (90 minutes).

   a. S. Brown (10 minutes): introduce panelists and frame the topics of the panel.

   b. Moderated Questions on EPA Policy and Operational Priorities (15 minutes).

   c. Moderated Questions on EPA Substantive Priorities for the Office of Water (15 minutes).

   d. Moderated Questions on EPA Enforcement Priorities (30 minutes).

   e. Questions from Audience (20 minutes).

4. Representative Moderator Questions.

   a. Moderated Questions on EPA Policy and Operational Priorities (15 minutes)

      i. How does the Office of Policy fit within EPA's organizational structure?
      ii. What is the role and responsibility of the Office of Policy?

iii. Administrator Pruitt has described the Agency's key principles to include (1) the importance of process; (2) adherence to the rule of law; and (3) the applicability of cooperative federalism. Can you explain what each of those principles means and how they will be incorporated into the Agency's work, generally, and in the context of the CWA programs?

iv. In October, Administrator Pruitt signed a memorandum on "sue and settle," can you explain the intent and likely impact of this memorandum?

v. Will the October memorandum likely result in EPA litigating more challenges (and reaching a decision on the merits), as opposed to a settlement and a consent decree?

vi. There has been talk of re-organization of the Agency (*e.g.*, consolidation of EPA Regions, placement of enforcement back into the program offices, etc.); will there be any re-organization of the Agency?

b. Moderated Questions on EPA Substantive Priorities for the Office of Water (15 minutes).

i. Looking past WOTUS, what are the Agency's substantive priorities for the Office of Water? What other rulemaking will the public likely see from the Office of Water in the next year and over the course of the next 3 years?

ii. There have been public statements related to the Office of Water conducting rulemaking related to the CWA 404 permitting program (separate from the WOTUS rulemaking), what is the Agency looking to address as part of any 404 permitting rulemaking?

iii. There is significant Circuit Court litigation related to what EPA has described as the "direct hydrologic connection" theory of CWA liability. Does EPA intend to provide additional guidance, conduct rulemaking, or otherwise further address this issue?

iv. President Trump has emphasized infrastructure as a priority; will this EPA prioritize water-related infrastructure and, if yes, what are its plans for doing so?

c. Moderated Questions on EPA Enforcement Priorities (30 minutes).

i. What are EPA's CWA enforcement priorities?

ii. What enforcement metrics will OECA examine to determine if the program is a "success"?

iii. Does OECA envision the States taking a bigger role in enforcement? If yes, what types of cases will EPA focus its enforcement efforts?

iv. Does OECA intend to shift focus from the current CWA National Enforcement Initiatives (NEI) that were finalized in the prior Administration?

v. How does OECA view the future of the very mature NEI focused

ED_001667A_00002324-00002

on municipal combined and sanitary sewer systems? Will it still be a priority?

vi. Is "Next Generation Compliance" still a priority for OECA?

vii. Does OECA intend to continue to push for "mitigation" to be part of consent decrees?

viii. If existing CWA consent decrees do not align with Administrator Pruitt's key principles of (1) process; (2) rule of law; and (3) cooperative federalism, does OECA envision entertaining modifications of those consent decrees?

ED_001667A_00002324-00003

To: Dravis, Samantha[dravis.samantha@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Mark Ryan[mr@ryankuehler.com]
From: Brown, Samuel L.
Sent: Mon 11/13/2017 5:37:11 AM
Subject: RE: ELI Conference | EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?
Policy and Enforcement Panel Overview (ELI-ALICLE).docx

Hi Samantha, Patrick, and Mark,

I am following up on the email below. Does sometime this week work for you for a 30 minute call to touch base on the panel? I'll be in Georgia most of this week for work, so on EST.

Thanks!

– Sam

From: Brown, Samuel L.
Sent: Sunday, November 05, 2017 8:13 PM
To: Dravis, Samantha; 'Traylor, Patrick'; 'Mark Ryan'
Subject: ELI Conference | EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?

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may be subject matter that is sensitive that you would like to not discuss, so I can tailor the conversation around any concerns that you may have.

I think it makes sense to have a short call to touch base. Does Wednesday or Friday this week work for you? Samantha/Patrick, if you have schedulers I am happy to work with them to get 30 minutes on your calendars.

Thanks so much and talk to you soon! – Sam

HUNTON & WILLIAMS **Samuel Brown**

Senior Attorney

slbrown@hunton.com
p Ex. 6 - Personal Privacy
f 415.975.3775

bio | vCard

Hunton & Williams LLP
50 California Street
Suite 1700
San Francisco, CA 94105

hunton.com

To: Greenwalt, Sarah[greenwalt.sarah@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]
From: Bennett, Karen C.
Sent: Thur 11/16/2017 6:56:55 PM
Subject: FW: NPDES/Groundwater Information
NMA Coalition 4th Circuit Kinder Morgan Amicus Brief.pdf

Please see attached amicus brief at pages 12-19.

Karen C. Bennett

CLARK HILL PLC
1001 Pennsylvania Avenue NW, Suite 1300 South | Washington, DC 20004
202.572.8676 (Direct) | Ex. 6 - Personal Privacy | 202.552.2369 (Fax)

KBennett@ClarkHill.com | www.clarkhill.com

Environmentalists Say EPA Policies Boost Suit Seeking CWA Ash Controls

October 31, 2017

Environmentalists are invoking past EPA policies to boost their lawsuit claim that the Clean Water Act (CWA) limits coal ash pollution that travels through groundwater to protected surface waters, in order to win judicial deference for that position and arguing that such a decision would be hard for the Trump administration to avoid.

An Oct. 30 brief from Waterkeeper Alliance and 15 local or regional environmental groups says the U.S. Court of Appeals for the 4th Circuit must uphold CWA authority over ash leaks to groundwater with a "direct" connection to surface waters, in part because EPA has backed that reading of the water law and courts should defer to it. The groups hope their suit sets a precedent forcing controls on ash to avoid groundwater contamination.

"That is EPA's longstanding and consistent interpretation of the Act, articulated in multiple notice-and-comment rulemakings since 1990, applied through the issuance of permits carrying the force of law, and reiterated in numerous administrative and judicial forums. EPA's interpretation is entitled to *Chevron* deference," the brief says.

Under the *Chevron* principle, courts will defer to an agency's reading of ambiguous statutory text as long as that interpretation is reasonable. Waterkeeper and its allies, filing as *amicus* parties in the 4th Circuit case *Sierra Club v. Virginia Electric Power Company (VEPCO)*, say that even though EPA is not involved in the case, its past positions on CWA limits on groundwater releases are well-founded and deserve deference.

For instance, they cite a 1990 rule on stormwater runoff that says, "discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)."

It also quotes the 1998 iteration of the CWA general permit for construction stormwater as saying, "EPA interprets the

CWA's [National Pollutant Discharge Elimination System (NPDES)] permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection."

"EPA has stated its interpretation many times over several decades. There was no 'stealth' in doing so, given that EPA's interpretation and rationale were explained in multiple notice-and comment rulemakings and in the issuance of individual and general NDPES permits. . . . The Court should afford *Chevron* deference to EPA's well-reasoned, expert judgment because it is reasonable and consistent with the statute EPA administers," the brief says.

The environmentalist groups do not address the possibility that the Trump EPA could file its own *amicus* brief to try to reverse that position, which would undercut any attempt to win *Chevron* deference, since that principle applies only to agencies' interpretations of law rather than arguments by third parties.

EPA under the current administration has generally backed the energy sector's requests to limit the reach of the CWA, including proposing to repeal the Obama-era rule governing which waters are subject to the law's permit requirements and weighing a likely replacement that will be narrower in scope.

However, an environmental attorney says it is unlikely the court would see such a reversal as persuasive.

"It would be extremely hard for an agency with decades of repeated interpretation that matches what the courts have done and Congress' intent and the purpose of the statute to suddenly say 'we don't think so anymore,'" the attorney says.

EPA Deference

The attorney continues that if EPA were to simply express a new reading of the "point source" language in a court brief, it would not warrant deference when weighed against a history of formal rulemakings and other agency action. "If they just say it, then they really haven't reversed anything."

A reversal that goes through notice-and-comment rulemaking would carry more weight, the attorney says, but such a rulemaking would be unlikely to finish before the 4th Circuit rules in *VEPCO*.

Environmentalists in the *VEPCO* suit are urging the 4th Circuit to preserve and strengthen a district court's ruling that the power company violated the CWA when arsenic and other pollutants leaked from a coal ash disposal site its Possum Point, VA, facility into groundwater, and was then carried to surface waters.

The CWA does not govern groundwater quality directly, but Sierra Club and its allies say that when the sub-surface channels create a direct connection to surface waters, releases to that groundwater can be subject to the law's permit mandates for "point sources."

"To be clear, EPA's position -- and the position advanced here by Waterkeeper *Amici* -- is not that groundwater is a point source or a water of the United States. Rather, in certain situations groundwater may be sufficiently hydrologically connected to surface water such that the groundwater acts as a conveyance between the point source and the jurisdictional water," the brief says.

Beyond the 1990 and 1998 rules, the environmentalists argue that EPA included similar language in the proposed version of a 2003 CWA rule expanding the universe of animal feedlots subject to NPDES permits, and has used those principles in permitting decisions.

While VEPCO and its allies have argued that EPA "disavowed" that line of thinking since the final feedlot rule relied instead on case-by-case findings, Waterkeeper and its allies say that was not the case.

Rather, they note, EPA said in a 2008 rule crafted to replace the 2003 version in response to a court remand that "nothing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water."

Similarly, the brief argues that even though EPA is proposing to withdraw its 2015 CWA jurisdiction rule that allowed for consideration of groundwater connectivity in judging which discharges require permits, that regulation only noted

the agency's "longstanding interpretation" rather than adopting a new reading of the law.

"Quite obviously, the withdrawal of a rule that does nothing to 'change . . . or affect . . . [EPA's] longstanding position" also does not change or affect that position," the brief says. -- *David LaRoss* (dlaross@iwpnews.com)

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No. 17-1640

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,

Plaintiffs-Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, L.P., and
PLANTATION PIPE LINE COMPANY, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION
CASE NO. 8:16-cv-04003-HMH

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, EDISON ELECTRIC INSTITUTE, NATIONAL MINING ASSOCIATION, AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Samuel L. Brown
Hunton & Williams LLP
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slbrown@hunton.com

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Dated: September 8, 2017

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Counties
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Michael R. Shebelskie Date: September 8, 2017

Counsel for: National Association of Counties

CERTIFICATE OF SERVICE

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I certify that on September 8, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Michael R. Shebelskie
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September 8, 2017
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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National League of Cities
(name of party/amicus)

who is amicus, makes the following disclosure:
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Counsel for: National League of Cities

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Clean Water Agencies
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Michael R. Shebelskie Date: September 8, 2017

Counsel for: Nat'l Ass'n of Clean Water Agencies

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Forest & Paper Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Michael R. Shebelskie Date: September 8, 2017

Counsel for: American Forest & Paper Ass'n

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Iron and Steel Institute
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Michael R. Shebelskie Date: September 8, 2017

Counsel for: American Iron and Steel Institute

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Edison Electric Institute
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Michael R. Shebelskie Date: September 8, 2017

Counsel for: Edison Electric Institute

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Mining Association
(name of party/amicus)

who is amicus, makes the following disclosure:
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Counsel for: National Mining Association

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Utility Water Act Group
(name of party/amicus)

who is amicus, makes the following disclosure:
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S.C. Code Ann. § 48-1-10(20) 20

S.C. Code Ann. § 48-1-90(A)(1) 20

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Water Pollution Control Legislation–1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. on Pub. Works, 92nd Cong. 230 (1971) 7

FEDERAL REGISTER

55 Fed. Reg. 47,990 (Nov. 16, 1990) 14,16

56 Fed. Reg. 64,876 (Dec. 12, 1991) 15,17

66 Fed. Reg. 2960 (Jan. 12, 2001) 14,17, 24

68 Fed. Reg. 7176 (Feb. 12, 2003) 14,21

80 Fed. Reg. 37,054 (June 29, 2015) 6

82 Fed. Reg. 3633 (Jan. 12, 2017) 23

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OTHER AUTHORITIES

American Society of Civil Engineers, 2013 Report Card for America's Infrastructure, https://www.infrastructurereportcard.org/cat-item/wastewater/ 29

EPA, 2012 Guidelines for Water Reuse, EPA/600/R-12/618 (Sept. 2012), https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411 22,25

EPA, Chesapeake Bay TMDL (Dec. 29, 2010), https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document.....29

EPA, Cost Methodology Report for Beef and Dairy Animal Feeding Operations, EPA-821-R-01-019 (Jan. 2001), https://yosemite.epa.gov/ee/epa/ria.nsf/oeT/8AD19DE463D507CC85256A3B004F51D7 24

EPA, Green Infrastructure, https://www.epa.gov/green-infrastructure.....23

EPA, ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.21 (Dec. 2015) 27

EPA, NPDES Permit Writer's Manual, EPA-833-K-10-001 (Sept. 2010), https://www.epa.gov/npdes/npdes-permit-writers-manual 28

EPA, Septic Systems Overview, https://www.epa.gov/septic/septic-systems-overview 26

Irvine Ranch Water District, Natural Treatment System, http://www.irwd.com/services/natural-treatment-system 23

Ojai Basin Groundwater Management Agency, San Antonio Creek Spreading Grounds, http://obgma.com/san-antonio-creek-spreading-grounds/ 22

Orange County Water District, Water Reuse, https://www.ocwd.com/what-we-do/water-reuse/ 23

U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm 24

U.S. Department of Housing and Urban Development and U.S. Census Bureau, American Housing Survey for the United States: 2011 (Sept. 2013).....25,26

AMICI CURIAE'S INTEREST[1]

Amici curiae ("*Amici*")—National Association of Counties, National League of Cities, National Association of Clean Water Agencies, American Forest & Paper Association, American Iron and Steel Institute, Edison Electric Institute, National Mining Association, and Utility Water Act Group—represent cities, towns, counties, public clean water utilities, and a cross-section of the nation's energy, mining, manufacturing, and paper and wood products industries. *Amici's* members are subject to the Clean Water Act ("CWA" or "Act"). 33 U.S.C. §§1251 *et seq*. *Amici's* broad perspective will aid the Court understand why Appellants' arguments ignore the Act's text, framework, and legislative history. *Amici* also identify the regulatory uncertainty and costs imposed on their members, and the public broadly, under Appellants' direct hydrologic connection theory, and why the theory is unnecessary to protect water quality. *Amici* participation will assist the Court to understand why it should reject Appellants' arguments and affirm the District Court's judgment.

[1] This brief was submitted with an accompanying motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3). No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund this brief preparation or submission. Only *Amici* or their members made a monetary contribution intended to fund its preparation or submission.

ARGUMENT

I. No Unauthorized Addition of Pollutants to Navigable Waters from a Point Source Was Alleged, As Required By the Act

The CWA's prohibition against "the discharge of any pollutant" unless authorized, in relevant part, by a National Pollutant Discharge Elimination System ("NPDES") permit, 33 U.S.C. §1311(a), is limited to the addition of pollutants to navigable waters from a "point source," *id.* §1362(12), which means "any discernible, confined and discrete conveyance." *Id.* §1362(14).

Appellants alleged an unauthorized discharge occurred here because pollutants from Kinder Morgan's pipeline allegedly entered groundwater with a direct hydrologic connection to navigable waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 8:16-4003-HMH, 2017 WL 2266875, at *4, 6 (D.S.C. Apr. 20, 2017) ("*Kinder Morgan*"). While a pipeline can be a point source, the District Court correctly held Appellants must "more than merely identify a possible point source." *Id.* at *3. They must allege (and prove) "the point source added pollutants to navigable waters." *Id.* at *4.

The District Court was correct: Appellants failed to allege that *a point source* added pollutants to navigable waters. *Id.* at *4. The pipeline leaked into soil and groundwater, not navigable waters. *Id.* at *3. A direct hydrologic connection between groundwater and navigable waters does not eliminate the statutory requirement that the means by which pollutants enter navigable waters

must be a discernible, confined and discrete conveyance. *Id.* at *4. While the CWA prohibits indirect discharges from point sources, pollutants still must enter navigable waters by means of some discernible, confined and discrete conveyance.

Groundwater is not a discernible, confined and discrete conveyance. Any addition of pollutants into navigable waters from groundwater is not by means of a discernible, confined and discrete conveyance. It constitutes nonpoint source pollution properly addressed by state law and/or other CWA or federal programs. *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011) (groundwater migration is nonpoint source pollution); *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454-55 (W.D. Pa. 2013) (same); *Tri-Realty Co. v. Ursinus Coll.*, No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) (same). The District Court correctly dismissed Appellants' complaint. *Severstal*, 794 F. Supp. 2d at 620 ("There is no basis for a citizen suit for nonpoint source[s] ....").

A. The Cause of the Addition Must Be a Discernible, Confined and Discrete Conveyance

The District Court was correct that the means by which pollutants enter navigable waters must be a point source. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (the alleged point source must "convey the pollutant to 'navigable waters'"); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (point sources "act as a means" of conveying

pollutants to navigable waters); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009) (Act "requires that pollutants reach navigable waters by a 'discernible, confined and discrete conveyance"). If an intervening event causes the addition, then no discharge from the point source occurs. *Sierra Club v. BNSF Ry. Co.*, No. C 13-967-JCC, 2016 WL 6217108, at *8 (W.D. Wash. Oct. 25, 2016) ("discharges to land and [then] from land to water are not point source discharges").

Appellants' arguments would eliminate the requirement under Section 301(a) that the cause of the addition be a point source. As one court explained:

> [N]onpoint source pollution … could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through nonpoint sources to come to rest in navigable waters.

26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Control Auth., No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *8 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017). That result is contrary to the CWA's plain language. *Cordiano*, 575 F.3d at 219 ("the phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute").

To illustrate this requirement of the Act: if oil leaks onto the ground, and it subsequently rains, the conveyance of that oil by the rainwater into a navigable water does not constitute a discharge from a point source. *See Ecological Rights*

Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 508 (9th Cir. 2013) ("'most common example of nonpoint source pollution is the residue left on roadways by automobiles'") (citation omitted); *Plaza Health Labs.,* 3 F.3d at 654 n.6 ("[Sources] may be point sources when they deposit waste directly into water; … [not] when they … deposit oil in a driveway, leaving it to be washed into nearby rivers.").

Stormwater runoff and groundwater flow are indistinguishable, in this respect. *26 Crown Assocs.*, 2017 WL 2960506, at *8 ("Ground water migration is no different than surface water run-off for purpose of the 'point source' requirement."). Therefore, if oil leaks into the soil, and groundwater flow subsequently conveys the oil to navigable waters, that too is not a discharge from a point source. *E.g.*, *Tri-Realty,* 2013 WL 6164092, at *8 (oil leaked from underground storage tank not a discharge from a point source).

Importantly, when Congress wanted to establish a discharge prohibition under the CWA without requiring that pollutants enter navigable waters through a discernible, confined and discrete conveyance, it knew how to do so. CWA Section 311 prohibits the discharge of oil or hazardous substances into or upon navigable waters and adjoining shorelines. 33 U.S.C. §1321(b)(1). Congress defined "discharge" for purpose of Section 311 differently, to mean "any spilling, leaking, pumping, pouring, emitting, emptying or dumping." *Id.* §1321(a)(2),

compare, *id.* §1362(12), (16). Congress left enforcement of such "discharges" exclusively to governmental agencies. *Severstal*, 794 F. Supp. 2d at 618 ("claims brought pursuant to [CWA Section 311] are not authorized under the CWA citizen suit provision").

B. No Direct Discharge Occurred Under the Facts Alleged

The District Court correctly held no direct discharge into navigable waters was alleged. *Kinder Morgan*, 2017 WL 2266875, at *4. Rather, the pipeline leaked into soil, and then groundwater,[2] which eventually carried some of the leaked material to navigable water. As the District Court wrote:

> To find that the pipeline directly discharged pollutants into navigable waters under the facts alleged would result in the CWA applying to every discharge into the soil and groundwater no matter its location.

Id. See also BNSF Ry. Co., 2016 WL 6217108, at *8.

Appellants ignore the Act's text by arguing a leak into groundwater with a direct hydrologic connection to navigable waters is, effectively, a direct discharge from a point source. Appellants' theory is contrary to the Act's point source requirement, its framework and legislative history. The Court should reject it.

Congress decided not to extend the CWA prohibition to pollutants entering groundwater, despite *knowing* that polluted groundwater may enter navigable waters. In fact, the U.S. Environmental Protection Agency ("EPA") asked

[2] Groundwater is not navigable water. 80 Fed. Reg. 37,054, 37,073 (June 29, 2015) (EPA has "never interpreted [groundwater] to be a [navigable water].").

Congress for authority over groundwater and explicitly told Congress the authority was necessary because *polluted groundwater impacts surface waters*, as the then-EPA administrator explained:

> 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) (emphases added).

Despite being aware that pollutants in groundwater enter navigable waters, the Senate and the House rejected proposals to extend the CWA's reach. *E.g.,* S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739 ("Several bills pending before the [Senate] Committee provided authority to establish Federally approved standards for groundwaters. … Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.").

Representative Aspin introduced the rejected House amendment, arguing it was necessary because "[i]f 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) (emphasis added). *See also Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977) (legislative history discussion). This removes any doubt Congress considered and rejected addressing the addition of pollutants to navigable waters through groundwater.

It is impossible to regulate the addition of pollutants to surface waters via groundwater without in practice regulating groundwater and nonpoint source pollution, which Congress rejected. *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) (CWA "contains no mechanism for *direct* federal regulation of nonpoint source pollution"). That legislative decision must be respected.

While protecting the Nation's waters is unquestionably an objective of the CWA, it was not Congress' only goal and cannot justify rewriting the Act. *See* 33 U.S.C. §1251(a)(7), (b); *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2185 (2014) (rejection of interpretation based on statute's objective not grounded in the statute's text and structure); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2d Cir. 2001) ("[T]he CWA balances a welter of consistent and inconsistent goals … congressional intent is not served by

elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer.").

Contrary to Appellants' argument, the "overwhelming majority" of courts have *not* held that the addition of pollutants into hydrologically connected groundwater constitutes a discharge from a point source under Section 301(a). Op.Br. at 9, 26, 31. Many of the cases Appellants cite do not examine the question. Others examine the separate question whether surface water features are navigable waters themselves. *E.g.*, *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (whether pond connected to river via groundwater was navigable water); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (whether gullies and arroyos that flowed into streams were navigable waters).

Others find "CWA jurisdiction," but like Appellants, mistakenly relied on policy preferences about how the Act *should* be constructed, not what it actually says. *E.g., Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319 (S.D. Iowa 1997) ("because [of] the CWA's goal"). *See also, Plaza Health Labs.*, 3 F.3d at 647 (whether a source is a point source "may not be resolved merely by simple reference to [the CWA's] admirable goal[s]"); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific

provision."). A court cannot rewrite the Act to comport with its notion of how Congress ought to have written it. The courts' "judicial task is only to determine the meaning of the statute as passed by Congress, not to question the wisdom of the provision enacted." *Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 347 (4th Cir. 2008).

C. No Indirect Discharge Occurred Under the Facts Alleged

The type of "indirect" discharge *Rapanos v. United States*, 547 U.S. 715, 743 (2006) recognized cannot salvage Appellants' complaint. *Rapanos* recognized that pollutants must still enter navigable waters by means of a discernible, confined and discrete conveyance to come within Section 301(a), and groundwater is the antithesis of such a conveyance.

As *Rapanos* recognized, the release of pollutants from the a point source (that is the original source of the pollutants) may require an NPDES permit under certain circumstances even if it is *not* directly into navigable waters. However, those circumstances exist only if "the pollutants discharged from a point source … pass 'through conveyances' in between" the source of the pollutants and the navigable water. *Id.* at 743 (each case cited in *Rapanos* concerned an indirect discharge of pollutants to navigable waters through one or more subsequent discrete conveyances).

That is not what allegedly happened here. Appellants do not allege groundwater is a point source, but since groundwater is the only means in this case by which pollutants could enter navigable waters, their indirect discharge argument necessarily depends on groundwater being a discrete conveyance. *26 Crown Assocs.*, 2017 WL 2960506, at *7 (allegation "necessarily relies on an assumption that ground water must function as a 'point source'").

Groundwater is not a point source. EPA agrees.[3] It is "basic science" that groundwater is diffuse. *Id.* at *8. Groundwater is the opposite of a "discernible, confined and discrete" conveyance. *Id.* ("Absent exceptional proof of something akin to a mythical Styx-like subterranean river, a diffuse medium like ground water for the passive migration of pollutants to navigable waters cannot constitute a 'point source' ...."); *Tri-Realty Co.*, 2013 WL 6164092, at *8 ("[G]iven its natural physical attributes, groundwater [cannot] fairly be described as a 'discernible, confined and discrete conveyance.'").

Because groundwater is not a discernible, confined and discrete conveyance, its transportation of pollutants spilled into the soil from the pipeline does not give rise to an "indirect" discharge.

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[3] Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 2, *Haw. Wildlife Fund v. Cty. of Maui*, No. 15-17447 (9th Cir. May 31, 2016), ECF No. 40 ("the United States does not contend that groundwater is a point source").

II. EPA Statements on Direct Hydrologic Connection Merit No Deference

Appellants rely on EPA statements in 1991, 1998 and 2001 to argue a leak of pollutants into groundwater with a direct hydrologic connection to navigable waters is a direct discharge from a point source. Op.Br. at 34-36. Appellants' reliance is misplaced. EPA's interpretation is inconsistent with the Act, conflicts with prior EPA interpretations, is based on inapposite case law, and is not the product of a reasoned analysis. Deference is inappropriate.

A. These Statements Cannot Get *Chevron* Deference

The CWA is unambiguous—there must be an addition of pollutants to navigable water "from [a] point source." 33 U.S.C. §§1311(a), 1362(12). Since Congress has spoken directly to the "precise question at issue," the Act's text controls. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Moreover, only agency interpretations produced through formal adjudication or notice-and-comment rulemaking receive *Chevron* deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *accord*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001) (statement must "carry[] the force of law" to receive *Chevron* deference).

The following history demonstrates why EPA's statements lack the force of law.

1. EPA's Contemporaneous Interpretation

- The modern CWA was enacted in 1972. FederalWater Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). At the time, EPA interpreted Act as not prohibiting the addition of pollutants into groundwater, even groundwater hydrologically connected to navigable water. As discussed above, that is *why* EPA asked Congress (unsuccessfully) to amend the legislation. *See Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 847 (6th Cir. 1994) (Nelson, J., concurring) (rejection of an EPA interpretation that was "diametrically opposed" to contemporaneous interpretation).
- That remained the United States' interpretation for nearly two decades, including when it was sued under the Act. In *Kelley v. United States*, 618 F. Supp. 1103, 1105-06 (W.D. Mich. 1985), "toxic chemicals were released into the ground … [that] contaminated the groundwater … [and] naturally discharg[ed] into the Grand Traverse Bay—an undisputed navigable body of water." The United States denied liability, arguing the Act does not prohibit pollutants that enter navigable waters from spills into the soil and groundwater. *See* Memorandum in Support of Defendants' Rule 12(b) Motion and in the Alternative for Summary Judgment at 5, *Kelley v. United States*, No. G-83-630 (W.D. Mich. July 12, 1984) (Exhibit A). The United States argued this had

consistently been EPA's position. *Id.* at 21-22. The court agreed with the United States:

> Congress did not intend the [CWA] to extend federal regulatory and enforcement authority over groundwater contamination [even when pollutants in the groundwater migrate to navigable waters]. Rather, such authority was to be left to the states.

Kelley, 618 F. Supp. at 1107. *See also Kelley v. United States*, No. 1:79-cv-10199, 1980 U.S. Dist. LEXIS 17772, at *3 (E.D. Mich. Oct. 28, 1980) (similar CWA citizen suit based on spill that soaked into the ground and migrated through groundwater to navigable waters; as recounted by the district court, the United States argued that the migration of pollutants through groundwater to navigable waters is not a discharge from a point source).

2. Subsequent Collateral Comments

- EPA stated a contrary position for the first time in 1990, in response to comments in an unrelated rulemaking on stormwater permitting. 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990). This collateral reference in a final rule preamble was not subject to public comment.
- EPA did not propose to rely on its new position in rulemaking until over ten years later, in 2001. 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001). The proposal generated such criticism, however, that in the final rule EPA *rejected* the proposed option that relied on its new position. 68 Fed. Reg. 7176, 7216 (Feb. 12, 2003); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 514-15 (2d Cir. 2005)

(recounting rejection of proposal without addressing the merits of EPA's new position).

- EPA ***never*** again proposed to incorporate its new position into a regulation. EPA instead episodically inserted statements as collateral references in unrelated actions. *E.g.*, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (Tribal water quality standards).

To give *Chevron* deference to EPA's new position in light of this history would be to endorse stealth agency rulemaking. Courts should not give *Chevron* deference to interpretations in rule preambles on unrelated subject matter, placed where the public could not know about—let alone challenge—the agency's interpretation. *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 966 (7th Cir. 1994) ("Collateral reference to a problem [in an EPA preamble] is not a satisfactory substitute for focused attention in rule-making or adjudication.").

B. These Statements Cannot Get *Skidmore* Deference[4]

While agency interpretations may have the "power to persuade" even if not entitled to *Chevron*-deference, they must be the product of a careful, thorough, and consistent analysis. *Mead*, 533 U.S. at 221, 227-28; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). EPA's position here falls short.

[4] Appellants have not argued *Skidmore* applies, but *Amici* want to be clear why no deference applies.

EPA's first statement on its new position, in 1990, is merely *ipse dixit*. EPA did not seek to ground its new position in the Act's text, structure, or legislative history. *See* 55 Fed. Reg. at 47,997; *United States v. ConAgra, Inc.*, No. CV 96-0134-S-LMB, 1997 WL 33545777, at *6 (D. Idaho Dec. 31, 1997) ("I do not believe that EPA's [1990] parenthetical comment in its discussion of storm water permit application regulations, without more, should be accorded the power to reshape the CWA's plain language and almost twentyfive years of [implementation] ....").

In 1990, EPA justified its position solely on two inapposite court decisions. 55 Fed. Reg. at 47,997. In the first, *Exxon*, the court explicitly said it was ***not*** deciding the issue. The court wrote:

> 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. ... ***We mean to express no opinion on what the result would be if that were the state of facts***.

554 F.2d at 1312 n.1 (emphasis added).

In the second, *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995), the court did not find a direct hydrologic connection results in a discharge from a point source. It examined the different question whether groundwater can be a navigable water because of its "effect" on surface water. *Id.* at 1196; *see also*

Martin v. Kan. Bd. of Regents, No. 90-2265-O, 1991 WL 33602, at *5 n.6 (D. Kan. Feb. 19, 1991) (citing *McClellan* for incorrect proposition that "[g]round water … that is naturally connected to surface waters constitute 'navigable waters' under the Act").

It was over a decade later, as part of its 2001 proposal, that EPA attempted to formulate a more detailed explanation of its new position, but as noted above, in the final rule EPA rejected the proposed option. And even there, EPA's discussion relied on its passing reference in 1990 and the inapposite case law, or their progeny. 66 Fed. Reg. at 3017. EPA did not explain how its new position comported with the Act's requirement that the means of pollutants entering navigable waters must be from a discernible, confined and discrete conveyance. EPA merely stated that an addition via groundwater is "effectively" from a point source. 56 Fed. Reg. at 64,892. That interpretation directly conflicts with the Act's requirement that an addition *in fact* be from a point source.

Further, EPA did not explain in 2001 how its new position aligned with the balance Congress struck between discharges from point sources and nonpoint source pollution and groundwater. *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003) (statutory interpretation should not disrupt careful balance struck by Congress). EPA also failed to reconcile Congress' concern that "uniform federal regulation [is] virtually impossible" when the regulation of the addition of

pollutants is dependent upon site-specific factors, which Appellants acknowledge is the case with the direct hydrologic connection theory. *See Shanty Town*, 843 F.2d at 791; Op.Br. at 36.

Eschewing the Act's text, EPA relied on the Act's objective of protecting water quality, failing altogether to recognize that achieving that objective must be tempered by that text and the Act's other goals and policies, including the role of states in protecting water quality. *Rodriguez v. United States*, 480 U.S. 522, 525–526 (1987) (per curiam) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law").

EPA also ignored the legislative history and its failed request to obtain authority from Congress to regulate the addition of pollutants into groundwater *because* they can enter navigable waters. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (failure of proposed amendment "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

Also, critically, EPA ignored its original, contrary understanding of the Act. Where an agency has changed its interpretation, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA has never acknowledged its about-face after nearly

two decades of consistent application—much less attempt to explain it. EPA's position does not warrant *Skidmore* deference.

III. The Direct Hydrologic Connection Theory, If Adopted, Would Have Significant Adverse Consequences to *Amici* and the Public

The direct hydrologic connection theory is unnecessary to protect water quality and would sow regulatory uncertainty, produce disincentives for critical infrastructure, and impose significant costs on *Amici* and the public.

A. The Direct Hydrologic Connection Theory Is Unnecessary to Protect Navigable Waters

Congress foresaw that an NPDES permit is not always the solution. 26 *Crown Assocs.*, 2017 WL 2960506, at *6 (CWA does not prohibit "every act that involves the noxious pollution of clean water."). There are other authorities to utilize. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529-30 (2d Cir. 2017) (interpretation exempting water transfers reasonable, in part, because "several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme").

The CWA itself contains alternatives, including, most notably, CWA Section 311. 33 U.S.C. §1321. Other CWA tools include total maximum daily loads ("TMDLs");[5] planning;[6] grants;[7] "processes, procedures, and methods to

[5] 33 U.S.C. §1313(d)(1)(C); *see also Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 299 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 1246 (2016) (TMDLs "tie

control [nonpoint source] pollution;"[8] and nonpoint source management programs.[9] Other federal statutes can also be utilized, such as the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. §6973(a); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984) (RCRA is "designed to deal with situations in which the regulatory schemes break down or have been circumvented.… Congress expressly intended that [RCRA] … close loopholes in environmental protection.").

Critically, States may adopt more stringent requirements, *see* 33 U.S.C. §1370 (preserves States' ability to adopt any requirement to control pollution), and many States, including South Carolina, have adopted laws relevant to these circumstances.[10]

Rejection of the direct hydrologic connection theory will not result in "rampant pollution," as Appellants contend. Op.Br. at 9. Applying the correct interpretation of the Act will prohibit leaks and spills—intentional or unintentional—both above and below ground, from industrial, commercial,

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together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.").

[6] 33 U.S.C. §1288(b).

[7] *Id.* §1288(f).

[8] *Id.* §1314(f)(2)(A)-(F).

[9] *Id.* §1329(b).

[10] *E.g.*, S.C. Code Ann. §§48-1-90(A)(1), 48-1-10(2), (20); W. Va. Code §22-11-8(b); N.C. Gen. Stat. §143-215.2(a); Md. Code Ann., Envir. §9-322; Va. Code Ann. §62.1-44.5.A(1), (3); D.C. Code §8-103.06.

residential or public infrastructure, *when* the means of the addition to navigable waters is a discernible, confined and discrete conveyance. *E.g.*, *United States v. Lucas*, 516 F.3d 316, 330-34, n.43 (5th Cir. 2008) (septic system constructed *in* a wetland "making a system that is typically a diffuse, non-point source into a point source"); *Minn. Ctr. for Envtl. Advocacy v. EPA*, No. CIV 03–5450(DWF/SRN), 2005 WL 1490331, at *6 (D. Minn. June 23, 2005) (addition from septic system via a pipe to "drain tiles" and "ditches" to navigable waters a prohibited indirect discharge).

B. The Direct Hydrologic Connection Theory Would Subject *Amici* and the Public to Regulatory Uncertainty

Appellants concede the existence of a direct hydrological connection is a fact-specific inquiry. Op.Br. at 36. It depends on site-specific factors, such as topography, climate, the distance to a surface water, geologic factors, and the like, and will require technical assessments. *See* 68 Fed. Reg. at 7216 ("highly dependent on site-specific variables"); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320 (D. Or. 1997) (it is "often not obvious" whether groundwater connects to navigable water).

Yet, there is no guidance on what is "direct." No clues exist, for example, on the minimum distance to navigable water, or the necessary time for pollutants to travel through groundwater, for a connection to be "direct." *Umatilla,* 962 F. Supp. at 1320 (this theory would "add a new level of uncertainty … and would

expose potentially [millions] of … [sources] to … litigation and legal liability if they … happen[] to make the 'wrong' choice").

Supreme Court justices have bemoaned the regulatory uncertainty caused by the CWA definition of "waters of the United States." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1816-17 (2016) ("the reach and systemic consequences of the [CWA] remain a cause for concern") (Kennedy, J., concurring); *Sackett v. EPA*, 566 U.S. 120, 132-33 (2012) ("The reach of the [CWA] is notoriously unclear;" no "clarity and predictability.") (Alito, J., concurring). This Court should not add to existing uncertainty by adopting Appellants' argument.

If it did, this uncertainty would create disincentives for critical private and public infrastructure. For example, groundwater recharge systems are used to convey stormwater or recycled wastewater (which contain "pollutants") into shallow subsurface aquifers to augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls, among other benefits.[11] This infrastructure can include spreading basins,[12] natural treatment systems,[13] and

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[11] EPA, 2012 Guidelines for Water Reuse at 4-25, EPA/600/R-12-618 (Sept. 2012), https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411 (last visited Sept. 7, 2017) ("2012 Guidelines for Water Reuse").

[12] *E.g.*, http://obgma.com/san-antonio-creek-spreading-grounds/ (last visited Sept. 7, 2017).

injection wells,[14] among others. Another example is green infrastructure, which is used to retain, percolate and infiltrate stormwater into the ground to minimize discharges of municipal stormwater and combined sewer overflows.[15] This type of infrastructure provides multiple benefits to the public, including improving water quality. If Appellants' argument is adopted, it will create uncertainty whether NPDES permit requirements apply and will likely impede the application of this type of beneficial infrastructure.

C. If Adopted, the Direct Hydrologic Connection Theory Would Impose Significant Costs on *Amici* and the Public

If Appellants' argument is adopted, significant costs will be imposed on *Amici* and the public. It would make a detailed technical assessment of hydrologic and geologic conditions necessary for a wide range of activities and sites. *Amici* and the public likely cannot afford to assume otherwise. Just one CWA violation can result in a civil penalty of $52,414 per day,[16] in addition to injunctive relief and legal fees. 33 U.S.C. §1319(b), (d).

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[13] *E.g.*, http://www.irwd.com/services/natural-treatment-system (last visited Sept. 7, 2017).

[14] *E.g.*, https://www.ocwd.com/what-we-do/water-reuse/ (last visited Sept. 7, 2017).

[15] *See generally*, EPA, Green Infrastructure, https://www.epa.gov/green-infrastructure (last visited Sept. 7, 2017).

[16] 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017) (inflation adjustment).

EPA once estimated the cost to determine whether groundwater beneath a source has a direct hydrologic connection to navigable water is $4,472. *See* 66 Fed. Reg. at 3020.[17] EPA's cost assumption was very conservative,[18] and the cost to a specific source will depend on the nature of the facility, its geographic location, and availability of trained hydrogeologists, among other factors; therefore, it is a significant underestimation of the likely cost.

The real significance of this cost arises from the countless number of facilities and people upon which it would be imposed. It is impossible to distinguish the pipeline in this case from other critical infrastructure that may contribute pollutants into soil and groundwater, such as groundwater recharge systems, green infrastructure, treatment ponds, landfills, and other sources above or below ground. Pipelines that could leak due to age or episodic failures include

[17] The original EPA estimate, $3,000 (in 1999 dollars), was adjusted for inflation (to 2017 dollars) using the U.S. Bureau of Labor Statistics' CPI inflation calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Sept. 5, 2017).

[18] *See* EPA, Cost Methodology Report for Beef and Dairy Animal Feeding Operations at 4-115 to 4-116, EPA-821-R-01-019 (Jan. 2001) (inputs used for EPA's cost estimate), https://yosemite.epa.gov/ee/epa/ria.nsf/oeT/8AD19DE463D507CC85256A3B004F51D7 (last visited Sept. 5, 2017).

public water supply pipelines,[19] recycled water pipelines,[20] and sanitary sewer pipelines.[21]

Septic systems are another ubiquitous example of a source that collects and disperses wastewater into soil and groundwater. Septic systems, generally, have not been understood to require NPDES permits. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 345 (E.D. Va. 1997) (septic systems are nonpoint sources). But that would change under Appellants' argument.

Over 22.2 million homes have septic systems. *See* U.S. Department of Housing and Urban Development and U.S. Census Bureau, American Housing Survey for the United States: 2011 at 14, Table C-04-AO (Sept. 2013) ("Household Survey") (Exhibit B). Assuming one septic system per home, the cost nationwide to perform assessments (using EPA's conservative cost estimate) is approximately *$89 billion*.[22] These costs would be borne disproportionately by

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[19] Potable water contains, among other things, chloramine, which may be considered a pollutant. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 333 (3d Cir. 2001) (describing disinfection process creating chloramines).

[20] *See* 2012 Guidelines for Water Reuse at D-132 (reclaimed water system in Cary, NC).

[21] *See e.g., Cal. River Watch v. E. Mun. Water Dist.*, No. 5:15-cv-01079-VAP-SP (C.D. Cal. filed June 2, 2015), ECF No. 1 (citizen suit complaint alleging sanitary sewer system pipeline exfiltration of wastewater into groundwater with direct hydrologic connection to navigable waters).

[22] This estimate uses the cost in 2011 dollars (i.e., $4,021) to align the calculation with the U.S. Census Bureau's most recent Annual Household Survey. As noted, the current cost is $4,472, which means the costs above are

rural, low income populations in the South. Rural communities disproportionately use septic systems rather than public sewer systems to dispose of wastewater: 42% in rural areas compared to 20% in the suburbs and 2% in the cities. *Id.* 11% of septic systems are associated with homes that are below the federal poverty level. *Id.* The 2017 federal poverty level for a family of four in South Carolina is $24,600. *See* 82 Fed. Reg. 8831, 8832 (Jan. 31, 2017). The cost of an assessment would consume *18% or greater* of a family of four's annual income.[23] Many homeowners may choose to not perform an assessment, but they would still risk a citizen suit or agency enforcement.[24]

Homeowners in the Fourth Circuit are among those that would face the greatest risk should these costs be imposed. A greater percentage of septic systems are in the South than in the rest of the U.S. 23% of homes in the South use septic systems for their sewage disposal, compared to 19%, 19% and 11% for the

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underestimated. Additionally, this cost does not include the millions of other sources that will be caught up in Appellants' theory.

[23] Comparing the $4,472 cost (in 2017 dollars) to the federal poverty level in 2017.

[24] Troublingly, EPA has argued that third parties are "free to file citizen suits against [owners of septic systems] to try and establish that they should be subject to federal permitting requirements." *See* United States' Memorandum in Support of Defendants' Motion for Summary Judgment at 2, *Conservation Law Found., Inc. v. EPA*, No. 1:10-cv-11455-MLW (D. Mass. Sept. 21, 2012), ECF No. 37.

Midwest, Northeast and West, respectively; 40% in South Carolina. Household Survey at 14.[25]

Assessments would be just the beginning of the costs *Amici* and the public would face. There are permit application fees, compliance costs, and other financial and logistical impacts. EPA estimates that the public already spends over 19 million labor hours and over $946 million in annual costs related to applying for NPDES permits and complying with just the monitoring, recordkeeping and reporting requirements. *See* EPA, ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.21 at 17, Table 12.1, Appendix A (Dec. 2015) (Exhibit C).

Critically, even if *Amici* err on the side of caution and apply for a permit, there is no certainty a permit can be obtained. The NPDES permitting regulations are "end-of-pipe." *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000) ("The structure of the CWA's definition of 'point source' … connotes the terminal end of an artificial system for moving water, waste, and other materials."). The permitting authority must calculate effluent limits,[26] determine the potential to

[25] EPA, Septic Systems Overview, https://www.epa.gov/septic/septic-systems-overview (last visited Sept. 7, 2017).

[26] 40 C.F.R. §122.45.

exceed water quality standards,[27] ensure consistency with antidegradation policies,[28] allocate load and waste loads as part of TMDLs,[29] assess the need for mixing zones,[30] and determine appropriate monitoring,[31] among other critical functions. *See generally*, EPA, NPDES Permit Writer's Manual, EPA-833-K-10-001 (Sept. 2010) (overview of permitting requirements).[32]

Determinations necessary to issue a permit would be infeasible (if not outright impossible) in the context of groundwater. Groundwater can be a "'soup'" of pollutants—mixing with pollutants from other sources and those naturally occurring—their fate and transport unknown. *Ecological Rights Found.*, 713 F.3d at 508.

Appellants' theory could prevent the permitting, and therefore the construction, of critical private and public infrastructure. *See, e.g.,* 40 C.F.R. §122.4(i) (no NPDES permit for a new source or a new discharger when the receiving water is impaired and there is not a sufficient load allocation); *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) (EPA violated §122.4(i) by

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[27] 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §122.44(d).

[28] 40 C.F.R. §131.12.

[29] *Id.* §130.7.

[30] *Id.* §131.13.

[31] *Id.* §122.44(i).

[32] https://www.epa.gov/npdes/npdes-permit-writers-manual (last visited Sept. 7, 2017).

issuing NPDES permit). For septic systems, the result could be a CWA-based *prohibition* on new housing in watersheds impaired for nutrients (*e.g.*, Chesapeake Bay) because of the inability to obtain a permit. *See* EPA, Chesapeake Bay TMDL, Section 4 at 4-5, Table 4-1 (Dec. 29, 2010) (impaired for nitrogen; 36% and 24% of the total nitrogen load into the Bay attributed to septic systems from Maryland and Virginia, respectively).[33]

If a permit cannot be obtained, all addition of pollutants must cease. 33 U.S.C. §1311(a). Significant resources to remove and/or replace infrastructure could be imposed on *Amici*.[34] Approximately $298 billion is needed for infrastructure over the next 25 years to address just the 800,000 miles of aging public sewer pipelines.[35] There is no indication Congress intended the CWA to be the tool to remedy this problem. None of these costs to *Amici* and the public have ever been considered by EPA through rulemaking, which would be necessary if the direct hydrologic connection theory was in fact the rule. *See* 33 U.S.C. §1314(b)(2)(B) (shall consider "the cost of achieving such effluent reduction").

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[33] https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document (last visited Sept. 7, 2017).

[34] In this case, even if complete source removal was technically possible, it would upset the State's existing Corrective Action Plan imposed via state authority after public comment. *Kinder Morgan*, 2017 WL 2266875, at *1.

[35] *See* American Society of Civil Engineers, 2013 Report Card for America's Infrastructure, https://www.infrastructurereportcard.org/cat-item/wastewater/ (last visited Sept. 7, 2017).

CONCLUSION

No pollutants were added to navigable waters by means of a discernible, confined and discrete conveyance. There is no basis for a CWA citizen suit. The Court should affirm the District Court's judgment.

Dated: September 8, 2017

Respectfully submitted,

/s/ Michael R. Shebelskie

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1640 **Caption:** Upstate Forever v. Kinder Morgan Energy Partners

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Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

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(s) Michael R. Shebelskie

Party Name Nat'l Ass'n of Counties et al.

Dated: Sept. 8, 2017

11/14/2016 SCC

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system at the addresses indicated below:

Clayton Monroe Custer – ccuster@wcsr.com
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Jackson Rehm Price – japrice@wcsr.com
Frank S. Holleman, III – fholleman@selcnc.org
Christopher K. DeScherer – cdescherer@selcsc.org

/s/ Michael R. Shebelskie
Michael R. Shebelskie

To: Ford, Peter[Ford.Peter@epa.gov]; Nagle, Deborah[Nagle.Deborah@epa.gov]; Lindley, Tom (Perkins Coie)[TLindley@perkinscoie.com]
Cc: Thomas, Christopher D. (Perkins Coie)[CThomas@perkinscoie.com]
From: Thomas, Christopher D. (Perkins Coie)
Sent: Sun 12/3/2017 10:46:57 PM
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Nonsense. I normally start preparing the night before in a bar, and I am way ahead of schedule for this one.

It appears Tom has no moderating obligations prior to our 1:30 session, so we could perhaps catch up in person tomorrow.

Also, I will be sending around a more complete rough script with prompts for the stuff on my list, which will include:

Ohio Valley Environmental Coalition & Columbia River Keeper: constructive submission.

U.S. v. Robertson: Ninth Circuit's case affirming criminal conviction for dredging and filling a WOTUS that apparently qualified only under the Kennedy test; the interesting part is that the panel's opinion reached that result by finding that the Kennedy test was a logical subset for the Scalia test, which seems highly naïve to me.

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Tennessee Clean Water Action Network v. TVA: now on appeal to the Sixth Circuit after the M.D. TN held that groundwater with a direct hydrologic connection to surface water does fall within the Clean Water Act's jurisdiction.

I have a few other less significant cases I can mention if time allows.

More substantively, I'd be interested in a discussion of how the TMDL process works in the West, especially with regard to impaired waters that are not normally wet and impacted by unregulated

stormwater flow. Does Friend of Pinto Creek really preclude new NPDES permits where there is no TMDL and little hope of developing one because of the orphan non-point sources? Pete, this was one of your old cases. Want to have a bit of discussion? I have no preconceived notions, other than confusion.

Best,

Chris Thomas | **Perkins Coie LLP**

PARTNER

2901 N. Central Avenue

Suite 2000

Phoenix, AZ 85012-8014

Ex. 6 - Personal Privacy

FAX: 602-648-7036

E-MAIL: CThomas@perkinscoie.com

From: Ford, Peter [mailto:Ford.Peter@epa.gov]
Sent: Friday, December 01, 2017 12:58 PM
To: Nagle, Deborah; Lindley, Tom (WDC); Thomas, Christopher D. (PHX)
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Winging it with you all. Should be ok.

Peter Z. Ford

U.S. EPA Office of General Counsel

202.564.5593

From: Nagle, Deborah
Sent: Friday, December 01, 2017 2:54 PM
To: Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com>; Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com>; Ford, Peter <Ford.Peter@epa.gov>

Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

I guess we are winging it – my calendar is also a mess for the rest of the day

-Deborah

Deborah G. Nagle, Acting Director
Office of Science and Technology
1200 Pennsylvania Ave, NW
Washington, DC 20460
Tel: (202) 564-1185

From: Lindley, Tom (Perkins Coie) [mailto:TLindley@perkinscoie.com]
Sent: Friday, December 01, 2017 1:46 PM
To: Nagle, Deborah <Nagle.Deborah@epa.gov>; Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com>; Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Have not heard from Chris, and now my schedule is a total mess, so please either go ahead without me, or we will truly wing it!

From: Lindley, Tom (WDC)
Sent: Tuesday, November 28, 2017 2:55 PM
To: Nagle, Deborah
Cc: Thomas, Christopher D. (PHX); Ford, Peter
Subject: Re: ALI-ABA Water Law Conference/Preliminary Rough Script

Friday also works for me if between 11-2 Eastern

Sent from my mobile phone

On Nov 28, 2017, at 13:59, Nagle, Deborah <Nagle.Deborah@epa.gov> wrote:

Friday works for me.

Deborah

Deborah G. Nagle, Acting Director
Office of Science and Technology
1200 Pennsylvania Ave, NW
Washington, DC 20460
Tel: (202) 564-1185

From: Thomas, Christopher D. (Perkins Coie) [mailto:CThomas@perkinscoie.com]
Sent: Tuesday, November 28, 2017 3:36 PM
To: Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com>; Nagle, Deborah <Nagle.Deborah@epa.gov>; Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Would Friday work for a preparatory call? I could also do Thursday, except for mid-day.

Chris Thomas | **Perkins Coie LLP**

PARTNER

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Suite 2000

Phoenix, AZ 85012-8014

Ex. 6 - Personal Privacy

FAX: 602-648-7036

E-MAIL: CThomas@perkinscoie.com

From: Thomas, Christopher D. (PHX)
Sent: Monday, November 27, 2017 1:58 PM
To: Lindley, Tom (WDC); Nagle, Deborah; Ford, Peter
Cc: Thomas, Christopher D. (PHX)
Subject: ALI-ABA Water Law Conference/Preliminary Rough Script

Tom, Deborah, and Pete:

This is still a work in progress, but attached is my initial attempt to script the first part of our presentation. Since I follow litigation much more closely than regulatory developments, I'm afraid I could not plug in the sum and substance of Deborah's likely response. There is also more to come in general. I will continue plugging away, but thought it might be useful for you to see what I had in mind before we perhaps get on a preparatory conference call.

Best,

Chris

Christopher Thomas | **Perkins Coie LLP**

PARTNER

E. CThomas@perkinscoie.com

<image001.jpg>

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To: Lindley, Tom (Perkins Coie)[TLindley@perkinscoie.com]
From: Nagle, Deborah
Sent: Mon 12/4/2017 3:24:15 PM
Subject: Re: ALI-ABA Water Law Conference/Preliminary Rough Script

Sounds good

Sent from my iPhone
Deborah G. Nagle
Acting Director, Office of Science and Technology
Ph: (202) 564-1185
Cell: Ex. 6 - Personal Privacy

On Dec 4, 2017, at 8:25 AM, Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com> wrote:

See you then! 9th floor at H&W, 2200Pennsylvania NW.

Can talk briefly before our panel.

Unfortunately one of my Tuesday speakers canceled Saturday with no prior notice or assistance for locating another, so I too am a bit buried. On the other hand, most of today is devoted to US, and our 130 panel.

Tom

From: Nagle, Deborah [mailto:Nagle.Deborah@epa.gov]
Sent: Monday, December 04, 2017 8:15 AM
To: Thomas, Christopher D. (PHX)
Cc: Ford, Peter; Lindley, Tom (WDC)
Subject: Re: ALI-ABA Water Law Conference/Preliminary Rough Script

I have a full schedule in the morning at work. I plan to get to the conference about 12:30ish

Deborah

Sent from my iPhone

Deborah G. Nagle

Acting Director, Office of Science and Technology

Ph: (202) 564-1185

Cell: Ex. 6 - Personal Privacy

On Dec 3, 2017, at 5:48 PM, Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com> wrote:

Nonsense. I normally start preparing the night before in a bar, and I am way ahead of schedule for this one.

It appears Tom has no moderating obligations prior to our 1:30 session, so we could perhaps catch up in person tomorrow.

Also, I will be sending around a more complete rough script with prompts for the stuff on my list, which will include:

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Tennessee Clean Water Action Network v. TVA: now on appeal to the Sixth Circuit after the M.D. TN held that groundwater with a direct hydrologic connection to surface water

does fall within the Clean Water Act's jurisdiction.

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Best,

Chris Thomas | **Perkins Coie LLP**

PARTNER

2901 N. Central Avenue

Suite 2000

Phoenix, AZ 85012-8014

Ex. 6 - Personal Privacy

E-MAIL: CThomas@perkinscoie.com

From: Ford, Peter [mailto:Ford.Peter@epa.gov]
Sent: Friday, December 01, 2017 12:58 PM
To: Nagle, Deborah; Lindley, Tom (WDC); Thomas, Christopher D. (PHX)
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Winging it with you all. Should be ok.

Peter Z. Ford

U.S. EPA Office of General Counsel

202.564.5593

From: Nagle, Deborah
Sent: Friday, December 01, 2017 2:54 PM
To: Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com>; Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com>; Ford, Peter <Ford.Peter@epa.gov>
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-Deborah

Deborah G. Nagle, Acting Director
Office of Science and Technology
1200 Pennsylvania Ave, NW
Washington, DC 20460
Tel: (202) 564-1185

From: Lindley, Tom (Perkins Coie) [mailto:TLindley@perkinscoie.com]
Sent: Friday, December 01, 2017 1:46 PM
To: Nagle, Deborah <Nagle.Deborah@epa.gov>; Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com>; Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

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Subject: Re: ALI-ABA Water Law Conference/Preliminary Rough Script

Friday also works for me if between 11-2 Eastern

Sent from my mobile phone

On Nov 28, 2017, at 13:59, Nagle, Deborah <Nagle.Deborah@epa.gov> wrote:

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Office of Science and Technology
1200 Pennsylvania Ave, NW
Washington, DC 20460
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From: Thomas, Christopher D. (Perkins Coie)
[mailto:CThomas@perkinscoie.com]
Sent: Tuesday, November 28, 2017 3:36 PM
To: Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com>; Nagle, Deborah <Nagle.Deborah@epa.gov>; Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

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PARTNER

E. CThomas@perkinscoie.com

<image001.jpg>

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Cc: Ford, Peter[Ford.Peter@epa.gov]; Lindley, Tom (Perkins Coie)[TLindley@perkinscoie.com]
From: Nagle, Deborah
Sent: Mon 12/4/2017 1:15:03 PM
Subject: Re: ALI-ABA Water Law Conference/Preliminary Rough Script

I have a full schedule in the morning at work. I plan to get to the conference about 12:30ish

Deborah

Sent from my iPhone
Deborah G. Nagle
Acting Director, Office of Science and Technology
Ph: (202) 564-1185
Cell: Ex. 6 - Personal Privacy

On Dec 3, 2017, at 5:48 PM, Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com> wrote:

Nonsense. I normally start preparing the night before in a bar, and I am way ahead of schedule for this one.

It appears Tom has no moderating obligations prior to our 1:30 session, so we could perhaps catch up in person tomorrow.

Also, I will be sending around a more complete rough script with prompts for the stuff on my list, which will include:

Ohio Valley Environmental Coalition & Columbia River Keeper: constructive submission.

U.S. v. Robertson: Ninth Circuit's case affirming criminal conviction for dredging and filling a WOTUS that apparently qualified only under the Kennedy test; the interesting part is that the panel's opinion reached that result by finding that the Kennedy test was a logical subset for the Scalia test, which seems highly naïve to me.

Ecological Rights Foundation v. PG&E: Ninth Circuit says RCRA citizen suits can be used

to abate unregulated stormwater discharges, if they otherwise constitute an imminent and substantial endangerment.

Tennessee Clean Water Action Network v. TVA: now on appeal to the Sixth Circuit after the M.D. TN held that groundwater with a direct hydrologic connection to surface water does fall within the Clean Water Act's jurisdiction.

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202.564.5593

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<image001.jpg>

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To: Ross, David[Ross.David@epa.gov]
Cc: Penman, Crystal[Penman.Crystal@epa.gov]
From: Paul Balserak
Sent: Thur 2/1/2018 4:41:16 PM
Subject: Speaking Request

Dear David,

I want to invite you to speak at AISI's Energy and Environment Committee meeting on February 28, 2018 at our offices in Washington DC. Three times a year, approximately 40-50 AISI member company federal representatives and environmental managers meet together to address a range of energy and environmental topics related to both the Hill and the Administration. We would love to hear from you, and at this point could accommodate pretty much any hour time slot during that day that works for you. The water policy issues of immediate interest to my members relate to the draft conductivity guidance from Dec 2016, the issue of conduit theory and, of course, the Waters of the US rulemaking effort. Our meeting actually runs through noon on March 1, so if Feb 28 is not convenient for you, please consider coming the morning of March 1. Thank you in advance for your consideration of this invite, David. Please feel free to reach me on either of the numbers below should you want to discuss any matter.

Best,

Paul

Paul Balserak

Vice President, Environment

American Iron and Steel Institute

25 Massachusetts Ave. NW, Suite 800

Washington, DC 20001

202 452-7122 (office)

Ex. 6 - Personal Privacy

To: Sawyers, Andrew[Sawyers.Andrew@epa.gov]
From: Julia Anastasio
Sent: Tue 2/20/2018 6:16:43 PM
Subject: RE: Follow-Up to Voicemail

Thanks. I will try to give you a buzz later this afternoon. Is there someone on your staff that Sean can work with to schedule a briefing?

Julia Anastasio

Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

Ex. 6 - Personal Privacy

Check out ACWA's Workshop Schedule: https://www.acwa-us.org/events/

From: Sawyers, Andrew [mailto:Sawyers.Andrew@epa.gov]
Sent: Tuesday, February 20, 2018 11:42 AM
To: Julia Anastasio <janastasio@acwa-us.org>
Cc: Sean Rolland <srolland@acwa-us.org>
Subject: RE: Follow-Up to Voicemail

Thanks Julia, sorry for the surprise - will be happy to discuss.

From: Julia Anastasio [mailto:janastasio@acwa-us.org]
Sent: Tuesday, February 20, 2018 11:40 AM
To: Sawyers, Andrew <Sawyers.Andrew@epa.gov>
Cc: Sean Rolland <srolland@acwa-us.org>
Subject: Follow-Up to Voicemail
Importance: High

Andrew

I thought I would send a note to follow up on the voicemail message that I left you last week about the *Notice and Request for Comment* associated with *Clean Water Act Coverage of Discharges of Pollutants via Direct Hydrologic Connection to Surface Water.*

The notice took ACWA by surprise. We would like to find time for either you or someone on your staff to join our members on a call to discuss the FR notice and the issue.

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To: Sawyers, Andrew[Sawyers.Andrew@epa.gov]
Cc: Sean Rolland[srolland@acwa-us.org]
From: Julia Anastasio
Sent: Tue 2/20/2018 4:39:50 PM
Subject: Follow-Up to Voicemail

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Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

Ex. 6 - Personal Privacy

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To: Julia Anastasio[janastasio@acwa-us.org]
From: Sawyers, Andrew
Sent: Tue 2/20/2018 9:17:55 PM
Subject: Re: Follow-Up to Voicemail

No - you and i should talk. There is a lot to this.

On Feb 20, 2018, at 4:15 PM, Julia Anastasio <janastasio@acwa-us.org> wrote:

Thanks. I will try to give you a buzz later this afternoon. Is there someone on your staff that Sean can work with to schedule a briefing?

Julia Anastasio

Executive Director & General Counsel

Association of Clean Water Administrators

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Ex. 6 - Personal Privacy

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To: Wendelowski, Karyn[wendelowski.karyn@epa.gov]
From: LexisNexisDelivery@lexisnexis.com
Sent: Fri 2/23/2018 2:46:26 PM
Subject: Email:Amigos Bravos v. EPA_ 324 F.3d 1166
Amigos Bravos v. EPA_ 324 F.3d 1166.pdf

Delivery

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User Name: KARYN WENDELOWSKI
Date and Time: Friday, February 23, 2018 9:46:00 AM EST
Job Number: 61944533

Document (1)

1. *Amigos Bravos v. EPA, 324 F.3d 1166*
   Client/Matter: -None-
   Search Terms: amigos bravos
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	Court: 10th Circuit

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KARYN WENDELOWSKI

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As of: February 23, 2018 2:46 PM Z

Amigos Bravos v. EPA

United States Court of Appeals for the Tenth Circuit

April 2, 2003, Filed

No. 02-2030

Reporter
324 F.3d 1166 *; 2003 U.S. App. LEXIS 6335 **; 56 ERC (BNA) 1270; 33 ELR 20166

AMIGOS BRAVOS, a nonprofit corporation, and NEW MEXICO CITIZENS FOR CLEAN AIR AND WATER, a nonprofit corporation, Plaintiffs-Appellants, v. ENVIRONMENTAL PROTECTION AGENCY, United States; CAROL BROWNER, Administrator of the Environmental Protection Agency; and GREG COOK, EPA Regional Administrator for Region VI, Defendants-Appellees.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. (D.C. NO. CIV-99-327 DJS/RLP).

Amigos Bravos v. EPA, 6 Fed. Appx. 719, 2001 U.S. App. LEXIS 4113 (2001)

Disposition: Affirmed.

Core Terms

pollutants, catalyst, discharges, costs, required by law, mandated, enforcement action, redelegated, issuance of permits, mandatory, lawsuit, moot, rock, attorney's fees, nondiscretionary, Defendants', prevailed, piles, district court, civil action, DELEGATED, point source, discretionary, limitations, gratuitous, groundless, frivolous, orders

Case Summary

Procedural Posture
In the U.S. District Court for the District of New Mexico, plaintiff two groups filed suit to compel defendants, the Environmental Protection Agency (EPA) and two EPA officials, to take action against pollution by a corporation. The suit was dismissed as moot when the EPA issued the corporation a permit with respect to the pollution. The magistrate, presiding with the parties' consent, denied plaintiffs' request for costs; plaintiffs appealed.

Overview

The appeal concerned the availability of an award for litigation costs (including attorney fees) under § 505(d) (*33 U.S.C.S. § 1365(d)*) of the Clean Water Act, when a lawsuit was mooted by government conduct in apparent response to the lawsuit. On appeal the groups challenged the magistrate's decision on two grounds. First, they argued that defendants' actions were mandated by law, and not discretionary. Second, they contended that the magistrate incorrectly applied the catalyst test because to meet the "required by law" element, a plaintiff need not demonstrate that the defendant had a nondiscretionary duty. In the groups' view, the element was satisfied if defendants' action was more than a wholly gratuitous response to an action that in itself was frivolous or groundless. Even if the catalyst theory applied to requests for costs under § 505(d), the groups were not entitled to recover their costs because EPA's action--issuing the permit to the corporation--was not a legally required response to the groups' suit.

Outcome
The appellate court affirmed the judgment of the district court.

LexisNexis® Headnotes

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Judicial Officers > Magistrates > Trial by Appeal & Consent

HN1[] Costs & Attorney Fees, Costs

The catalyst theory permits a plaintiff to recover costs even when the defendant's acts render the suit moot if the plaintiff can show: (1) that the lawsuit is causally linked to securing the relief obtained and (2) that the defendant's conduct in response to the lawsuit was required by law.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN2[] Coverage & Definitions, Discharges

The Clean Water Act (CWA) provides that the discharge of any pollutant by any person is generally unlawful. 33 U.S.C.S. § 1311(a). Discharge of a pollutant includes any addition of any pollutant to navigable waters from any point source. 33 U.S.C.S. § 1362(12)(A). A "point source" is any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). A point source discharge otherwise prohibited by the CWA is lawful if authorized by a National Pollutant Discharge Elimination System permit issued by the Environmental Protection Agency. 33 U.S.C.S. §§ 1311(a), 1342.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Recordkeeping & Reporting

Environmental Law > ... > Enforcement > Citizen Suits > Grounds for Citizen Suits

Environmental Law > Water Quality > General Overview

HN3[] Clean Water Act, Recordkeeping & Reporting

See 33 U.S.C.S. § 1365(a)(2).

Environmental Law > Water Quality > General Overview

HN4[] Environmental Law, Water Quality

See 33 U.S.C.S. § 1365(d).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5[] Standards of Review, Abuse of Discretion

An appellate court reviews a district court's refusal to grant attorney's fees for abuse of discretion. Underlying factual findings are reviewed for clear error; legal conclusions are reviewed de novo.

Environmental Law > Water Quality > General Overview

HN6[] Environmental Law, Water Quality

See 33 U.S.C.S. § 1319(a)(3).

Environmental Law > Water Quality > General Overview

HN7[] Environmental Law, Water Quality

Despite the "he shall" language, the weight of authority is that 33 U.S.C.S. § 1319(a)(3) does not impose a mandatory duty on the Administrator of the Environmental Protection Agency.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN8[] **Agency Rulemaking, Rule Application & Interpretation**

An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Administrative Law > Judicial Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Torts > Public Entity Liability > Immunities > Judicial Immunity

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN9[] **Administrative Law, Judicial Review**

An agency's decision not to take enforcement action should be presumed immune from judicial review under the Administrative Procedure Act.

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Environmental Law > Water Quality > General Overview

HN10[] **Clean Water Act, Enforcement**

The Environmental Protection Agency Delegations Manual delegates the authority of the Administrator of the Environmental Protection Agency to make 33 U.S.C.S. § 1319(a) findings to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance. The delegations manual for Region VI in turn states that (1) this authority has been redelegated to the Director of the Compliance Assurance and Enforcement Division and the Director of the Water Quality Protection Division, and (2) the authority may not be redelegated further.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN11[] **Discharge Permits, Effluent Limitations**

See 33 U.S.C.S. § 1311(a).

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN12[] **Discharge Permits, Effluent Limitations**

See 33 U.S.C.S. § 1311(e).

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

Environmental Law > Water Quality > General Overview

HN13[] **Discharge Permits, Public Participation**

See 33 U.S.C.S. § 1342(a)(1).

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Catalyst Theory

Environmental Law > Water Quality > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN14[] **Basis of Recovery, Catalyst Theory**

In the context of the required-by-law element of the

catalyst test, a defendant may unilaterally undertake action that moots the suit. In such a case, a plaintiff may still recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action, and that the defendant's conduct was required by law, i.e., not a wholly gratuitous response to an action that in itself was frivolous or groundless.

Counsel: Matthew K. Bishop, Taos, New Mexico, for Plaintiffs-Appellants.

Kathryn E. Kovacs, U.S. Department of Justice, Environment & Natural Resources Division, Appellate Section, Washington, D.C. (Thomas L. Sansonetti, Assistant Attorney General; David C. Shilton and Mary F. Edgar, U.S. Department of Justice, Environment & Natural Resources Division, Appellate Section, Washington, D.C., Richard T. Witt, U.S. Environmental Protection Agency, Office of General Counsel, Washington, D.C., and Renea Ryland, U.S. Environmental Protection Agency, Office of Regional Counsel, Dallas, Texas, of counsel, with her on the brief), for Defendants-Appellees.

Judges: Before BRISCOE, BALDOCK, and HARTZ, Circuit Judges.

Opinion by: HARTZ

Opinion

[*1168] HARTZ, Circuit Judge.

This appeal concerns the availability of an award for litigation costs (including attorney fees) under § 505(d) of the Clean Water Act (CWA), *33 U.S.C. § 1365(d),* when a lawsuit has been mooted by government conduct in apparent response to the lawsuit.

Plaintiffs Amigos Bravos and New Mexico Citizens for Clean **[**2]** Air and Water brought suit to compel the Environmental Protection Agency (EPA) to take action against pollution by Molycorp, Inc. The suit was dismissed as moot when the EPA issued Molycorp a permit with respect to the pollution at issue. Contending that their lawsuit was what caused the EPA to act, Plaintiffs moved to recover their costs under the "catalyst theory." *HN1*[] The catalyst theory permits a plaintiff to recover costs even when the defendant's acts render the suit moot if the plaintiff can "show: (1) that [the] lawsuit is causally linked to securing the relief obtained and (2) that the defendant's conduct in response to the lawsuit was required by law." *Ctr. for Biological Diversity v. Norton, 262 F.3d 1077, 1081 (10th Cir. 2001)* (internal quotation marks omitted). The magistrate judge, presiding with the consent of the parties under *28 U.S.C. § 636(c)(1)*, denied Plaintiffs' request for costs because they had failed to establish that the EPA's actions were "required by law."

Exercising jurisdiction under *28 U.S.C. §§ 636(c)(3) and 1291*, we affirm. We hold that even if the catalyst theory applies to requests for **[**3]** costs under *§ 505(d),* Plaintiffs are not entitled to recover their costs because EPA's action--issuing the permit to Molycorp--was not a legally required response to Plaintiffs' lawsuit.

I. Background

This case arose out of the EPA's initial refusal to recognize pollution of the Red **[*1169]** River arising from waste rock piles at Molycorp's molybdenum mine as a point source discharge subject to regulation under the CWA. *HN2*[] The CWA provides that "the discharge of any pollutant by any person" is generally unlawful. *33 U.S.C. § 1311(a).* "'Discharge of a pollutant'" includes "any addition of any pollutant to navigable waters from any point source." *Id. § 1362(12)(A)*. A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *§ 1362(14).* A point source discharge otherwise prohibited by the CWA is lawful if authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by the EPA. *See §§ 1311(a), 1342*.

In 1977 Molycorp obtained an NPDES permit for its mine operations. When it applied for renewal in 1992, some members of the public complained that the mine's waste **[**4]** rock piles were contaminating ground water that was then seeping into the Red River. They contended that the discharges from the piles should be considered point sources subject to regulation under the CWA. The EPA disagreed and issued Molycorp an NPDES permit that did not address the discharge of pollutants from the waste rock piles.

Three years later Plaintiffs sued Molycorp under *33 U.S.C. § 1365(a)(1),* alleging that Molycorp was in violation of the CWA because discharges from the waste rock piles were point source discharges for which no NPDES permit had been obtained. The district court characterized the suit as a challenge to the

Administrator's decision to reissue Molycorp's permit without regulating these discharges, a decision that could be challenged only by appealing the issuance of the permit to the court of appeals. *See id.* § 1369(b)(1)(F). Accordingly, it dismissed the action. We affirmed. *Amigos Bravos v. Molycorp, Inc., 166 F.3d 1220 (10th Cir. 1998)* (unpublished).

In the meantime, the EPA Region 6 NPDES Permits Branch had requested "assistance in determining if mining activities at the . . . Molycorp . . . Mine . . **[**5]** . are a source of contamination to the Red River." Aplt. App. at 36. The request was "specifically . . . to determine if the[] mining activities were resulting in the discharge of . . . [pollutants] via seeps along the Red River . . . ." *Id.* In response, the Region 6 Ground Water Center of Excellence conducted a study of the Molycorp site. EPA geologist David Abshire summarized the study's results in a February 1998 document entitled "Report on Hydrological Connection Associated With Molycorp Mining Activity, Questa, New Mexico." For purposes of this appeal, we will assume that Plaintiffs have accurately characterized the report as concluding that pollution from the waste rock piles was "traveling to seeps along the Red River via a ground water hydrological connection." Aplt. Br. at 5.

Approximately a year after the report was issued, Plaintiffs brought this action against Defendants under the CWA's citizen-suit provision, 33 U.S.C. § 1365(a)(2). *HN3*[] That provision states that "any citizen may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . **[**6]** which is not discretionary with the Administrator." *Id.*

Plaintiffs' complaint contained two counts. Count I alleged that the EPA was aware that Molycorp was illegally discharging pollutants and therefore had a nondiscretionary duty under § 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), to take one of two enforcement actions: either issue a compliance order or file a civil action against Molycorp. Plaintiffs asked the court to declare that the EPA had **[*1170]** failed to fulfill this duty under § 309(a)(3), and to order the EPA to take one of the two enumerated enforcement actions against Molycorp. Count II alleged that under §§ 301 and 402 of the CWA, the EPA had a nondiscretionary duty to either prohibit Molycorp's illegal discharges or issue a permit for them. Plaintiffs asked the court to declare that the EPA had violated this duty and to order the EPA to issue a permit or prohibit Molycorp's discharges. The district court dismissed the case, ruling that in light of Plaintiffs' earlier action against Molycorp itself, Plaintiffs' action against the EPA and its administrators was barred by the doctrine of collateral estoppel.

We reversed and remanded because **[**7]** the elements of collateral estoppel had not been established. *See* Amigos Bravos v. E.P.A., 236 F.3d 621 (10th Cir. 2001). While rehearing before this court was pending, the EPA issued Molycorp a permit for the discharges referred to in Plaintiffs' complaint, on condition that within two years Molycorp would install a specified "seepage interception and management system" for the purpose of preventing all but trace amounts of pollutants from being discharged into the Red River from the waste rock piles. Permit at Pt. I, 17 and Pt. II, 1. The permit also provided that Molycorp would be subject to monitoring and reporting requirements. All parties agreed that issuance of the permit mooted Plaintiffs' case. We therefore vacated the order of reversal, withdrew our opinion, and remanded to the district court with instructions to vacate its earlier judgment, opinion, and order. *See* Amigos Bravos v. E.P.A., 6 Fed. Appx. 719 (10th Cir. 2001).

In the remand order, however, we said that the district court had not been divested of jurisdiction to decide whether Plaintiffs were entitled to recover litigation costs under § 505(d) of the CWA, 33 U.S.C. § 1365 (d) **[**8]** . *HN4*[] That section allows the court to "award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). On remand Plaintiffs contended that they were entitled to an award of litigation costs under the catalyst theory because Defendants had acted in response to their lawsuit. But the magistrate judge denied Plaintiffs' motion for costs because "Defendants' action was not required by law." *Amigos Bravos v. E.P.A.*, No. 99-CV-00327, slip op. at 8 (D.N.M. Jan. 16, 2002).

On appeal Plaintiffs challenge the magistrate judge's decision on two grounds. First, they argue that Defendants' actions were mandated by law, and not discretionary. Second, they contend that the judge incorrectly applied the catalyst test because to meet the "required by law" element, a plaintiff need not demonstrate that the defendant had a nondiscretionary duty. In Plaintiffs' view, the "element is satisfied if defendants' action is more than a 'wholly gratuitous response to an action that in itself was frivolous or groundless.'" Aplt. Br. at **[**9]** 26 (quoting J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1475

(10th Cir. 1985)).

Defendants respond that the district court correctly denied Plaintiffs' request for costs because Plaintiffs failed to establish either the causation element or the required-by-law element of the catalyst test. Alternatively, they claim that after the Supreme Court's decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001), the catalyst theory is no longer an appropriate basis for awarding attorney fees to parties, like Plaintiffs, who do not obtain some form of **[*1171]** court-ordered relief. Because we conclude that Plaintiffs may not recover their costs even if the catalyst theory applies, we need not decide whether *Buckhannon* forecloses application of the catalyst theory in the context of § 505(d).

HN5[] "This court reviews a district court's refusal to grant attorney's fees for abuse of discretion." Center for Biological Diversity, 262 F.3d at 1080. Underlying factual findings are reviewed for clear error; legal conclusions are reviewed *de novo* **[**10]** . Id. We first discuss whether Defendants' actions were discretionary or mandatory. We then address whether the catalyst test permits recovery of costs even when the defendant's actions were discretionary.

II. Were Defendants' Actions Mandatory?

Count I of Plaintiffs' complaint alleged that the EPA had a non-discretionary duty under CWA § 309(a)(3) "to take enforcement action . . . regarding the illegal discharges of pollutants from Molycorp's waste rock dumps," and thus should be ordered to issue a compliance order or file a civil action against Molycorp. Aplt. App. at 80. Count II alleged that the EPA had a nondiscretionary duty under a combination of §§ 301(a), 301(e) , and 402(a)(1) to either issue a permit for the known illegal discharges or prohibit them, and asked the court to order the EPA to take one of these actions. We now address whether EPA's issuance of a permit to Molycorp was mandated under the theory of either claim.

A. Count I:* The § 309(a)(3) *Claim

HN6[] Section 309(a)(3) reads: "Whenever on the basis of any information available to him the Administrator finds that any person is in violation of [effluent limitations] . . ., he shall issue **[**11]** an order requiring such person to comply with such section or requirement, or he shall bring a civil action . . . ." 33 U.S.C. § 1319(a)(3).

HN7[] Despite the "he shall" language, the weight of authority is that § 309(a)(3) does not impose a mandatory duty on the Administrator. *See* Sierra Club v. Whitman, 268 F.3d 898, 900, 902-03 (9th Cir. 2001) (EPA does not have a mandatory duty to investigate and make findings, nor does it have a mandatory duty to take enforcement action once a finding is made.); Dubois v. Thomas, 820 F.2d 943, 947, 951 (8th Cir. 1987) (same); Sierra Club v. Train, 557 F.2d 485, 488-91 (5th Cir. 1977); City of Olmsted Falls v. EPA, 233 F. Supp. 2d 890, 901-04 (N.D. Ohio 2002); 2 Envtl. Law Inst., Law of Environmental Protection § 9:4 (Sheldon M. Novick ed., 2002). *But see* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 134 (D.S.C. 1978) (" 309(a)(3) imposes a nondiscretionary duty on the Administrator to issue compliance orders once he 'finds' a violation of the [CWA]"); Illinois v. Hoffman, 425 F. Supp. 71, 77 (S.D. Ill. 1977) **[**12]** (Administrator's duty to act is triggered "whenever a violation is directed to the attention of the Administrator."); *cf.* Save the Valley, Inc. v. U.S.E.P.A, 99 F. Supp. 2d 981 (S.D. Ind. 2000) (holding that under CWA § 309(a)(2) the Administrator has a duty to make a finding when she becomes aware of violations, but specifically distinguishing that section from § 309(a)(3)).

The view that § 309(a)(3) does not restrict the Administrator's discretion is in keeping with the Supreme Court's pronouncement of "the general unsuitability for judicial review of agency decisions to refuse enforcement." Heckler v. Chaney, 470 U.S. 821, 831, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). The *Heckler* Court's explanation included the following passage pertinent to the present case:

> HN8[] An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly **[*1172]** within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action **[**13]** requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than

the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32. (We should add that these reasons for taking no action at all may also justify taking partial enforcement action rather than engaging in full enforcement.) The Court concluded that *HN9*[] "an agency's decision not to take enforcement action should be presumed immune from judicial review under [the *Administrative Procedure Act*]." *Id. at 832*.

Plaintiffs acknowledge this authority to some extent. They explicitly concede that "under *section 309(a)(3)*, there is no duty to make a finding . . . ." Aplt. Reply Br. at 19. They assert, however, that (1) the Administrator made the requisite finding here; and (2) once such a finding is made, *§ 309(a)(3)* mandates enforcement action. We need not address Plaintiffs' second assertion. Even were we to create a circuit split **[**14]** by agreeing that a finding mandates enforcement action, we would still reject Plaintiffs' argument for two reasons.

First, the Administrator did not make the required finding that there had been a violation of the CWA. The person identified by Plaintiffs as having made the finding was an EPA geologist, Mr. Abshire. But EPA geologists have not been delegated the authority to make *§ 309(a)(3)* findings. *HN10*[] The EPA Delegations Manual delegates the Administrator's authority to make *§ 309(a)* findings to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance. [1] **[**15]** The delegations manual for Region VI in turn states that (1) this authority has been redelegated to the Director of the Compliance Assurance and Enforcement Division and the Director of the Water Quality Protection Division, and (2) the authority "may not be redelegated further." Aple. Br. Addendum at vii. [2]

[*1173] Plaintiffs have neither alleged nor offered evidence that anyone with authority to make findings **[**16]** made the necessary finding here. Perhaps Plaintiffs could prove that someone with such authority knew that there was a statutory violation at the Molycorp mine. But "knowing" is not "finding." The statutory word "finds" would be a most peculiar way of expressing "knows." Indeed, Plaintiffs' proper

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[1] The substance of the provision in the manual is as follows:

1. AUTHORITY. Pursuant to *Section 309(a) of the Clean Water Act (CWA)*, to make findings of violation; to issue and serve notices of violation; to issue and obtain service of administrative compliance orders; to send copies of any orders issued to appropriate States; and to confer with persons to whom an order is issued.

2. TO WHOM DELEGATED. Regional Administrators and Assistant Administrator for Enforcement and Compliance Assurance.

3. LIMITATIONS.

a. The Assistant Administrator for Enforcement and Compliance Assurance may exercise these authorities in multi-regional cases and cases of national significance. In such cases, the Assistant Administrator for Enforcement and Compliance Assurance or his/her designee must notify any affected Regional Administrators or their designees when exercising the above authorities to issue orders and to confer with a person to whom an order is issued.

b. The Regional Administrators may exercise the above only for those matters initiated by the Regions.

4. REDELEGATION AUTHORITY. These authorities may be redelegated to the Division Director level, and the authority to confer with persons to whom an order has been issued may be further redelegated to the staff level.

[2] The substance of the provision is as follows:

1. AUTHORITY. Pursuant to *Section 309(a) of the Clean Water Act (CWA)*:

a. to make findings of violation,

b. to issue and serve notices of violation,

c. to issue and obtain service of administrative compliance orders,

d. to send copies of any orders issued to appropriate States, and

e. to confer with persons to whom an order is issued.

2. TO WHOM DELEGATED. Paragraphs 1a, b, c, d, and e are redelegated to the Director, Compliance Assurance and Enforcement Division, and Director, Water Quality Protection Division.

3. LIMITATIONS. The authority of the Director, Compliance Assurance and Enforcement Division is limited to the NPDES Program and the authority of the Director, Water Quality Protection Division is limited to the Wetlands Protection Program.

4. REDELEGATION AUTHORITY. The authority in subparagraph 1.e may be redelegated to staff level. All other authorities may not be redelegated.

acknowledgment that there is no duty to make a finding--i.e., that making a finding is discretionary--would make it impossible to equate "making a finding" with "knowing," which is not a matter of discretion.

The second flaw in Plaintiffs' argument is that even if § 309(a)(3) mandates certain action, it certainly did not mandate what the EPA ended up doing in this case. Plaintiffs have failed to connect the relief obtained with the relief that allegedly would have been mandated. What the EPA did to moot Plaintiffs' suit was issue a permit to Molycorp. But issuance of a permit is not an act mandated by § 309(a)(3). What that section says the Administrator "shall" do if she finds a violation is issue a compliance order or bring a civil action. It says nothing about issuance of a permit.

In apparent recognition of this fact, Count I of Plaintiffs' complaint did not seek issuance of a permit, **[**17]** even as an alternative. The relief sought in that count was a court order that the EPA either issue a compliance order to Molycorp or bring a civil action against Molycorp. Even if that relief was mandatory, that relief was never obtained. (The fact that issuance of a permit could moot a claim that the Administrator failed to comply with § 309(a)(3) in itself strongly suggests that § 309(a)(3) is not a mandatory provision; but we need not resolve that matter on this appeal.)

For the above reasons, we hold that the EPA's action--issuance of a permit--was not mandated by § 309(a)(3).

B. Count II: The §§ 301(a)/301(e)/402(a)(1) Claim

Plaintiffs assert that a nondiscretionary duty to enforce can also be derived from a combination of §§ 301(a), 301(e), and 402(a)(1) of the CWA. ***HN11***[] Section 301(a) states the general rule that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a). ***HN12***[] Section 301(e) provides, "Effluent limitations . . . shall be applied to all point sources of discharge of pollutants . . . ." 33 U.S.C. § 1311(e). And ***HN13***[] § 402(a)(1) reads, "The Administrator may, after opportunity for public **[**18]** hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section [301(a)]." 33 U.S.C. § 1342(a)(1).

Plaintiffs' argument is that because all point sources "shall be" subject to effluent limitations, and all discharges "shall be unlawful" (in the absence of a § 402 permit), the EPA must "*either* permit [meaning 'issue a permit for'] or prohibit an **[*1174]** illegal discharge." Aplt. Br. at 37. Relying on Natural Resources Defense Council v. Costle, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1375 (D.C. Cir. 1977), Plaintiffs contend that despite the appearance of the word "may" in § 402(a)(1), the "EPA does not have the discretion to exempt a known discharge from the mandates of the CWA." Aplt. Br. at 38. That proposition, however, does not take Plaintiffs as far as they need to go. *Costle* merely stated that the EPA must either issue a permit for the offending discharge or leave the discharger subject to the total prohibition expressed in § 301. Costle, 568 F.2d at 1375. The court did not address whether the EPA must take action against a violator. And nothing in §§ 301(a), 301(e), **[**19]** or 402(a)(1) compels such action.

We conclude that the statutory language, particularly when read in light of Heckler, indicates that the EPA is not "required by" §§ 301(a), 301(e), and 402(a)(1) of the CWA to take enforcement action against all illegal discharges. Accordingly, EPA's issuance of the permit to Molycorp was not mandated by the statutory provisions relied upon in Plaintiffs' Count II.

III. Can a Discretionary Act Be "Required By Law"?

Alternatively, Plaintiffs contend that the required-by-law element of the catalyst test can be established even in the absence of a mandatory duty. They argue that under this court's decision in J & J Anderson Inc., 767 F.2d at 1475, a defendant's conduct was "required by law" for purposes of the catalyst test when it was not a "'wholly gratuitous response to an action that in itself was frivolous or groundless.'" Aplt. Br. at 26.

Plaintiffs' argument points to an apparent inconsistency in this circuit's formulation of the second element of the catalyst test. The great majority of our opinions simply recite the rule that the defendant's conduct in response to the plaintiff's suit must be "required by law. **[**20]** " *See* Ctr. for Biological Diversity, 262 F.3d at 1081; Powder River Basin Res. Council v. Babbitt, 54 F.3d 1477, 1486 (10th Cir. 1995); City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1048 (10th Cir. 1994); Am. Council of the Blind of Colo., Inc. v. Romer, 962 F.2d 1501, 1504 (10th Cir. 1992); O'Connor v. City and County of Denver, 894 F.2d 1210, 1226 (10th Cir. 1990); Lopez v. Sullivan, 882 F.2d 1533, 1536 (10th Cir. 1989); Luethje v. Peavine Sch. Dist. of Adair County, 872 F.2d 352, 354 (10th Cir. 1989); Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986); Operating Eng'rs Local Union No. 3 of the Int'l Union of Operating

Eng'rs, AFL-CIO v. Bohn, 737 F.2d 860, 863 (10th Cir. 1984); cf. Foremaster v. City of St. George, 882 F.2d 1485, 1488 (10th Cir. 1989) (plaintiff must show that "he would have prevailed on the merits").

In J & J Anderson, 767 F.2d at 1475, however, we followed our recitation of the two-part test with the following quotation from Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982): **[**21]** HN14[] "Indeed, a defendant may unilaterally undertake action that moots the suit. In such a case, a plaintiff may still recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action[,] *and that the defendant's conduct was required by law, i.e., not a wholly gratuitous response to an action that in itself was frivolous or groundless.*" Some subsequent opinions have repeated the emphasized language. *See* Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1199 (10th Cir. 1998); Beard v. Teska, 31 F.3d 942, 953 (10th Cir. 1994); Collins v. Romer, 962 F.2d 1508, 1514 (10th Cir. 1992).

[*1175] On several occasions we have sought to reconcile what appear to be two separate tests. In our most recent attempt we explained: "The essential part of that language is 'that the defendants' conduct was *required by law*.' The court's reference to 'a wholly gratuitous response to an action that in itself was frivolous or groundless' is obviously intended as only one example of the type of conduct referred to by the court." Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs., 31 F.3d 1052, 1055 (10th Cir. 1994). **[**22]** *See* Supre v. Ricketts, 792 F.2d at 964 (Seth, J., concurring) ("the term 'gratuitous conduct' [has] acquired a definition by our cases . . . as an action not required by law"); *accord* Goichman v. City of Aspen, 859 F.2d 1466, 1471 (10th Cir. 1988).

Regardless of the formulation adopted in the opinion, however, our decisions are generally consistent. All but one case that recites the required-by-law element either (1) found the second prong of the catalyst test was met because the plaintiff demonstrated (or the defendant did not contest) that it would have prevailed on the merits, *see* Ctr. for Biological Diversity, 262 F.3d at 1081; Beard, 31 F.3d at 953; Collins, 962 F.2d at 1514, 1517; Luethje, 872 F.2d at 354-56; Foremaster, 882 F.2d at 1489; (2) found an award of attorney fees inappropriate because the plaintiff would not have prevailed, *see* Kan. Health Care Ass'n, 31 F.3d at 1055; City of Chanute, 31 F.3d at 1049-50; O'Connor, 894 F.2d at 1226-27; Goichman, 859 F.2d at 1471; Supre, 792 F.2d at 963; **[**23]** J & J Anderson, 767 F.2d at 1477-78; (3) did not need to address the second prong because no causal connection was established, *see* Am. Council of the Blind, 962 F.2d at 1505-08; Operating Eng'rs, 737 F.2d at 863-64; or (4) remanded on other grounds, *see* Powder River Basin Res. Council, 54 F.3d at 1486-87; Lopez, 882 F.2d at 1536-37.

The sole exception is Ellis, 163 F.3d 1186. In *Ellis* the plaintiff brought race discrimination and retaliation claims against the hospital where she worked and several of its employees. Our opinion recited in some detail the evidence supporting the plaintiff's claims. To determine whether she would actually have prevailed, however, would have required an assessment of the credibility of the pertinent witnesses. We ruled that the plaintiff was entitled to an award of attorney fees under the catalyst test, observing "that [the plaintiff's] action against the individual defendants was not frivolous or groundless . . . ." 163 F.3d at 1199.

Ellis can be reconciled with our other precedents on the ground that in *Ellis* we could not **[**24]** determine whether the defendants' actions were "required by law" without "'conducting the very trial mooted by a defendant's voluntary compliance.'" Morris v. City of W. Palm Beach, 194 F.3d 1203, 1210 (11th Cir. 1999) (quoting Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 17 F.3d 260, 263 n.1 (8th Cir. 1994)). When a full-scale evidentiary hearing would be required to determine whether the plaintiff would have prevailed, it is worth keeping in mind the Supreme Court's admonition that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

That is not, however, the situation presented by this case. We can readily determine on the record before us that the action taken by the EPA was not a legally mandated response to Plaintiffs' lawsuit. Accordingly, even if the catalyst theory still applies to attorney fee requests under § 505(d) of the CWA, Plaintiffs are not entitled to recover their fees here.

It certainly appears that Plaintiffs performed a significant public service in bringing this pollution problem to **[**25]** the attention of the EPA and holding its feet to the fire. For that, they "can derive satisfaction **[*1176]** from the fruit of [their] labors." Goichman, 859 F.2d at 1471. But there is no legal authority for us to order further compensation.

We **AFFIRM** the judgment of the district court.

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National Tribal Water Council and EPA
Monthly Conference Call Agenda
Wed., March 14, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EDT
Conference Number: (202) 991-0477; ID Code: Ex. 6 - Personal Privacy

AGENDA

I. **Introductions** *(Karen Gude, OW)* **(5 minutes)**

II. **Update from Prior NTWC Call** *(Ken Norton, NTWC)* **(10 minutes)**

EPA Office of Research and Development: Strategic Research Action Plans *(Suzanne Van Drunick, National Program Director (NPD), EPA ORD Safe and Sustainable Water Resources Research Program & Monica Rodia, ORD)* **(20 minutes)**

EPA's Office of Research and Development (ORD) has issued six Strategic Research Action Plans (StRAPs) laying out its research agenda. The plans may be of interest to the tribes, especially the Safe and Sustainable Water Resources Research Program, which includes significant nutrient work. Over the next six months, ORD will lead a refresh of its StRAPs, which affords a unique opportunity to engage with tribes during this research planning phase to build partnerships that can help ensure ORD will build tribal research capacity. These StRAPs will outline a four-year strategy, 2019 to 2022, for delivering research and results to support EPA's mission to protect human health and the environment. ORD will do this through interactions with tribes supported by a combination of teleconferences, in-person meetings, and informational sessions with EPA tribal partnership groups and RTOCs, ahead of tribal consultation.

III. **Report Out on Hypoxia Task Force Meeting** *(Michael Bolt, NTWC & Kyra Reumann-Moore, OW/OWOW)* **(15 minutes)**

IV. **Regulatory Updates & Tribal Consultation Information (25 minutes)**

- Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water *(Scott Wilson, OW/OWM)*
  - For more information: https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface
- Update: Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop. *(Rose Kwok, OW/OWOW)*
  - For more information: https://www.epa.gov/wotus-rule
- Update: Tribal Consultation Opportunity, *Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 C.F.R. § 25.5 (Janine Barr, OW/OST)*
  - For more information: https://tcots.epa.gov
- Update: Tribal Consultation and Coordination on the National Primary Drinking Water Regulation for Lead and Copper *(Karen Gude, OW)*
  - For more information: https://tcots.epa.gov

V. Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements (All) (15 minutes)

- Upcoming Triennial Capacity Development and Operator Certification Workshop in Indianapolis, IN, in August 2018. *(Sam Russell, OW/OGWDW)*
- Planning for Spring NTWC in-person meeting in Washington, DC *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
- Re-launch of NTWC website (http://www.nau.edu/ntwc) *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
- Reminder: Planning for 2018 Tribal Lands and Environment Conference *(Karen Gude, OW)*
  - Spokane Convention Center in Spokane, WA, August 13-16, 2018; Deadline for Session Proposals: May 4, 2018
  - More information: https://www7.nau.edu/itep/main/Conferences/confr_tlef

VI. Next Steps

- Reminder: Next NTWC & NTWC/EPA calls are scheduled for April 11, 2018.

EPA

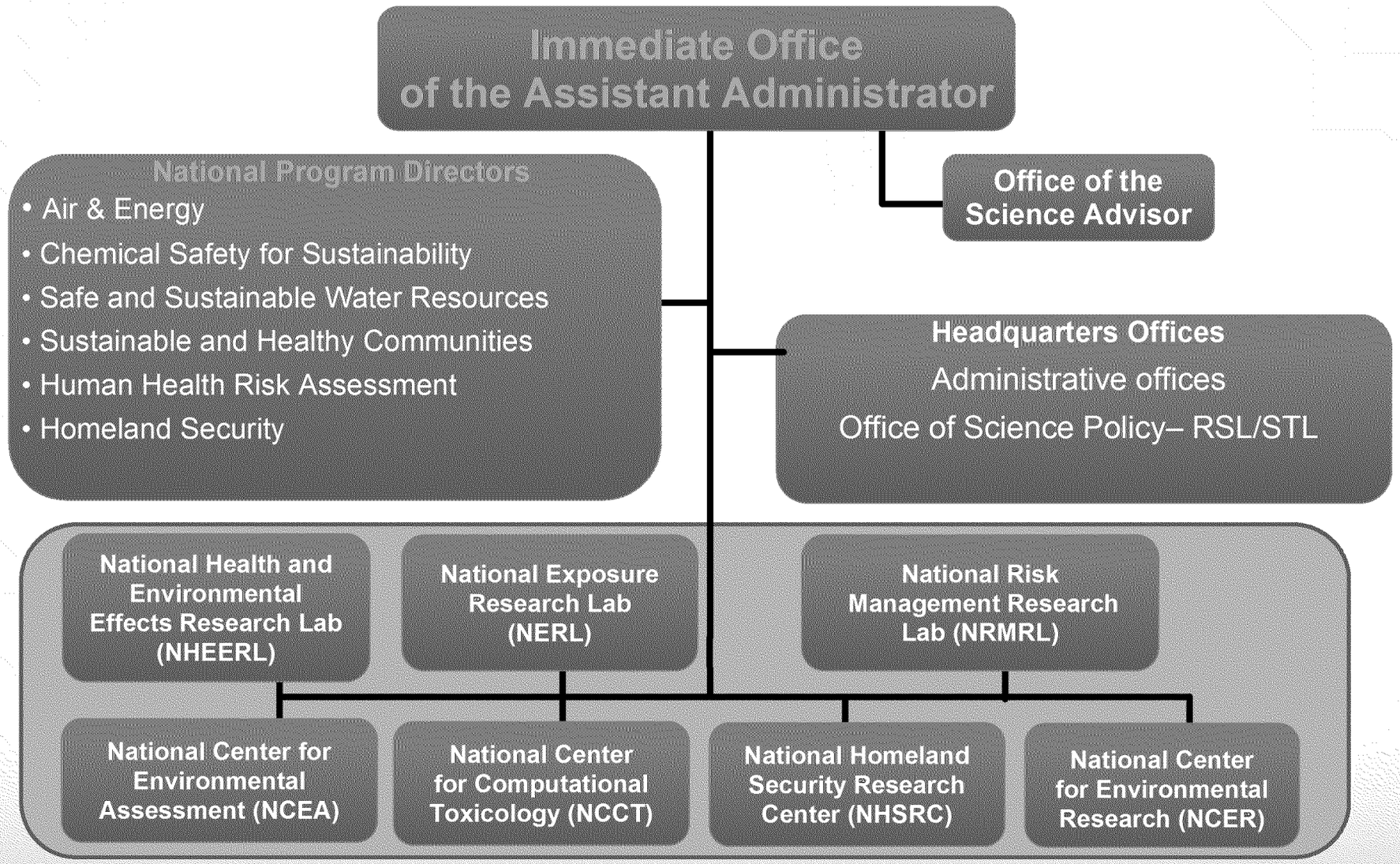
Office of Research and Development

Safe and Sustainable Water Resources Research Program

National Tribal Water Council

March 14, 2018

ORD Organizational Chart



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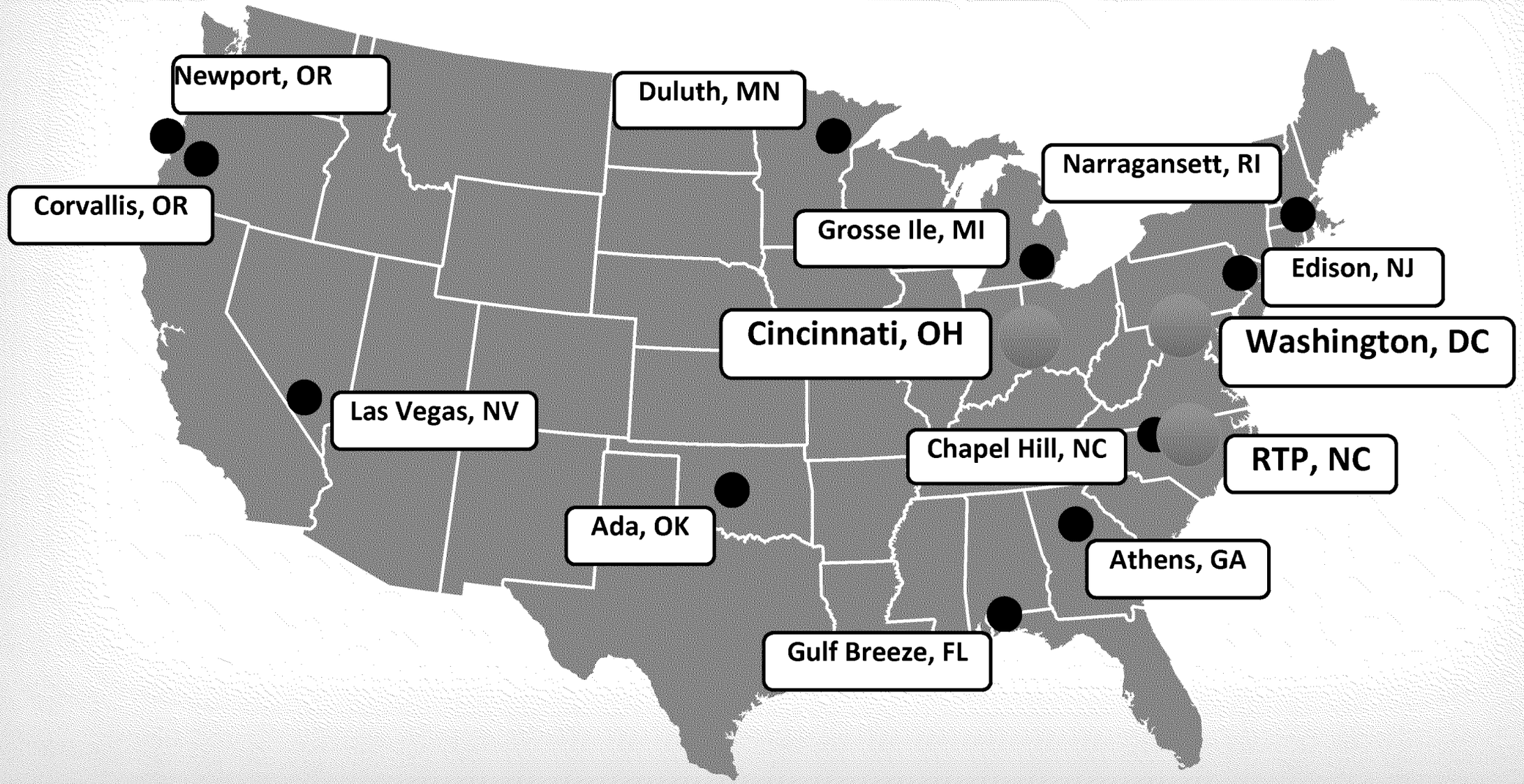
ORD Research Facilities



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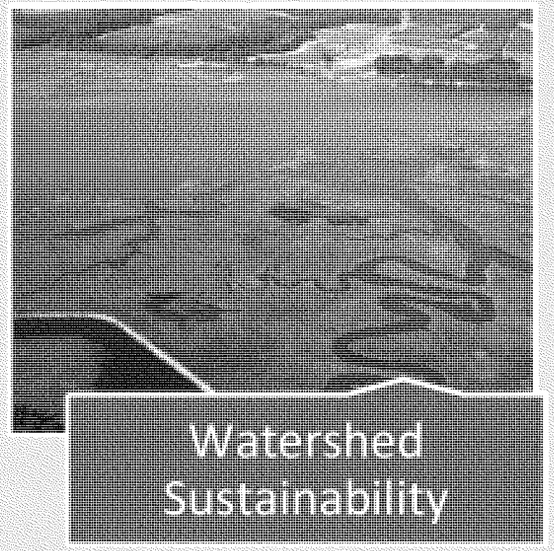
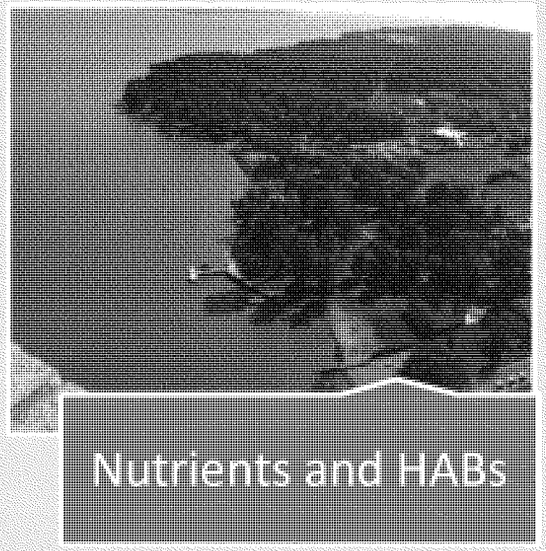
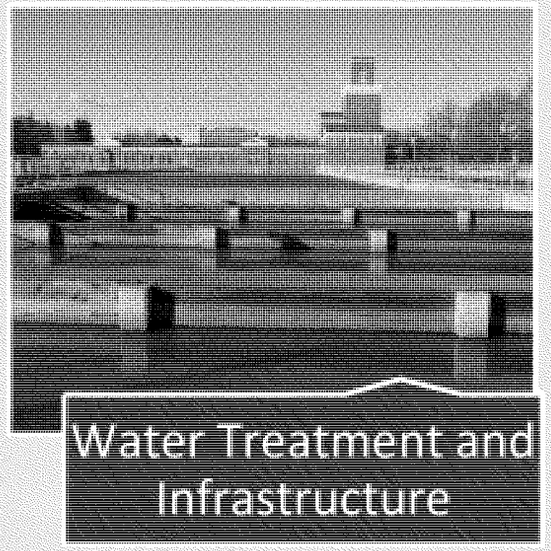
SSWR Research Topics

Clean Water Act | **Safe Drinking Water Act**







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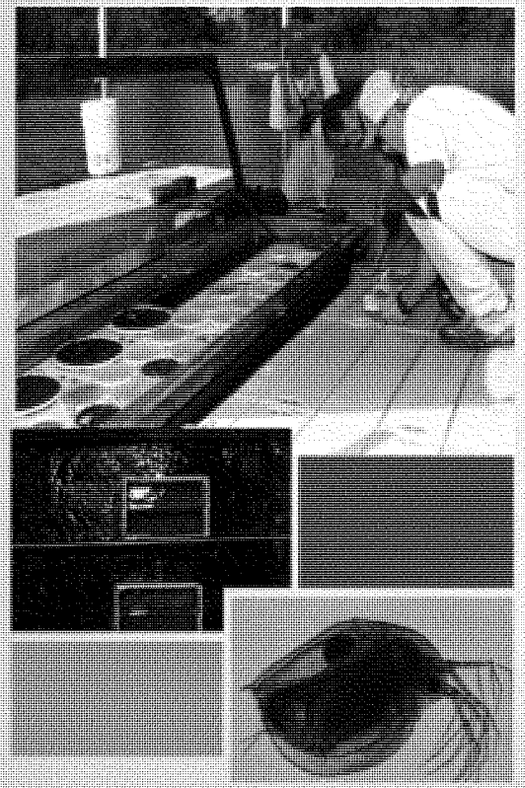
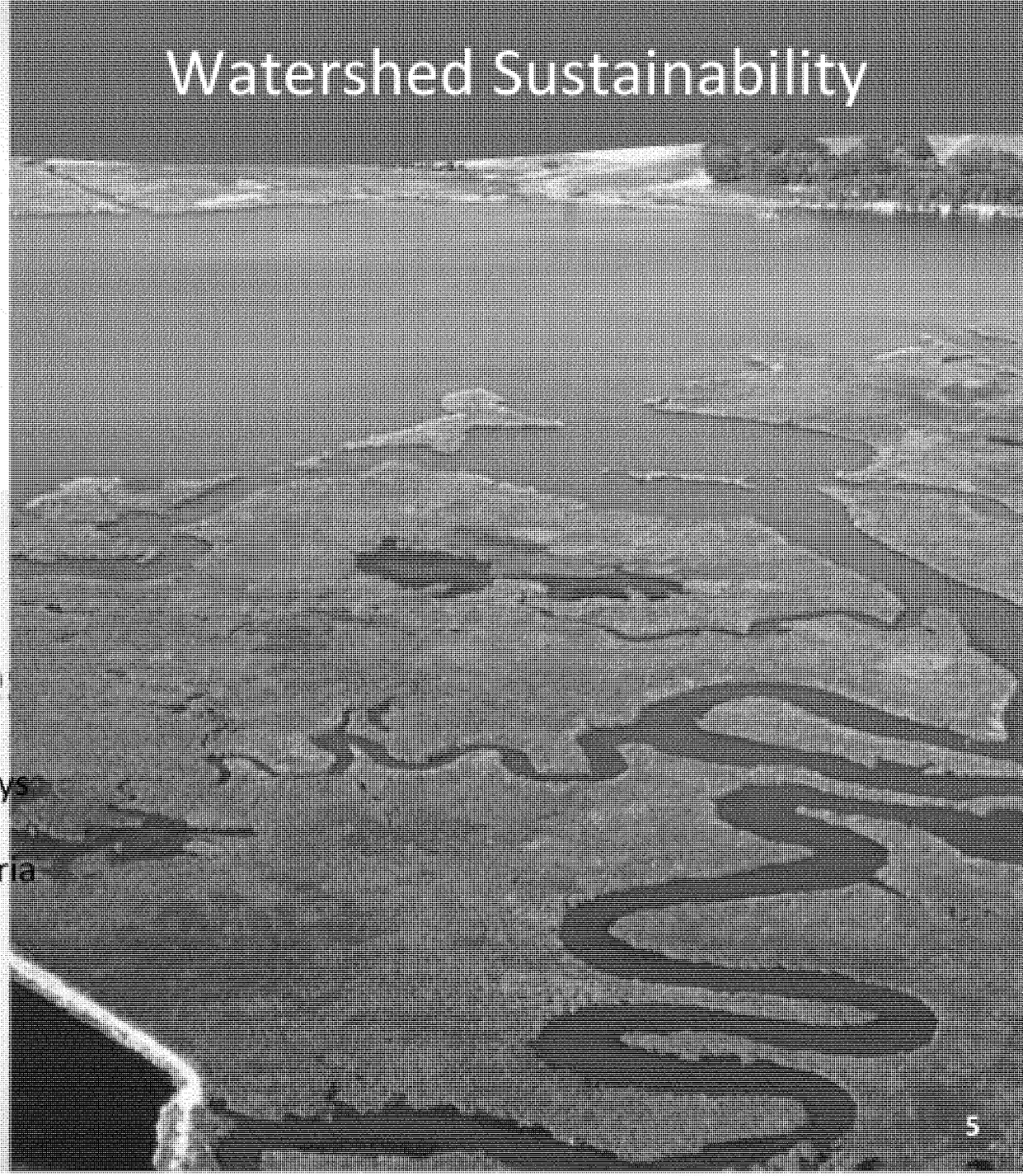
Main Topic Activities

Advancement of integrated water resource and watershed management approaches, models, and decision-making tools that ensure sufficient supplies of clean water to support economic, environmental, and public health requirements.



Research Prioritie

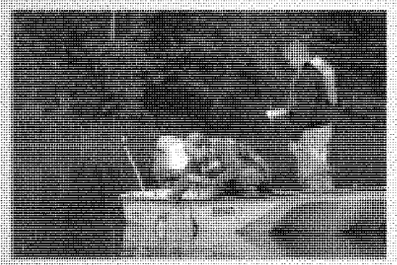
- National Aquatic Resource Surveys
- Recreational Water Quality Criteria
- Aquatic Water Quality Criteria



Main Topic Activities

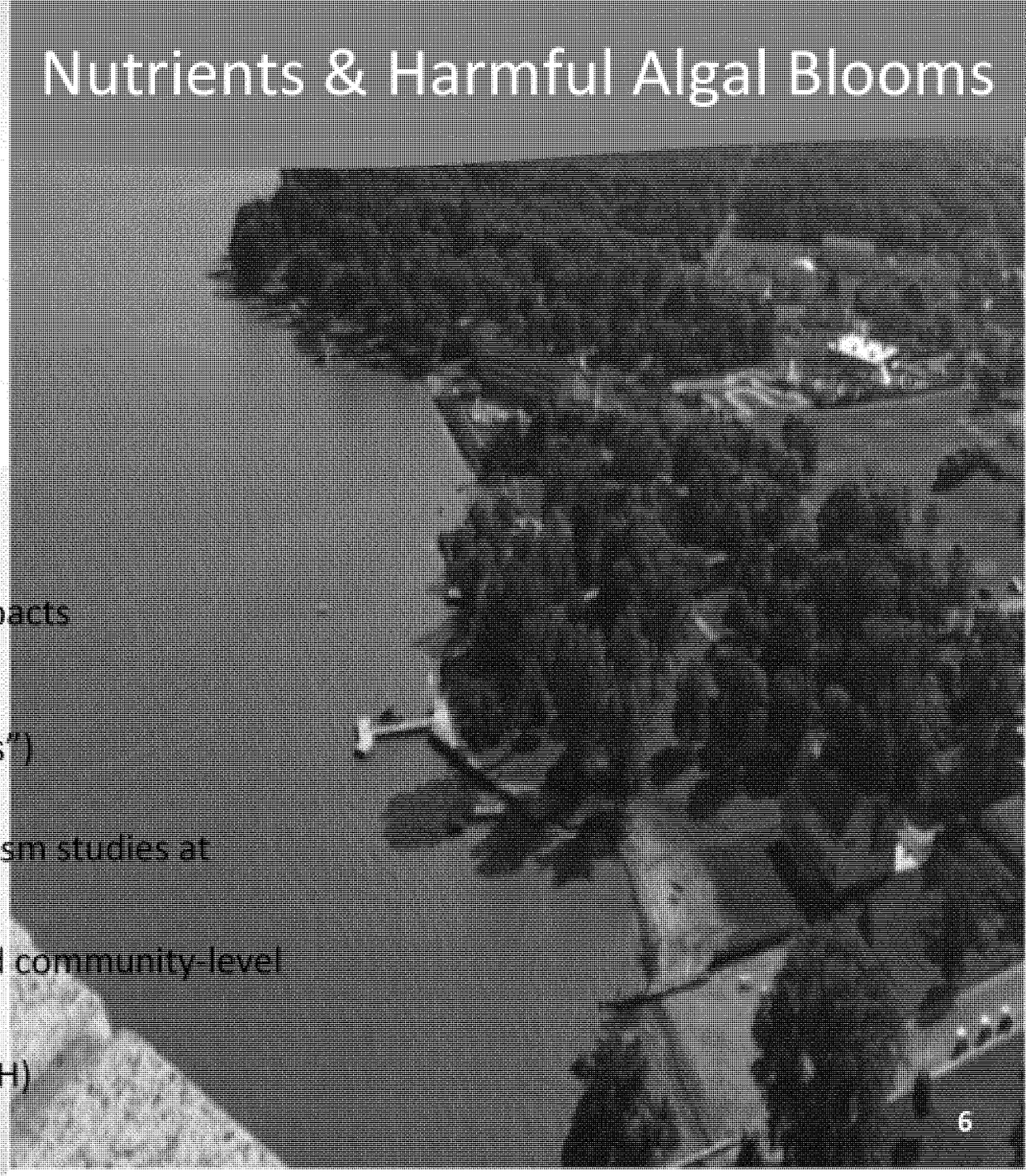
Improve the science needed to define appropriate nutrient levels and to develop technologies and management practices to monitor and attain appropriate nutrient loadings.

Provide information and tools that improve the ability of local, state and national stakeholders to manage the risks posed by HABs.



Research Priorities

- Models & relating nutrient loading to impacts
- Conduct water quality standard/aquatic life criteria ("targets") validation studies
- Linkages between N and P with biota, experimental mesocosm studies at Experimental Stream Facility (Ohio)
- Biotic colonization studies in a nearby stream to understand community-level responses to N and P
- Nutrient Enhanced Coastal Acidification and Hypoxia (NECAH)



Cyanobacteria Assessment Network

Nutrients and HABs

Problem

How to detect and quantify algal blooms to protect use of U.S. lakes and estuaries?

Action

Create a standard and uniform approach for identification of algal blooms using satellites.

Result

New methods to quantify algal bloom frequency and extent.

Impact

- Applied novel sophisticated tool to assist in management of events that may involve significant risk to the public.
- Improve resource allocations and reduce exposures.

EPA Analytical Methods

- **Method 544:** Determination of microcystins and nodularins in drinking water by LC/MS/MS
- **Method 545:** Determination of cylindrospermopsin and anatoxin-a in drinking water by LC/ESI-MS/MS
- **Method 546:** Determination of microcystins and nodularins in drinking water and ambient water by ELISA
- **Single Laboratory Validated Methods:** Determination of cylindrospermopsin and anatoxin-a and for microcystins and nodularins in ambient freshwaters by LC/MS/MS

epa.gov/water-research/cyanobacteria-assessment-network-cyan

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Challenging Nutrients Coalition

EPA led interagency collaboration on prize challenges to address nutrients

CHALLENGE	GOAL	RESULT/STATUS
Nutrient Sensor Challenge	Affordable nitrogen and phosphorous sensors to market	3x price reduction sensors on the market
Visualize Nutrients	Effective communication/visualization of nutrient data	Award winning video
Smart Septic Sensor Challenge	Nitrogen sensors to monitor septic system integrity	Breakthrough technology for low-cost nitrogen sensors (U. Connecticut)
Nutrient Reduction Challenge	Recover nitrogen/phosphorous from pork and dairy manure	Prototypes in development
Nutrient Sensor Action Challenge	Demonstrated use of nitrogen/phosphorous sensor data for use in decision making	Stage 1 - 11 teams participated Stage 2- launch 2/18

Main Topic Activities

Water Treatment and Infrastructure

Develop and evaluate data, approaches, and technologies that will support the promulgation and implementation of federal water regulations and guidance, while also addressing regional, state, and community issues of concern.

Develop and demonstrate best practices and tools for managing stormwater volume and improving water quality, and assess their feasibility.

Cyanotoxins
- Guidance for drinking water treatment

Lead
- Develop risk assessment/exposure model in support of Lead and Copper Rule
- Characterization in distribution/premise plumbing systems and improved methods

PFAS
- Hazard information
- Methods development and validation

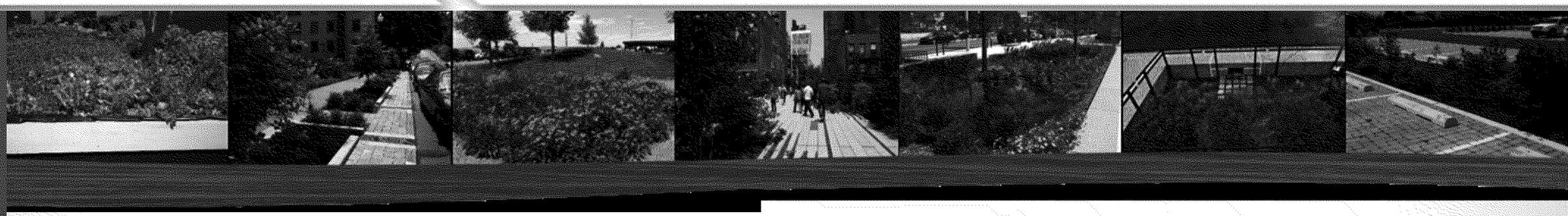
Small System
- Development of biological treatment systems for ammonia removal

EPANET
- Advanced extensions for water security, contaminant reactions, and real-time con

Opportunistic Pathogens
- *Legionella*, *Mycobacterium*
- Occurrence and detection
- Copper/silver ionization treatment, UV treatment

Treatability Database
- Collaborate with OW to develop cost models for inclusion in database

Stormwater Management



Treatment & Infrastructure

- National Stormwater Calculator (SWC)
- Storm Water Management Model (SWMM)
- Performance assessments of GI/low impact development systems
  - permeable pavement
  - rain gardens
  - swales
- Urban soil characterization for improving GI implementation
- Focused assessments of urban GI on water quantity and quality

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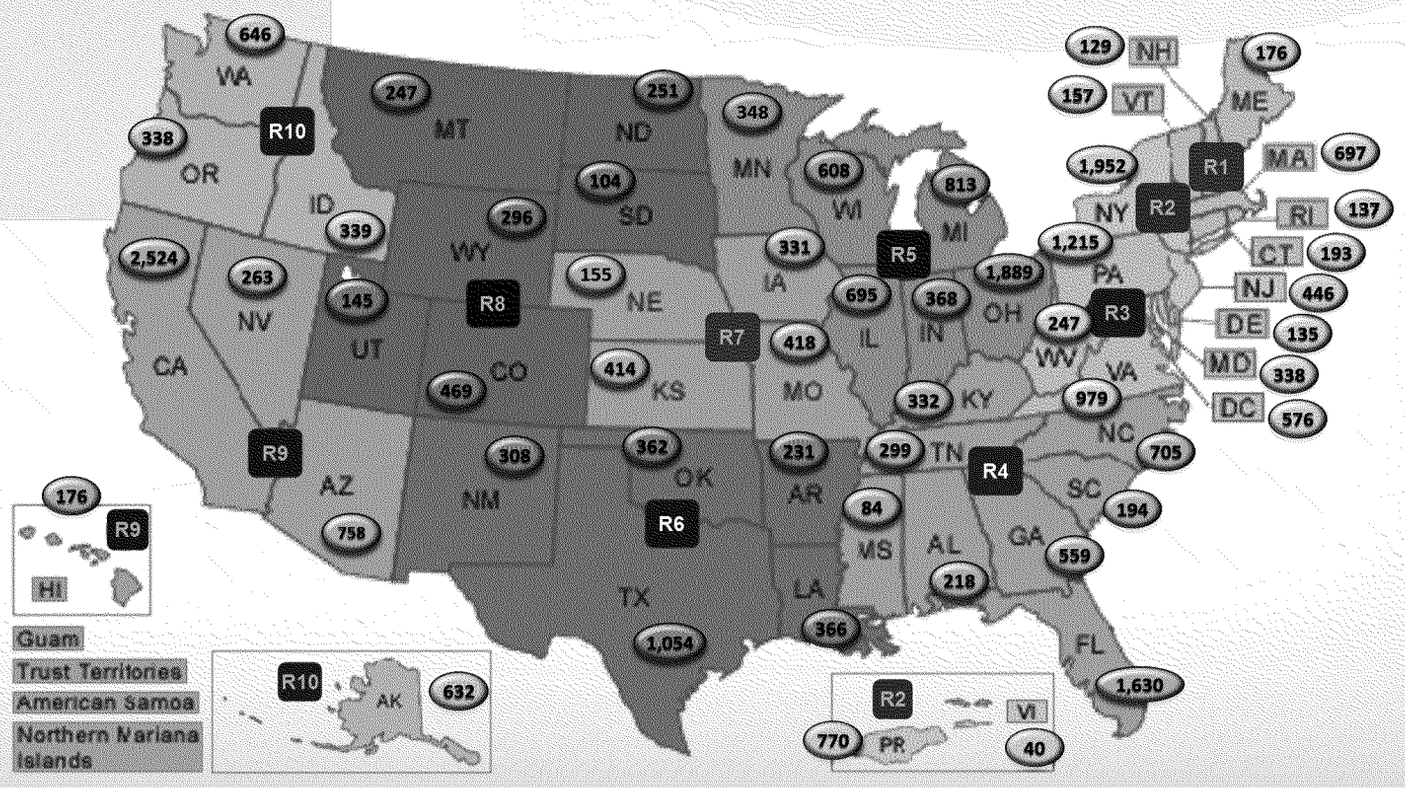
Outreach Highlights

- SSWR Webinar Series
- Small Systems Monthly Webinar Series
- Small Systems Annual Workshop
- EPA Tools and Resources Webinar Series
- Science Matters Biweekly Newsletter
- Fact Sheets:

January 2015 – February 2018

- 29,570 Attendees
- 18,091 Continuing Ed. Credits



Questions?

From: Stover, Michael
Location: Mt Roosevelt Ex. 6 - Personal Privacy Adobe Connect: login as guest to https://epawebconferencing.acms.com/r1tribalpgm/
Importance: Normal
Subject: Monthly RTOC meeting
Start Date/Time: Wed 3/14/2018 2:00:00 PM
End Date/Time: Wed 3/14/2018 4:00:00 PM
RTOC Draft AGENDA Mar 14 2018.docx

Hello everyone,

Please see draft agenda attached, and please let me know if you have any additions or edits. A final agenda with supporting documents will be released prior to the call.

Mike Stover

****

Hello everyone,

This is a placeholder for monthly RTOC calls in 2018. An agenda, call-in information and supporting documentation will be provided prior to each monthly call.

Thanks!

Mike

Michael A. Stover, PE

Captain, USPHS
Indian Program Manager
EPA - New England, Region 1
5 Post Office Square, Suite 100
Mail Code OEP06-3
Boston, MA 02109-3912

Ex. 6 - Personal Privacy
stover.michael@epa.gov

LC63142

DRAFT AGENDA for Monthly RTOC CALL

Date: **Wednesday, March 14, 2018**
Time: **10:00am – 12:00pm** **Location: Mt Roosevelt (6th Floor)**
Dial-In Number: 202-991-0477 * Conference Code:** Ex. 6 - Personal Privacy
Adobe Connect: login as guest to https://epawebconferencing.acms.com/r1tribalpgm/

From: Gude, Karen
Location: DCRoomEast2369B/DC-ICC-OW-IO; Conference Number: (202) 991-0477; ID Ex. 6 - Personal Privacy Normal
Subject: National Tribal Water Council - EPA Monthly Call
Start Date/Time: Wed 3/14/2018 6:00:00 PM
End Date/Time: Wed 3/14/2018 7:30:00 PM
3-14-18 NTWC-EPA Monthly Call Draft Agenda.docx

Please see draft agenda for 3/14 NTWC-EPA Call. Thank you.

National Tribal Water Council and EPA
Monthly Conference Call Agenda
Wed., March 14, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EDT
Conference Number: (202) 991-0477; Ex. 6 - Personal Privacy

DRAFT AGENDA

I. **Introductions** *(Karen Gude, OW)* **(5 minutes)**

II. **Update from Prior NTWC Call** *(Ken Norton, NTWC)* **(10 minutes)**

III. **EPA Office of Research and Development: Strategic Research Action Plans** *(TENTATIVE: Monica Rodia, ORD)* **(20 minutes)**
EPA's Office of Research and Development (ORD) has issued six Strategic Research Action Plans (StRAPs) laying out its research agenda. The plans may be of interest to the tribes, especially the Safe and Sustainable Water Resources Research Program, which includes significant nutrient work. Over the next six months, ORD will lead a refresh of its StRAPs, which affords a unique opportunity to engage with tribes during this research planning phase to build partnerships that can help ensure ORD will build tribal research capacity. These StRAPs will outline a four-year strategy, 2019 to 2022, for delivering research and results to support EPA's mission to protect human health and the environment. ORD will do this through interactions with tribes supported by a combination of teleconferences, in-person meetings, and informational sessions with EPA tribal partnership groups and RTOCs, ahead of tribal consultation.

IV. **Report Out on Hypoxia Task Force Meeting** *(Michael Bolt, NTWC & Kyra Reumann-Moore, OW/OWOW)* **(15 minutes)**

V. **Regulatory Updates & Tribal Consultation Information (25 minutes)**
- Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water *(Scott Wilson, OW/OWM)*
  - For more information: https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface
- Update: Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop. *(Rose Kwok, OW/OWOW)*
  - For more information: https://www.epa.gov/wotus-rule
- Update: Tribal Consultation Opportunity, *Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 C.F.R. § 25.5 (Janine Barr, OW/OST)*
  - For more information: https://tcots.epa.gov
- Update: Tribal Consultation and Coordination on the National Primary Drinking Water Regulation for Lead and Copper *(Karen Gude, OW)*
  - For more information: https://tcots.epa.gov

VI. Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements (All) (15 minutes)

- Upcoming Triennial Capacity Development and Operator Certification Workshop in Indianapolis, IN, in August 2018. *(Sam Russell, OW/OGWDW)*
- Planning for Spring NTWC in-person meeting in Washington, DC *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
- Re-launch of NTWC website (http://www.nau.edu/ntwc) *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
- Reminder: Planning for 2018 Tribal Lands and Environment Conference *(Karen Gude, OW)*
  - Spokane Convention Center in Spokane, WA, August 13-16, 2018; Deadline for Session Proposals: May 4, 2018
  - More information: https://www7.nau.edu/itep/main/Conferences/confr_tlef

VII. Next Steps

- Reminder: Next NTWC & NTWC/EPA calls are scheduled for April 11, 2018.

From: Gude, Karen
Location: DCRoomEast2369B/DC-ICC-OW-IO; Conference Number: (202) 991-0477; ID Ex. 6 - Personal Privacy
Importance: Normal
Subject: National Tribal Water Council - EPA Monthly Call
Start Date/Time: Wed 3/14/2018 6:00:00 PM
End Date/Time: Wed 3/14/2018 7:30:00 PM
3-14-18 NTWC-EPA Monthly Call Final Agenda.docx
NTWC_SSWR_3-14-18.pptx

Final agenda for 3/14 NTWC-EPA call is attached.

Attached also please find a PowerPoint presentation for EPA Office of Research and Development's session on the Strategic Research Action Plans, and the Safe and Sustainable Water Resources Research Program. Thank you.

National Tribal Water Council and EPA
Monthly Conference Call Agenda
Wed., March 14, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EDT
Conference Number: (202) 991-0477; Ex. 6 - Personal Privacy

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From: Gude, Karen
Location: DCRoomEast2369B/DC-ICC-OW-IO; Conference Number: (202) 991-0477; ID Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: National Tribal Water Council - EPA Monthly Call
Start Date/Time: Wed 3/14/2018 6:00:00 PM
End Date/Time: Wed 3/14/2018 7:30:00 PM
3-14-18 NTWC-EPA Monthly Call Final Agenda.docx

Final agenda for 3/14 NTWC-EPA call is attached. Thank you.

To: Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Fotouhi, David[Fotouhi.David@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Leopold, Matt[Leopold.Matt@epa.gov]; Forsgren, Lee[Forsgren.Lee@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]; Bowman, Liz[Bowman.Liz@epa.gov]
From: Ross, David P
Sent: Mon 2/12/2018 2:55:32 PM
Subject: FW: Final Draft of Conduit Theory Notice
Draft hydrologic connection notice 2-12-18.docx

Deliberative

FYI, OW is moving this into the final process for publication. Thanks everyone for the excellent work on this. Our OW comms team has prepared a desk statement and Q&A and should be moving that through the system for review and approval as well. I gave it a fairly significant review and edit last night, and aligned it with the terminology used in this version.

Thanks again.

Dave

From: Ross, David P
Sent: Monday, February 12, 2018 9:51 AM
To: Campbell, Ann <Campbell.Ann@epa.gov>
Subject: Final Draft of Conduit Theory Notice
Importance: High

Deliberative

Ann,

This is done. Please put this into final processing. I don't need to see this again unless there are substantive questions that are flagged in final formatting. Thanks.

Dave

From: Penman, Crystal
Location: 3233 WJCE Call in 1-866-299-3188 passcode Ex. 6 - Personal Privacy
Importance: Normal
Subject: Meeting on Hawaii Wildlife Fund v. County of Maui
Categories: Orange Category
Start Date/Time: Tue 8/1/2017 3:00:00 PM
End Date/Time: Tue 8/1/2017 4:00:00 PM

Ex. 5 - Attorney Work Product

).pdf
DHC options paper final 8-1-17.docx
EPA statements on DHC -Attachment 3.docx
DHC Options paper cases Attachment 4.doc

To: Campbell, Ann[Campbell.Ann@epa.gov]; Stebe, Katherine[Stebe.Katherine@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]
Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Zobrist, Marcus[Zobrist.Marcus@epa.gov]; Wilson, Scott[Wilson.Js@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Lousberg, Macara[Lousberg.Macara@epa.gov]
From: Evalenko, Sandy
Sent: Mon 2/12/2018 3:11:28 PM
Subject: FW: Final Draft of Conduit Theory Notice
Draft hydrologic connection notice 2-12-18.docx

Ann – Thanks, I'll coordinate with OWM.

Sandy

From: Campbell, Ann
Sent: Monday, February 12, 2018 9:59 AM
To: Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Stebe, Katherine <Stebe.Katherine@epa.gov>
Cc: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Zobrist, Marcus <Zobrist.Marcus@epa.gov>; Wilson, Scott <Wilson.Js@epa.gov>; Sawyers, Andrew <Sawyers.Andrew@epa.gov>
Subject: FW: Final Draft of Conduit Theory Notice
Importance: High

Folks, please prepare this for signature. Thank you.

To: Wehling, Carrie[Wehling.Carrie@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]
From: Sawyers, Andrew
Sent: Mon 2/12/2018 3:28:39 PM
Subject: FW: Final Draft of Conduit Theory Notice
Draft hydrologic connection notice 2-12-18.docx

FYI – we were directed to finalize for signature. Thanks for all your support.

From: Campbell, Ann
Sent: Monday, February 12, 2018 9:59 AM
To: Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Stebe, Katherine <Stebe.Katherine@epa.gov>
Cc: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Zobrist, Marcus <Zobrist.Marcus@epa.gov>; Wilson, Scott <Wilson.Js@epa.gov>; Sawyers, Andrew <Sawyers.Andrew@epa.gov>
Subject: FW: Final Draft of Conduit Theory Notice
Importance: High

Folks, please prepare this for signature. Thank you.

Cc: Farris, Erika D.[Farris.Erika@epa.gov]
To: Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Zobrist, Marcus[Zobrist.Marcus@epa.gov]
From: Sawyers, Andrew
Sent: Wed 2/7/2018 7:15:32 PM
Subject: Fwd: ACTION: Direct Hydrologic Connection Request for Comment
Draft hydrologic connection notice 2-7-18.docx
ATT00001.htm

Marcus, Carrie and Karyn, please see the note below. Are you ok moving forward? Ex. 5 - Deliberative Process **Ex. 5 - Deliberative Process** Beyond that, I think it captures the spirt of the previous iteration. Please let me know if there are any red flags.

Thanks
Andrew

Begin forwarded message:

From: "Campbell, Ann" <Campbell.Ann@epa.gov>
Date: February 7, 2018 at 10:13:54 AM PST
To: "Sawyers, Andrew" <Sawyers.Andrew@epa.gov>, "Zobrist, Marcus" <Zobrist.Marcus@epa.gov>
Cc: "Kloss, Christopher" <Kloss.Christopher@epa.gov>, "Lousberg, Macara" <Lousberg.Macara@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Subject: ACTION: Direct Hydrologic Connection Request for Comment

Andrew, I understand Dave sent you the latest on this earlier in the week. The attached includes a few additional edits but has not changed substantially from the version provided to you earlier. Please let me know by COB if there are any fatal flaws. There is an interest in getting this out this week if possible. So once you've reviewed the document will need to be finalized and prepared for Dave's signature. WPS can assist and I am copying Macara here.

To: Wilson, Scott[Wilson.Js@epa.gov]; Zobrist, Marcus[Zobrist.Marcus@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Frace, Sheila[Frace.Sheila@epa.gov]
Cc: Gilbertson, Sue[gilbertson.sue@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]; Schollhamer, Mary[Schollhamer.Mary@epa.gov]
From: Stebe, Katherine
Sent: Tue 2/13/2018 3:09:29 PM
Subject: Hydrologic connection notice has been signed
Direct Hydrologic Connection FRN_signed_20180212.pdf

Dave Ross signed the Notice yesterday, and the package is with OP's FR Liaison team for publishing.

Katherine Stebe

Office of Wastewater Management

U.S. Environmental Protection Agency

(202) 564-7933

To: Sawyers, Andrew[Sawyers.Andrew@epa.gov]
Cc: Souders, Alison[Souders.Alison@epa.gov]
From: Farris, Erika D.
Sent: Mon 3/19/2018 1:31:07 PM
Subject: Conduit theory/ Direct hydrologic connection papers
DHC one pager 2_28_18 final.docx
DHC briefing paper February 2018.docx
Direct Hydrologic Connection FRN_signed_20180212.pdf

Andrew – Attached are 3 Direct Hydrologic Connection papers. Let me know if you were looking for a different version. I'll give you the printed copies when you are free.

To: Wehling, Carrie[Wehling.Carrie@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]
From: Sawyers, Andrew
Sent: Tue 2/13/2018 3:27:07 PM
Subject: Fwd: Hydrologic connection notice has been signed
Direct Hydrologic Connection FRN_signed_20180212.pdf
ATT00001.htm

FYI

Begin forwarded message:

From: "Stebe, Katherine" <Stebe.Katherine@epa.gov>
To: "Wilson, Scott" <Wilson.Js@epa.gov>, "Zobrist, Marcus" <Zobrist.Marcus@epa.gov>, "Sawyers, Andrew" <Sawyers.Andrew@epa.gov>, "Frace, Sheila" <Frace.Sheila@epa.gov>
Cc: "Gilbertson, Sue" <gilbertson.sue@epa.gov>, "Farris, Erika D." <Farris.Erika@epa.gov>, "Schollhamer, Mary" <Schollhamer.Mary@epa.gov>
Subject: Hydrologic connection notice has been signed

Dave Ross signed the Notice yesterday, and the package is with OP's FR Liaison team for publishing.

Katherine Stebe

Office of Wastewater Management

U.S. Environmental Protection Agency

(202) 564-7933

To: Bodine, Susan[bodine.susan@epa.gov]
From: Shiffman, Cari
Sent: Wed 4/18/2018 2:48:59 PM
Subject: FW: FOIA Release: EPA-HQ-2018-004521 Hydrologic Connection Interim Release 69 pages
18-0216 WKA hydrological connections FOIA.pdf
Notice for Comment on Groundwater Discharges (3) (1).pdf
Binder1.pdf

Susan,

As mentioned this morning, for awareness, responsive records from your e-mail to a FOIA on hydrologic connection via groundwater are on pages 1-3 and 32.

Thanks,

Cari Shiffman, Chief of Staff

U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

Office: (202) 564-2898 | Mobile: Ex. 6 - Personal Privacy

From: Campbell, Ann
Sent: Tuesday, April 17, 2018 2:18 PM
To: Shiffman, Cari <Shiffman.Cari@epa.gov>
Cc: Zipf, Lynn <Zipf.Lynn@epa.gov>
Subject: FOIA Release: EPA-HQ-2018-004521 Hydrologic Connection Interim Release 69 pages

Cari, I wanted to make Susan aware, via you, of the attached FOIA on hydrologic connection via groundwater. Our interim response is due Thursday. We intend to respond with

communications to external entities. Susan has a number of emails that were identified as responsive (found on pages 1-3 and page 32). If you have any questions, I am copying our FOIA lead here in OW, Lynn Zipf.

Thanks!

Ann Campbell

Chief of Staff (acting)

Office of Water

****

This is a FOIA from Super Law Group requesting:

"Any and all records of communications subsequent to November 7, 2016, regarding whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to Clean Water Act regulation, including but not limited to records or communications related to the February 14 Notice attached, between (a) people and organizations outside EPA and (b) members of the transition, beachhead, and landing teams in any EPA office, and EPA staff in any EPA office, including but not limited to the Office of the Administrator (Immediate Office), Office of Congressional and Intergovernmental Relations, Office of the Executive Secretariat, Office of Policy, Office of Public Affairs, Office of Water, and Office of General Counsel."

I have attached the FOIA request for your information. This is the first interim release of 69 pages focusing on (a) communication with people and parties outside of EPA. Since it is with external stakeholders, the deliberative exemption does not apply.

The deadline for sending these to the requester is this upcoming Thursday, April 19. Please let me know if you have any questions.

Lynn Zipf

FOIA Specialist

Office of Water

EPA East Room 3349K

(202) 564-1509

To: Bodine, Susan[bodine.susan@epa.gov]
From: Smith, Brooks M.
Sent: Wed 2/21/2018 3:43:23 PM
Subject: RE: report language
CWA report language.pdf

I clearly need a metadata crash-course. Clean version attached. Best! Brooks

Brooks M. Smith
troutman sanders
Direct: 804.697.1414
brooks.smith@troutman.com

From: Bodine, Susan [mailto:bodine.susan@epa.gov]
Sent: Wednesday, February 21, 2018 10:30 AM
To: Smith, Brooks M. <Brooks.Smith@troutmansanders.com>
Subject: RE: report language

The document lists Michael Kafka as the author.

From: Smith, Brooks M. [mailto:Brooks.Smith@troutmansanders.com]
Sent: Wednesday, February 21, 2018 10:21 AM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: report language

Just so you don't think I've lost my mind on CWA, UIC and RCRA basics, here's the version that I worked on and that reflects the latest thinking on possible report language. I'd welcome your input on substance and strategy for addressing the issue in this manner. Best! Brooks

Brooks M. Smith
Direct: 804.697.1414

brooks.smith@troutman.com

troutman sanders
1001 Haxall Point, Suite 1500
Richmond, VA 23219
troutman.com

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To: Bodine, Susan[bodine.susan@epa.gov]
From: Smith, Brooks M.
Sent: Wed 2/21/2018 3:21:17 PM
Subject: report language
CWA report language.pdf

Just so you don't think I've lost my mind on CWA, UIC and RCRA basics, here's the version that I worked on and that reflects the latest thinking on possible report language. I'd welcome your input on substance and strategy for addressing the issue in this manner. Best! Brooks

Brooks M. Smith
Direct: 804.697.1414
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Richmond, VA 23219
troutman.com

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To: Press[Press@epa.gov]
From: David LaRoss
Sent: Wed 2/14/2018 8:15:44 PM
Subject: Groundwater "Conduit" comments

I've been told that EPA has posted online a document soliciting public comments on whether pollution releases that travel through a "direct conduit" of groundwater to surface waters can be regulated under the CWA -- which has been the subject of many ongoing court cases, most recently in the 9th Circuit. But I can't find any active webpage on the issue. Can you send a copy of the document or the link to where it's posted?
Thanks.

To: Dravis, Samantha[dravis.samantha@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Mark Ryan[mr@ryankuehler.com]
From: Brown, Samuel L.
Sent: Mon 12/4/2017 1:26:55 AM
Subject: Logistics | ELI Conference: EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?
Policy and Enforcement Panel Overview (ELI-ALICLE).docx

Hi Samantha, Patrick, and Mark,

I am looking forward to seeing you tomorrow afternoon, Monday, December 4. A reminder that our panel discussion is **3:00pm-4:30pm**. If possible, please try and be there by 2:45pm so we can go over a few logistical items. The event is at the Hunton & Williams DC office at 2200 Pennsylvania Avenue, NW (on Washington Circle). When you arrive, take the elevator up to the 9th Floor.

If you have any questions tomorrow, please feel free to call or text my cell at (Ex. 6 - Personal Privacy

Thank you again for your participation in this event!

- Sam

From: Brown, Samuel L.
Sent: Sunday, November 05, 2017 8:13 PM
To: Dravis, Samantha; 'Traylor, Patrick'; 'Mark Ryan'
Subject: ELI Conference | EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?

Hi Samantha, Patrick, and Mark,

Thank you again for agreeing to participate in the ELI and ALI-CLE conference on the Clean Water Act in Washington D.C. on Monday, December 4 from 3:00pm – 4:30pm.

Attached is an overview of how I am thinking to structure our panel. The attachment includes representative moderated questions that I would suggest that I tee up for discussion. Again, the thought is no slide decks, just moderated discussion and then Q&A with the audience. I welcome your input and suggestions, in particular on the moderated questions. I welcome any subject matter that you would like to highlight or discuss. Samantha/Patrick, I understand there may be subject matter that is sensitive that you would like to not discuss, so I can tailor the conversation around any concerns that you may have.

I think it makes sense to have a short call to touch base. Does Wednesday or Friday this week work for you? Samantha/Patrick, if you have schedulers I am happy to work with them to get 30 minutes on your calendars.

Thanks so much and talk to you soon! – Sam

HUNTON & WILLIAMS **Samuel Brown**

Senior Attorney

slbrown@hunton.com
p Ex. 6 - Personal Privacy
f 415.975.3775

bio | vCard

Hunton & Williams LLP
50 California Street
Suite 1700
San Francisco, CA 94105

hunton.com

To: Dravis, Samantha[dravis.samantha@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Mark Ryan[mr@ryankuehler.com]
From: Brown, Samuel L.
Sent: Mon 11/13/2017 5:37:11 AM
Subject: RE: ELI Conference | EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?
Policy and Enforcement Panel Overview (ELI-ALICLE).docx

Hi Samantha, Patrick, and Mark,

I am following up on the email below. Does sometime this week work for you for a 30 minute call to touch base on the panel? I'll be in Georgia most of this week for work, so on EST.

Thanks!

– Sam

From: Brown, Samuel L.
Sent: Sunday, November 05, 2017 8:13 PM
To: Dravis, Samantha; 'Traylor, Patrick'; 'Mark Ryan'
Subject: ELI Conference | EPA Policy Goals, Regulatory Reform, and Enforcement: What Does the Future Hold?

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Thanks so much and talk to you soon! – Sam

HUNTON & WILLIAMS **Samuel Brown**

Senior Attorney

slbrown@hunton.com

Ex. 6 - Personal Privacy

f 415.975.3775

bio | vCard

Hunton & Williams LLP
50 California Street
Suite 1700
San Francisco, CA 94105

hunton.com

To: Greenwalt, Sarah[greenwalt.sarah@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]
From: Bennett, Karen C.
Sent: Thur 11/16/2017 6:56:55 PM
Subject: FW: NPDES/Groundwater Information
NMA Coalition 4th Circuit Kinder Morgan Amicus Brief.pdf

Please see attached amicus brief at pages 12-19.

Karen C. Bennett

CLARK HILL PLC
1001 Pennsylvania Avenue NW, Suite 1300 South | Washington, DC 20004
202.572.8676 (Direct) Ex. 6 - Personal Privacy 202.552.2369 (Fax)

KBennett@ClarkHill.com | www.clarkhill.com

Environmentalists Say EPA Policies Boost Suit Seeking CWA Ash Controls

October 31, 2017

Environmentalists are invoking past EPA policies to boost their lawsuit claim that the Clean Water Act (CWA) limits coal ash pollution that travels through groundwater to protected surface waters, in order to win judicial deference for that position and arguing that such a decision would be hard for the Trump administration to avoid.

An Oct. 30 brief from Waterkeeper Alliance and 15 local or regional environmental groups says the U.S. Court of Appeals for the 4th Circuit must uphold CWA authority over ash leaks to groundwater with a "direct" connection to surface waters, in part because EPA has backed that reading of the water law and courts should defer to it. The groups hope their suit sets a precedent forcing controls on ash to avoid groundwater contamination.

"That is EPA's longstanding and consistent interpretation of the Act, articulated in multiple notice-and-comment rulemakings since 1990, applied through the issuance of permits carrying the force of law, and reiterated in numerous administrative and judicial forums. EPA's interpretation is entitled to *Chevron* deference," the brief says.

Under the *Chevron* principle, courts will defer to an agency's reading of ambiguous statutory text as long as that interpretation is reasonable. Waterkeeper and its allies, filing as *amicus* parties in the 4th Circuit case *Sierra Club v. Virginia Electric Power Company (VEPCO)*, say that even though EPA is not involved in the case, its past positions on CWA limits on groundwater releases are well-founded and deserve deference.

For instance, they cite a 1990 rule on stormwater runoff that says, "discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)."

It also quotes the 1998 iteration of the CWA general permit for construction stormwater as saying, "EPA interprets the

CWA's [National Pollutant Discharge Elimination System (NPDES)] permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection."

"EPA has stated its interpretation many times over several decades. There was no 'stealth' in doing so, given that EPA's interpretation and rationale were explained in multiple notice-and comment rulemakings and in the issuance of individual and general NDPES permits. . . . The Court should afford *Chevron* deference to EPA's well-reasoned, expert judgment because it is reasonable and consistent with the statute EPA administers," the brief says.

The environmentalist groups do not address the possibility that the Trump EPA could file its own *amicus* brief to try to reverse that position, which would undercut any attempt to win *Chevron* deference, since that principle applies only to agencies' interpretations of law rather than arguments by third parties.

EPA under the current administration has generally backed the energy sector's requests to limit the reach of the CWA, including proposing to repeal the Obama-era rule governing which waters are subject to the law's permit requirements and weighing a likely replacement that will be narrower in scope.

However, an environmental attorney says it is unlikely the court would see such a reversal as persuasive.

"It would be extremely hard for an agency with decades of repeated interpretation that matches what the courts have done and Congress' intent and the purpose of the statute to suddenly say 'we don't think so anymore,'" the attorney says.

EPA Deference

The attorney continues that if EPA were to simply express a new reading of the "point source" language in a court brief, it would not warrant deference when weighed against a history of formal rulemakings and other agency action. "If they just say it, then they really haven't reversed anything."

A reversal that goes through notice-and-comment rulemaking would carry more weight, the attorney says, but such a rulemaking would be unlikely to finish before the 4th Circuit rules in *VEPCO*.

Environmentalists in the *VEPCO* suit are urging the 4th Circuit to preserve and strengthen a district court's ruling that the power company violated the CWA when arsenic and other pollutants leaked from a coal ash disposal site its Possum Point, VA, facility into groundwater, and was then carried to surface waters.

The CWA does not govern groundwater quality directly, but Sierra Club and its allies say that when the sub-surface channels create a direct connection to surface waters, releases to that groundwater can be subject to the law's permit mandates for "point sources."

"To be clear, EPA's position -- and the position advanced here by Waterkeeper *Amici* -- is not that groundwater is a point source or a water of the United States. Rather, in certain situations groundwater may be sufficiently hydrologically connected to surface water such that the groundwater acts as a conveyance between the point source and the jurisdictional water," the brief says.

Beyond the 1990 and 1998 rules, the environmentalists argue that EPA included similar language in the proposed version of a 2003 CWA rule expanding the universe of animal feedlots subject to NPDES permits, and has used those principles in permitting decisions.

While VEPCO and its allies have argued that EPA "disavowed" that line of thinking since the final feedlot rule relied instead on case-by-case findings, Waterkeeper and its allies say that was not the case.

Rather, they note, EPA said in a 2008 rule crafted to replace the 2003 version in response to a court remand that "nothing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water."

Similarly, the brief argues that even though EPA is proposing to withdraw its 2015 CWA jurisdiction rule that allowed for consideration of groundwater connectivity in judging which discharges require permits, that regulation only noted

the agency's "longstanding interpretation" rather than adopting a new reading of the law.

"Quite obviously, the withdrawal of a rule that does nothing to 'change . . . or affect . . . [EPA's] longstanding position" also does not change or affect that position," the brief says. -- *David LaRoss* (dlaross@iwpnews.com)

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To: Ford, Peter[Ford.Peter@epa.gov]; Nagle, Deborah[Nagle.Deborah@epa.gov]; Lindley, Tom (Perkins Coie)[TLindley@perkinscoie.com]
Cc: Thomas, Christopher D. (Perkins Coie)[CThomas@perkinscoie.com]
From: Thomas, Christopher D. (Perkins Coie)
Sent: Sun 12/3/2017 10:46:57 PM
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Nonsense. I normally start preparing the night before in a bar, and I am way ahead of schedule for this one.

It appears Tom has no moderating obligations prior to our 1:30 session, so we could perhaps catch up in person tomorrow.

Also, I will be sending around a more complete rough script with prompts for the stuff on my list, which will include:

Ohio Valley Environmental Coalition & Columbia River Keeper: constructive submission.

U.S. v. Robertson: Ninth Circuit's case affirming criminal conviction for dredging and filling a WOTUS that apparently qualified only under the Kennedy test; the interesting part is that the panel's opinion reached that result by finding that the Kennedy test was a logical subset for the Scalia test, which seems highly naïve to me.

Ecological Rights Foundation v. PG&E: Ninth Circuit says RCRA citizen suits can be used to abate unregulated stormwater discharges, if they otherwise constitute an imminent and substantial endangerment.

Tennessee Clean Water Action Network v. TVA: now on appeal to the Sixth Circuit after the M.D. TN held that groundwater with a direct hydrologic connection to surface water does fall within the Clean Water Act's jurisdiction.

I have a few other less significant cases I can mention if time allows.

More substantively, I'd be interested in a discussion of how the TMDL process works in the West, especially with regard to impaired waters that are not normally wet and impacted by unregulated

stormwater flow. Does Friend of Pinto Creek really preclude new NPDES permits where there is no TMDL and little hope of developing one because of the orphan non-point sources? Pete, this was one of your old cases. Want to have a bit of discussion? I have no preconceived notions, other than confusion.

Best,

Chris Thomas | **Perkins Coie LLP**

PARTNER

2901 N. Central Avenue

Suite 2000

Phoenix, AZ 85012-8014

PHONE: 602-351-8045

FAX: 602-648-7036

E-MAIL: CThomas@perkinscoie.com

From: Ford, Peter [mailto:Ford.Peter@epa.gov]
Sent: Friday, December 01, 2017 12:58 PM
To: Nagle, Deborah; Lindley, Tom (WDC); Thomas, Christopher D. (PHX)
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Winging it with you all. Should be ok.

Peter Z. Ford

U.S. EPA Office of General Counsel

202.564.5593

From: Nagle, Deborah
Sent: Friday, December 01, 2017 2:54 PM
To: Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com>; Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com>; Ford, Peter <Ford.Peter@epa.gov>

Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

I guess we are winging it – my calendar is also a mess for the rest of the day

-Deborah

Deborah G. Nagle, Acting Director
Office of Science and Technology
1200 Pennsylvania Ave, NW
Washington, DC 20460
Tel: (202) 564-1185

From: Lindley, Tom (Perkins Coie) [mailto:TLindley@perkinscoie.com]
Sent: Friday, December 01, 2017 1:46 PM
To: Nagle, Deborah <Nagle.Deborah@epa.gov>; Thomas, Christopher D. (Perkins Coie) <CThomas@perkinscoie.com>; Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Have not heard from Chris, and now my schedule is a total mess, so please either go ahead without me, or we will truly wing it!

From: Lindley, Tom (WDC)
Sent: Tuesday, November 28, 2017 2:55 PM
To: Nagle, Deborah
Cc: Thomas, Christopher D. (PHX); Ford, Peter
Subject: Re: ALI-ABA Water Law Conference/Preliminary Rough Script

Friday also works for me if between 11-2 Eastern

Sent from my mobile phone

On Nov 28, 2017, at 13:59, Nagle, Deborah <Nagle.Deborah@epa.gov> wrote:

Friday works for me.

Deborah

Deborah G. Nagle, Acting Director
Office of Science and Technology
1200 Pennsylvania Ave, NW
Washington, DC 20460
Tel: (202) 564-1185

From: Thomas, Christopher D. (Perkins Coie) [mailto:CThomas@perkinscoie.com]
Sent: Tuesday, November 28, 2017 3:36 PM
To: Lindley, Tom (Perkins Coie) <TLindley@perkinscoie.com>; Nagle, Deborah <Nagle.Deborah@epa.gov>; Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: ALI-ABA Water Law Conference/Preliminary Rough Script

Would Friday work for a preparatory call? I could also do Thursday, except for mid-day.

Chris Thomas | Perkins Coie LLP

PARTNER

2901 N. Central Avenue

Suite 2000

Phoenix, AZ 85012-8014

PHONE: 602-351-8045

FAX: 602-648-7036

E-MAIL: CThomas@perkinscoie.com

From: Thomas, Christopher D. (PHX)
Sent: Monday, November 27, 2017 1:58 PM
To: Lindley, Tom (WDC); Nagle, Deborah; Ford, Peter
Cc: Thomas, Christopher D. (PHX)
Subject: ALI-ABA Water Law Conference/Preliminary Rough Script

Tom, Deborah, and Pete:

This is still a work in progress, but attached is my initial attempt to script the first part of our presentation. Since I follow litigation much more closely than regulatory developments, I'm afraid I could not plug in the sum and substance of Deborah's likely response. There is also more to come in general. I will continue plugging away, but thought it might be useful for you to see what I had in mind before we perhaps get on a preparatory conference call.

Best,

Chris

Christopher Thomas | Perkins Coie LLP

PARTNER

E. CThomas@perkinscoie.com

<image001.jpg>

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To: Sawyers, Andrew[Sawyers.Andrew@epa.gov]
From: Julia Anastasio
Sent: Tue 2/20/2018 6:16:43 PM
Subject: RE: Follow-Up to Voicemail

Thanks. I will try to give you a buzz later this afternoon. Is there someone on your staff that Sean can work with to schedule a briefing?

Julia Anastasio

Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

Ex. 6 - Personal Privacy

Check out ACWA's Workshop Schedule: https://www.acwa-us.org/events/

From: Sawyers, Andrew [mailto:Sawyers.Andrew@epa.gov]
Sent: Tuesday, February 20, 2018 11:42 AM
To: Julia Anastasio <janastasio@acwa-us.org>
Cc: Sean Rolland <srolland@acwa-us.org>
Subject: RE: Follow-Up to Voicemail

Thanks Julia, sorry for the surprise - will be happy to discuss.

From: Julia Anastasio [mailto:janastasio@acwa-us.org]
Sent: Tuesday, February 20, 2018 11:40 AM
To: Sawyers, Andrew <Sawyers.Andrew@epa.gov>
Cc: Sean Rolland <srolland@acwa-us.org>
Subject: Follow-Up to Voicemail
Importance: High

Andrew

I thought I would send a note to follow up on the voicemail message that I left you last week about the *Notice and Request for Comment* associated with *Clean Water Act Coverage of Discharges of Pollutants via Direct Hydrologic Connection to Surface Water.*

The notice took ACWA by surprise. We would like to find time for either you or someone on your staff to join our members on a call to discuss the FR notice and the issue.

Thanks.

Julia Anastasio

Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

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To: Sawyers, Andrew[Sawyers.Andrew@epa.gov]
Cc: Sean Rolland[srolland@acwa-us.org]
From: Julia Anastasio
Sent: Tue 2/20/2018 4:39:50 PM
Subject: Follow-Up to Voicemail

Andrew

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Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

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Check out ACWA's Workshop Schedule: https://www.acwa-us.org/events/

To: Ross, David[Ross.David@epa.gov]
Cc: Penman, Crystal[Penman.Crystal@epa.gov]
From: Paul Balserak
Sent: Thur 2/1/2018 4:41:16 PM
Subject: Speaking Request

Dear David,

I want to invite you to speak at AISI's Energy and Environment Committee meeting on February 28, 2018 at our offices in Washington DC. Three times a year, approximately 40-50 AISI member company federal representatives and environmental managers meet together to address a range of energy and environmental topics related to both the Hill and the Administration. We would love to hear from you, and at this point could accommodate pretty much any hour time slot during that day that works for you. The water policy issues of immediate interest to my members relate to the draft conductivity guidance from Dec 2016, the issue of conduit theory and, of course, the Waters of the US rulemaking effort. Our meeting actually runs through noon on March 1, so if Feb 28 is not convenient for you, please consider coming the morning of March 1. Thank you in advance for your consideration of this invite, David. Please feel free to reach me on either of the numbers below should you want to discuss any matter.

Best,

Paul

Paul Balserak

Vice President, Environment

American Iron and Steel Institute

25 Massachusetts Ave. NW, Suite 800

Washington, DC 20001

202 452-7122 (office)

Ex. 6 - Personal Privacy

To: Julia Anastasio[janastasio@acwa-us.org]
From: Sawyers, Andrew
Sent: Tue 2/20/2018 9:17:55 PM
Subject: Re: Follow-Up to Voicemail

No - you and i should talk. There is a lot to this.

On Feb 20, 2018, at 4:15 PM, Julia Anastasio <janastasio@acwa-us.org> wrote:

Thanks. I will try to give you a buzz later this afternoon. Is there someone on your staff that Sean can work with to schedule a briefing?

Julia Anastasio

Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

Ex. 6 - Personal Privacy

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To: Sawyers, Andrew <Sawyers.Andrew@epa.gov>
Cc: Sean Rolland <srolland@acwa-us.org>
Subject: Follow-Up to Voicemail
Importance: High

Andrew

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Thanks.

Julia Anastasio

Executive Director & General Counsel

Association of Clean Water Administrators

202.756.0600 (O)

Ex. 6 - Personal Privacy

Check out ACWA's Workshop Schedule: https://www.acwa-us.org/events/

To: Wendelowski, Karyn[wendelowski.karyn@epa.gov]
From: LexisNexisDelivery@lexisnexis.com
Sent: Fri 2/23/2018 2:54:03 PM
Subject: Email:Amigos Bravos v. EPA_ 324 F.3d 1166
Amigos Bravos v. EPA_ 324 F.3d 1166.pdf

Delivery

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To: Wendelowski, Karyn[wendelowski.karyn@epa.gov]
From: LexisNexisDelivery@lexisnexis.com
Sent: Fri 2/23/2018 2:46:26 PM
Subject: Email:Amigos Bravos v. EPA_ 324 F.3d 1166
Amigos Bravos v. EPA_ 324 F.3d 1166.pdf

Delivery

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From: Stover, Michael
Location: Mt Roosevelt Ex. 6 - Personal Privacy Adobe Connect: login as guest to https://epawebconferencing.acms.com/r1tribalpgm/
Importance: Normal
Subject: Monthly RTOC meeting
Start Date/Time: Wed 3/14/2018 2:00:00 PM
End Date/Time: Wed 3/14/2018 4:00:00 PM
RTOC Draft AGENDA Mar 14 2018.docx

Hello everyone,

Please see draft agenda attached, and please let me know if you have any additions or edits. A final agenda with supporting documents will be released prior to the call.

Mike Stover

****

Hello everyone,

This is a placeholder for monthly RTOC calls in 2018. An agenda, call-in information and supporting documentation will be provided prior to each monthly call.

Thanks!

Mike

Michael A. Stover, PE

Captain, USPHS
Indian Program Manager
EPA - New England, Region 1
5 Post Office Square, Suite 100
Mail Code OEP06-3
Boston, MA 02109-3912

Ex. 6 - Personal Privacy
stover.michael@epa.gov

LC63142

From: Gude, Karen
Location: DCRoomEast2369B/DC-ICC-OW-IO; Conference Number: (202) 991-0477; ID Ex. 6 - Personal Privacy
Normal
Subject: National Tribal Water Council - EPA Monthly Call
Start Date/Time: Wed 3/14/2018 6:00:00 PM
End Date/Time: Wed 3/14/2018 7:30:00 PM
3-14-18 NTWC-EPA Monthly Call Draft Agenda.docx

Please see draft agenda for 3/14 NTWC-EPA Call. Thank you.

From: Gude, Karen
Location: DCRoomEast2369B/DC-ICC-OW-IO; Conference Number: (202) 991-0477; ID Ex. 6 - Personal Privacy
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Start Date/Time: Wed 3/14/2018 6:00:00 PM
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3-14-18 NTWC-EPA Monthly Call Final Agenda.docx
NTWC_SSWR_3-14-18.pptx

Final agenda for 3/14 NTWC-EPA call is attached.

Attached also please find a PowerPoint presentation for EPA Office of Research and Development's session on the Strategic Research Action Plans, and the Safe and Sustainable Water Resources Research Program. Thank you.

From: Gude, Karen
Location: DCRoomEast2369B/DC-ICC-OW-IO; Conference Number: (202) 991-0477; ID Code: Ex. 6 - Personal Privacy
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Proposed Congressional report language:

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Potential regulatory approach:

- Explain there is no overlap between RCRA and the CWA and that the new rule is intended to harmonize the two statutes with respect to releases to groundwater from CCR units.
- Explain that CCR units are not point sources, thus the new rule is not excluding a source otherwise regulated.
- 40 C.F.R. 257.50 (Scope and purpose)—releases to groundwater from CCR units are exclusively regulated under the CCR rule.
- 40 C.F.R. Part 122 (EPA Administered Permit Programs: The National Pollutant Discharge Elimination System)—if you are subject to the CCR rule for impacts to groundwater from CCR unit releases, you are not subject to this part for such releases, irrespective of any hydrological connection (direct or otherwise) or traceability to surface waters (*but* outfall where conveyance adds pollutants to navigable waters continues to be subject to Part 122).

No. 17-1640

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v.

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PLANTATION PIPE LINE COMPANY, INC.,

Defendants-Appellees.

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FOR THE DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION
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BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, EDISON ELECTRIC INSTITUTE, NATIONAL MINING ASSOCIATION, AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Dated: September 8, 2017

Counsel for Amici Curiae

DRAFT AGENDA for Monthly RTOC CALL

Date: **Wednesday, March 14, 2018**
Time: **10:00am – 12:00pm** **Location: Mt Roosevelt (6th Floor)**
Dial-In Number: 202-991-0477 * Conference Code:** Ex. 6 - Personal Privacy
Adobe Connect: login as guest to https://epawebconferencing.acms.com/r1tribalpgm/

National Tribal Water Council and EPA
Monthly Conference Call Agenda
Wed., March 14, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EDT
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I. **Introductions** *(Karen Gude, OW)* **(5 minutes)**

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III. **EPA Office of Research and Development: Strategic Research Action Plans** *(TENTATIVE: Monica Rodia, ORD)* **(20 minutes)**
EPA's Office of Research and Development (ORD) has issued six Strategic Research Action Plans (StRAPs) laying out its research agenda. The plans may be of interest to the tribes, especially the Safe and Sustainable Water Resources Research Program, which includes significant nutrient work. Over the next six months, ORD will lead a refresh of its StRAPs, which affords a unique opportunity to engage with tribes during this research planning phase to build partnerships that can help ensure ORD will build tribal research capacity. These StRAPs will outline a four-year strategy, 2019 to 2022, for delivering research and results to support EPA's mission to protect human health and the environment. ORD will do this through interactions with tribes supported by a combination of teleconferences, in-person meetings, and informational sessions with EPA tribal partnership groups and RTOCs, ahead of tribal consultation.

IV. **Report Out on Hypoxia Task Force Meeting** *(Michael Bolt, NTWC & Kyra Reumann-Moore, OW/OWOW)* **(15 minutes)**

V. **Regulatory Updates & Tribal Consultation Information (25 minutes)**
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- Reminder: Planning for 2018 Tribal Lands and Environment Conference *(Karen Gude, OW)*
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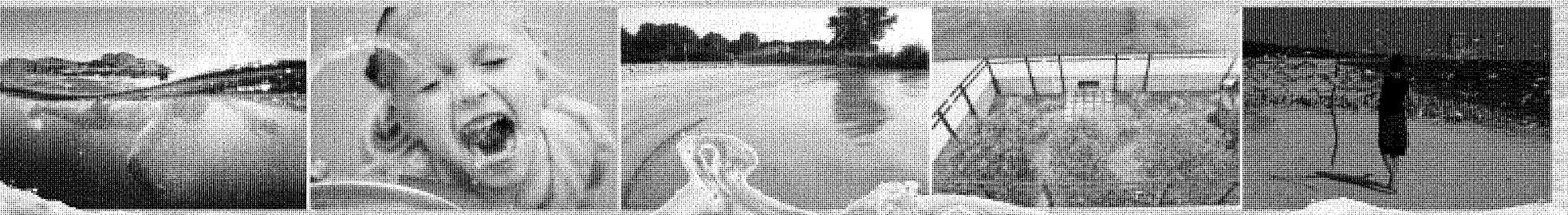
EPA
Office of Research and Development

SAFE AND SUSTAINABLE WATER RESOURCES RESEARCH PROGRAM



National Tribal Water Council

March 14, 2018

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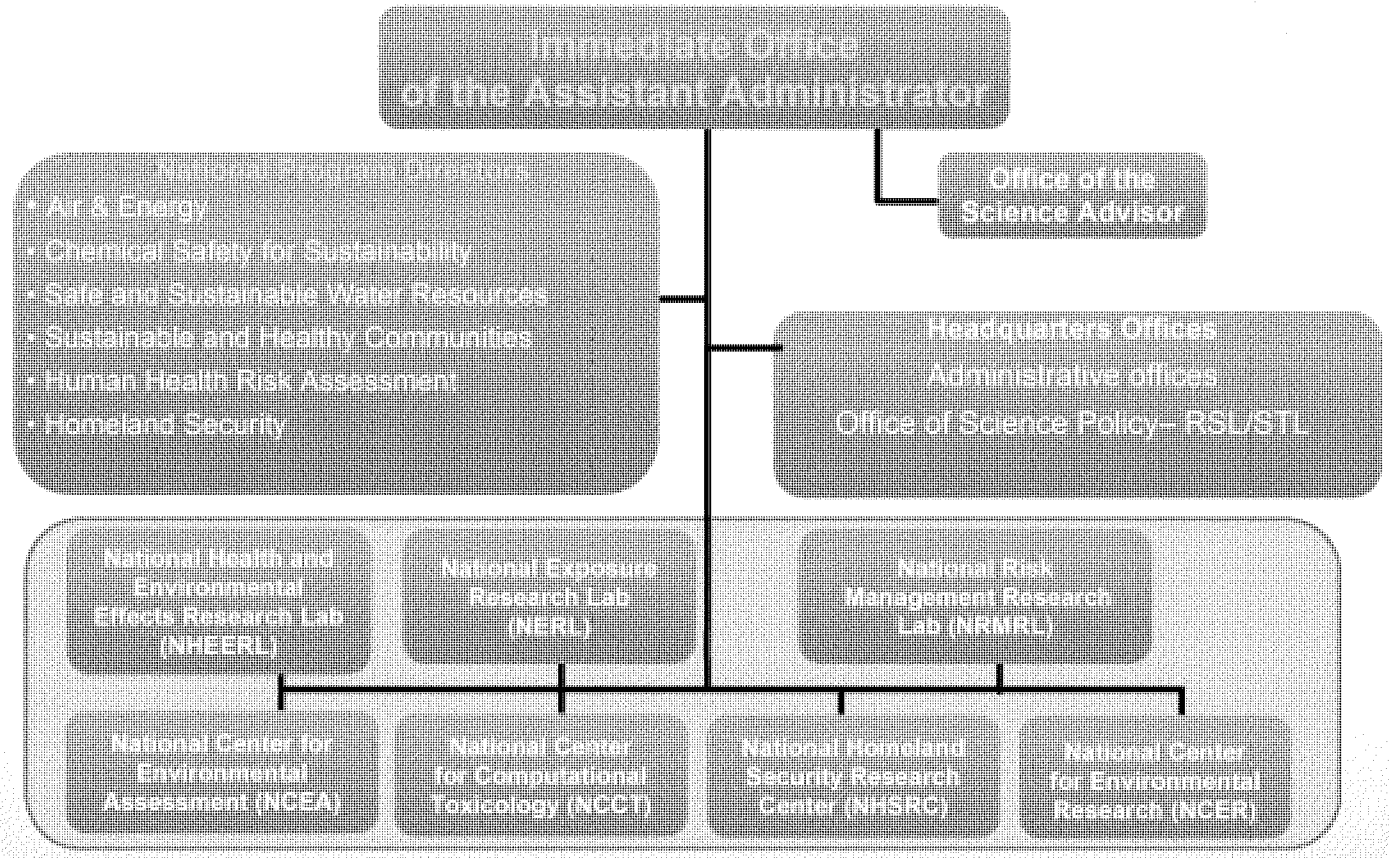
ORD Organizational Chart



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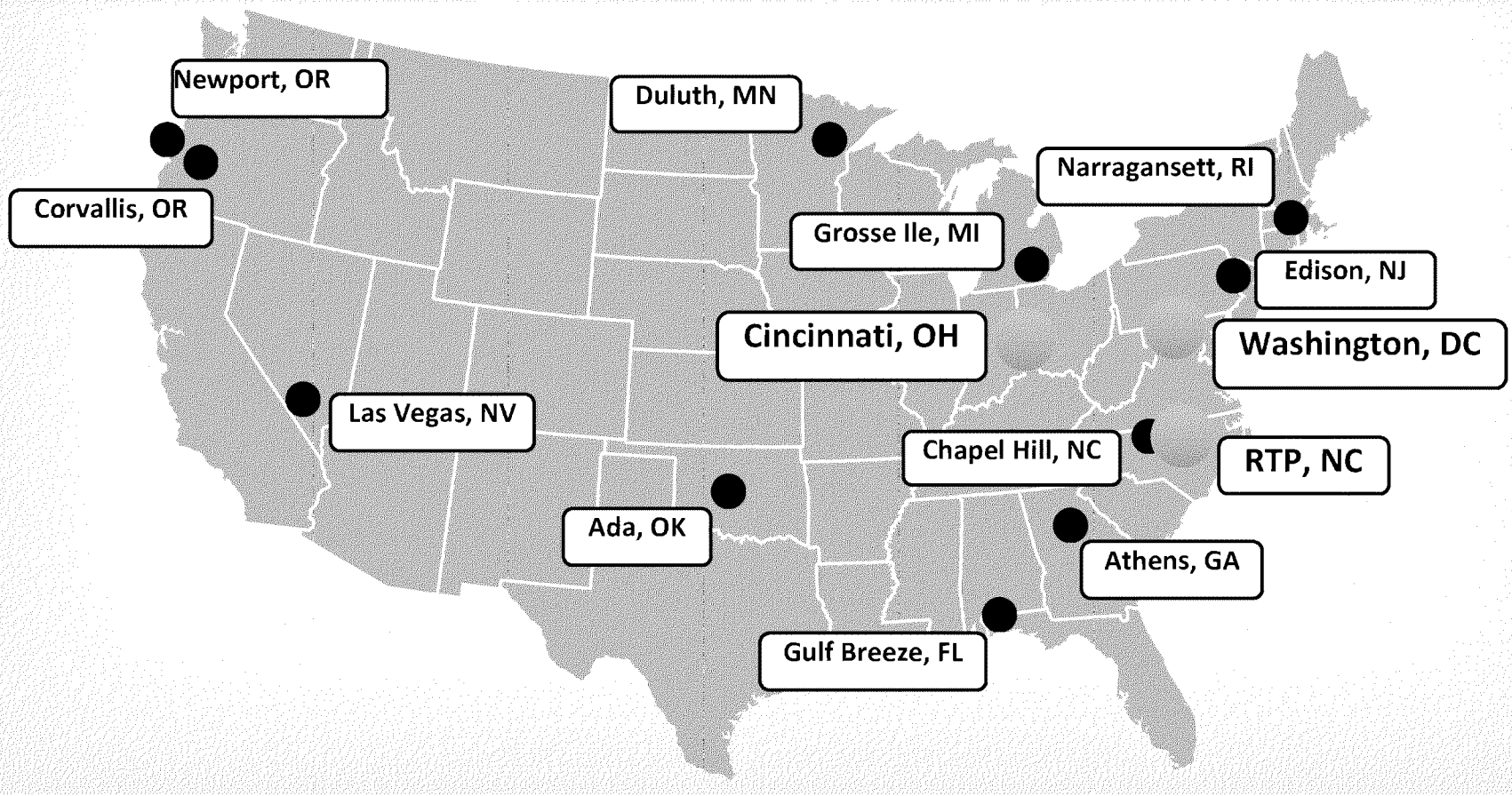
ORD Research Facilities



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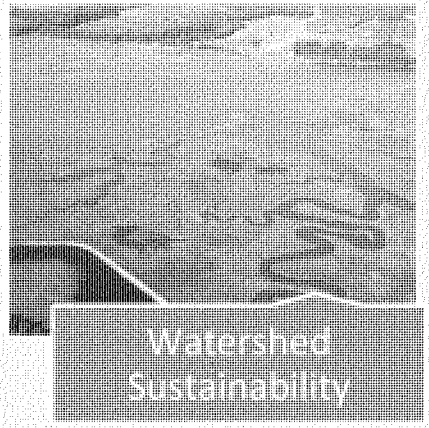
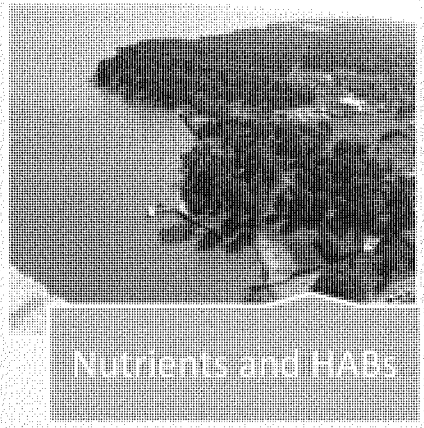
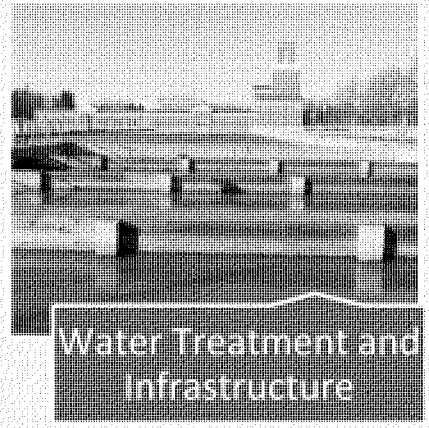
SSWR Research Topics

Clean Water Act **Safe Drinking Water Act**







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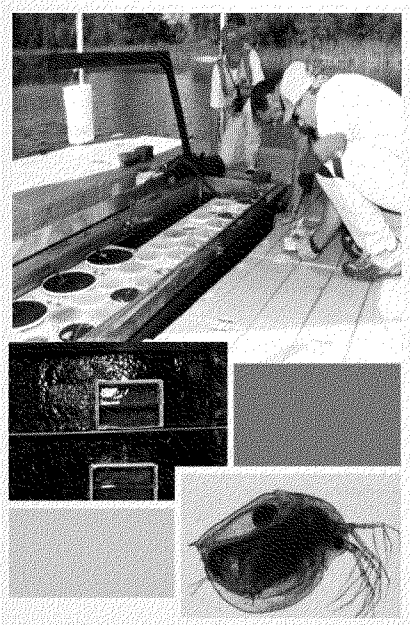
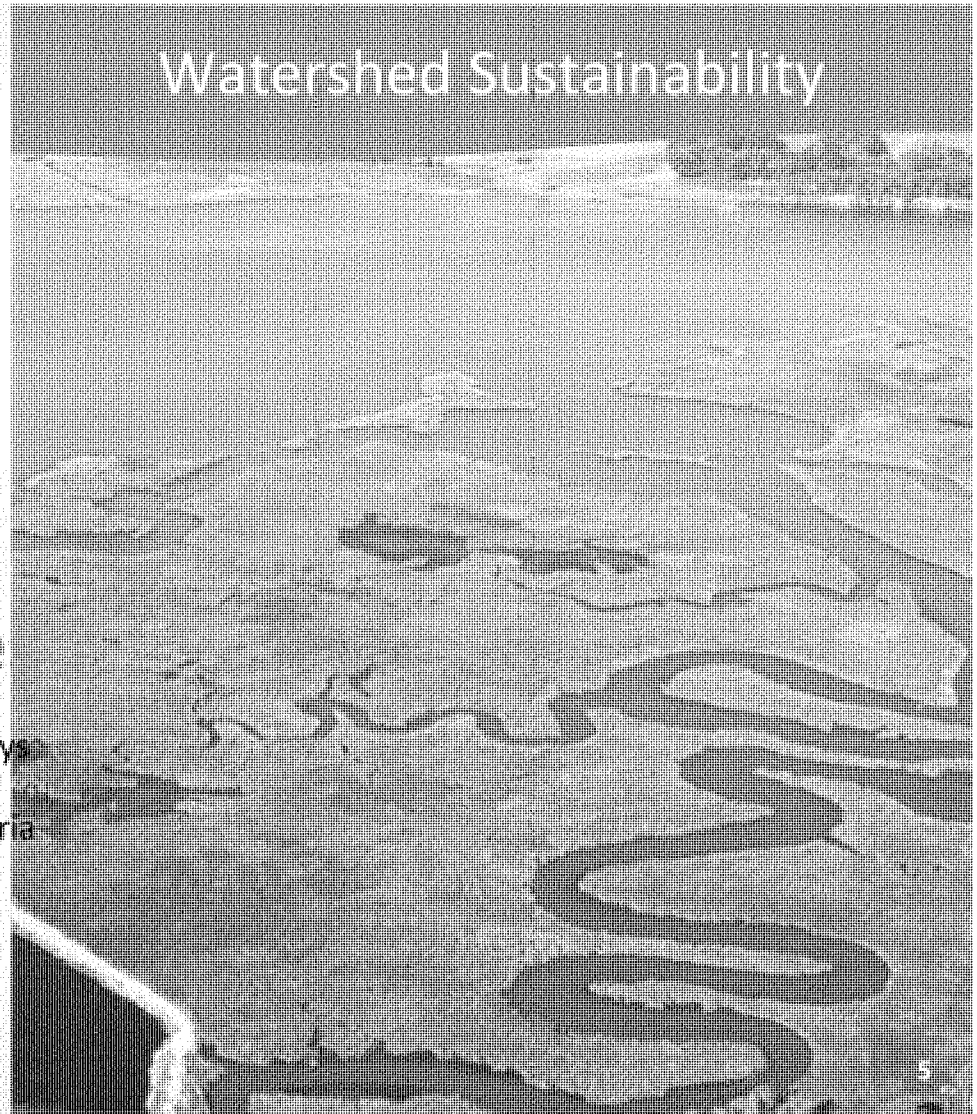
Main Topic Activities

Advancement of integrated water resource and watershed management approaches, models, and decision-making tools that ensure sufficient supplies of clean water to support economic, environmental, and public health requirements.



Research Prioritie

- National Aquatic Resource Surveys
- Recreational Water Quality Criteria
- Aquatic Water Quality Criteria



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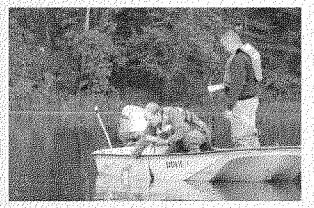
Nutrients & Harmful Algal Blooms

Main Topic Activities

Improve the science needed to define appropriate nutrient levels and to develop technologies and management practices to monitor and attain appropriate nutrient loadings.

Provide information and tools that improve the ability of local, state and national stakeholders to manage the risks posed by HABs.



Research Priorities

- Models & relating nutrient loading to impacts
- Conduct water quality standard/aquatic life criteria ("targets") validation studies
- Linkages between N and P with biota, experimental mesocosm studies at Experimental Stream Facility (Ohio)
- Biotic colonization studies in a nearby stream to understand community-level responses to N and P
- Nutrient Enhanced Coastal Acidification and Hypoxia (NECAH)

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Cyanobacteria Assessment Network

CYAN

Problem

How to detect and quantify algal blooms to protect use of U.S. lakes and estuaries?

Action

Create a standard and uniform approach for identification of algal blooms using satellites.

Result

New methods to quantify algal bloom frequency and extent.

Impact

- Applied novel sophisticated tool to assist in management of events that may involve significant risk to the public.
- Improve resource allocations and reduce exposures.

EPA Analytical Methods

- **Method 544:** Determination of microcystins and nodularins in drinking water by LC/MS/MS
- **Method 545:** Determination of cylindrospermopsin and anatoxin-a in drinking water by LC/ESI-MS/MS
- **Method 546:** Determination of microcystins and nodularins in drinking water and ambient water by ELISA
- **Single Laboratory Validated Methods:** Determination of cylindrospermopsin and anatoxin-a and for microcystins and nodularins in ambient freshwaters by LC/MS/MS

epa.gov/water-research/cyanobacteria-assessment-network-cyan

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Challenging Nutrients Coalition

EPA led interagency collaboration on prize challenges to address nutrients

CHALLENGE	GOAL	RESULT/STATUS
Nutrient Sensor Challenge	Affordable nitrogen and phosphorous sensors to market	3x price reduction sensors on the market
Visualize Nutrients	Effective communication/visualization of nutrient data	Award winning video
Smart Septic Sensor Challenge	Nitrogen sensors to monitor septic system integrity	Breakthrough technology for low-cost nitrogen sensors (U. Connecticut)
Nutrient Reduction Challenge	Recover nitrogen/phosphorous from pork and dairy manure	Prototypes in development
Nutrient Sensor Action Challenge	Demonstrated use of nitrogen/phosphorous sensor data for use in decision making	Stage 1 - 11 teams participated Stage 2- launch 2/18

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Main Topic Activities

Develop and evaluate data, approaches, and technologies that will support the promulgation and implementation of federal water regulations and guidance, while also addressing regional, state, and community issues of concern.

Develop and demonstrate best practices and tools for managing stormwater volume and improving water quality, and assess their feasibility.

Cyanotoxins
- Guidance for drinking water treatment

Lead
- Develop risk assessment/exposure model in support of Lead and Copper Rule
- Characterization in distribution/premise plumbing systems and improved methods

PFAS
- Hazard information
- Methods development and validation

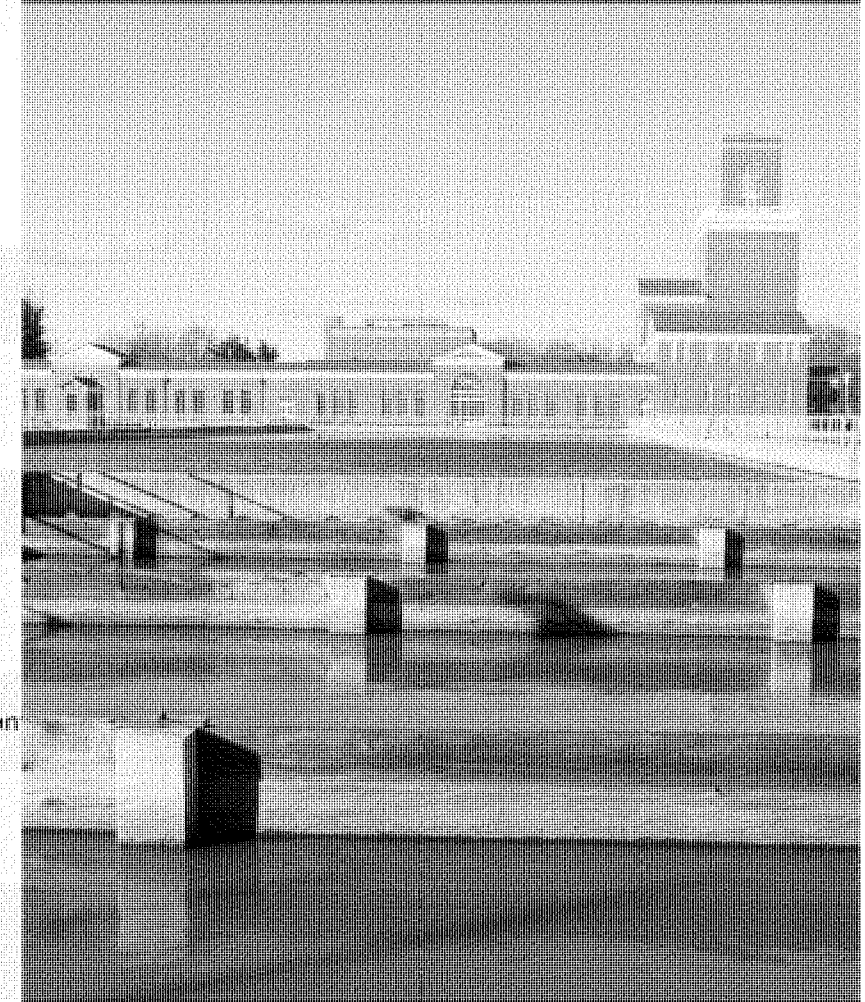
Small System
- Development of biological treatment systems for ammonia removal

EPANET
- Advanced extensions for water security, contaminant reactions, and real-time con

Opportunistic Pathogens
- *Legionella*, *Mycobacterium*
- Occurrence and detection
- Copper/silver ionization treatment, UV treatment

Treatability Database
- Collaborate with OW to develop cost models for inclusion in database

Water Treatment and Infrastructure



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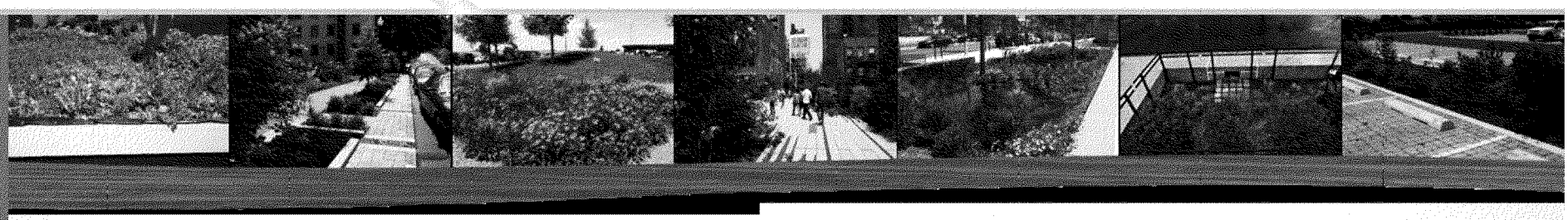
EPA

Stormwater Management

Treatment & Infrastructure



- National Stormwater Calculator (SWC)
- Storm Water Management Model (SWMM)
- Performance assessments of GI/low impact development systems
  - permeable pavement
  - rain gardens
  - swales
- Urban soil characterization for improving GI implementation
- Focused assessments of urban GI on water quantity and quality

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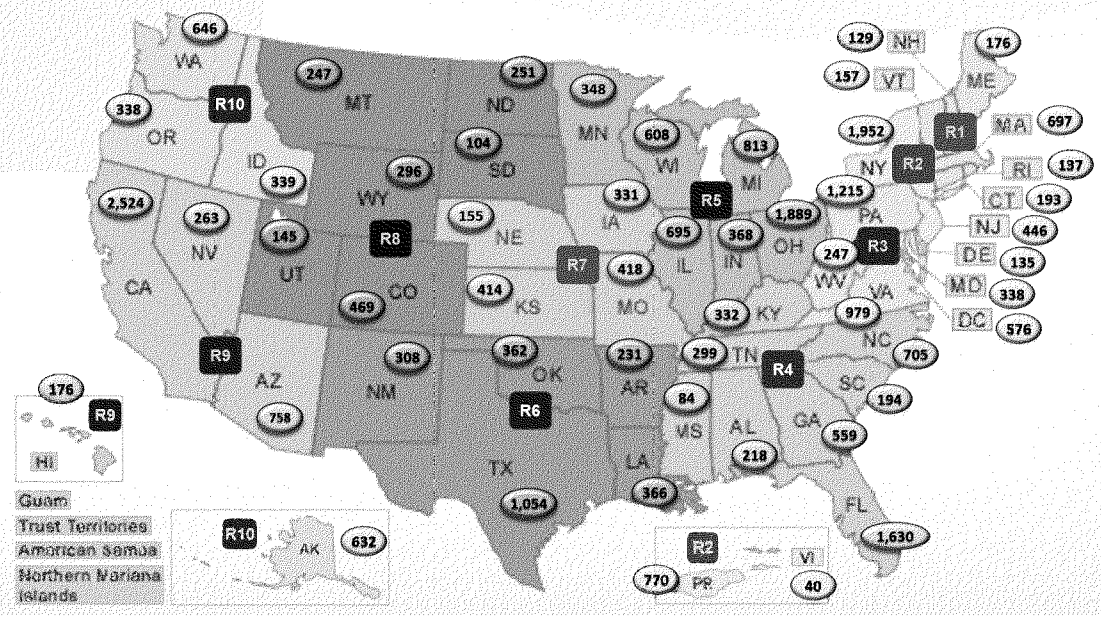
Outreach Highlights

- SSWR Webinar Series
- Small Systems Monthly Webinar Series
- Small Systems Annual Workshop
- EPA Tools and Resources Webinar Series
- Science Matters Biweekly Newsletter
- Fact Sheets:

January 2015 – February 2018

- 29,570 Attendees
- 18,091 Continuing Ed. Credits



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- Re-launch of NTWC website (http://www.nau.edu/ntwc) *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
- Reminder: Planning for 2018 Tribal Lands and Environment Conference *(Karen Gude, OW)*
  - Spokane Convention Center in Spokane, WA, August 13-16, 2018; Deadline for Session Proposals: May 4, 2018
  - More information: https://www7.nau.edu/itep/main/Conferences/confr_tlef

VII. Next Steps

- Reminder: Next NTWC & NTWC/EPA calls are scheduled for April 11, 2018.

National Tribal Water Council and EPA
Monthly Conference Call Agenda
Wed., March 14, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EDT
Conference Number: (202) 991-0477; Ex. 6 - Personal Privacy

AGENDA

I. **Introductions** *(Karen Gude, OW)* **(5 minutes)**

II. **Update from Prior NTWC Call** *(Ken Norton, NTWC)* **(10 minutes)**

EPA Office of Research and Development: Strategic Research Action Plans
(Suzanne Van Drunick, National Program Director (NPD), EPA ORD Safe and Sustainable Water Resources Research Program & Monica Rodia, ORD) **(20 minutes)**

EPA's Office of Research and Development (ORD) has issued six Strategic Research Action Plans (StRAPs) laying out its research agenda. The plans may be of interest to the tribes, especially the Safe and Sustainable Water Resources Research Program, which includes significant nutrient work. Over the next six months, ORD will lead a refresh of its StRAPs, which affords a unique opportunity to engage with tribes during this research planning phase to build partnerships that can help ensure ORD will build tribal research capacity. These StRAPs will outline a four-year strategy, 2019 to 2022, for delivering research and results to support EPA's mission to protect human health and the environment. ORD will do this through interactions with tribes supported by a combination of teleconferences, in-person meetings, and informational sessions with EPA tribal partnership groups and RTOCs, ahead of tribal consultation.

III. **Report Out on Hypoxia Task Force Meeting** *(Michael Bolt, NTWC & Kyra Reumann-Moore, OW/OWOW)* **(15 minutes)**

IV. **Regulatory Updates & Tribal Consultation Information (25 minutes)**

- Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water *(Scott Wilson, OW/OWM)*
  - For more information: https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface
- Update: Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop. *(Rose Kwok, OW/OWOW)*
  - For more information: https://www.epa.gov/wotus-rule
- Update: Tribal Consultation Opportunity, *Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 C.F.R. § 25.5 (Janine Barr, OW/OST)*
  - For more information: https://tcots.epa.gov
- Update: Tribal Consultation and Coordination on the National Primary Drinking Water Regulation for Lead and Copper *(Karen Gude, OW)*
  - For more information: https://tcots.epa.gov

V. Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements (All) (15 minutes)

- Upcoming Triennial Capacity Development and Operator Certification Workshop in Indianapolis, IN, in August 2018. *(Sam Russell, OW/OGWDW)*
- Planning for Spring NTWC in-person meeting in Washington, DC *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
- Re-launch of NTWC website (http://www.nau.edu/ntwc) *(Ann Marie Chischilly & Elaine Wilson, ITEP)*
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VI. Next Steps

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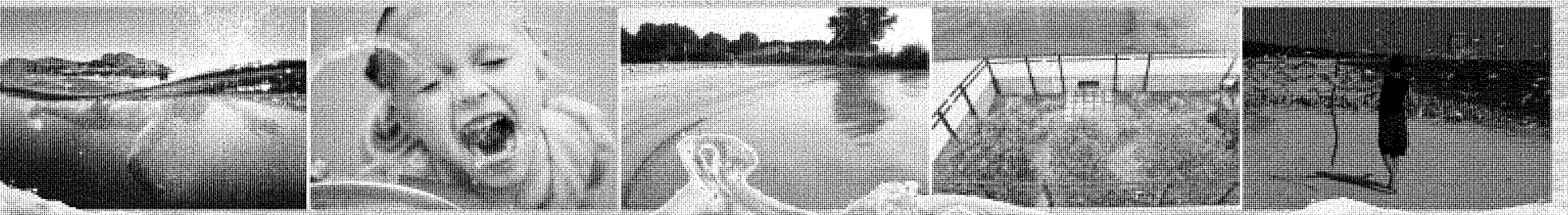
EPA
Office of Research and Development

SAFE AND SUSTAINABLE WATER RESOURCES RESEARCH PROGRAM



National Tribal Water Council

March 14, 2018

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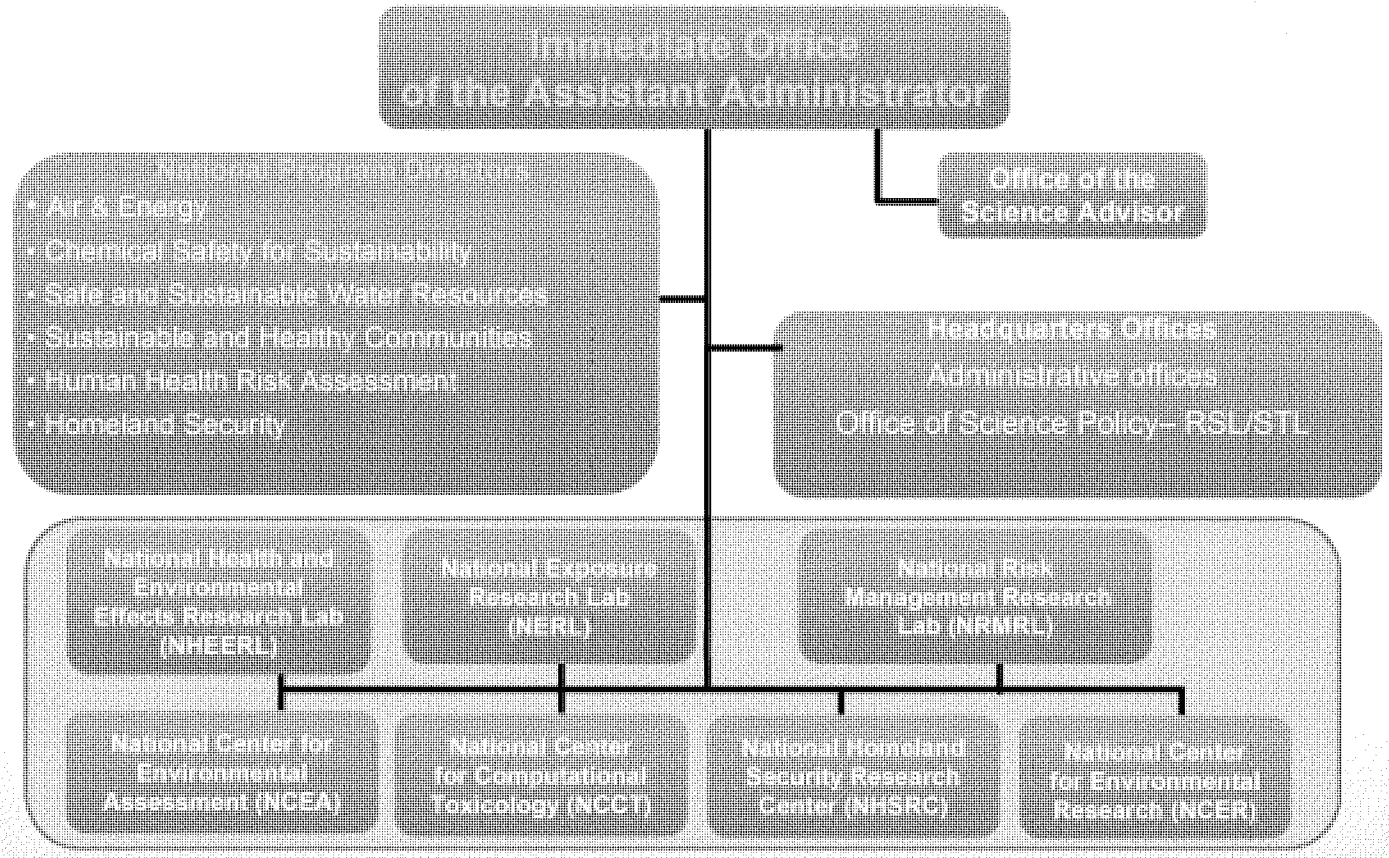
ORD Organizational Chart



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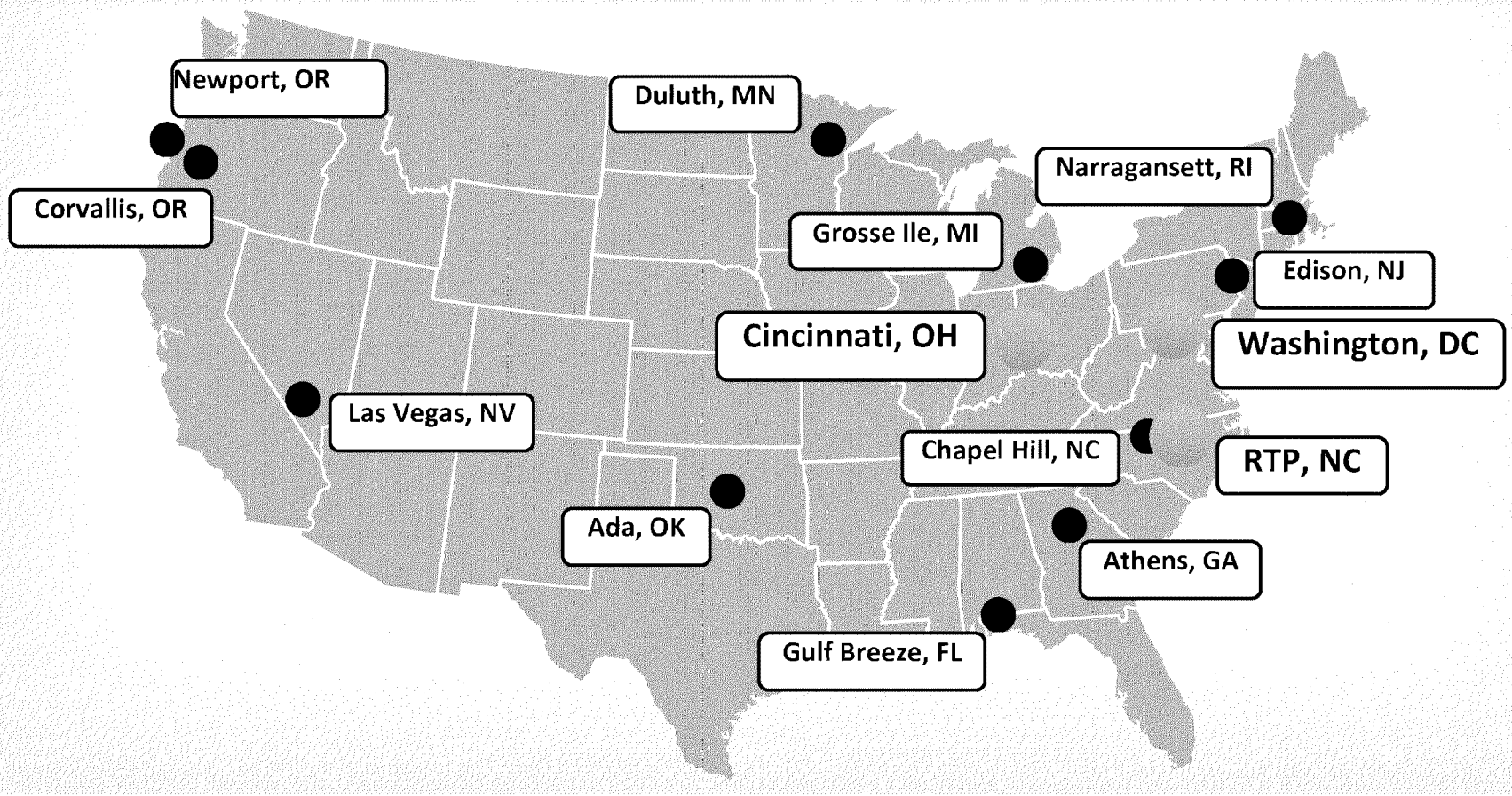
ORD Research Facilities



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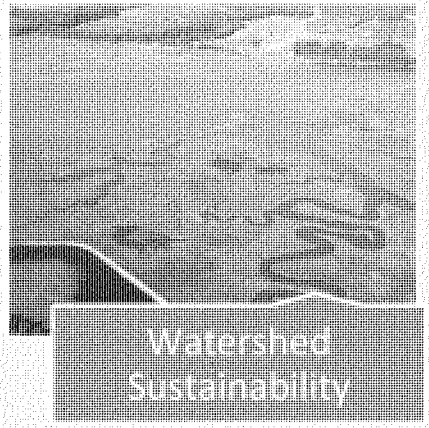
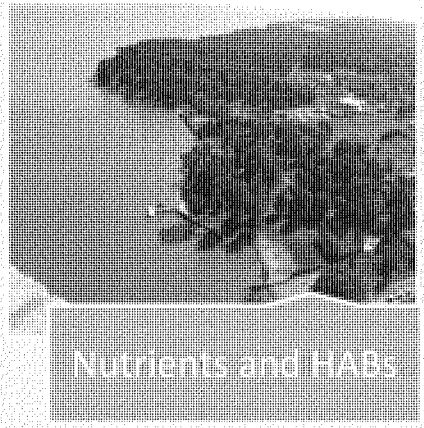
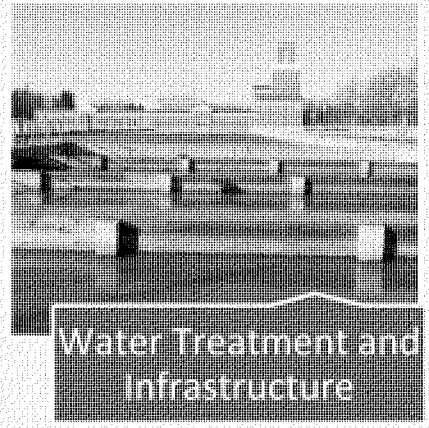
SSWR Research Topics

Clean Water Act **Safe Drinking Water Act**







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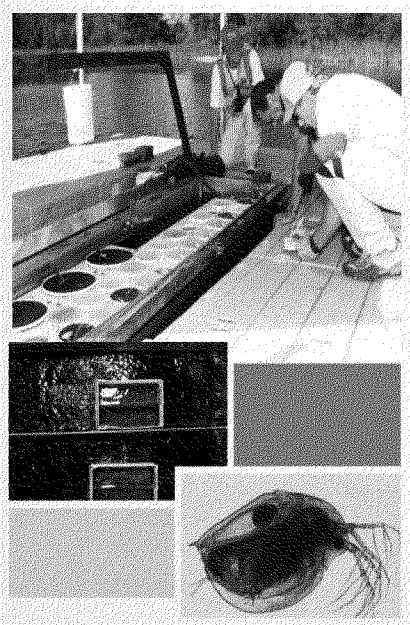
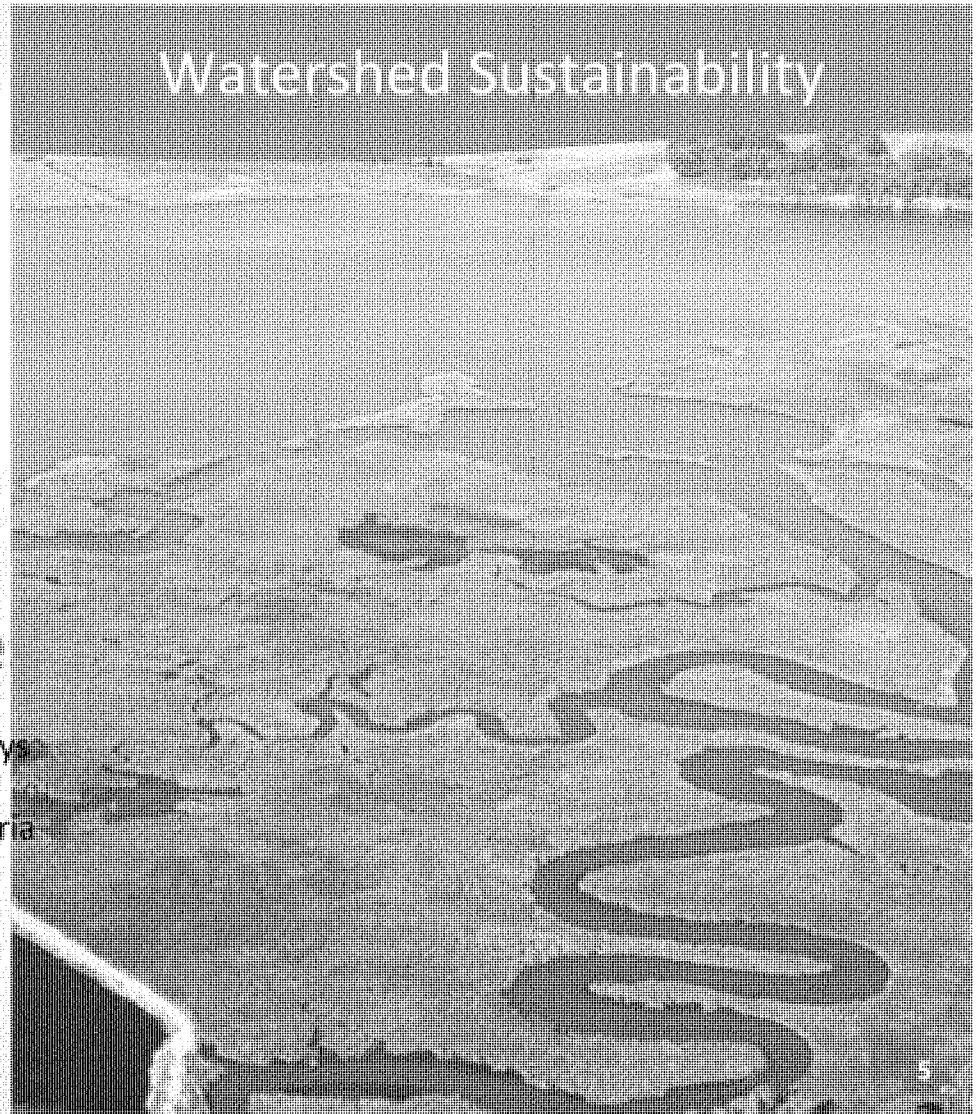
Main Topic Activities

Advancement of integrated water resource and watershed management approaches, models, and decision-making tools that ensure sufficient supplies of clean water to support economic, environmental, and public health requirements.



Research Prioritie

- National Aquatic Resource Surveys
- Recreational Water Quality Criteria
- Aquatic Water Quality Criteria



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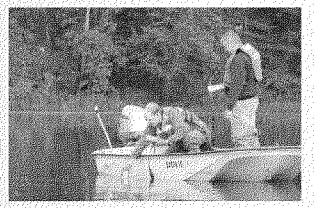
Nutrients & Harmful Algal Blooms

Main Topic Activities

Improve the science needed to define appropriate nutrient levels and to develop technologies and management practices to monitor and attain appropriate nutrient loadings.

Provide information and tools that improve the ability of local, state and national stakeholders to manage the risks posed by HABs.



Research Priorities

- Models & relating nutrient loading to impacts
- Conduct water quality standard/aquatic life criteria ("targets") validation studies
- Linkages between N and P with biota, experimental mesocosm studies at Experimental Stream Facility (Ohio)
- Biotic colonization studies in a nearby stream to understand community-level responses to N and P
- Nutrient Enhanced Coastal Acidification and Hypoxia (NECAH)

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Cyanobacteria Assessment Network

CYAN

Problem

How to detect and quantify algal blooms to protect use of U.S. lakes and estuaries?

Action

Create a standard and uniform approach for identification of algal blooms using satellites.

Result

New methods to quantify algal bloom frequency and extent.

Impact

- Applied novel sophisticated tool to assist in management of events that may involve significant risk to the public.
- Improve resource allocations and reduce exposures.

EPA Analytical Methods

- **Method 544:** Determination of microcystins and nodularins in drinking water by LC/MS/MS
- **Method 545:** Determination of cylindrospermopsin and anatoxin-a in drinking water by LC/ESI-MS/MS
- **Method 546:** Determination of microcystins and nodularins in drinking water and ambient water by ELISA
- **Single Laboratory Validated Methods:** Determination of cylindrospermopsin and anatoxin-a and for microcystins and nodularins in ambient freshwaters by LC/MS/MS

epa.gov/water-research/cyanobacteria-assessment-network-cyan

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Challenging Nutrients Coalition

EPA led interagency collaboration on prize challenges to address nutrients

CHALLENGE	GOAL	RESULT/STATUS
Nutrient Sensor Challenge	Affordable nitrogen and phosphorous sensors to market	3x price reduction sensors on the market
Visualize Nutrients	Effective communication/visualization of nutrient data	Award winning video
Smart Septic Sensor Challenge	Nitrogen sensors to monitor septic system integrity	Breakthrough technology for low-cost nitrogen sensors (U. Connecticut)
Nutrient Reduction Challenge	Recover nitrogen/phosphorous from pork and dairy manure	Prototypes in development
Nutrient Sensor Action Challenge	Demonstrated use of nitrogen/phosphorous sensor data for use in decision making	Stage 1 - 11 teams participated Stage 2- launch 2/18

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Main Topic Activities

Develop and evaluate data, approaches, and technologies that will support the promulgation and implementation of federal water regulations and guidance, while also addressing regional, state, and community issues of concern.

Develop and demonstrate best practices and tools for managing stormwater volume and improving water quality, and assess their feasibility.

Cyanotoxins
- Guidance for drinking water treatment

Lead
- Develop risk assessment/exposure model in support of Lead and Copper Rule
- Characterization in distribution/premise plumbing systems and improved methods

PFAS
- Hazard information
- Methods development and validation

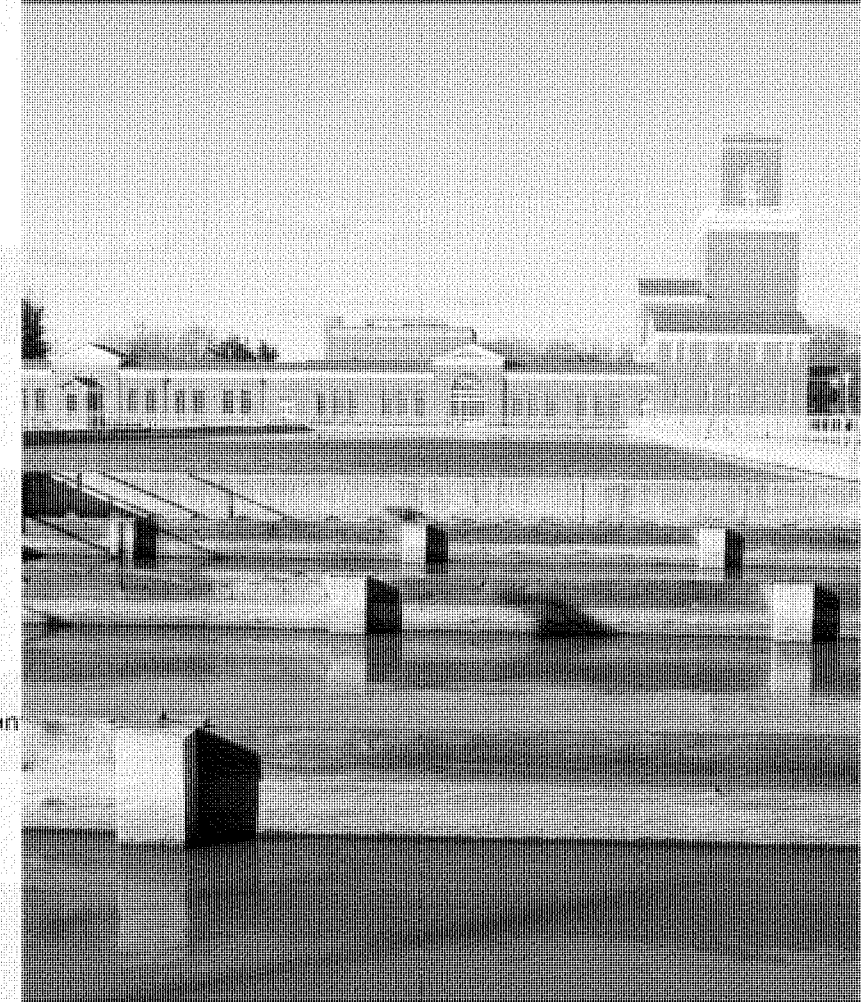
Small System
- Development of biological treatment systems for ammonia removal

EPANET
- Advanced extensions for water security, contaminant reactions, and real-time con

Opportunistic Pathogens
- *Legionella*, *Mycobacterium*
- Occurrence and detection
- Copper/silver ionization treatment, UV treatment

Treatability Database
- Collaborate with OW to develop cost models for inclusion in database

Water Treatment and Infrastructure



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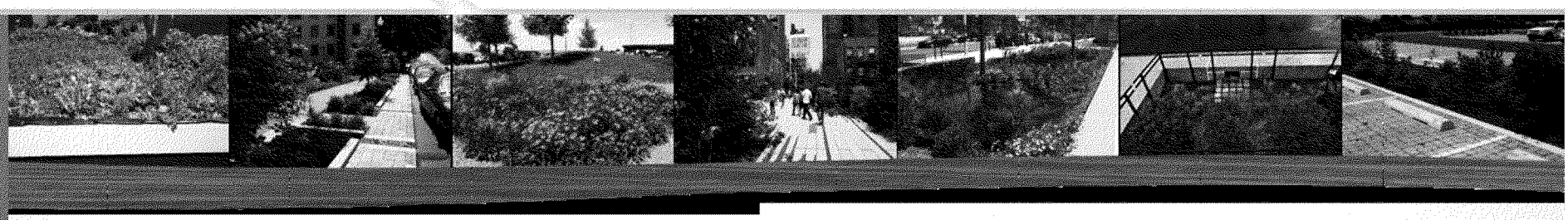
Stormwater Management

Treatment & Infrastructure



- National Stormwater Calculator (SWC)
- Storm Water Management Model (SWMM)
- Performance assessments of GI/low impact development systems
  - permeable pavement
  - rain gardens
  - swales
- Urban soil characterization for improving GI implementation
- Focused assessments of urban GI on water quantity and quality

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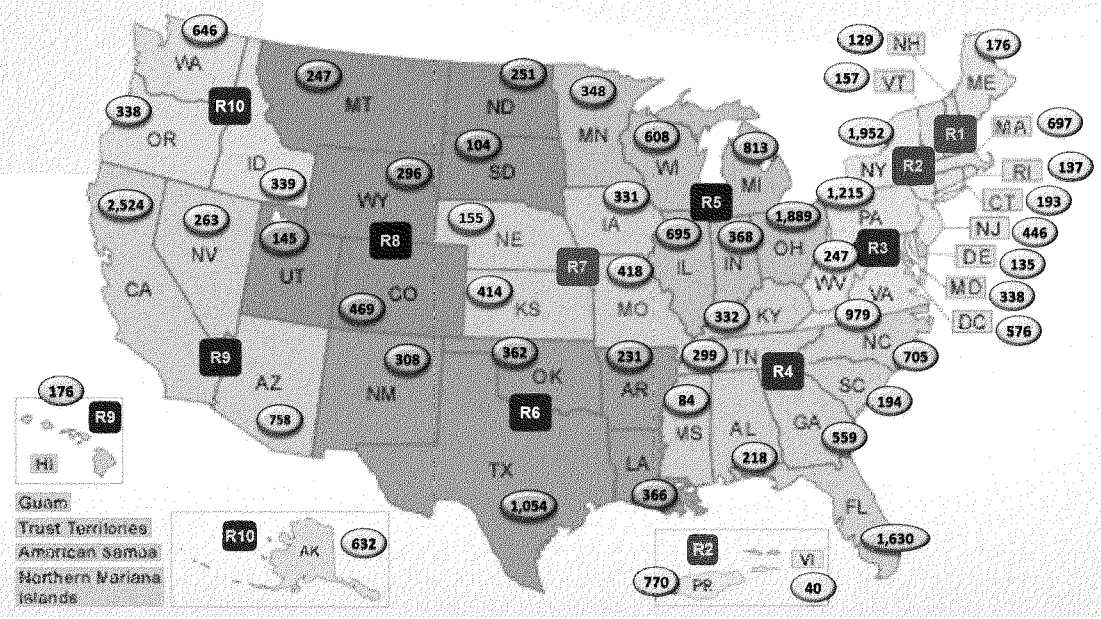
Outreach Highlights

- SSWR Webinar Series
- Small Systems Monthly Webinar Series
- Small Systems Annual Workshop
- EPA Tools and Resources Webinar Series
- Science Matters Biweekly Newsletter
- Fact Sheets:

January 2015 – February 2018

- 29,570 Attendees
- 18,091 Continuing Ed. Credits



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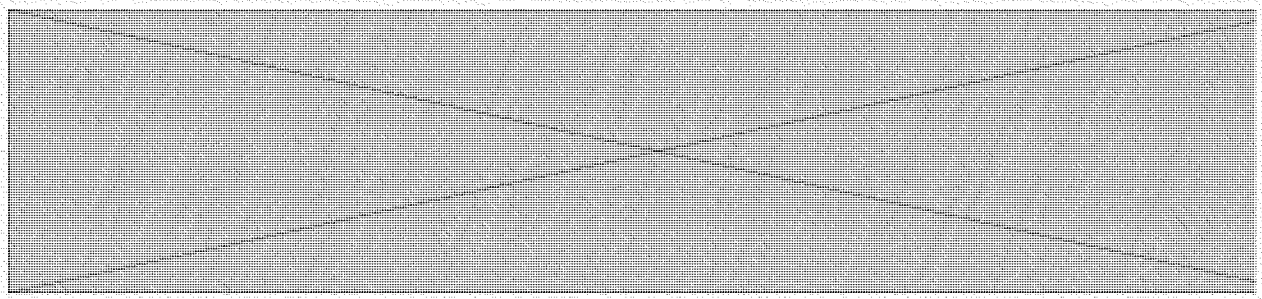
ED_001667C_00000624-00069

To: Hanson, Tanner[Tanner.Hanson@mail.house.gov]
Cc: Small, Jeff[Jeff.Small@mail.house.gov]
From: Hanson, Tanner
Sent: Mon 5/21/2018 4:49:14 PM
Subject: ICYMI: Rep. Banks' WOTUS Repeal Amendment Passes House Floor



For Immediate Release **Date:** May 21, 2018
Contact: Tanner Hanson Tanner.Hanson@mail.house.gov

In Case You Missed It: Rep. Banks' WOTUS Repeal Amendment Passes House Floor

WASHINGTON, D.C. – Congressional Western Caucus Chairman **Paul A. Gosar D.D.S. (AZ-04)** and Western Caucus Member **Jim Banks (IN-03)** released the following statements after Congressman Banks' Amendment #16 to H.R. 2 - which would repeal the 'Waters of the United States' rule issued by the Obama Administration - passed the Floor of the U.S. House of Representatives by a bipartisan vote of 238-173:

Congressman Jim Banks stated "While I am glad to see my colleagues support my amendment to repeal this onerous regulation, I am disappointed that the farm bill ultimately did not pass. The WOTUS rule gave unelected bureaucrats at the EPA the power to broadly interpret what is a navigable waterway, leading to mass confusion for farmers in northeast Indiana and across the country. We are getting closer than ever to providing much-needed clarity to the American people, and I am hopeful that the House will advance my amendment to the Senate in the near future."

Chairman Paul Gosar said: "A permanent, legislative fix for WOTUS is crucially necessary, and my friend and colleague Jim Banks' amendment would allow one by paving the way for EPA to write a definition of 'navigable waters' under the Clean Water Act that is both Constitutional and commonsensical. By expanding EPA jurisdiction to transient waters and

tiny ditches, the Obama-era definition is neither of those - and it must go. Congress must return regulatory certainty to our nation's farmers, ranchers, broader industry and private landowners by repealing this behemoth of a regulation."

Background:

On Friday, May 18, 2018, Congressman Banks' Amendment #16 to H.R. 2 - colloquially known as the 'Farm Bill' - was agreed to by a vote of 238-173 on the Floor of the U.S. House of Representatives.

Rep. Banks' amendment had strong bipartisan support with 13 Democrats voting in favor of final passage.

If made law, the amendment would repeal the Obama-era definition of 'navigable waters' under the Clean Water Act that unconstitutionally expanded the EPA's jurisdiction over transient and insignificant waters, and in a way that was also inconsistent with the underlying Clean Water Act.

The previous Administration's Waters of the U.S. rule, commonly referred to 'WOTUS', attempted to assert Clean Water Act jurisdiction over nearly all areas with even the slightest connections to water resources, including man-made conveyances.

The language of the rule is drafted so vaguely as to encompass nearly all water sources with any hydrologic connection to downstream navigable waters, including ditches, pipes, farmland ponds, groundwater, as well as other waters traditionally regulated by the state. Although the agencies maintained that the rule was narrow and clarified Clean Water Act jurisdiction, it would in fact aggressively expand federal authority under the Clean Water Act while bypassing Congress and creating unnecessary ambiguity. In fact, even the Obama Administration admitted when announcing the final rule that WOTUS would expand agency control over 60% of our country's streams and millions of acres of wetlands which were previously non-jurisdictional.

This proposed water grab runs contrary to Supreme Court decisions as well as state and tribal water laws. If implemented, this misguided regulation would have devastating economic consequences for farmers, ranchers, small businesses, and communities throughout the country.

As the late Justice Scalia wrote in the plurality opinion in the case of Rapanos v. United States, which concerned this definition: "In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."

See the text of Rep. Banks' amendment here. A press release by Congressman Banks on the amendment's passage can be found here.

- -

Amendment Sponsors & Cosponsors (17):
Jim Banks*, Mark Amodei, Kevin Cramer, Jeff Duncan, Ron Estes, Paul Gosar, Jaime Herrera-Beutler, Trey Hollingsworth, Duncan Hunter, Markwayne Mullin, Steve Pearce, Dana Rohrabacher, Todd Rokita, Jason Smith, Scott Tipton, Mark Walker, Jackie Walorski

Endorsed by:
American Energy Alliance, American Exploration & Mining Association, American Farm Bureau Federation, American Forest & Paper Association, Americans for Tax Reform, Edison Electric Institute, FreedomWorks (Key Vote), Golf Course Superintendents Association of America, Independent Petroleum Association of America, Industrial Minerals Association, National Association of Home Builders (Key Vote), National Cattlemen's Beef Association, National Cotton Council, National Club Association, National Taxpayers Union (Key Vote), National Water Resources Association, National Stone Sand and Gravel Association, Public Lands Council, Women's Mining Coalition, U.S. Chamber of Commerce, Agribusiness & Water Council of Arizona, Alaska Miners Association, Arizona Association of Conservation Districts, Arizona Cattlemen's Association, Arizona Farm Bureau Federation, Arizona Mining Association, Arizona Pork Council, Arizona Rock Products Association, AZ , BASS Nation, The Bass Federation-AZ, Bullhead Area Chamber of Commerce Government Affairs Committee, Colorado Pork Producers Council, Golden Vertex Corp., Grand Canyon Electric Cooperative Association, International Council of Shopping Centers, Irrigation and Electrical Districts' Association of Arizona, Pima Natural Resource Conservation District, SRT Outdoors, Sulphur Springs Valley Electric Cooperative, Inc., Yavapai Cattle Growers Association, Arizona State Senator Sylvia Allen, Apache County Supervisor Doyel Shamley

###

WEBSITE | UNSUBSCRIBE

—

From: Leopold, Matt
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4045
Importance: Normal
Subject: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
Categories: Red Category
Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

To: Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Zobrist, Marcus[Zobrist.Marcus@epa.gov]
From: /O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B8C25A0C2FB648B6A947694A8492311E-CAMPBELL, ANN
Sent: Wed 5/23/2018 6:29:02 PM
Subject: FW: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water
EEIGroundwaterCommentsFINAL_052118.pdf

For the docket, in case these were not submitted directly.

Ann Campbell

Chief of Staff (acting)

Office of Water

From: Bond, Alexander [mailto:ABond@eei.org]
Sent: Tuesday, May 22, 2018 10:33 AM
To: Leopold, Matt <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>
Cc: Shea, Quin <QShea@eei.org>; Fisher, Emily <EFisher@eei.org>; Mohammed, Riaz <rmohammed@eei.org>; 'David Chung - Crowell & Moring (dchung@crowell.com)' <dchung@crowell.com>; Veney, Carla <Veney.Carla@epa.gov>; Penman, Crystal <Penman.Crystal@epa.gov>
Subject: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water

David & Matt –

Please find EEI's comments on the Agency's request for input on whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation attached here, FYI. We would love to come in and discuss a) our comments and b) your thinking regarding any possible next steps as soon as is convenient for you both. Would we be able to find a window to meet in early to mid-June?

Thank you!

Alex

--

Alex Bond

Associate General Counsel, Energy & Environment
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
Ex. 6 - Personal Privacy
www.eei.org

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To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]
Cc: Campbell, Ann[Campbell.Ann@epa.gov]
From: Penman, Crystal
Sent: Thur 5/3/2018 2:31:42 PM
Subject: FW: Invitation to speak at ABA SEER fall conference

From: Martella, Roger(GE Corporate) [mailto:Roger.Martella@ge.com]
Sent: Tuesday, April 24, 2018 7:47 AM
To: Ross, David P <ross.davidp@epa.gov>
Cc: Steinbauer, Gary <GSteinbauer@babstcalland.com>
Subject: Invitation to speak at ABA SEER fall conference

Hi David—I hope you are doing well and congratulations again on your confirmation! I hope everything is going well with the transition, and I'm sure you're having a rewarding experience at EPA.

ABA's Section on Energy, Environment and Resources would be honored to invite you to speak at the Fall conference in San Diego, California at the Marriott Marquis San Diego Marina on October 17-20, 2018 on a panel of leading Clean Water Act practitioners providing their perspectives on the latest legal developments. This panel will be held the morning of October 19, 2018, and a full description of the panel follows:

Breakout Session D1:

Staying afloat in the deluge of Clean Water Act developments

This year began with significant court decisions and unprecedented agency actions covering the most important and controversial regulatory programs under the Clean Water Act. While new theories on liability, like the "groundwater conduit" theory, flow through the federal courts, a torrent of other issues related to the development and implementation of multi-state TMDLs to address nutrient loadings and the application of the U.S. EPA's water transfers rule are coming to a head across the country. All of this is occurring along with the administration's deregulatory efforts, which include rescinding and potentially redefining "waters of the United States." Join this group of leading authorities on the Clean Water Act as they share their insights on the current state of the legal landscape, changes on the horizon, and solutions for clients during this era of increasing change.

Kristy Neihaus Bulleit (Hunton Andrews Kurth) will be moderating the panel that currently incudes Brooks Smith (Troutman Sanders) and Steve Fleischli (NRDC) as speakers. Your perspective would be invaluable.

There is a long tradition of EPA officials speaking at SEER conferences, and I frequently serve as a liaison to make sure that we address all the questions/needs of the officials so they have a very positive experience. Matt Leopold and Bill Wehrum recently spoke at the Orlando spring conference, and we are inviting others from EPA for the fall conference in San Diego.

Thank you for considering this request, and please let me know if we can answer any questions.
Best wishes -- Roger

To: Campbell, Ann[Campbell.Ann@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Wilson, Scott[Wilson.Js@epa.gov]; Ramach, Sean[Ramach.Sean@epa.gov]
From: Zobrist, Marcus
Sent: Wed 5/23/2018 9:10:44 PM
Subject: Re: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water

Thanks. We'll check to make sure these are in the docket.

From: Campbell, Ann
Sent: Wednesday, May 23, 2018 2:37:48 PM
To: Sawyers, Andrew; Zobrist, Marcus
Subject: FW: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water

For the docket, in case they didn't make it there directly. Thanks.

Ann Campbell

Chief of Staff (acting)

Office of Water

From: Bond, Alexander [mailto:ABond@eei.org]
Sent: Tuesday, May 22, 2018 10:33 AM
To: Leopold, Matt <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>
Cc: Shea, Quin <QShea@eei.org>; Fisher, Emily <EFisher@eei.org>; Mohammed, Riaz <rmohammed@eei.org>; 'David Chung - Crowell & Moring (dchung@crowell.com)' <dchung@crowell.com>; Veney, Carla <Veney.Carla@epa.gov>; Penman, Crystal <Penman.Crystal@epa.gov>
Subject: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water

David & Matt –

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flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation attached here, FYI. We would love to come in and discuss a) our comments and b) your thinking regarding any possible next steps as soon as is convenient for you both. Would we be able to find a window to meet in early to mid-June?

Thank you!

Alex

--

Alex Bond

Associate General Counsel, Energy & Environment
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
Ex. 6 - Personal Privacy
www.eei.org

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To: Campbell, Ann[Campbell.Ann@epa.gov]
Cc: Penman, Crystal[Penman.Crystal@epa.gov]
From: Forsgren, Lee
Sent: Wed 5/23/2018 7:57:06 PM
Subject: Re: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water

Thanks

Sent from my iPhone

> On May 23, 2018, at 2:30 PM, Campbell, Ann <Campbell.Ann@epa.gov> wrote:
>
> Lee, thought you'd want to see these as well as the request for a meeting. Please advise.
>
> I also sent the comments to the program to ensure they reach the docket.
>
> Ann Campbell
> Chief of Staff (acting)
> Office of Water
>
> From: Bond, Alexander [mailto:ABond@eei.org]
> Sent: Tuesday, May 22, 2018 10:33 AM
> To: Leopold, Matt <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>
> Cc: Shea, Quin <QShea@eei.org>; Fisher, Emily <EFisher@eei.org>; Mohammed, Riaz <rmohammed@eei.org>; 'David Chung - Crowell & Moring (dchung@crowell.com)' <dchung@crowell.com>; Veney, Carla <Veney.Carla@epa.gov>; Penman, Crystal <Penman.Crystal@epa.gov>
> Subject: EEI Comments on Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water
>
> David & Matt –
>
> Please find EEI's comments on the Agency's request for input on whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation attached here, FYI. We would love to come in and discuss a) our comments and b) your thinking regarding any possible next steps as soon as is convenient for you both. Would we be able to find a window to meet in early to mid-June?
>
> Thank you!
>
> Alex
>
>
>
> --
>
> Alex Bond
> Associate General Counsel, Energy & Environment
> 701 Pennsylvania Avenue, N.W.
> Washington, D.C. 20004-2696
> Ex. 6 - Personal Privacy
> www.eei.org<http://www.eei.org/>
> Follow EEI on Twitter<http://www.twitter.com/Edison_Electric>, Facebook<http://www.facebook.com/pages/Edison-Electric-Institute/253118344285>, and

YouTube<http://www.youtube.com/eeitv>.
> [cid:94C01F3C-3F79-431A-97F9-93E58F91EBC6]
>
> <image001.png>
> <EEIGroundwaterCommentsFINAL_052118.pdf>

To: roger.martella@ge.com[roger.martella@ge.com]
Cc: Penman, Crystal[Penman.Crystal@epa.gov]
From: Lieberman, Paige
Sent: Thur 5/3/2018 6:49:54 PM
Subject: RE: Invitation to speak at ABA SEER fall conference
OW Speaker Request Form.DOCX

Hello Roger –

Thank you for inviting Dave Ross to attend the ABA fall conference in San Diego this October. It sounds like an interesting panel session planned on the Clean Water Act.

Could you please complete the attached speaker request form, to inform Dave's attendance? We will get back to you once we have a decision from Dave.

Thanks,

Paige

Paige Lieberman

Acting Director of Stakeholder Engagement

Office of Water

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

(202) 564-9957

From: Martella, Roger(GE Corporate) [mailto:Roger.Martella@ge.com]
Sent: Tuesday, April 24, 2018 7:47 AM
To: Ross, David P <ross.davidp@epa.gov>
Cc: Steinbauer, Gary <GSteinbauer@babstcalland.com>
Subject: Invitation to speak at ABA SEER fall conference

Hi David—I hope you are doing well and congratulations again on your confirmation! I hope everything is going well with the transition, and I'm sure you're having a rewarding experience at EPA.

ABA's Section on Energy, Environment and Resources would be honored to invite you to speak at the Fall conference in San Diego, California at the Marriott Marquis San Diego Marina on October 17-20, 2018 on a panel of leading Clean Water Act practitioners providing their perspectives on the latest legal developments. This panel will be held the morning of October 19, 2018, and a full description of the panel follows:

Breakout Session D1:

Staying afloat in the deluge of Clean Water Act developments

This year began with significant court decisions and unprecedented agency actions covering the most important and controversial regulatory programs under the Clean Water Act. While new theories on liability, like the "groundwater conduit" theory, flow through the federal courts, a torrent of other issues related to the development and implementation of multi-state TMDLs to address nutrient loadings and the application of the U.S. EPA's water transfers rule are coming to a head across the country. All of this is occurring along with the administration's deregulatory efforts, which include rescinding and potentially redefining "waters of the United States." Join this group of leading authorities on the Clean Water Act as they share their insights on the current state of the legal landscape, changes on the horizon, and solutions for clients during this era of increasing change.

Kristy Neihaus Bulleit (Hunton Andrews Kurth) will be moderating the panel that currently incudes Brooks Smith (Troutman Sanders) and Steve Fleischli (NRDC) as speakers. Your perspective would be invaluable.

There is a long tradition of EPA officials speaking at SEER conferences, and I frequently serve as a liaison to make sure that we address all the questions/needs of the officials so they have a very positive experience. Matt Leopold and Bill Wehrum recently spoke at the Orlando spring conference, and we are inviting others from EPA for the fall conference in San Diego.

Thank you for considering this request, and please let me know if we can answer any questions.
Best wishes -- Roger

From: Leopold, Matt
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4045
Importance: Normal
Subject: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
Categories: Red Category
Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

Room change

To: Forsgren, Lee[Forsgren.Lee@epa.gov]
Cc: Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Grevatt, Peter[Grevatt.Peter@epa.gov]; Penman, Crystal[Penman.Crystal@epa.gov]; Tyner, Jake[JTyner@USChamber.com]
From: Chaitovitz, Chuck
Sent: Wed 6/6/2018 2:19:10 PM
Subject: draft discussion topics
ATT00001.txt
draft_agenda-USEPA_2.docx

Good morning Lee:

Hope all is well.

In advance of our discussion next week, I am attaching an updated draft agenda and discussion topics for your consideration.

Please feel free to contact me with any questions or if you wish to discuss.

Thanks again, and I look forward to talking soon,

Chuck

Chuck Chaitovitz

Vice President, Environmental Affairs and Sustainability

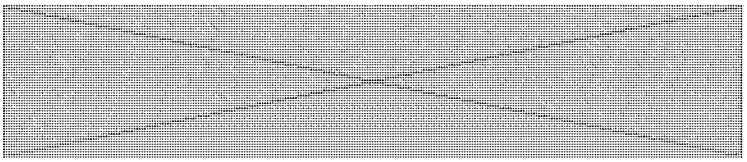
U.S. Chamber of Commerce

202-463-5316 (Phone)

Ex. 6 - Personal Privacy

cchaitovitz@uschamber.com

http://www.uschamber.com



Collaboration Discussion:
U.S. EPA and the U.S. Chamber of Commerce

June 13, 2018
1:00 pm to 1:45 pm
Draft Agenda

Objectives:

- Establish a positive dialogue with Chamber members
- Explore collaboration around proactive and constructive shared, strategic priorities

Agenda:

- Welcome and introduction
- Shared priorities discussion
    - What is U.S. EPA working on where the Chamber can assist?
- Low hanging/early wins:
    - Mobilizing private capital on modernizing water infrastructure
        - Convening the investment and water communities
        - Collaborating on key water system development issues including utility governance, expanding the network of WIFIA participants, and other financing and technical solutions
        - Engaging local Chambers to develop a pipeline of bankable projects
        - Aligning funding and capacity solutions for rural communities (working with USDA, RCAP, local Chambers and others) and the role of the private sector
    - Promoting the export of U.S. water technologies products and services
    - Catalyzing technology innovation in the water-energy nexus, including the testbed network concept
    - Developing flexible sustainable solutions working with communities and utilities -- permit streamlining, CCR, conduit theory, effluent guidelines, nutrients, PFOS/PFOA, WOTUS, etc.
    - Capacity building/workforce development – technical and skills issues for water operators and other technical and trade professions
- Next steps

Participants:

- Lee Forsgren
- Chuck Chaitovitz
- Heath Knakmuhs
- Michael Schon
- Jake Tyner

From: Forsgren, Lee
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4045
Importance: Normal
Subject: Accepted: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

From: Veney, Carla
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4045
Importance: Normal
Subject: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
Start Date/Time: Fri 5/4/2018 6:00:00 PM
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Room change

From: Veney, Carla
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000
Importance: Normal
Subject: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy)
Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

To: Fotouhi, David[Fotouhi.David@epa.gov]
From: Maher, Lauren
Sent: Fri 5/11/2018 6:44:01 PM
Subject: EEI Mtg- Docket Entry
DHC.Record of Meeting on Direct Hydrological Connection.docx

Hi David,

FYI- attached are notes from the EEI meeting, which will be added to the docket for the DHC Federal Register notice. Matt is aware that Carrie drafted these for the docket. Note that EEI no longer intends to submit any written materials to follow-up on last week's meeting, but did indicate they will file comments in the next few weeks (deadline is 5/21).

Lauren Maher

Attorney Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

202-564-9888

maher.lauren@epa.gov

FILED: May 30, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1640
(8:16-cv-04003-HMH)

UPSTATE FOREVER; SAVANNAH RIVERKEEPER

Plaintiffs - Appellants

v.

KINDER MORGAN ENERGY PARTNERS, L.P.; PLANTATION PIPE LINE COMPANY, INC.

Defendants - Appellees

ANDERSON COUNTY, SOUTH CAROLINA; PIPELINE SAFETY TRUST

Amici Supporting Appellant

AMERICAN PETROLEUM INSTITUTE; ASSOCIATION OF OIL PIPE LINES; GPA MIDSTREAM ASSOCIATION; TEXAS PIPELINE ASSOCIATION; NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES; AMERICAN FOREST AND PAPER ASSOCIATION; AMERICAN IRON AND STEEL INSTITUTE; EDISON ELECTRIC INSTITUTE; NATIONAL MINING ASSOCIATION; UTILITY WATER ACT GROUP; STATE OF WEST VIRGINIA; STATE OF SOUTH CAROLINA; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSOURI; STATE OF OKLAHOMA; STATE OF UTAH; STATE OF WISCONSIN; GOVERNOR PHIL BRYANT

Amici Supporting Appellee

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;
NATIONAL ASSOCIATION OF MANUFACTURERS

Amici Curiae Supporting Rehearing Petition

O R D E R

Upon consideration of appellees' petition for rehearing and rehearing en banc and appellants' response, Chief Judge Gregory and Judge Keenan voted to deny panel rehearing, and Judge Floyd voted to grant panel rehearing.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory, Judge Wilkinson, Judge King, Judge Duncan, Judge Keenan, Judge Wynn and Judge Diaz voted to deny rehearing en banc. Judge Niemeyer, Judge Traxler, Judge Agee, Judge Floyd, and Judge Thacker voted to grant rehearing en banc. Judge Motz and Judge Harris did not participate in the poll.

The petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 30, 2018

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The petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

From: Fotouhi, David
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000
Importance: Normal
Subject: FW: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

-----Original Appointment-----
From: Leopold, Matt
Sent: Tuesday, May 1, 2018 1:01 PM
To: Leopold, Matt; 'Bond, Alexander'; Ross, David P; Fotouhi, David
Cc: Forsgren, Lee; Neugeboren, Steven; Wehling, Carrie; Wendelowski, Karyn
Subject: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
When: Friday, May 4, 2018 2:00 PM-2:45 PM (UTC-05:00) Eastern Time (US & Canada).
Where: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000

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Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000
Importance: Normal
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From: Fotouhi, David
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000
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Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

To: steve@agri-pulse.com[steve@agri-pulse.com]
From: Lynn, Tricia
Sent: Tue 6/5/2018 8:47:56 PM
Subject: FW: FOR REVIEW: Agri-Pulse (Steve Davies). Groundwater Conduit (6/5)

Hi Steve--

-

On background:

No. The official docket "Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water," identified by Docket ID EPA-HQ-OW-2018-0063 at http://www.regulations.gov, has received 58,336 comments. The EPA will carefully consider all comments received as we consider potential next steps.

Best,

Tricia

Tricia Lynn

Office of Public Affairs

U.S. EPA

Office: 202.564.2615

On Jun 5, 2018, at 12:36 PM, Steve Davies <steve@agri-pulse.com> wrote:

Hi Enesta --

Deadline today for this one. Does EPA have a schedule for how long it will take **to review comments and propose a clarification** of its position on the "groundwater conduit" question -- that is, can water discharged from a point source that then travels through groundwater to a navigable water be regulated under the CWA?

https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0063 docket

Thank you

Steve

p.s. also sent this to Robert but thought you're probably the better person(?)

Steve Davies
Associate Editor
202-744-1535
steve@agri-pulse.com

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Washington, DC 20250
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From: Fotouhi, David
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000
Importance: Normal
Subject: FW: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
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From: Leopold, Matt
Sent: Tuesday, May 1, 2018 1:01 PM
To: Leopold, Matt; 'Bond, Alexander'; Ross, David P; Fotouhi, David
Cc: Forsgren, Lee
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When: Friday, May 4, 2018 2:00 PM-2:45 PM (UTC-05:00) Eastern Time (US & Canada).
Where: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000

17-2426

United States Court of Appeals for the Second Circuit

26 CROWN STREET ASSOCIATES, LLC, 26 CROWN MASTER TENANT, LLC, PMC PROPERTY GROUP, INC.,
Plaintiffs-Appellants,

v.

GREATER NEW HAVEN REGIONAL WATER POLLUTION CONTROL AUTHORITY, CITY OF NEW HAVEN,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR CONNECTICUT (NEW HAVEN)

BRIEF FOR PLAINTIFFS-APPELLANTS

JEFFREY J. MIRMAN
JOHN F. DRONEY
HINCKLEY, ALLEN & SNYDER, LLP
20 Church Street, 18th Floor
Hartford, Connecticut 06103
(860) 725-6200
Attorneys for Plaintiffs-Appellants

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ED_001667C_00004532-00002

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Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metro. Transit Auth.,
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Lujan v. Defenders of Wildlife,
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Mancuso v. Consol. Edison Co. of New York, Inc.,
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CORPORATE DISCLOSURE STATEMENT

In conformance with Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant 26 Crown Street Associates, LLC states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock or membership interests.

In conformance with Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant 26 Crown Master Tenant, LLC states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock or membership interests.

In conformance with Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant PMC Property Group, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock or membership interests.

INTRODUCTION

The federal Clean Water Act ("CWA"), 33 U.S.C. § 1342, aims to protect the integrity of the country's navigable waters by making it illegal to discharge pollutants into them without a permit. The Defendants in this case, the City of New Haven (the "City") and the Greater New Haven Regional Water Pollution Control Authority (the "Authority") (collectively the "Defendants"), have allowed New Haven's sewer system and storm water system to fall into such a state of disrepair and overburden that raw sewage is backing up onto properties throughout New Haven, and is also being discharged directly into Long Island Sound and its tributaries. The Defendants permitted these backups and discharges to occur in violation of the CWA, resulting in further pollution to Long Island Sound and its tributaries. As a result, the Defendants—as parties to an EPA NPDES Permit—are required to engage in conduct to repair the system and prevent these backups and discharges.

The Plaintiffs are the owners and lessors of real property located at 26 Crown Street in New Haven, Connecticut (the "Property"), which consists of a four-floor adaptive use property with sixty-four residential units and one commercial unit. (Second Amended Complaint ("SAC"), JA722, ¶ 4). The ground

floor is occupied by a coffee shop. (*Id.*). The Property is about one-half mile from Long Island Sound.[1]

Because of the dilapidated sewer system in New Haven, the Plaintiffs and their residents have suffered through numerous unfortunate instances of raw sewage backing up in the basement of the Property. The sewage backups are not only highly unpleasant, but also seep into cracks in the aging basement foundation at the Property and into the water table under the property. At this close proximity to Long Island Sound, the ground water empties into nearby tributaries and makes its way into Long Island Sound. Therefore, the outpourings of raw sewage are not only contaminating the Property, but also contributing to contamination of the nearby Long Island Sound. In addition to concerns over the raw sewage in their basement, the Plaintiffs' business interests are also harmed by the contamination to Long Island Sound, as increasing contamination inevitably affects the Property's desirability to current and potential residents.

The Plaintiffs brought this action as concerned citizens under the citizen suit provision of the CWA, 33 U.S.C. § 1365, seeking to enjoin the Defendants' actions that cause this unpermitted contamination. The District Court erroneously dismissed the Plaintiffs' Second Amended Complaint, mistakenly concluding that

[1] The SAC states that the Property is 1/10 of a mile from Long Island Sound. The pleadings later identified that the Property is actually closer to one-half mile away, which the Plaintiffs do not dispute. (*see* JSA243).

they lacked standing and failed to state a claim under the Clean Water Act. For the reasons set forth more fully below, this Court should reverse that decision and remand for further proceedings on the Plaintiffs' Clean Water Act claim, and related state law claims.

STATEMENT OF JURISDICTION

Plaintiffs brought suit under the CWA, 33 U.S.C. § 1365 and the Civil Rights Act, 42 U.S.C. § 1983. Therefore, the District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The District Court had supplemental jurisdiction over the Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. The District Court dismissed the SAC and entered final judgment for the Plaintiffs on July 17, 2017. (JA895). The Plaintiffs filed a timely Notice of Appeal on August 4, 2017. (JA897). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment that disposes of all of the Plaintiffs' claims.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in concluding that the Plaintiffs did not have standing to assert injuries from the loss of aesthetic enjoyment of a clean environment?

2. Did the District Court err in concluding that the Plaintiffs did not have standing to assert the rights of other New Haven property owners or to complain generally about discharges of sewage into Long Island Sound and its tributaries?

3. If the Plaintiff did have standing to assert the injuries and rights set forth in Issues 1 and 2 above, did the Plaintiffs set forth a plausible claim for relief under the Clean Water Act?

4. Did the District Court err in concluding that the Plaintiffs' Second Amended Complaint does not plausibly allege that any of the sewage backflows onto the property of 26 Crown Street involved a discharge of pollutants to navigable waters of the United States?

5. If the Plaintiffs set forth a plausible claim under the Clean Water Act, did the District Court err in dismissing the Plaintiffs' state law claims?

STATEMENT OF THE CASE

The Plaintiffs filed their original Complaint on October 2, 2015. The Defendants each moved to dismiss in January and February 2016. On December 8, 2015, the Plaintiffs filed a First Amended Complaint. On June 9, 2016, following oral argument on the motions to dismiss, the District Court ordered the parties to submit supplemental briefing to address a series of questions raised *sua sponte* by the District Court. Those issues included two of the issues on appeal here, namely: (1) whether the Plaintiffs have standing to assert claims of damage to other

property owners and claims of damage arising from overflows to Long Island Sound; and (2) whether the alleged backflows at 26 Crown Street are subject to regulation under the CWA. The parties submitted supplemental briefing in June and July 2016. In addition, with leave of the Court, the Plaintiffs filed the SAC on July 12, 2016. The District Court, Meyer, J., granted the Defendants' motions to dismiss on July 11, 2017. *Reported at 26 Crown Street Associates, LLC, et al. v. Greater New Haven Water Pollution Control Authority, et al.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506 (D. Conn. July 11, 2017).

The Plaintiffs timely filed a notice of appeal to this Court.

A. **Background**

The Plaintiffs brought this suit individually and on behalf of all persons similarly situated, as citizens who have suffered injury due to the failure of the Defendants to maintain the combined sewer and storm water systems in the City of New Haven. This failure has resulted in discharges of polluted sewage effluent to numerous properties throughout New Haven, including the Property, into Long Island Sound, and into the ground and groundwater within New Haven. These failures constitute violations of the CWA and various state statutes and common law.

B. Operation of the Sanitary and Combined Sewer Systems

The Authority is a regional water pollution control authority created in 2005 pursuant to state statute to jointly manage the individual water treatment systems for the City and Towns of New Haven, Hamden, Woodbridge, and East Haven. (JA724-25, ¶ 10). These communities agreed to create a single entity to jointly manage their sewage treatment systems and conveyed assets, including sanitary waste and combined storm water and sewage systems of pipes to the Authority. (*Id.*).

The Authority owns and operates a system that collects wastewater and sewage from domestic and commercial properties through a system of pipes that flow to a wastewater treatment plant located at 345 East Shore Parkway in New Haven. (JA725, ¶ 11). The pipes and plant together are referred to as the Sanitary Sewer System. The Authority primarily operates the Sanitary Sewer System. (*Id.*).

The City has installed over time a series of catch basins and pipes that collect storm water, consisting of rain or snowmelt that runs off surfaces such as rooftops, paved streets, highways, and parking lots and picks up and transports contaminants. (JA725, ¶ 12). This system is known as the Storm Water System. (*Id.*). The majority of the Storm Water System is interconnected with the Sanitary Sewer System and flows to the treatment plant. (*Id.*). Where the Storm Water System is interconnected with the Sanitary Sewer System, the interconnected

system is referred to as the Combined Sewer System. (*Id.*). Those Storm Water System pipes that are not combined with the sewer do not go to the Treatment Plant and are discharged into Long Island Sound. (*Id.*). The Storm Water System is controlled and maintained exclusively by the City. (*Id.*). At various points in the City—at regulators or junction controls—the City's Storm Water System is interconnected with the Authority's Sanitary Sewer System and Combined Sewer Systems. After the formation of the Authority in 2005, New Haven and three other towns transferred primary management and responsibility for the Combined Sewer System to the Authority through an Asset Purchase Agreement. Through that agreement, the City retained ownership of the catch basins and storm sewer systems, as excluded assets from the agreement. (JA726, ¶¶ 13-14). Under the Asset Purchase Agreement, the City and Authority also entered into a Cost Sharing Agreement to share costs and planning of Combined Sewer Overflow activities. (JA726-27, ¶15).

C. Combined Sewer Overflows Release Untreated Sewage into Long Island Sound and Onto the Plaintiffs' Property.

Wastewater and sewage collected by the Sanitary Sewer System, as well as storm water through the Combined Sewer System, are pumped to the Treatment Plant. (JA727-28, ¶ 18). The Treatment Plant discharges treated wastewater to New Haven Harbor, part of Long Island Sound. (*Id.*). During wet weather events, the systems cannot handle the volume of incoming water, resulting in back-ups in

the pipes followed by discharge of untreated wastewater, known as "combined sewer overflows" at various points throughout New Haven. (*Id.*). These overflows result in discharges of untreated water, exceeding permitted water quality standards, into various bodies of water, including Long Island Sound and its tributaries. (*Id.*).

Since August 2012, and numerous times each year since then, untreated sewage is and has been released onto the Property, and many other public and private properties throughout New Haven, as a result of the sewer overflows. (JA730-31, ¶ 24). The effect of these overflows is to leave areas, including living spaces, basements, yards, and paved areas of the affected properties with standing water filled with untreated sewage. (JA731-32, ¶ 28). The recent and continued population growth and corresponding development in New Haven has and continues to increase the flow of wastewater into the Combined Sewer System, exacerbating the existing issues. (JA729-30, ¶ 21).

A number of these sewage backups have taken place in the basement of the Property. (JA730-31,¶ 24; JA731-32, ¶ 28). Because the basements were constructed decades ago, they contain cracks through which sewage waters escape and enter the soil below the basement. (JA731-32, ¶ 28). The escaped sewage then seeps into the water table beneath the Property. The ground water at this close proximity to Long Island Sound is hydrologically connected to Long Island Sound.

(JA732, ¶ 29.). Therefore, pollutants that enter the ground through the basement of the Property find their way into Long Island Sound, contributing to its contamination. *(Id.)*.

D. The NPDES Permits

Under authority delegated by Congress, the State of Connecticut issues permits for the discharge of pollutants into "navigable waters," which are subject to the CWA, 33 U.S.C. § 1251 *et seq.*, specifically Section 401 of the CWA, 33 U.S.C. § 1341. (JA728, ¶ 19). The permits issued under the National Pollution Discharge Elimination System, or "NPDES permits," contain conditions intended to ensure compliance with, among other things, water quality standards for the receiving body of water, in this case Long Island Sound. (*Id.*).

In 2010, the Authority received, and has since applied for a renewal of, an NPDES Wastewater Discharge Permit No. CT0100366. (JA728-29, ¶ 20). Among the conditions of this permit and renewal are specific limitations as to discharge of untreated sewage from Combined Sewer Overflows, which must still meet state water quality standards when released at approved overflow discharge points or directly into Long Island Sound. (*Id.*). On information and belief, the releases caused by the Defendants do not meet this standard. Further, the NPDES permit does not allow discharges of untreated effluent at any other points than the thirty-four locations listed in the permit. (*Id.*).

E. The District Court Action

The Plaintiffs brought this action in the District Court on October 2, 2015, alleging that the Defendants are causing releases of contaminated effluent in violation of the NPDES permit issued under the CWA. The Complaint also alleged a takings violation under the State and Federal Constitution arising out of the repeated sewage backflows on the Property, as well as state law claims for private nuisance, trespass, negligence, negligence *per se*, and public nuisance. The Plaintiffs amended their complaint on December 8, 2015.

Subsequently, both Defendants filed motions to dismiss. (JA11-496). The motions to dismiss largely focused on the statute of limitations and issues relating to ownership of the sewer systems at issue. Neither defendant challenged the Plaintiffs' standing to bring a claim arising out of pollution to Long Island Sound. Whether the Plaintiffs had stated a claim under the CWA for the backflows polluting the Property was only raised improperly on the City's Reply to the Plaintiffs' Opposition to Motion to Dismiss, and was not raised in the original motion to dismiss. The Plaintiffs moved to strike the City's reply. (*See* JA609).

Following oral argument on the motions to dismiss on June 8, 2016, the District Court ordered the parties to submit supplemental briefing on three issues the District Court had raised *sua sponte.* (JA8, Dkt. No. 57). Those issues were: (1) whether Plaintiffs have standing to assert claims of damage arising from overflows

to Long Island Sound; (2) whether the alleged backflows of storm/sewage/wastewater into the basement of Property at 26 Crown Street are subject to regulation under the CWA; and (3) whether, assuming the complaint otherwise states plausible grounds for relief under the CWA against the Authority, the City of New Haven may be liable under the CWA pursuant to an aiding-and-abetting theory of liability. Following oral argument on the supplemental briefs, the Plaintiffs filed a Second Amended Complaint (JA722), which is the operative complaint on appeal.

F. The District Court Ruling

After receiving the final supplemental briefs from the parties in August 2016, the District Court, on July 11, 2017, granted the motions to dismiss as to both Defendants. (JSA233). The District Court's ultimate reasons for granting the motions to dismiss hinged on the very issues raised and addressed in the supplemental briefs, and were premised on none of the issues raised in the original motions to dismiss.

As an initial matter, the District Court concluded that "the only injury for which plaintiffs have standing is the backflow of sewage onto their own property." (JSA234). The District Court went on to grant the Defendants' motions to dismiss on the basis of (1) lack of standing, and (2) failure to state a claim under the CWA.

With regard to the standing issue, the District Court held that the Plaintiffs lacked standing to assert injuries from the loss of aesthetic enjoyment of a clean environment. (*Id.*). The District Court held that the Plaintiffs did not have standing to assert the rights of other New Haven property owners or to "complain more generally about discharges of sewage into the Long Island Sound that have no effect on them or their business." (*Id.*).

The District Court then dismissed the Plaintiffs' claim under the CWA for two reasons. First, the District Court held that the SAC did not allege a discharge of pollutants to navigable waters, as required under the CWA. On this point, the District Court found that the Plaintiffs' allegations of a hydrologic connection between the backups in the basement of the Plaintiffs' property and Long Island Sound were not "plausible," ostensibly given the proximity of Long Island Sound from the Property. In making that determination, the District Court applied the "significant nexus" test adopted from Justice Kennedy's concurring opinion in *Rapanos v. United States,* 574 U.S. 715 (2006). (JA244-45). Based on that test, the District Court concluded that it was "wholly speculative and implausible to conclude that the occasional flooding of the basement of 26 Crown Street has any effect at all – much less a significant effect – on the waters of the Long Island Sound more than a half a mile away." (JSA245). The District Court reached this

conclusion without the benefit of any evidence or expert testimony on the issue or any ecological or scientific evidence. (*See id.*).

The District Court further held that ground water migration into navigable waters was not a "point source" of pollution and therefore not cognizable under the CWA. In reaching that conclusion, the Court stated that "[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river, a diffuse medium like ground water for the passive migration of pollutants to navigable waters cannot constitute a 'point source' within the meaning of the Clean Water Act." (JSA246).

SUMMARY OF ARGUMENT

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits "the discharge of any pollutant" without a permit into "navigable waters," which it defines, in turn, as "the waters of the United States." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016) (citing 33 U.S.C. §§ 1311(a), 1362(7), (12)). The Plaintiffs brought suit under the CWA due to the Defendants' failure to maintain their sewer and storm water systems, which failure has and will continue to injure the Plaintiffs, their tenants, and other residents of New Haven.

The Plaintiffs—as residential property owners—have standing to complain about aesthetic harms that plague their tenants and those who frequent their Property. The Plaintiffs brought this action under the citizen suit provision of the CWA, which allows them to act as a private attorney general in enforcing the CWA. (JA739, ¶ 52). The Plaintiffs are "citizens" as that term is defined under the CWA, 33 U.S.C. § 1365(g), because corporate entities are persons under the law and the Plaintiffs' interests are adversely affected by the actions of the Defendants. (*Id.*). *See Americold Realty Trust v. Conagra Foods, Inc.*, 136 S.Ct. 1012, (2016) (noting "corporations can assert their own citizenship" and "a corporation itself [can] be considered a citizen of its state of incorporation") (citation omitted). As a citizen, the Plaintiffs have standing to bring suit for the Defendants' violation of the NPDES permit, which has resulted in contamination to the Property and Long Island Sound.

The Plaintiffs' corporate status does not preclude them from asserting a claim as citizens under the CWA for the Defendants' violation of the NPDES permit. If the NPDES permit is not being followed, then pollution of Long Island Sound is occurring. The allegations of the SAC support the Plaintiffs' standing to assert claims that address injuries not just to themselves, but injuries to their tenants and other residents of New Haven.

The District Court concluded that the Plaintiffs do not have standing to assert claims under the CWA for claimed "ecological and aesthetic injuries" or for claimed economic injury. The District Court then determined that the Plaintiffs' allegations did not set forth a plausible claim for relief under the CWA. The District Court's dismissal of the SAC was premised on several errors of law.

First, the District Court erred in concluding that the Plaintiffs did not have standing to assert injuries from the loss of aesthetic enjoyment of a clean environment. The District Court disregarded, and thus effectively discredited, the Plaintiffs' factual allegations of injuries that are actual or imminent stemming from the Defendants' pollution of Long Island Sound. The SAC alleges economic damage to the Plaintiffs due to, *inter alia*, "loss of use, stigma, property damage, diminution in value, and other damages." (JA731, ¶ 26). The District Court erred in granting dispositive relief without acknowledging the impact of the injuries alleged and without permitting the Plaintiffs to pursue discovery and develop a fuller record on which the District Court (and this Court) could make the requisite factual findings fairly to assess the Plaintiffs' claims.

Second, the District Court erred in concluding that the Plaintiffs did not have standing to assert the rights of other New Haven property owners or to complain generally about discharges of sewage into Long Island Sound. The District Court failed to consider that the Plaintiffs are proper representatives for

claims based on overflows to Long Island Sound because they possess the same interests and have suffered the same injuries as other New Haven property owners as residential tenants. The Plaintiffs demonstrated they have standing to assert the rights of their tenants and other New Haven property owners because they satisfy the requirements for third-party standing and have asserted an interest that is within the zone of interests protected by the CWA. The Plaintiffs plausibly alleged an actual and imminent economic injury to themselves arising out of aesthetic injuries to their tenants and other residents of New Haven. Therefore, the District Court incorrectly determined that the Plaintiffs did not plausibly allege an injury-in-fact.

Third, because the District Court incorrectly concluded the Plaintiffs only had standing insofar as they sought redress for backflows to their own property, the District Court erred in further concluding the Plaintiffs did not have standing under the CWA. A citizen suit under the CWA may be brought against any government instrumentality that is alleged to be in violation of an effluent standard of limitation under the CWA. 33 U.S.C. § 1365(a)(1). Here, the District Court failed to consider the Plaintiffs' allegations that the Defendants' acts and omissions have caused increased sewage discharge, affecting the ground and surface waters of the state, which are hydrologically connected to Long Island Sound and its tributaries. The Plaintiffs set forth a plausible claim for relief under the CWA.

Fourth, the District Court erred in concluding that the SAC does not plausibly allege that any of the sewage backflows onto the Property involved a discharge of pollutants to navigable waters of the United States. The District Court improperly ignored the fact that ground water with a hydrologic connection to a body of navigable water is protected under the CWA. Furthermore, the District Court's determination that there was no "significant nexus" between the ground water and surface water at issue was sufficiently pleaded, and involves a highly specialized and fact-dependent analysis that was improperly resolved on a motion to dismiss.

Finally, the District Court erred in dismissing the Plaintiffs' state law claims. Because the District Court dismissed the Plaintiffs' federal causes of action, the District Court declined to exercise supplemental jurisdiction over the Plaintiffs' remaining state law claims. However, because the Plaintiffs did state a valid claim under the CWA, the District Court erred in declining to exercise supplemental jurisdiction over the state law claims.

For these reasons, the judgment of dismissal should be reversed and the case remanded for further proceedings.

ARGUMENT

I. The Plaintiffs Have Standing to Bring This Claim.

A. Standard of Review For Dismissal Under Fed. R. Civ. P. 12(b)(1)

This Court reviews *de novo* a district court's dismissal under F.R.C.P. 12(b)(1). *Fountain v. Karim*, 838 F.3d 129 (2d Cir. 2016). When reviewing a Rule 12(b)(1) dismissal, the Court must accept the factual allegations of the complaint as true, and draw all reasonable inferences in plaintiff's favor. *Hemi Grp., LLC v. City of New York*, 559 U.S. (2010).

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Fountain,* 838 F.3d at 134. "In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239 (2d Cir. 2014). "[T]he court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing." *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000).

B. **The District Court Erred in Disregarding the Complaint's Allegations of Injury to Plaintiffs from Harm to Long Island Sound.**

The District Court incorrectly concluded that the Plaintiffs did not have standing to assert injuries from the loss of aesthetic enjoyment of a clean environment. Based on this finding, the District Court improperly dismissed the SAC.

To meet the constitutional requirements for standing, a plaintiff must establish three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (internal citations and quotation marks omitted).

The Plaintiffs' allegations satisfied each of these threshold requirements.

1. Plaintiffs Established an Injury-in-Fact Because They Alleged Economic Injury Due to Aesthetic Injury to Current and Prospective Tenants of Their Property.

The SAC makes specific factual allegations of injury to the Plaintiffs that are actual or imminent stemming from the Defendants' pollution of Long Island Sound. (*See* JA731-32, ¶¶ 26-31; JA735, ¶¶ 38-39). The District Court concluded that it could ignore these well-pleaded allegations because "plaintiffs are companies, not natural persons." (JSA241) ("A company cannot suffer hurt feelings or a violation of some perceptual or emotional sense of well-being. Companies do not suffer aesthetic injuries from harm to the environment.") (Citations omitted). (*Id.*).

However, in reaching this conclusion, the District Court disregarded the SAC's allegations of collective injury to the Plaintiffs through their tenants and to prospective tenants and/or residents of New Haven who visit and use the Property. The Plaintiffs alleged that their tenants have suffered and will continue to suffer aesthetic injury from contamination on or in the Property and to Long Island Sound, and that prospective tenants and/or residents of New Haven suffer aesthetic injury from knowing that sewage is being released into Long Island Sound. (*See* JA731, ¶ 26; JA732, ¶ 30; JA735, ¶¶ 38-40).

The Plaintiffs further alleged there is a common cause of the injuries to the Plaintiffs, their tenants, and other residents of New Haven; the Plaintiffs argued

they "will suffer economic injury based on decreased demand for their properties should pollution to the Long Island Sound continue." (JA706; *see also* JA731, ¶ 26). The Plaintiffs will sustain the economic damage arising from "loss of use, stigma, property damage, diminution in value, and other damages." (JA731, ¶ 26). The District Court overlooked these well-pleaded allegations in rendering its decision.

Harm in aesthetics and ecology of an area is "an injury in fact sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727 (1972). "To have standing under the Clean Water Act, [33 U.S.C. § 1251, *et seq*.], a party must allege a specific injury to his interest that can be redressed by the statute." *Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metro. Transit Auth.*, 765 F.2d 1169 (D.C. Cir. 1985) (hereinafter "*Citizens*"). "An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *United States v. SCRAP*, 412 U.S. 669 (1972) (citation omitted). A review of the SAC demonstrates that the Plaintiffs plausibly alleged a specific injury to their interests that can be redressed by the District Court.

The District Court relied on *Citizens*, 765 F.2d at 1173, in concluding that the Plaintiffs, in their capacity as companies, do not have standing to claim aesthetic injury. (JA885; JSA241). But *Citizens* is distinguishable from the present

case. *Citizens* involved a claim against a transit authority brought by a town, a citizens' committee, and individuals alleging, *inter alia*, violation of the CWA. *Id.* at 1171. After the CWA claim had been made by these plaintiffs, a corporation which operated a shopping mall joined the action as a party plaintiff and sought reimbursement of expenses incurred in remedying pollution of its property. *Id.* The *Citizens* court noted that the corporate plaintiff did not complain of any pollution to the stream at issue in the action or pollution that would constitute a violation of the CWA, nor did it ever serve the notice required by the CWA before a suit may be filed for a violation. *Id.*

The *Citizens* court thus found that the corporate plaintiff lacked standing under the CWA, reasoning:

> It might be contended that [the plaintiff] had standing to complain of discharges into the stream as an economic injury. Perhaps that would have been so but [the plaintiff] consistently treated this allegation as noneconomic, as claiming aesthetic damage. Nowhere . . . in the complaint does [the plaintiff] state actual damages, that it has lost business, that any customer chose not to shop at the mall, or that the value of its property had declined. *Id.*

Here, unlike the plaintiff corporation in *Citizens*, the Plaintiffs have not treated their claim as one solely of aesthetic injury. The Plaintiffs have also specifically treated their claim as one of economic injury arising out of the aesthetic injuries suffered by their tenants and other residents of New Haven. (*See* JA731, ¶ 26; JA735, ¶¶ 38-39).

While the *Citizens* court declined to extend a finding of aesthetic harm to corporate entities, it explicitly chose not to decide the issue of whether the plaintiff would have had standing "had [the corporation] alleged economic injury to itself due to aesthetic injury to others." *Citizens*, 765 F.2d at 1173. Here by contrast, the Plaintiffs have alleged economic injury to themselves caused by aesthetic injury to their tenants and other residents of New Haven. (JA731, ¶ 26; JA735, ¶¶ 38-39). Furthermore, the Plaintiffs have standing because they are asserting the rights of their tenants and those who visit their Property to a clean and aesthetically pleasing environment. Based on these allegations, the Plaintiffs have the requisite standing to assert injuries from the loss of aesthetic enjoyment of a clean environment. (JA735, ¶¶ 38-39).

The Plaintiffs alleged that they "will suffer economic injury based on decreased demand for their properties should pollution to Long Island Sound continue." (JA706). The Plaintiffs' economic injuries arise out of, *inter alia*, "loss of use, stigma, property damage, [and] diminution in value." (JA731, ¶ 26). The Plaintiffs directly linked their economic injury to their allegation that other residents of New Haven—who now may not choose to move to or visit the Property—"suffer aesthetic injury from knowing that sewage is being released indirectly into . . . the tributaries of [] Long Island Sound." (JA735, ¶ 39).

Moreover, unlike the corporate Plaintiff in *Citizens*, the Plaintiffs here are not an independent, disinterested corporation that produces goods and has little to no connection to the environment. The Plaintiffs' business is entirely dependent upon tenants' aesthetic enjoyment of the Property and the surrounding environment. The Plaintiffs must ensure that their tenants have a clean, habitable, and desirable environment in which to reside. The Plaintiffs must also ensure that prospective tenants and other residents of New Haven have a clean and aesthetically pleasing environment to visit. The Plaintiffs will certainly be injured if their tenants and other residents of New Haven continue to suffer aesthetic injuries from their inability to enjoy the Sound due to an increase in pollution due to untreated sewage. The Plaintiffs, though business entities, have brought the SAC to address their tenants' and other New Haven residents' injuries, which includes the contamination of Long Island Sound a short half mile away.

The Plaintiffs—as residential property owners—have standing to complain about aesthetic harms that plague their tenants and those who frequent their Property. It would be illogical and unworkable to hold that each of the Plaintiffs' tenants must bring suit individually to complain about backflows to the Property where the Plaintiffs own the Property and undertake the remediation for the benefit of their tenants. Of the possible affected plaintiffs of the contamination, the

Plaintiffs are best situated to complain of the injuries to their tenants and engage the judiciary to prevent future harm.

The Plaintiffs brought this action under the citizen suit provision of the CWA, which allows them to act as a private attorney general in enforcing the CWA. (JA739, ¶ 52). The Plaintiffs are "citizens" as that term is defined under the CWA, 33 U.S.C. § 1365(g), because corporate entities are persons under the law and the Plaintiffs' interests are adversely affected by the actions of the Defendants. (*Id.*). As a citizen, the Plaintiffs have standing to bring suit for the Defendants' violation of the NPDES permit, which has resulted in contamination to the Property and to Long Island Sound. *See Americold Realty Trust*, 136 S.Ct. at 1014 (noting that "corporations can assert their own citizenship" and "a corporation itself [can] be considered a citizen of its state of incorporation") (citation omitted).

The Plaintiffs' corporate status should not preclude them from asserting a claim under the CWA for the Defendants' violation of the NPDES permit. If the NPDES permit is not being followed, as the Plaintiffs allege, then pollution of Long Island Sound is occurring. The economic injuries alleged by the Plaintiffs are sufficient at the pleading stage to permit them to bring the claims asserted in the SAC.

2. **The Aesthetic and Economic Injuries Alleged by the Plaintiffs Amply Satisfy the Injury-in-Fact Requirement.**

The Plaintiffs adequately alleged an injury-in-fact in the SAC. As discussed above, the Plaintiffs brought this suit not just for themselves, but on behalf of those who can sense their surroundings and be affronted by deteriorations in their environment. Although this Court has not ruled on this issue, District Courts in this Circuit have found that allegations of aesthetic harm, such as offense and fear and concern of nearby contamination, are sufficient to confer standing. *See, e.g.*, *Mancuso v. Consol. Edison Co. of New York, Inc.*, 130 F. Supp. 2d 584 (S.D.N.Y 2001) (averments that plaintiff's "aesthetic sensibilities" were "offended when viewing tortured animals as he passe[d] the property on his walks" established injury-in-fact at the pleading stage) *aff'd*, 25 F. App'x 12 (2d Cir. 2002); *Chart v. Town of Parma*, No. 10-CV-6179, 2012 WL 3839241 (W.D.N.Y. Aug. 28, 2012) (finding a plaintiff sufficiently asserted that he had suffered an injury-in-fact from the alleged contamination where the plaintiff "alleged that he is afraid and concerned that the contamination will adversely affect other users of" a park); *cf. Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.*, 2006 WL 2223946 (D. Conn. 2006) (plaintiff's "fear and uncertainty" that defendant's actions could pollute a nearby state park was reasonable and conferred standing); *Mut. Life Ins. Co. of New York v. Mobil Corp.*, No. CIVA96CV1781RSP/DNH, 1998 WL 160820 (N.D.N.Y. Mar. 31, 1998) (allowing plaintiff shopping center

owners to proceed with claim under the CWA where a truck at a gasoline station adjacent to the plaintiff's property spilled gasoline that migrated onto their property, and entered the ground water eventually flowing into and contaminating a nearby wetland and lake). The allegations of the SAC more than meet this standard. (*See, e.g.*, JA731, ¶ 26; JA732, ¶30; JA735, ¶¶38-39).

a. <u>Even if Plaintiffs Lacked Standing to Claim Aesthetic Harm by Itself, the Combination of Aesthetic Harm and Direct Injury to the Property Confer Standing.</u>

The District Court acknowledged that the Plaintiffs have sufficiently alleged injuries from backflows of sewage onto the Property. (JA884; JSA240). "In the context of environmental law, evidence of pollution on one's land ordinarily satisfies the standing inquiry." *Tri-Realty Co. v. Ursinus College*, 124 F. Supp. 3d 418 (E.D.Pa. 2015) (citations omitted). Backflows of sewage on and in the Property certainly will result in economic injury to the Plaintiffs due to aesthetic harm to others because the Plaintiffs' tenants know that both the Property in which they reside and Long Island Sound are being polluted by the sewage. The Plaintiffs depend on their tenants' aesthetic enjoyment of a clean environment to maintain their business. When one considers the Plaintiffs' allegations in their entirety, it is readily apparent that the SAC plausibly alleges facts that state legally cognizable interests held by the Plaintiffs.

The Plaintiffs properly alleged injuries that are actual and imminent. In *Hawaii's Thousand Friends, Life of Land, Inc. v City & Cty. Of Honolulu*, 806 F. Supp. 225 (D. Haw. 1992), plaintiffs' claim of injury to recreational, aesthetic, and environmental interests was recognized as a cognizable interest for standing purposes. There, the possibility of facing another sewage bypass was actual and imminent as several bypasses occurred even after the parties had entered into a consent agreement. *Id.* The court noted that "plaintiffs need not wait until it rains to establish actual and imminent injury." *Id.*; *see also San Francisco Herring Ass'n et al. v. Pac. Gas & Elec. Co. et al.*, 81 F. Supp. 3d 847 (N.D. Cal 2015) (finding standing under the CWA based on actual or threatened diminution of the property value of a plaintiff's home).

Similarly, here the Plaintiffs need not wait for another storm event or for further pollution of Long Island Sound to occur to have standing to assert a claim under the CWA. Since 2012, untreated sewage is and has been released into the basement of the Property numerous times. (JA730-31, ¶ 24; JA731-32, ¶ 28). The pollution of the Property, coupled with the attendant aesthetic injuries suffered by the Plaintiffs' tenants who know that the Property is being contaminated and that such contamination is also polluting Long Island Sound, threaten immediate diminution of the value of the Property. Should contamination of the Property and Long Island Sound persist, the Plaintiffs will suffer adverse economic harm.

In considering standing, the District Court overlooked the fact that the Plaintiffs need not prove the injuries set forth in the SAC at the motion to dismiss stage. "A challenge to standing does not justify an inquiry into the strength of a complaint. Questions of standing deal exclusively with whether the plaintiff alleged facts satisfying the constitutional and prudential limitations of the doctrine." *Harris v. City of Zion, Lake County, III*, 927 F.2d 1401, 1406, (7th Cir. 1991) (citation omitted). "Requiring proof of damage to the environment would raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit." *Borough of Upper Saddle River, N.J. v. Rockland Cty. Sewer Dist. #1*, 16 F. Supp. 3d 294 (S.D.N.Y. 2014); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (hereinafter "*Laidlaw*") ("General allegations of injury may suffice at the pleading stage . . . . And where . . . the case has proceeded to judgment, those specific facts must be supported adequately by [] evidence . . . .") (Internal citations and quotation marks omitted).

At the motion to dismiss stage, it is enough that the Plaintiffs have pled good-faith allegations of damage that can be remedied by the federal courts. *See Conley v. Gibson*, 355 U.S. 41 (1957) (a motion to dismiss presumes that general allegations embrace those specific facts that are necessary to support the claim).

The Plaintiffs sufficiently alleged a personal stake in this suit to justify the exercise of the court's remedial powers of injunctive relief on their behalf.

C. Plaintiffs Meet Article III Standing Requirements.

In addition to dismissing the SAC on the grounds that the Plaintiffs as corporate entities did not have standing to assert any injuries from the loss of aesthetic enjoyment of a clean environment, the District Court also dismissed the Plaintiffs' claims for lack of standing to assert the rights of other New Haven property owners or to complain generally about discharges of sewage into Long Island Sound. The District Court was incorrect on both grounds.

1. The District Court Erred in Concluding that Plaintiffs Do Not Have Standing to Assert the Rights of Other New Haven Property Owners.

The Plaintiffs have standing to assert the rights of other New Haven property owners because their allegations embrace the harms regulated by the CWA. The Plaintiffs are proper representatives for claims based on overflows to Long Island Sound because they possess the same interests and have suffered the same injuries as other New Haven property owners. It would be contrary to good sense to hold that tenants and invitees have greater standing than the Plaintiffs to complain about backflows to the Property where the Plaintiffs are the owners of the Property that must remediate the harm.

The District Court improperly relied on *Lujan*, 497 U.S. at 871, when it found that the Plaintiffs do not have an interest in preventing pollution in Long Island Sound. *Lujan* involved evidence submitted in support of a motion for summary judgment, after extensive factual development of the issues. *Id.* In its discussion of standing, the *Lujan* Court focused on the allegations of the complaint and then turned to the affidavits submitted by the plaintiff to search for support. *Id.* at 885. The *Lujan* Court did not conclude that the well-pleaded allegations of the complaint would not be sufficient to confer standing.

It was thus premature for the District Court to dismiss the SAC at the pleading stage. The Plaintiffs properly alleged injuries to themselves and to others arising out of the same cause — backflows of sewage onto the Property and the properties of other New Haven property owners, and overflows into Long Island Sound.

The Plaintiffs are interested in ending contamination to properties in New Haven and pollution to Long Island Sound from sewage released during storm events. The Plaintiffs' interests are fundamentally no different from an environmental association that aims to improve the quality of life of its members. An association has standing to bring suit in its own name on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c)

neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138 (2d Cir. 2006) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977)).

While not an environmental association, the reasoning of the doctrine of associational standing applies equally here because the Plaintiffs are seeking to protect interests that are germane to its organizational purpose. The Plaintiffs have standing to assert the rights of other New Haven property owners because each of the elements to establish associational standing have been met. First, the Plaintiffs are asserting claims that other New Haven property owners have standing to pursue in their own right because individual property owners have standing under the CWA to complain of backflows of sewage onto their property as well as aesthetic injuries from harm to Long Island Sound. Second, the interest that the Plaintiffs seek to protect—the right to enjoy a clean and unpolluted environment—is germane to property owners. Finally, neither the claim asserted nor the relief requested by the Plaintiffs require the participation of individual property owners in the lawsuit because the Plaintiffs have brought this action for the benefit of all New Haven property owners that have been harmed, including themselves. The Plaintiffs have asserted an interest that is within the zone of interests to be protected by the CWA because the SAC aims to "restore and maintain the

chemical, physical, and biological integrity of [Long Island Sound]." 33 U.S.C. § 1251(a)(2012).

The District Court "[did not] doubt for a moment that [Plaintiffs] have standing to the extent that the [SAC] alleges backflows on their property." (JA884; JSA240). The Plaintiffs' tenants would similarly have standing to bring a claim under the CWA for the backflows onto the Property where they reside as well as for aesthetic harm caused by overflows to Long Island Sound. The Supreme Court has recognized that "an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity." *Hunt*, 432 U.S. Surely here, where the District Court recognized that the Plaintiffs suffered a direct injury to the Property, the Plaintiffs are the proper party to address these very injuries suffered by their tenants. The Plaintiffs are thus also the proper party to address the aesthetic injuries of their tenants that are caused by the same violation.

The Plaintiffs have sufficiently alleged injuries common to themselves, their tenants, and other property owners in New Haven. The Plaintiffs have standing to assert their rights together with other New Haven property owners who share their interest in ending backflows onto their properties from sewage released during storm events.

The Plaintiffs specifically alleged harm to themselves as property owners, harm to their tenants, and harm to other New Haven property owners who have also suffered this particularized injury. (JA731, ¶ 26; JA732, ¶ 30; JA735, ¶¶ 38-40). Furthermore, the relief requested by the Plaintiffs, if granted, will protect all property owners' aesthetic concerns that they quite rightly have to enjoy a clean environment. The Plaintiffs' allegations relating to the odorous and hazardous nature of sewage and the proximity of the contamination to other property owners were sufficient for the Plaintiffs to state a concrete and particularized injury on behalf of other New Haven property owners.

2. The District Court Erred in Concluding that Plaintiffs Do Not Have Standing to Complain Generally about Discharges of Sewage into Long Island Sound.

As discussed above, the Plaintiffs alleged facts that plausibly establish economic injury to them from pollution to Long Island Sound. In concluding otherwise, the District Court committed reversible error. The District Court's conclusion was based upon the Plaintiffs having "not alleged facts that plausibly establish economic injury that is actual or imminent," relying upon *Laidlaw*, 528 U.S. at 181. (JA885; JSA241). The District Court improperly dismissed the SAC because it did not accept the material allegations of the SAC as true or construe those allegations in the Plaintiffs' favor.

The District Court took an unduly narrow view of standing when it made its findings concerning the allegations of the SAC. The standard of review applicable to motions to dismiss for lack of standing must focus on the allegations of the SAC. Because "standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *United States v. Vazquez*, 145 F.3d 74 (2d Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

The Plaintiffs plausibly alleged injuries that are certainly actual and imminent to constitute an injury-in-fact. The Plaintiffs alleged that "[s]ince August 10, 2012, during significant wet weather events, the Combined System and/or the municipal wastewater system and/or the stormwater sewer system has backed up at the Properties" and there have been "additional releases of untreated sewage into Long Island Sound during Combined Sewer Overflows and from releases that have occurred elsewhere in the City due to backflow." (JA730-31, ¶ 24; JA732, ¶, 30). As discussed above, the Plaintiffs plausibly alleged an economic injury to themselves arising out of aesthetic injuries to their residents and residents of New Haven generally. The District Court thus incorrectly determined that the economic injury to the Plaintiffs was not actual or imminent.

The series of prior contamination events the Plaintiffs alleged in the SAC permitted the District Court to draw an inference that future occurrences—both at

the Property and into Long Island Sound—would cause actual or imminent economic injury to the Plaintiffs. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. (internal quotation marks and citation omitted). "[T]o whatever extent future-oriented allegations . . . might fall short of properly alleging injury in fact . . . the question is not whether *any* of the allegations of injury are speculative, but whether *all* of them are, therefore requiring the complaint's dismissal." *Downtown Development, Inc.*, 448 F.3d at 146 (emphasis in original).

Applying the relevant law, the District Court nevertheless incorrectly concluded that the Plaintiffs did not allege facts that plausibly establish any injury to them from the contamination of Long Island Sound. (JA885; JSA241). In *Sierra Club, Lone Star Chapter*, 73 F.3d at 556, members of an environmental group had standing to bring an action under the CWA even though they merely expressed concern about the effect of an oil company's produced water discharge and even though all but one member couched injury in terms of future impairment. ("Whether the affiants were 'concerned' or 'believed' or 'knew to a moral certainty' that [polluted] water would adversely affect their activities on the bay is a semantic distinction that makes little difference in the standing analysis. The

requirement that a party demonstrate an injury in fact is designed to limit access to the courts to those 'who have a direct stake in the outcome' . . . as opposed to those who 'would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'") (citations omitted).

Similarly, here the Plaintiffs alleged that they "will suffer economic injury based on decreased demand for their properties should pollution to the Long Island Sound continue." (JA706). Indeed, the SAC speaks specifically to the types of economic damage to the Plaintiffs, which includes "loss of use, stigma, property damage, diminution in value, and other damages." (JA731 ¶ 26). To this end, significant diminution to the Property's value, loss of use and stigma will occur because "sewage is odorous and despoils that natural state of the creeks and land surrounding the tributaries and the Long Island Sound itself." (JA732, ¶ 30).

The allegations of the SAC, when considered in their entirety, demonstrate that the Plaintiffs are concerned and believe that the continued contamination of the Property, the properties of other New Haven property owners, and of Long Island Sound will adversely affect their business interests in proximity to Long Island Sound. The Plaintiffs have alleged a direct stake in the outcome of this case consistent with *Sierra Club, Lone Star Chapter*, 73 F.3d at 556. The Plaintiffs sufficiently alleged an economic injury that is actual and imminent.

II. The Plaintiffs Set Forth a Plausible Claim for Relief Under the Clean Water Act.

A. Standard of Review of Dismissal Under Fed. R. Civ. P. 12(b)(6)

This Court reviews *de novo* a district court's dismissal under Rule 12(b)(6). *See, e.g.*, *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, (2d Cir. 2016). When reviewing a Rule 12(b)(6) dismissal, the Court accepts the factual allegations of the complaint as true, and draws all reasonable inferences in plaintiff's favor. *Hemi Grp., LLC*, 559 U.S. at 5.

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) "the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A plaintiff need merely plead only "factual content that allows the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949).

B. The Plaintiffs Have Standing to Assert An Injury Arising from Pollution to Long Island Sound, Therefore State a Claim Under the Clean Water Act.

The District Court concluded that because the Plaintiffs only had standing insofar as they sought redress for backflows to their own property, the Plaintiffs did not have standing under the CWA. (JSA242). However, because the District Court incorrectly concluded that the Plaintiffs did not have standing to assert any

causes of action from pollution to Long Island Sound, as discussed in the preceding sections, the conclusion that the Plaintiffs did not plausibly allege a cause of action under the CWA is also necessarily flawed.

A citizen suit under the CWA may be brought against any person or government instrumentality that is alleged to be in violation of an effluent standard of limitation under the CWA. 33 U.S.C. § 1365(a)(1). Here, acts and omissions by the City and the Authority have caused increased sewage discharge, which affects the ground and surface waters of the State and are connected to Long Island Sound and its tributaries.

The NPDES permit issued to the Authority permits it to release untreated sewage, which must meet certain water quality standards, from specific, designated, Combined Sewer Overflow discharge points. (JA728-29, ¶ 20). Rather than comply with the permit mandates, the state of disrepair of the Defendants' system has resulted in backups releasing contaminated discharge on and near the Property, through locations that are not specified in the permit, including into tributaries and Long Island Sound. (JA737-38, ¶¶ 47-50). These allegations sufficiently state a claim under the citizen suit provision of the CWA.

The CWA prohibits "the discharge of any pollutant" without a permit into "navigable waters," which it defines, in turn, as "the waters of the United States." *U.S. Army Corps of Engineers*, 136 S. Ct. at 1811 (citing 33 U.S.C. §§ 1311(a),

1362(7), (12)). Long Island Sound and its tributaries are navigable waters of the United States within the meaning of the CWA. *See, e.g.*, *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of City of New York*, No. 94 CIV. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996) (Long Island Sound was a navigable water for purposes of a claim under the CWA).

Finally, as discussed in Section I.B., *supra*, the Plaintiffs have suffered harm as a result of contamination to Long Island Sound. As such, the Plaintiffs have met all the requisite elements to state a claim under the CWA.

C. Sewage Backflows Onto the Property at 26 Crown Street Involve a Discharge of Pollutants to Navigable Waters of the United States.

1. The District Court Erred in Concluding that the Plaintiffs' Did Not Allege a Sufficient Hydrologic Connection Between the Backflows at 26 Crown Street and Long Island Sound.

In granting the Defendants' Motions to Dismiss, the District Court stated that "even fully crediting plaintiffs' allegations that the sewage backflows in their basement have seeped through the floor and into the ground water beneath their property and that there is some sort of hydrologic connection between this ground water and the Long Island Sound, I conclude that such allegations of the pollution of navigable waters by means of passive ground water migration do not suffice as a matter of law to state a claim under the Clean Water Act." (JSA235).

This conclusion incorrectly ignores the fact that ground water with a hydrologic connection to a body of navigable water is protected under the CWA. Furthermore, the District Court's determination that there was no "significant nexus" between the ground water and surface water at issue requires a highly specialized and fact-dependent analysis that was wholly inappropriate for resolution on a motion to dismiss.

a. Ground Water Hydrologically Connected to Navigable Water is Protected Under the CWA.

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As stated above, the CWA prohibits "the discharge of any pollutant" without a permit into "navigable waters," which it defines, in turn, as "the waters of the United States." *U.S. Army Corps of Engineers,* 136 S. Ct. at 1811 (citing 33 U.S.C. §§ 1311(a), 1362(7), (12)).

While the Plaintiffs do not dispute that pollution to ground water with no hydrologic connection to surface water is not covered under the CWA, protecting ground water that does have such a connection clearly furthers the purpose of the CWA.

Many courts throughout the country that have analyzed the issue conclude that Congress intended to regulate the discharge of pollutants that could affect surface waters of the United States, whether it reaches the surface water directly or

through ground water. *See e.g., Sierra Club v. Virginia Elec. & Power Co.*, 247 F. Supp. 3d 753 (E.D. Va. 2017); *McClellan Ecological Seepage Situation ("MESS") v. Weinberger*, 707 F.Supp. 1182 (E. D.Cal. 1988); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993); *Washington Wilderness Coalition*, 870 F. Supp. at 990; *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001); *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052 (N.D. Cal. Sept. 1, 2005); *Friends of Santa Fe County v. LAC Minerals. Inc.*, 892 F. Supp. 1333 (D.N.M.1995); *Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 599 F. Supp. 2d 175 (D.P.R. 2009). Courts take the view that this is because ground water is a conduit through which contaminants reach jurisdictional waters. *See, e.g., Hawaii Wildlife Fund*, 24 F. Supp. 3d at 995 ("When [ground water] is a conduit through which pollutants reach the ocean, then there has been the 'addition of [a] pollutant to navigable waters.").

The rationale supporting these conclusions is simple and persuasive: "since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit." *Hernandez*, 599 F. Supp. 2d at 180 (citing *Washington Wilderness Coalition,* 870 F. Supp. at 990).

The Environmental Protection Agency ("EPA"), the agency charged with administering the CWA as a whole, *see* 33 U.S.C. § 1251(d), takes the position that

surface water that has a direct hydrologic connection to navigable waters is subject to the CWA on a case-by-case basis. *See Revised Nat'l Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to* Waterkeeper *Decision*, 73 Fed. Reg. 71420 (Nov. 20, 2008) ("The EPA] believe[s] that requirements limiting the discharge of pollutants to surface water via groundwater that has a direct hydrologic connection to surface water should be addressed on a site-specific basis.").

While this Circuit has not specifically ruled on the issue, several district courts within this Circuit have accepted this premise. *See Mut. Life Ins. Co. of N.Y.*, 1998 WL 160820 (denying the defendant Mobil truck driver's motion to dismiss plaintiff's complaint alleging that his accidental release of gas into the ground was a violation of the CWA where the plaintiff had alleged a hydrologic connection between the ground water and navigable waters); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001) (not analyzing the issue but accepting as a necessary prerequisite in analyzing whether past discharge into ground water is covered under the CWA); *New York v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985) (declining to consider defendant's argument that the scope of the CWA does not cover contamination to groundwater because it was clear that the plaintiffs had

alleged contamination to groundwater that threatened to contaminate navigable waters).

b. <u>The District Court's Finding That There is No Significant Nexus Between the Ground Water and Long Island Sound Was Inappropriate on a Motion to Dismiss.</u>

The District Court's holding that no claim under the CWA existed (JSA235) was based in large part on its conclusion that the Plaintiffs had not shown a significant hydrologic nexus between the Property and Long Island Sound. (JSA245). However, that conclusion was inappropriate on a motion to dismiss, where the District Court did not have a record of scientific evidence or expert testimony upon which to rely, and was required to accept the Plaintiffs' allegations as true and in the light most favorable to the Plaintiffs.

In reaching its holding, the District Court relied upon the "significant nexus" test taken from Justice Kennedy's plurality opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006), to determine whether the pollution alleged bore a significant nexus to a body of navigable water. (JSA245). Justice Kennedy reasoned that "[t]he required nexus must be assessed in terms of the statute's goals and purposes" and that a nexus was significant where it "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" (*Id.* at 779-80). Here, the record does not support the District Court's conclusion that there was no "significant nexus" alleged. Indeed, such a conclusion

would require a level of factual findings that could not have been resolvable on a motion to dismiss.

Whether and the degree to which a hydrologic connection exists depends on various complex ecological factors that had not yet been developed in the record of this case. This Court has acknowledged that "[s]tudies do show that variability in topography, climate, distance to surface water, and geologic factors influence whether and how pollutant discharges at a particular site enter surface water via groundwater. *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005) (citing EPA, Proposed Rule Development Document 12–12 (Jan. 2001)). *See also Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992) (because a determination of whether "waters of the United States" should include ground water connected to surface water "ultimately involves an ecological judgment about the relationship between surface waters and groundwaters, it should be left in the first instance to the discretion of the EPA and the Corps.").

As further evidence that such a finding is not appropriate on a motion to dismiss, the Army Corps of Engineers, one of the two agencies charged with enforcing the CWA (along with the EPA) has a procedure by which it offers jurisdictional determinations ("JDs") to determine if a property contains "waters of the United States" and is therefore subject to the CWA's permitting requirements, because of the difficulty in defining that term. *See U.S. Army Corps of Engineers*,

136 S. Ct. at 1809 (citing 33 C.F.R. § 331.2). The JDs can be either "preliminary" or advisory in nature, or "approved," which are definitive and rendered after "extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property." (*Id.*) (citing *U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook* 47–60 (2007). Indeed, the Corps recommends such factfinding as to the existence of a "significant nexus" including "an assessment of the flow characteristics and functions of the tributary, itself, in combination with the functions performed by any wetlands adjacent to the tributary to determine if they have more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of [traditional navigable waters]." *U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook* 15 (2007). In 2016, the Supreme Court held that such agency determinations were appealable final decisions. *U.S. Army Corps of Engineers*, 136 S. Ct. at 1816.

Moreover, cases in which a court has accepted that pollution to ground water connected to navigable water may be actionable under the CWA have been resolved on summary judgment, where the court is afforded the opportunity to consider a variety of ecological data and expert testimony in determining whether and the extent to which a hydrologic connection exists. *See, e.g.*, *Rapanos,* 574 U.S. at 757 (vacating the Sixth Circuit's grant of summary judgment determining

that certain Michigan wetlands were "waters of the United States."); *Cordiano v. Metacon Gun Club, Inc.*, 575 F. 3d 199 (2d Cir. 2009) (affirming summary judgment holding that a gun club did not constitute a jurisdictional wetland under the CWA); *Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014) (granting summary judgment for the plaintiff holding that defendants had violated the CWA in discharging pollutants into ground water that reached navigable waters); *Zdziebloski v. Town of E. Greenbush*, No. 115CV0298LEKCFH, 2017 WL 1968672 (N.D.N.Y. May 11, 2017) (granting summary judgment for defendants holding that the plaintiffs had failed to come forward with admissible evidence sufficient to allow a reasonable jury to conclude that either *Rapanos* had been met to determine whether there was a sufficient hydrologic connection between a pond on the plaintiff's property and a body of navigable water).

In reaching its ultimate conclusion as to the CWA claim, the District Court reasoned that "[i]t would be nothing but fanciful and well exceeding the bounds of plausibility to conclude that the occasional backflows of polluted water into the basement of plaintiffs' property somehow found their way past several city blocks, the Northeast Corridor train tracks, sprawling acres of an IKEA parking lot, and six or more lanes of Interstate 95 to contaminate the Long Island Sound." (JSA243). Without pointing to any expert testimony or scientific evidence in the record, of

which there was none at the motion to dismiss stage, the District Court continued that it was "wholly speculative and implausible to conclude that the occasional flooding of the basement of 26 Crown Street has any effect at all – much less a significant effect – on the waters of the Long Island Sound more than half a mile away." (JSA245). The District Court assumed, without taking evidence, that the flow would occur as the District Court imagined, and not in some other direct route to the Sound or its tributaries.

However, the SAC clearly alleges that escaped sewage seeps into the cracks in the Plaintiffs' basement and into the ground water, and that such ground water is hydrologically connected to Long Island Sound, especially in such close proximity to the Sound. (JA731-32, ¶¶ 28-29). These allegations are based on credible ecological studies and publicly available information. *See, e.g.*, *Water Conservation and Marine Water Quality Fact Sheet*, Long Island Sound Study, *available at* http://longislandsoundstudy.net/2010/03/water-conservation-and-marine-water-quality/ ("The connection between ground and surface water pollution is close in the Long Island Sound area since the flow of streams draining to the Sound comes primarily from groundwater contributions.").

Further, the limited expert evidence before the District Court did not support the District Court's holding. The only expert evidence in the record was the testimony of two experts—one submitted by the Plaintiffs and the other by the

City. The experts' opinions centered primarily on the issue of ownership of the Combined Sewer System and the apportionment of responsibility between the City and Authority. (*See* JA32-35, Affidavit of Giovanni Zinn, P.E.; JA526-37, Affidavit of Peter Shanahan). None of the expert testimony refuted the Plaintiffs' allegations of a hydrologic connection between the ground water at the Property and Long Island Sound, but rather supported the link between the poorly maintained sewer system and effects on the Property. For instance, the Plaintiffs submitted an affidavit from Peter Shanahan, Ph.D, P.E., a hydrologist and environmental engineer with more than 40 years of consulting experience on hydrology and water quality issues. In relevant part, Dr. Shanahan opined "the sanitary system does not have adequate capacity to convey the combined stormwater and sanitary flows during moderate wet weather events. Thus, stormwater drainage has been found to exert a negative effect on the sanitary sewer system in the vicinity of 26 Crown Street." (JA529-530, ¶12).

Under the well-accepted motion to dismiss standard, the District Court was required to "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326 (2d Cir. 1997). As the case progresses and the record is developed, the Plaintiffs bear the burden to prove the extent of the hydrologic connection, but not at the motion to dismiss stage. *See*

Mut. Life Ins. Co. of New York, 1998 WL 160820 ("[The plaintiff's] complaint alleges a hydrological connection between the contaminated ground water and navigable waters. . . On a Rule 12(b)(6) motion, I must take that allegation as true, and it is sufficient to withstand Mobil's motion to dismiss. . . Of course, plaintiff ultimately will have to prove a link between contaminated ground waters and navigable waters."); *see also Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880 (D.N.J. Jan. 8, 2013) (denying defendant's motion to dismiss holding plaintiffs had sufficiently pled a claim under the CWA where plaintiff's pleaded that discharges to, *inter alia*, a ditch, were entering ground water hydrologically connected to a nearby river).

The District Court's conclusion that no significant nexus existed was not supported by the record and was inappropriate at the motion to dismiss stage of the pleadings, and should be reversed.

2. **The District Court Erred in Concluding that Ground Water Is Not a "Point Source" Under the CWA.**

The District Court concluded that even if the Plaintiffs had alleged a sufficient hydrologic connection between the Property and Long Island Sound, the Plaintiffs still failed to state a claim under the CWA because "a diffuse medium like ground water. . . cannot constitute a 'point source' within the meaning of the Clean Water Act." (JSA245-46).

In reaching this conclusion, the District Court acknowledged that the Second Circuit has not addressed this issue, but attempted to analogize it to the Second Circuit's decisions regarding "ordinary surface water run-off" not being a "point source." (JSA247). The District Court reasoned, without citation to any case law or expert testimony, that "[g]round water migration is no different than surface water run-off for purposes of the 'point source' requirement." (*Id.*). But in reaching that conclusion, the District Court cited to this Circuit's decision in *Cordiano*, 575 F. 3d at 199 (JSA246). That case does not support the District Court's finding because it reasoned that "surface water runoff which is ***neither collected nor channeled***" was not a point source under the CWA. *Id.* at 22 (emphasis added). Indeed, the EPA has espoused this standard. *See, e.g., Tennessee Clean Water Network v. Tennessee Valley Auth.,* No. 3:15-CV-00424, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2017) (citing *Nat'l Pollutant Discharge Elimination Sys. Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations,* 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001) ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act.")). By that standard, ground water is distinct because it may indeed, be channeled. *See, e.g., Moden v. United States,* 60

Fed. Cl. 275 (2004)(discussing the flow of contamination through "groundwater channels").

The District Court's conclusion ignores not only the relevant case law but also the legal scholarship on this topic, which concludes that ground water can fall within the term "point source," as defined by the CWA as "any discernable, confined and discrete conveyance," 33 U.S.C. §1362(14). Likewise, this Court has taken the position that "[t]he definition of a point source is to be broadly interpreted" and embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180 (2d Cir. 2010); *see also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994).

In *Peconic Baykeeper*, this Court manifested its broad interpretation of the term "point source" in holding that anti-mosquito spraying activities from spray applicators attached to trucks and helicopters were "point sources" under the CWA. *Peconic Baykeeper*, 600 F.3d at 188. The District Court cited to that case, but attempted to distinguish it on account of the "difference between a migration medium that is air and a migration medium that is the land or subterranean ground waters." (JSA248). In *Peconic Baykeeper,* the Court held that the spray apparatus discharging the contaminant was the "point source," *Peconic Baykeeper,* 600 F.3d

at 188, and that classification was not lessened by the fact that the contaminant was dispersed through air particles before entering a body of water. Without attempting to explain why diffusion through air particles was not a disqualifying factor in *Peconic Baykeeper* but diffusion through land or ground water was here, the District Court appeared to take issue with the very proposition that pollution to ground water could cause pollution to bodies of surface water. (JSA246). The District Court reasoned that "[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river, a diffuse medium like ground water for the passive migration of pollutants to navigable waters cannot constitute a 'point source' within the meaning of the [CWA]." (*Id.*).

But a significant number of courts across the country have disagreed with the District Court's view and held that ground water itself constitutes a point source. *See, e.g.*, *Hawai"i Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 999 (D. Haw. 2014) ("nothing in the record suggests that the groundwater is not itself a 'confined and discrete conveyance.'") (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) ("The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.")); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880 (D.N.J. Jan. 8, 2013) (holding that plaintiffs had sufficiently pled that

hydrologically connected ground water was a point source); *Greater Yellowstone Coal. v. Larson,* 641 F. Supp. 2d 1120 (D. Idaho 2009); *see also* Mary Christina Wood, *Regulating Discharges in Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 Harv. Envtl. L. Rev. 569, 575 (1988) ("A certain amount of groundwater travels in defined subterranean channels. . . the channels are very much akin to traditional 'point sources' and should be treated as such for purposes of [the CWA].").

These courts have relied on the basic reasoning that since the goal of the CWA is to protect the quality of surface waters, "any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit." *Washington Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983 (E.D. Wash. 1994) ("the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit.").

As with the District Court's determination that there is no sufficient nexus between the ground water and surface water at issue, the District Court's determination that ground water migration was not a "point source" under the CWA (JSA248) was also inappropriate on a motion to dismiss. Reaching a contrary result, in *Raritan Baykeeper,* 2013 WL 103880, at *15, the U.S. District Court for the District of New Jersey held that the plaintiffs had "sufficiently

pleaded that groundwater is a point source because it is hydrologically connected to the river."

Finally, the District Court expressed concern in its decision that holding that ground water pollution could be a point source could invariably "thwart" Congress's purpose to limit the scope of the Clean Water Act" because "[i]t would become commonplace for litigants to style any claim of ground pollution as a claim for Clean Water Act pollution on the basis of speculation and attenuated causal inferences that ground pollution . . . may ultimately end up polluting navigable waters." (JSA248). The Court's concern for upholding limits on the ability of parties to bring a claim under the CWA was also evidenced during the motion hearing on October 31, 2016, in which the District Court used the example of whether pouring a cup on ammonia onto the New Haven Green would be a violation of the CWA. (JA869) and attempted to frame the Plaintiffs' theory as whether "any kind of pollution of the ground that seeps into the ground is potentially a violation of the Clean Water Act . . . ." (*Id.*). Counsel for the Plaintiffs then clarified that the theory applies *only* where a hydrologic connection can be established. (JA870).

Contrary to the District Court's concerns, such a holding would not "effectively read the 'point source' requirement out of the Clean Water Act." (JSA248). As the SAC makes clear, the Plaintiffs are located in relative close

proximity to Long Island Sound or its tributaries. Secondly, the backflows of pollution are taking place in the basement of the Property, in which aging construction has left cracks through which seepage waters escape and enter the water table underground, eventually reaching Long Island Sound. (JA731-32, ¶¶ 28-29). While the District Court's point that every pollutant that touches the ground that may find its way into a body of navigable water should not be considered a "point source" under the CWA may be contrary to Congress' intent, a point not made with the benefit of citation, the case at hand is distinguishable.

On the facts alleged, the Plaintiffs have pleaded that the Defendants have acted in violation of the NPDES permit and in violation of the CWA, and such violations have resulted in contamination to Long Island Sound by way of a ground water connection through the Property. The allegations of a hydrologic ground water connection and ground water acting as a point source have significant precedent in the existing case law and interpretations of the CWA. As such, the District Court erred in dismissing the Plaintiffs' claims as a matter of law on a motion to dismiss.

III. <u>The District Court Erred in Dismissing the Plaintiffs' State Law Claims</u>.

After dismissing the Plaintiffs' claim under the CWA and takings claim, the District Court held that because the federal claims should be dismissed, the District

Court could not exercise supplemental jurisdiction over the Plaintiffs' state law claims for private nuisance, public nuisance, trespass, negligence, negligence *per se*, and Conn. Gen. Stat. §§ 22a-452, 22a-16 *et seq.* as to all defendants, as well as a claim for aiding and abetting as to the City of New Haven. (*See* JSA742-50; JSA249 (SAC Third through Tenth Claims for Relief)).

However, because the Plaintiffs did state a valid claim under the CWA, the District Court erred in declining to exercise supplemental jurisdiction over the state law claims. 28 U.S.C. §1367 states that: "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Because the CWA is a federal law, the district court has original jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

The Plaintiffs' state law claims all relate to discharges of water caused by the Defendants' failure to improve and maintain the Combined System. *See generally* SAC, JA722-53). The state law claims indisputably arise from the same nucleus of operative fact as the federal claim. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966) (for purposes of supplemental jurisdiction, "[t]he state and federal claims must derive from a common nucleus of operative fact."). The

District Court, therefore, erred in declining to exercise supplemental jurisdiction over the state law claims under 28 U.S.C. § 1331.

CONCLUSION

For all the foregoing reasons the Plaintiffs submit that this Court should reverse the decision and judgment of the District Court, and remand to the District Court for further proceedings.

Respectfully Submitted,

THE PLAINTIFFS/APPELLANTS,

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CERTIFICATE OF COMPLIANCE

In conformance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-point Times New Roman proportional font and contains 13,431 words. Accordingly, the brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Local Rule 32.1(a)(4)(A).

Dated: October 2, 2017

By /s/ *Jeffrey J. Mirman*
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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1640

UPSTATE FOREVER; SAVANNAH RIVERKEEPER,

Plaintiffs - Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, L.P.; PLANTATION PIPE LINE COMPANY, INC.,

Defendants - Appellees.

ANDERSON COUNTY, SOUTH CAROLINA; PIPELINE SAFETY TRUST,

Amici Supporting Appellant,

AMERICAN PETROLEUM INSTITUTE; ASSOCIATION OF OIL PIPE LINES; GPA MIDSTREAM ASSOCIATION; TEXAS PIPELINE ASSOCIATION; NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES; AMERICAN FOREST AND PAPER ASSOCIATION; AMERICAN IRON AND STEEL INSTITUTE; EDISON ELECTRIC INSTITUTE; NATIONAL MINING ASSOCIATION; UTILITY WATER ACT GROUP; STATE OF WEST VIRGINIA; STATE OF SOUTH CAROLINA; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSOURI; STATE OF OKLAHOMA; STATE OF UTAH; STATE OF WISCONSIN; GOVERNOR PHIL BRYANT

Amici Supporting Appellee.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Henry M. Herlong, Jr., Senior District Judge. (8:16-cv-04003-HMH)

Argued: December 7, 2017 Decided: April 12, 2018

Before GREGORY, Chief Judge, and KEENAN and FLOYD, Circuit Judges.

Vacated and remanded by published opinion. Judge Keenan wrote the majority opinion, in which Chief Judge Gregory joined. Judge Floyd wrote a dissenting opinion.

ARGUED: Frank S. Holleman, III, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Appellants. James P. Cooney, III, WOMBLE BOND DICKINSON (US) LLP, Charlotte, North Carolina, for Appellees. **ON BRIEF:** Christopher K. DeScherer, SOUTHERN ENVIRONMENTAL LAW CENTER, Charleston, South Carolina, for Appellants. Richard E. Morton, Todd W. Billmire, Jackson R. Price, Charlotte, North Carolina; Clayton M. Custer, WOMBLE CARLYLE SANDRIDGE & RICE, LLP, Greenville, South Carolina, for Appellees. Catherine H. McElveen, RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC, Mount Pleasant, South Carolina, for Amicus Pipeline Safety Trust. Leon C. Harmon, Anderson, South Carolina, for Amicus Anderson County, South Carolina. Alan Wilson, Attorney General, Robert Cook, Solicitor General, J. Emory Smith, Jr., Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL, Columbia, South Carolina, for Amicus State of South Carolina. Patrick Morrisey, Attorney General, Thomas M. Johnson, Jr., Deputy Solicitor General, John S. Gray, Deputy Attorney General, Charleston, West Virginia, for Amicus State of West Virginia. Steve Marshall, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALABAMA, Montgomery, Alabama, for Amicus State of Alabama. Leslie Rutledge, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARKANSAS, Little Rock, Arkansas, for Amicus State of Arkansas. Curtis T. Hill, Jr., Attorney General, OFFICE OF THE ATTORNEY GENERAL OF INDIANA, Indianapolis, Indiana, for Amicus State of Indiana. Derek Schmidt, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF KANSAS, Topeka, Kansas, for Amicus State of Kansas. Jeff Landry, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF LOUISIANA, Baton Rouge, Louisiana, for Amicus State of Louisiana. Joshua D. Hawley, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MISSOURI, Jefferson City, Missouri, for Amicus State of Missouri. Mike Hunter, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF OKLAHOMA, Oklahoma City, Oklahoma, for Amicus State of Oklahoma. Sean D. Reyes, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF UTAH, Salt Lake City, Utah, for Amicus State of Utah. Brad Schimel, Attorney General, WISCONSIN

DEPARTMENT OF JUSTICE, Madison, Wisconsin, for Amicus State of Wisconsin. Samuel L. Brown, HUNTON & WILLIAMS LLP, San Francisco, California; Nash E. Long, III, Brent A. Rosser, HUNTON & WILLIAMS LLP, Charlotte, North Carolina; Michael R. Shebelskie, HUNTON & WILLIAMS LLP, Richmond, Virginia, for Amici National Association of Counties, National League of Cities, National Association of Clean Water Agencies, American Forest and Paper Association, American Iron and Steel Institute, Edison Electric Institute, National Mining Association, and Utility Water Act Group. David H. Coburn, Cynthia L. Taub, STEPTOE & JOHNSON LLP, Washington, D.C., for Amici American Petroleum Institute, Association of Oil Pipe Lines, GPA Midstream Association, and Texas Pipeline Association.

BARBARA MILANO KEENAN, Circuit Judge:

In late 2014, several hundred thousand gallons of gasoline spilled from a rupture in a pipeline owned by Plantation Pipe Line Company, Inc., a subsidiary of Kinder Morgan Energy Partners, LP (collectively, Kinder Morgan), near Belton, South Carolina. It is undisputed that the gasoline has seeped into nearby waterways, and the plaintiffs allege that the gasoline has continued to travel a distance of 1000 feet or less from the pipeline to those "navigable waters."

Two plaintiff conservation groups brought a "citizen suit" under the Clean Water Act (the CWA, or the Act), 33 U.S.C. §§ 1251–1387, alleging that Kinder Morgan was in violation of the Act for polluting navigable waters without a permit and seeking relief to remediate the ongoing pollution. This case requires us to determine whether citizens may bring suit alleging a violation of the CWA when the source of the pollution, the pipeline, is no longer releasing the pollutant, but the pollutant allegedly is passing a short distance through the earth via ground water and is being discharged into surface waterways.

The district court held that it lacked subject matter jurisdiction under the CWA, because the pipeline has been repaired and the pollutants currently pass through ground water to reach navigable waters. We conclude that the district court erred in holding that it lacked jurisdiction, because citizens may bring suit under 33 U.S.C. § 1365(a) for discharges of pollutants that derive from a "point source" and continue to be "added" to navigable waters. We further hold that the plaintiffs have stated a valid claim for a discharge under the CWA. Accordingly, we vacate the district court's judgment, and remand for further proceedings consistent with this opinion.

I.

A.

In 1972, Congress enacted the CWA to eliminate the discharge of certain pollutants or "effluents" into the "navigable waters" of the United States. *See S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 563 (4th Cir. 2014); *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 264–65 (4th Cir. 2001). The CWA's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The federal government's prior regime of water pollution control focused primarily on measuring direct injuries to the Nation's waters using water quality standards. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (en banc) [*Friends of the Earth II*]. In the CWA, however, Congress shifted its regulatory focus for water pollution from water quality standards to limiting discharges of pollutants. *See id.* One of the CWA's central provisions establishes that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

The Act authorizes exceptions to this general prohibition in the form of permits issued in accordance with the National Pollutant Discharge Elimination System (NPDES), which allows limited discharges. *See* 33 U.S.C. §§ 1311(a), 1342; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) ("[T]he NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants."); *Friends of the Earth II*, 204 F.3d at 151. Both the Environmental Protection Agency (EPA) and state environmental control agencies may issue NPDES

permits. *See Friends of the Earth II*, 204 F.3d at 152. However, consistent with the CWA's general prohibition, a polluter does not violate the statute only when it exceeds limitations in its permit. Instead, a polluter also may be in violation of the statute due to a discharge for which the polluter could not have obtained *any* permit. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 561 (5th Cir. 1996) ("Nothing in the CWA limits a citizen's right to bring an action against a person who is allegedly discharging a pollutant without a permit solely to those cases where EPA has promulgated an effluent limitation or issued a permit that covers the discharge.").

The CWA authorizes both citizens and government agencies to enforce the Act's provisions. Citizen suits under the CWA have the "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). The Act contains the following citizen suit provision:

> [A]ny citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is *alleged to be in violation of* . . . an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a) (emphasis added). An "effluent standard or limitation" is defined to include the Act's central prohibition on the "discharge of any pollutant" without a permit. *See* 33 U.S.C. §§ 1365(f), 1311(a).

The Act sets forth a technical definition of the term "discharge of a pollutant," which is defined expansively to include "any addition of any pollutant to navigable

waters from any point source."[1] 33 U.S.C. § 1362(12)(A). A "point source" in turn is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . ." 33 U.S.C. § 1362(14). The term "navigable waters" is defined in the CWA as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has interpreted the term "navigable waters" to mean more than waters that are navigable-in-fact, and to include, for example, wetlands and related hydrological environs. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 730–31, 735 (2006) (plurality opinion) (observing that navigable waters include more than traditionally navigable waters and may include certain wetlands); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) ("Congress chose to define the waters covered by the Act broadly.").

B.

The plaintiffs Upstate Forever and the Savannah Riverkeeper[2] (collectively, the plaintiffs) allege that in late 2014, over 369,000 gallons of gasoline spilled from Kinder Morgan's underground pipeline, which extends over 1100 miles through parts of the eastern United States. In December 2014, citizens in Anderson County, South Carolina,

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[1] Although Section 1311(a) refers to the "discharge of any pollutant" and Section 1362(12)(A) defines "discharge of a pollutant," we construe these two terms to be substantively identical and refer to the "discharge of a pollutant."

[2] Upstate Forever and the Savannah Riverkeeper are non-profit public interest organizations that operate in Anderson County, South Carolina, where the spill occurred. Upstate Forever has stated goals of developing clean water in the Upstate region of South Carolina, and the Savannah Riverkeeper works to restore the lakes and tributaries in the Savannah River watershed.

discovered dead plants, a petroleum odor, and pools of gasoline in the vicinity of the pipeline. The plaintiffs allege that gasoline and gasoline toxins have seeped and continue to seep into ground water, wetlands, and waterways in Anderson County and the Savannah River watershed. They allege that although a reported 209,000 gallons were recovered by the end of 2015, no significant amount of contaminants has been removed since that time. Consequently, at the time that the plaintiffs filed their complaint, at least 160,000 gallons allegedly remained unrecovered. Kinder Morgan repaired the pipeline shortly after the initial spill.

When Kinder Morgan's pipeline broke six to eight feet underground, gasoline and related contaminants spilled out into soil and ground water. The plaintiffs allege that these contaminants are seeping into two nearby tributaries of the Savannah River, Browns Creek and Cupboard Creek, and their adjacent wetlands. The pipeline broke less than 1000 feet from Browns Creek and its adjacent wetland, and 400 feet from Cupboard Creek and a second wetland. Both waterways and the wetlands are downgradient from the spill site. The plaintiffs allege that gasoline pollutants from the pipeline are seeping into navigable waters as defined by the CWA, including the above two creeks in Anderson County, Broadway Lake, Lake Secession, Lake Russell, and the Savannah River.[3]

[3] Kinder Morgan does not challenge the plaintiffs' allegation that these waters, including Browns Creek, Cupboard Creek, and their adjacent wetlands, constitute navigable waters as defined by the CWA. 33 U.S.C. § 1362(7).

The plaintiffs allege that a "plume" of petroleum contaminants continues to migrate into these waterways years later through ground water and various natural formations at the spill site, including "seeps, flows, fissures, and channels." Hazardous gasoline contaminants have been detected on several occasions at the spill site in ground water wells. Contaminants were also detected in Browns Creek as early as January 2015, and additional tests in Browns Creek have reported high levels of contaminants on several later dates in 2015 and in 2016.

Kinder Morgan has implemented certain remediation and recovery measures under the guidance of the South Carolina Department of Health and Environmental Control (DHEC). DHEC is the agency authorized to issue NPDES permits and oversee water quality in South Carolina. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 390 (4th Cir. 2011) [*Friends of the Earth III*]; S.C. Code § 48-1-100(B).

The plaintiffs allege that Kinder Morgan has failed to comply fully with DHEC's abatement instructions. They claim that although DHEC instructed Kinder Morgan to test for pollution in March 2016, Kinder Morgan only began that additional testing after the plaintiffs made their own visit to the spill site in August 2016. The plaintiffs further allege that their testing conducted in August 2016 revealed that the levels of gasoline contaminants in Browns Creek actually were increasing almost two years after the spill. During their August 2016 visit to the area, oil sheens were visible on the surface of Browns Creek, and devices used to absorb the oil had not been maintained and were saturated with oil.

Kinder Morgan allegedly delayed by six months its submission to DHEC of the required site remediation plan and site assessment, and also refused to comply with another of DHEC's water sampling requests. Publicly available data on DHEC's website indicate that DHEC sampled surface waters at Browns Creek in February 2017 and found pollutants at three locations, each of which is being remediated. South Carolina Department of Health and Environmental Control, *Surface Water Sampling Event*, http://www.scdhec.gov/HomeAndEnvironment/Pollution/CleanUpPrograms/OngoingProjectsUpdates/PlantationPipeline/SurfaceWaterSamplingEvent/ (last visited Apr. 11, 2018).

The plaintiffs filed this suit in December 2016, alleging discharges of gasoline and gasoline pollutants without a permit, in violation of the CWA under 33 U.S.C. § 1311(a).[4] The complaint includes allegations that the pipeline ruptured and caused a discharge that has polluted, and continues to pollute, navigable waters by seeping from a point source over a distance of 1000 feet or less through soil and ground water to nearby tributaries and wetlands. The plaintiffs thus allege in their complaint two interrelated violations of the CWA: (1) that Kinder Morgan has caused discharges of pollutants from point sources to navigable waters without a permit; and (2) that Kinder Morgan has caused discharges of pollutants that continue to pass through ground water with a "direct hydrological connection" to navigable waters. The plaintiffs also allege that the remediation actions taken to date by Kinder Morgan have been insufficient to abate the

[4] Kinder Morgan does not contend that gasoline and related contaminants are not pollutants under the CWA. *See United States v. Hamel*, 551 F.2d 107, 110–11 (6th Cir. 1977) (holding that the CWA definition of "pollutant" covers gasoline discharges).

pollution, and seek damages, declaratory relief, and injunctive relief requiring that Kinder Morgan take further measures to control and abate the spill.

Kinder Morgan moved to dismiss the plaintiffs' complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, contending both that the district court lacked subject matter jurisdiction and that the plaintiffs had failed to state a claim for relief. Addressing first the sufficiency of the plaintiffs' pleadings, the district court held that the plaintiffs had failed to state a claim because the pipeline had been repaired and no longer was discharging pollutants "directly" into navigable waters. The court also held that it lacked subject matter jurisdiction over the complaint, stating that the CWA did not encompass the movement of pollutants through ground water that is hydrologically connected to navigable waters. Accordingly, the court dismissed the plaintiffs' complaint on both grounds. The plaintiffs timely noted this appeal.

II.

On appeal, the plaintiffs contend that the district court erred in determining that the continuing addition of pollutants to navigable waters is not an ongoing violation of the CWA because the pipeline has been repaired. According to the plaintiffs, a claim for a discharge of a pollutant, in violation of 33 U.S.C. § 1311(a), need not allege that the pollutant is being discharged *directly* from the point source into navigable waters. They assert that the CWA also prohibits the discharge of pollutants from a point source through ground water that has a direct hydrological connection to navigable waters.

In response, Kinder Morgan contends that the district court did not err because the violation ceased once the pipeline was repaired. Alternatively, Kinder Morgan asserts that if seepage is ongoing, the pollution is seeping from nonpoint sources, namely, from natural formations at the spill site. Kinder Morgan also argues that discharges into navigable waters from hydrologically connected ground water do not fall within the CWA's definition of a "discharge of a pollutant" in 33 U.S.C. § 1362(12)(A). We disagree with Kinder Morgan's position.

A.

We review de novo the district court's dismissal of the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir. 2004); *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768–69 (4th Cir. 1991). A district court should grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999) (citation omitted). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must "provide[] sufficient detail [ ] to show that he has a more-than-conceivable chance of success on the merits." *Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014) (citation omitted).

As a threshold matter, a court first must determine whether it has jurisdiction to entertain a claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). A court's determination of subject matter jurisdiction addresses whether the court has the

authority to entertain a particular kind of case, not whether a claim for relief is viable under a particular construction of a statute. *See id.* at 89. Unless Congress has "clearly state[d] that [a statutory limitation] is jurisdictional . . . courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (citations and internal quotation marks omitted).

In the present case, the primary issue we consider is whether an indirect discharge of a pollutant through ground water, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA. Because our answer to this question largely depends on our construction of the statutory term "discharge of a pollutant," the question ordinarily would not be jurisdictional in nature.[5] However, because courts have "jurisdiction" over CWA citizen suits only if the complaint alleges an ongoing violation, *Gwaltney*, 484 U.S. at 64, we must address the question of an ongoing violation before proceeding further in this case. Accordingly, we first address whether the plaintiffs have alleged an ongoing violation and, if so, whether they sufficiently have alleged a nexus between the source of the pollution and navigable waters to state a claim for discharge of a pollutant under the CWA. *See Steel Co.*, 523 U.S. at 88–90.

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[5] Had the plaintiffs alleged that ground water, of itself, falls within the meaning of navigable waters under the CWA, we would be confronting a distinctly different question here. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 180 (2001) (referring to "navigable waters" as a "traditional jurisdictional term"). However, in this case, the plaintiffs have alleged only that Kinder Morgan discharged pollutants "*via* hydrologically connected groundwater to surface waters" (emphasis added).

B.

The CWA authorizes citizens to seek injunctive relief only to abate a "continuous or intermittent" violation. *Gwaltney*, 484 U.S. at 64; *Friends of the Earth III*, 629 F.3d at 402 ("We have instructed that a citizen plaintiff can prove an ongoing violation . . . by proving violations that continue on or after the date the complaint is filed." (citation omitted)). Conversely, when a violation of the CWA is "wholly past," the federal courts do not have jurisdiction to entertain a citizen suit, even if the past discharge violated the CWA. *Gwaltney*, 484 U.S. at 64. As we already have noted, the CWA's citizen suit provision is intended primarily to allow citizens "to abate pollution when the government cannot or will not command compliance." *Id.* at 62; *cf. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981) ("[P]rivate enforcement suits were intended [often] to be limited to [ ] injunctive relief."). The citizen suit provision thus enables citizens to seek abatement of polluting discharges to further the CWA's central purpose, namely, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

In *Gwaltney*, the Supreme Court emphasized that the CWA, like other environmental statutes, authorizes "prospective relief" that only can be attained while a violation is ongoing and susceptible to remediation. 484 U.S. at 57; *see also, e.g.*, 15 U.S.C. § 2619(a)(1) (authorizing citizen suits against persons "alleged to be in violation of" the statute); 42 U.S.C. § 6972 (same). We applied the principles of *Gwaltney* in our decision in *Goldfarb v. Mayor of Baltimore*, holding that a claim of an ongoing violation supported a citizen suit under the Resource Conservation and Recovery Act of 1976

(RCRA), Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901–6992k), under a provision that is "identical" to the citizen suit authorization in the CWA. 791 F.3d 500, 513 (4th Cir. 2015).

The plaintiffs in *Goldfarb* alleged that the City of Baltimore had stored hazardous chemicals, which had leaked from the point of storage and had continued to migrate through the soil in violation of the RCRA's permitting standards. *Id.* at 512. In response to the City's contention that any RCRA violations were wholly past under the rationale of *Gwaltney*, we observed that "although a defendant's *conduct* that is causing a *violation* may have ceased in the past . . . what is relevant is that the *violation* is continuous or ongoing." *See id.* at 511–13 (citing *S. Rd. Assocs. v. IBM Corp.*, 216 F.3d 251, 255 (2d Cir. 2000)). Accordingly, we held that the plaintiffs had alleged an ongoing violation of the RCRA. *Id.*

Our analysis in *Goldfarb* regarding an ongoing violation is equally applicable here.[6] Nothing in the language of the CWA suggests that citizens are barred from seeking injunctive relief after a polluter has repaired the initial cause of the pollution. When interpreting a statute, we attend first to the statute's plain language. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). Like the RCRA, the CWA's plain language requires only that the citizen allege that the polluter "be in violation of" an "effluent standard or limitation" under the Act. 33 U.S.C. § 1365(a); *see Goldfarb,* 791 F.3d at

[6] We disagree with the dissent's view that our decision in *Goldfarb* is not helpful. We held in *Goldfarb* under an identical citizen suit provision that conduct causing a violation need not be ongoing to state a claim, so long as the violation itself is ongoing. 791 F.3d at 513.

512–13. As noted above, an "effluent limitation" of the CWA includes any unpermitted "discharge of a pollutant." 33 U.S.C. §§ 1365(f), 1311(a). Accordingly, the relevant violation here is the discharge of a pollutant, defined in the Act as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

Kinder Morgan's gasoline pipeline unambiguously qualifies as a point source.[7] 33 U.S.C. § 1362(14) (defining a point source to include a "pipe" or "conduit"). The plaintiffs claim that pollutants originating from this point source continue to be "added" to bodies of water that allegedly are navigable waters under the Act, including the two creeks in Anderson County, adjacent wetlands, Broadway Lake, Lake Secession, Lake Russell, and the Savannah River watershed. The CWA's language does not require that the point source continue to release a pollutant for a violation to be ongoing. The CWA requires only that there be an ongoing "addition . . . to navigable waters," regardless whether a defendant's conduct causing the violation is ongoing. 33 U.S.C. §

[7] Under the dissent's view, pollution becomes "nonpoint source pollution" not covered by the CWA at the moment when the point source no longer actively releases the pollutant. *See, e.g.*, *ONRC Action v. U.S. Bureau of Reclamation*, 798 F.3d 933, 936 (9th Cir. 2015) (noting that the CWA provides no direct mechanism for regulating "nonpoint source pollution"). We are not persuaded by this argument, because the plaintiffs adequately have alleged that the pipeline is *a* point source of the discharge, which satisfies the CWA's requirement that the alleged pollution be "from *any* point source." *See* 33 U.S.C. § 1362(12)(A) (emphasis added). Moreover, the cases relied on by the dissent show that nonpoint source pollution arises from "dispersed activities over large areas, and is not traceable to any single discrete source." *See, e.g.*, *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002); *see also* 33 U.S.C. 1314(f) (providing examples of nonpoint source pollution, including "agricultural and silvicultural activities"). The plaintiffs here allege that the pollution is traceable not to dispersed activities and nonpoint sources but to Kinder Morgan's pipeline, a discrete source.

1362(12)(A). *See Goldfarb*, 791 F.3d at 513; *IBM Corp.*, 216 F.3d at 254 (noting under identical RCRA citizen suit provision that "defendant's current activity at the site is not a prerequisite for finding a current violation").

The CWA's term "discharge of a pollutant" is a statutory term of art precisely defined in the CWA. *Cf. Riverside Bayview Homes, Inc.*, 474 U.S. at 133 (noting that statutory definition of "navigable waters" in CWA makes ordinary meaning of those words less important). The definition does not place temporal conditions on the discharge of a pollutant from a point source. Nor does the definition limit discharges under the Act to additions of pollutants to navigable waters from a point source that continues actively to release such pollutants. Instead, the precondition for alleging a cognizable discharge of a pollutant is only that the plaintiff allege an ongoing addition to navigable waters originating from a point source. 33 U.S.C. § 1362(12)(A). Moreover, as we explain below, the CWA is not limited to discharges of pollutants "directly" from the point source to navigable waters. *See, e.g.*, *Hawai'i Wildlife Fund v. Cty. of Maui*, No. 15-17447, 2018 WL 1569313, at *7–*8 (9th Cir. Feb. 1, 2018). Necessarily, when a discharge is indirect, there will be a delay between the time at which pollution leaves the point source and the time at which it is added to navigable waters. However, nothing in the CWA's language indicates that such a delay prevents the pollution from constituting an ongoing violation for purposes of a citizen suit, as long as pollutants continue to be "added" to navigable waters. *See* 33 U.S.C. § 1362(12)(A). The plaintiffs have alleged such an ongoing addition here.

The CWA is a strict liability statute. *Friends of the Earth II,* 204 F.3d at 151. As noted above, Congress set forth in the Act its intention that "the discharge of pollutants into the navigable waters be eliminated," 33 U.S.C. § 1251(a)(1), not that the originating source of pollutants be corrected. Thus, remedial efforts taken in good faith "do[] not *ipso facto* establish the absence of federal jurisdiction over a citizen suit." *Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 540 (4th Cir. 2005). To protect the nation's waters under the CWA, abatement of a pollutant requires more than the repair of a pipeline, and the need for such abatement continues so long as the contaminant continues to flow into navigable waters. *See Gwaltney*, 484 U.S. at 62 (explaining that CWA's citizen suit provision has "the central purpose of permitting citizens to abate pollution"). Thus, the fact that a ruptured pipeline has been repaired, of itself, does not render the CWA violation wholly past.[8]

Our conclusion is not altered by Kinder Morgan's citation to cases from other circuits. Those decisions were based on materially different facts. For example, in *Hamker v. Diamond Shamrock Chemical Co.,* the Fifth Circuit examined a complaint containing allegations of a discharge of oil into ground water from the defendant's pipe, rather than a discharge reaching navigable waters. *See* 756 F.2d 392, 397 (5th Cir. 1985).

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[8] The dissent relies on *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), for its conclusion that this is an "ongoing migration" case that does not fall under the CWA's citizen suit provision. However, that court did not hold that an ongoing migration of pollutants cannot constitute a continuing violation of the CWA, but rather noted that the case before the court did not involve a simple ongoing migration of pollutants. *Id.* at 1140.

As the court observed, the complaint alleged only that the discharged oil was "leaking into ground water" and "grasslands," not into navigable waters.[9] *Id.* Likewise, the Second Circuit held that continuing decomposition of "lead shot" in the Long Island Sound is not a "present violation" of the CWA. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312–13 (2d Cir. 1993). That holding pertained to whether the continuing effects of pollutants *already* "deposited" into a navigable water constituted a continuing violation. *Id.* at 1313. In contrast, the plaintiffs allege here that pollutants *continue to be added to* navigable waters, a violation encompassed within the Act's statutory definition. Accordingly, we conclude that the plaintiffs have alleged an ongoing violation of 33 U.S.C. § 1311(a), and that the district court erred in dismissing their complaint for lack of subject matter jurisdiction.

C.

i.

We turn to consider the question of first impression in this Circuit whether a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA. Initially, we observe that a discharge of a pollutant under the Act need not be a discharge "directly" to a navigable water from a point source. In *Rapanos v. United States*, the

[9] Moreover, to the extent that *Hamker*'s reasoning suggests that an ongoing violation requires that the point source continually discharge a pollutant, *Hamker* contravenes our decision in *Goldfarb*, and we decline to adopt the Fifth Circuit's approach. *See Goldfarb*, 791 F.3d at 513.

Supreme Court considered the kinds of connected waters covered by the CWA. *See* 547 U.S. at 732–38. Justice Scalia, writing for a plurality of four Justices, concluded that certain wetlands and intermittent streams did not themselves fall within the meaning of navigable waters under the CWA.[10] *See id.* at 739. However, when analyzing the kinds of connected waters that might fall under the CWA, Justice Scalia observed that "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Id.* at 743 (quoting 33 U.S.C. § 1362(12)(A)). Accordingly, he observed that federal courts consistently have held that a discharge of a pollutant "that naturally washes downstream likely violates § 1311(a)." *Id.* (emphasis removed) (citing *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946–47 (W.D. Tenn. 1976)).

The plain language of the CWA requires only that a discharge come "from" a "point source." *See* 33 U.S.C. § 1362(12)(A). Just as the CWA's definition of a

[10] The district court here rejected the plaintiffs' argument that the CWA covers a discharge through soil and ground water, because the court concluded that such an argument relies on an impermissible "Land is Waters" approach to CWA jurisdiction. In reaching this conclusion, the district court relied on the plurality opinion in *Rapanos*, which characterized the plaintiffs' theory there that "intermittent streams" were navigable waters as a so-called "Land is Waters" approach, and rejected that approach. 547 U.S. at 732–34. However, Justice Kennedy's controlling concurrence in *Rapanos* did not join the plurality in rejecting the plaintiffs' theory as a "Land is Waters" approach to CWA jurisdiction. 547 U.S. at 768–70; *United States v. Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017) (holding that Justice Kennedy's "significant nexus" test controls after *Rapanos*). Moreover, the "Land is Waters" theory in *Rapanos* involved whether certain bodies of water themselves qualified as navigable waters, which is not at issue here. 547 U.S. at 739 (plurality opinion). Thus, irrespective whether a "Land is Waters" approach remains viable under the CWA following *Rapanos*, the plaintiffs' theory in the present case does not rely on such an approach.

discharge of a pollutant does not require a discharge directly to navigable waters, *Rapanos*, 547 U.S. at 743, neither does the Act require a discharge directly from a point source,[11] *see* 33 U.S.C. § 1362(12)(A). The word "from" indicates "a starting point: as (1) a point or place where an actual physical movement . . . *has its beginning*." Webster's Third New International Dictionary 913 (Philip Babcock Gove et al. eds., 2002) (emphasis added); *see also* The American Heritage Dictionary of the English Language 729 (3d ed. 1992) (noting "from" indicates a "starting point" or "cause"). Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.

To hold otherwise effectively would require that any discharge of a pollutant cognizable under the CWA be seamlessly channeled by point sources until the moment the pollutant enters navigable waters. The Second Circuit rejected such an interpretation of the CWA, and we agree with that court's reasoning. In *Waterkeeper Alliance, Inc. v.*

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[11] The dissent relies on cases that include language stating that a point source must "convey" or "introduce" pollutants to navigable waters. *See, e.g.*, *Miccosukee*, 541 U.S. at 105 (observing that "a point source . . . need only convey the pollutant to 'navigable waters'"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 491 (2d Cir. 2001) (stating that a "point source must introduce the pollutant into navigable water" (emphasis omitted) (citation omitted)). We disagree with any suggestion that these cases support the conclusion that the CWA requires a discharge from the point source directly to navigable waters. First, these cases simply did not confront the question of an indirect discharge of pollutants through land or ground water over time. Second, many of these cases were decided before *Rapanos* clarified that the CWA's language does not require a direct discharge. *See* 547 U.S. at 743; *Hawai'i Wildlife Fund*, 2018 WL 1569313, at *7–*8. Finally, as we explain below, the point source here allegedly *is* "conveying" and "introducing" pollutants to the navigable waters, albeit indirectly, because it is the undisputed cause of the addition.

EPA, the Second Circuit held that if courts required both the cause of the pollution *and* any intervening land to qualify as point sources, such an interpretation would, in practice, "impose a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them." 399 F.3d 486, 510–11 (2d Cir. 2005); *see also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding that liquid manure that passed from tankers through intervening fields to nearby waters constituted a discharge from a point source). The Ninth Circuit likewise rejected the theory that the CWA creates liability for discharges "only . . . where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch." *Hawai'i Wildlife Fund*, 2018 WL 1569313, at *7.

The logic of *Waterkeeper Alliance* and *Hawai'i Wildlife Fund* is equally applicable here. The plaintiffs have alleged that the pipeline is the starting point and cause of pollution that has migrated and is migrating through ground water to navigable waters. Accordingly, we hold in agreement with the Second and Ninth Circuits that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters.

ii.

Although we conclude that an indirect discharge may fall within the scope of the CWA, such discharges must be sufficiently connected to navigable waters to be covered under the Act. As the Ninth Circuit recently held, a discharge that passes from a point source through ground water to navigable waters may support a claim under the CWA. *Hawai'i Wildlife Fund*, 2018 WL 1569313, at *8. However, a discharge through ground

water does not always support liability under the Act. *Id.* Instead, the connection between a point source and navigable waters must be clear.

The EPA has developed the term "direct hydrological connection" to identify for purposes of the CWA whether there is a clear connection between the discharge of a pollutant and navigable waters when the pollutant travels through ground water. The EPA consistently has taken the position that the Act applies to discharges "from a point source via ground water that has a direct hydrologic connection to surface water." National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3015 (proposed Jan. 12, 2001) [CAFOs Standards]; *see also* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) ("[T]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters."). The assessment of the directness of a hydrological connection is a "factual inquiry," in which "time and distance" are relevant, as well as factors such as "geology, flow, and slope." CAFOs Standards, 66 Fed. Reg. at 3017. This interpretation by the EPA of its statutory authority "warrants respectful consideration," especially in the context of a "complex and highly technical regulatory program." *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

In light of the above considerations, we hold that a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through ground water.[12] This determination necessarily is fact-specific. In the present case, the plaintiffs have alleged that pollutants are seeping into navigable waters in Anderson County about 1000 feet or less from the pipeline. This extremely short distance, if proved, provides strong factual support for a conclusion that Kinder Morgan's discharge is covered under the CWA. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1148–50 (10th Cir. 2005) (holding that a discharge that passed through a 2.5-mile tunnel between mine shaft and navigable water could be covered under CWA).

Also as a matter of undisputed fact, the ruptured pipeline caused the pollution at issue here. Kinder Morgan does not assert that the pollutants found in the creeks and wetlands have an independent or contributing cause. And this is not a case in which pollutants are diluted while passing through a labyrinth of underground "tunnel geology," *El Paso Gold Mines*, 421 F.3d at 1150, or are otherwise diverted from their natural course, *see Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (holding that natural flow of "[g]ravity . . . resulting in a discharge into a navigable body of water,

[12] The Ninth Circuit has held that an indirect discharge must be "fairly traceable" from the point source to navigable waters. *Hawai'i Wildlife Fund,* 2018 WL 1569313, at *8 n.3. We see no functional difference between the Ninth Circuit's fairly traceable concept and the direct hydrological connection concept developed by EPA that we adopt today, which as we explain below includes a concept of traceability. In fact, the direct hydrological connection concept may be viewed as a narrower application of the same principle, addressing point source discharges *through ground water*.

may be part of a point source discharge if the [polluter] at least initially collected or channeled the water and other materials").

Additionally, the plaintiffs have alleged a traceable discharge from the ruptured pipeline. The traceability of a pollutant in measurable quantities is an important factor in the determination whether a particular discharge is covered by the CWA. *See Hawai'i Wildlife Fund,* 2018 WL 1569313, at *8 (holding that claim for indirect discharge must show that pollution is "fairly traceable" to the point source); *El Paso Gold Mines*, 421 F.3d at 1140 n.4 (noting that pollution that is "not traceable to a single, identifiable source or conveyance" is nonpoint source pollution). And Kinder Morgan does not dispute that pollutants originating from the gasoline pipeline *already* have been detected in the waters of Anderson County.

As we have noted, the CWA's stated purpose is "to restore . . . the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and the statute establishes a regime of zero tolerance for unpermitted discharges of pollutants, 33 U.S.C. § 1311(a). In contrast, 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. Such an outcome would greatly undermine the purpose of the Act. Thus, we hold that the plaintiffs plausibly have alleged a direct hydrological connection between the ground water and navigable waters to state a claim for a discharge of a pollutant under 33 U.S.C. § 1311(a).

We find no merit in Kinder Morgan's concern that our holding will result in unintended coverage under the CWA of any discharge of a pollutant into ground water. We do not hold that the CWA covers discharges to ground water itself. Instead, we hold only 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.[13] Accordingly, the plain language and purpose of the Clean Water Act direct our conclusion in the present case that the district court has jurisdiction to entertain the plaintiffs' claim under 33 U.S.C. § 1365(a), and that the plaintiffs have stated a claim for a violation of the Act's prohibition of the "discharge of any pollutant." 33 U.S.C. § 1311(a).

III.

For these reasons, we vacate the district court's decision and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED

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[13] We also note that federal courts in several states, including some within this Circuit, have upheld in citizen suits the CWA's coverage of ground water-related discharges within those jurisdictions. *See, e.g.*, *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 762 (E.D. Va. 2017); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015); *see also Tenn. Riverkeeper v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, at 13–18 (N.D. Ala. Aug. 20, 2013).

FLOYD, Circuit Judge, dissenting:

Based on allegations that pollutants are being added into navigable waters, the majority concludes that the Appellants have adequately alleged a cognizable and ongoing Clean Water Act ("CWA") violation. Maj. Op. at 19. While this conclusion may seem intuitive at first glance, close examination of the text, history, and structure of the CWA reveals that not every addition of pollution amounts to a CWA violation—much less an ongoing CWA violation. Congress precisely defined a CWA violation as the addition of pollutants *from a point source*, and for there to be an ongoing CWA violation, there must be an ongoing addition of pollutants from a point source into navigable waters. *See* 33 U.S.C. § 1362(12). Here, the only point source at issue—Kinder Morgan's pipeline—has been repaired and is not currently adding any pollutants into navigable waters, thus negating a necessary element of a CWA violation. Because there is no ongoing violation under the meaning of the CWA, I would affirm the district court's dismissal of the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. I respectfully dissent.

I.

A.

The parties' pleadings and briefs reveal the following facts. In late 2014, residents of Belton, South Carolina, discovered that Kinder Morgan's pipeline released a large amount of gasoline and contaminated the nearby ground ("spill site"). Kinder Morgan repaired the pipeline within a few days of discovering the leak and began remediation

efforts that are ongoing to this day under the supervision of the South Carolina Department of Health and Environmental Control (DHEC). Kinder Morgan has recovered over 209,000 gallons of gasoline, but over 160,000 gallons of gasoline remain unrecovered at the spill site. Kinder Morgan's repaired pipeline is not currently leaking any additional gasoline. Nevertheless, as the gasoline from the spill site gets washed off by ground water or seeps through the ground from the spill site, gasoline is being introduced to navigable waters. In December 2016, the environmental groups Upstate Forever and Savannah Riverkeeper (collectively, "Appellants") initiated a citizen suit against Kinder Morgan, alleging an ongoing CWA violation. After full briefing on the matter, on April 20, 2017, the district court dismissed the Appellants' complaint for lack of subject matter jurisdiction and failure to state a claim.

B.

We review a district court's order dismissing a complaint for lack of subject matter jurisdiction and for failure to state a claim *de novo*. *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 505 (4th Cir. 2015). Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move to dismiss a plaintiff's complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). To determine whether subject matter jurisdiction exists, courts are "to regard the pleadings' allegations as mere evidence . . . and may consider evidence outside of the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The nonmoving plaintiff bears the burden of proving subject matter jurisdiction, and "the moving party should prevail

only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

Rule 12(b)(6) allows a party to move to dismiss the plaintiff's complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). When a complaint is attacked by a Rule 12(b)(6) motion, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

II.

Congress enacted the CWA, 33 U.S.C. § 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251. To accomplish these goals, Congress comprehensively reshaped the federal water regulatory scheme in various ways. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203–4 (1976).

First, Congress concentrated the federal regulatory effort on curtailing point source pollution—that is, pollution from "discernible, confined and discrete conveyance[s]," 33 U.S.C. § 1362(14)—"which tended to be more notorious and more easily targeted," *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). Second, Congress established the National Pollution Discharge Elimination System (NPDES) which "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla.*

Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004). Third, Congress sought to ensure compliance by instituting an enforcement mechanism under which state and federal governments bear the primary responsibility for policing past and ongoing CWA violations, and private citizens provide supplementary enforcement for ongoing violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52–53, 58 (1987); *The Piney Run Preservation Ass'n v. The Cty. Comm'rs of Carroll Cty., Md.*, 523 F.3d 453, 456 (4th Cir. 2008).

While the CWA includes other important features, it bears explaining these three central features in detail, as they are critical to this appeal.

A.

In drafting the CWA, Congress focused the federal regulatory effort on reducing point source pollution by making the existence of, and the addition of pollutants from, a point source a *sine qua non* element of a CWA violation. The text and structure of the CWA unambiguously lead to this conclusion.

At the outset, it is important to note that "Congress consciously distinguished between point source and nonpoint source discharges." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Point source pollution is pollution from "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The non-exhaustive list of examples of a point source in the CWA includes "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.* All other sources of pollution—namely, those that are not "discernible, confined and discrete," *id.*—are considered

nonpoint sources. *Or. Nat. Desert Ass'n*, 550 F.3d at 780. In other words, nonpoint source pollution "is defined by exclusion and includes all water quality problems" that are not from a point source. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982).

Unlike point source pollution, nonpoint source pollution "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). "Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 220 (2d Cir. 2009) (internal quotation marks omitted). Indeed, a common example of nonpoint source pollution is rain washing pollution off the highway and carrying it along "by runoff in a polluted soup[] [to] creeks, rivers, bays, and the ocean." *Forsgren*, 309 F.3d at 1183. The EPA guidance on nonpoint source pollution similarly confirms that "[i]n practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." *Cordiano*, 575 F.3d at 220 (quoting EPA Office of Water, *Nonpoint Source Guidance* 3 (1987)).

That Congress intended to target point source pollution, rather than nonpoint source pollution, is evident from the text of the CWA, which makes the existence of a point source a required element of a CWA violation. 33 U.S.C. § 1311(a) provides that "[e]xcept as in compliance with [the various section in the CWA], the discharge of any

pollutant by any person shall be unlawful." "Discharge of a pollutant" is a term of art under the CWA, with a more precise meaning than under ordinary parlance. *Cf. Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case." (internal quotation marks omitted)). Congress defined "discharge of a pollutant" as "any addition of any pollutant to navigable waters *from any point source*." 33 U.S.C. § 1362(12) (emphasis added).

In summarizing the requirements under these two statutory provisions, 33 U.S.C. §§ 1311(a), 1362(12), courts have consistently restated the elements of a CWA violation as "(1) discharg[ing] (2) a pollutant (3) into navigable waters (4) *from a point source* (5) without a [NPDES] permit." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005) (emphasis added); *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004); *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993); *Nat'l Wildlife Fed'n v. Consumer Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) ("[F]or NPDES requirements to apply to any given set of circumstances, 'five elements must be present: (1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*.' " (quoting *Gorsuch*, 693 F.2d at 165)); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). The "point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters[.] . . .' " *Miccosukee Tribe*, 541 U.S. at 105. For there to be a conveyance or "addition" of pollutants under the meaning of the CWA, "a 'point source must *introduce* the pollutant into navigable water from the outside world[,]' . . . [that is,] any place outside the particular body of water to which pollutants

are introduced." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (quoting *Gorsuch*, 693 F.2d at 165). As these definitions unambiguously show, a critical element of a CWA violation is that the pollutant comes from a point source.

Furthermore, the general structure of the CWA confirms that Congress sought to focus on point source pollution. "A central provision of the [CWA] is its requirement that individuals, corporations, and governments secure [NPDES] permits before discharging pollution from any point source into the navigable waters . . ." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013). Under the CWA, point source pollution is regulated by the EPA through the NPDES permitting program, *see* 33 U.S.C. § 1342, and nonpoint source pollution is regulated by the states, *see* 33 U.S.C. § 1329; *Cordiano*, 575 F.3d at 219–220; *Gorsuch*, 693 F.2d at 165–66. Based on this structure, courts have consistently recognized that "nonpoint sources of pollution have not generally been targeted by the CWA . . . ." *Or. Nat. Desert Ass'n*, 550 F.3d at 785. In drafting the CWA, "[w]hile Congress could have defined a 'discharge' to include generalized runoff, . . . it chose to limit the permit program's application to the . . . [point source] category." *Id.* (quoting William L. Andreen, *Water Quality Today—Has the Clean Water Act Been A Success?*, 55 Ala. L. Rev. 537, 562 (2004)). In sum, the fact that "the [CWA] assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states," *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 299 (3d Cir. 2015), plainly shows that Congress's main focus in enacting the CWA was the reduction of point source pollution.

A careful review of the CWA's text and structure reveals that Congress sought to target point source pollution and thus included point source as an indispensable element of a CWA violation.[1]

B.

Congress chose the NPDES permitting program as a central means of controlling point source pollution. "[I]ndividuals, corporations, and governments [must] secure [NPDES] permit[s] before discharging pollution from any point source into the navigable waters of the United States." *Decker*, 568 U.S. at 602.

Under the CWA, the state and federal governments act as partners in administering the NPDES program and issuing the permits. *Arkansas v. Oklahoma*, 503

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[1] While the text and structure speak unambiguously, for those who may find legislative history persuasive, the CWA's legislative history similarly confirms Congress's focus on point source pollution. Congress added the term "point source" "as a means of identifying industrial polluters" to narrow and clarify the scope of the CWA. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993). The Senate Report for the CWA explains:

> In order to further clarify the scope of the regulatory procedures in the Act [sic] the Committee has added a definition of point source to distinguish between control requirements where there are specific confined conveyances, such as pipes, and control requirements which are imposed to control runoff. The control of pollutants from runoff is applied pursuant to Section 209 and the authority resides in the State or local agency.

S. Rep. No. 92-414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3744. The narrowing of Congress's regulatory focus resulted "in part because nonpoint sources were far more numerous and more technologically difficult to regulate," whereas "point sources . . . tended to be more notorious and more easily targeted." *Or. Nat. Def. Ass'n*, 550 F.3d at 780; *see also* S. Rep. No. 92-414, at 39 ("[M]any nonpoint sources of pollution are beyond present technology of control"). Whatever the reason, the legislative history confirms that Congress intended to focus on point source pollution in enacting the CWA.

U.S. 91, 101 (1992). An NPDES permit can be issued by either the EPA or a state agency. The EPA "initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007). "If authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Id.*

An NPDES permit "place[s] limits on the type and quantity of pollutants that can be released into the Nation's waters," *Miccosukee Tribe*, 541 U.S. at 102, and "defines, and facilitates compliance with, and enforcement of, . . . a discharger's obligations under the [CWA]," *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205. The EPA promulgates the "effluent limitations" that "restrict the quantities, rates, and concentrations of specified substances which are discharged." *Arkansas*, 503 U.S. at 101; *see also* 33 U.S.C. §§ 1311, 1314. The states, with substantial guidance from EPA, promulgate the "water quality standards" that express the states' "desired condition of a waterway . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Id.* (internal quotation marks); *see also* 33 U.S.C. § 1313. In addition to listing the effluent limitations and water quality standards, NPDES permits also require "compliance with the inspection, reporting and monitoring requirements of the [CWA] as outlined in 33 U.S.C. § 1318." *Menzel v. Cty. Util. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983). To the benefit of NPDES permit holders, the CWA "shields NPDES permit holders from liability if their discharges comply with their permits." *Ohio Valley Envtl.*

Coal. v. Fola Coal Co., LLC, 845 F.3d 133, 135 (4th Cir. 2017). The NPDES permitting scheme thus constitutes "[t]he primary means for enforcing these limitations and standards." *Arkansas*, 503 U.S. at 101.

NPDES permitting is, however, not only ill-equipped to address, but also inapplicable to, nonpoint source pollution. Unlike a point source, nonpoint source pollution "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *Forsgren*, 309 F.3d at 1184. And for that reason, nonpoint source pollution "is very difficult to regulate through individual permits." *Id.* More specifically, it would be difficult to mandate compliance with inspection, reporting, and monitoring requirements given that nonpoint source pollution cannot be traced to discrete sources. Thus, sensibly, the CWA does not attempt to regulate nonpoint source pollution through the NPDES permitting. *See El Paso*, 421 F.3d at 1140 n.4 (observing that "[g]roundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting"); *Forsgren*, 309 F.3d at 1183 (stating that nonpoint source pollution "is regulated in a different way and does not require [an NPDES] permit); *Gorsuch*, 693 F.2d at 166 (accepting the EPA's explanation of the CWA that nonpoint source pollution "includes all water quality problems not subject to § 402 [NPDES permit program]").

In sum, Congress chose the NPDES permitting scheme as the primary means of controlling point source pollution, which is the focus of the CWA regulatory scheme.

C.

Congress also instituted a comprehensive enforcement scheme to ensure compliance with the CWA, in which the state and federal governments bear the primary responsibility for enforcement, but private citizens have limited supplementary enforcement authority.

Under the CWA, "the primary responsibility for enforcement rests with the state and federal governments . . . ." *The Piney Run*, 523 F.3d at 456 (quoting *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007)). 33 U.S.C. § 1319 vests the EPA with a broad range of enforcement tools —criminal, civil, and administrative. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 122 (2012) ("If the EPA determines that any person is in violation of [the CWA], the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action."); *United States v. Schallom*, 998 F.2d 196, 198 (4th Cir. 1993) (per curiam) (affirming a criminal conviction for discharging pollutants without a permit in violation of 33 U.S.C. § 1319(c)(2)). The EPA may initiate administrative and civil proceedings for both present and past CWA violations. *See Gwaltney*, 484 U.S. at 58.

The CWA also includes a citizen suit provision, 33 U.S.C. § 1365(a), under which "private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting [CWA] violations." *The Piney Run*, 523 F.3d at 456 (quoting *Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d at 637). Under the citizen suit provision, "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of" the CWA. 33 U.S.C.

§ 1365(a)(1). However, "the citizen suit is meant to supplement rather than to supplant governmental action," *Gwaltney*, 484 U.S. at 60, and, therefore, Congress limited a citizen's ability to enforce the CWA in various ways.[2]

One important jurisdictional limit on a citizen's ability to enforce the CWA is that she may only bring a suit for an *ongoing* CWA violation but not for a *past* violation. *Id.* at 57. The text of the CWA authorizes a citizen suit only against someone "alleged to be in violation of" the CWA. 33 U.S.C. § 1365(a)(1). The Supreme Court concluded that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either *continuous* or *intermittent* violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57 (emphasis added). The *Gwaltney* Court further stated that "Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option." *Id.* In other words, Congress did not authorize a citizen to enforce the CWA for "wholly past violations." *Id.*. The Supreme Court observed that allowing citizens to pursue wholly past violations "could undermine the

[2] A citizen invoking the CWA citizen suit provision must first show that she has Article III and statutory standing to bring the suit. *See* 33 U.S.C. § 1365(g); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc). Moreover, the citizen may not commence suit prior to 60 days after giving notice of the alleged violation to the appropriate governmental authority and the alleged polluter. 33 U.S.C. § 1365(b)(1)(A). Lastly, 33 U.S.C. § 1365(b)(1)(B) "bars a citizen from suing if the EPA or the State has already commenced, and is 'diligently prosecuting,' an enforcement action." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 175 (2000). Congress instituted these restrictions on the CWA citizen suit provision "to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 29 (1989).

supplementary role envisioned for the citizen suit." *Id.* at 60. Thus, a citizen seeking to commence a citizen suit "must show that the defendant's violations of the CWA are ongoing at the time of suit." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 521 (4th Cir. 2003).

Therefore, although Congress envisioned private citizens playing an important role in the CWA enforcement by providing supplementary enforcement, it also placed jurisdictional limitations on citizen suits by requiring the existence of an ongoing violation.

III.

The threshold jurisdictional question in this appeal is whether there is a cognizable and ongoing CWA violation such that the Appellants' citizen suit may proceed. *See Gwaltney*, 484 U.S. at 57. In my view, the Appellants have failed to show that the CWA violation is ongoing, because there is no ongoing discharge of pollutants from a point source. *Cf. Am. Canoe Ass'n*, 326 F.3d at 521. Instead, the facts presented to us in the record demonstrate that there is an ongoing groundwater migration from the spill site, which does not amount to a CWA violation and cannot support a citizen suit. *See Or. Nat. Desert Ass'n*, 550 F.3d at 785 (noting that Congress chose not to include generalized runoff within the definition of "discharge").

A.

In my view, there is no ongoing CWA violation. The Appellants cannot show that there is an ongoing discharge of pollutants from a point source, because the only point source at issue—the pipeline—is not currently leaking or releasing any pollutants.

A CWA violation is defined as an unpermitted "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). For there to be an "addition . . . from a point source," *id.*, the point source must convey, transport, or introduce the pollutant to navigable waters. *See Miccosukee Tribe*, 541 U.S. at 105 (observing that "a point source . . . need only convey the pollutant to 'navigable waters' " and that the examples of point sources in 33 U.S.C. § 1362(12) are objects that "transport" pollutants); *Catskill Mts.*, 273 F.3d at 491 ("[A] 'point source must *introduce* the pollutant into navigable water from the outside world.' " (quoting *Gorsuch*, 693 F.2d at 165)). In other words, to constitute a CWA violation, a point source must have been involved in the discharging activity.

Thus, for there to be an *ongoing* CWA violation, a point source must currently be involved in the discharging activity by adding, conveying, transporting, or introducing pollutants to navigable waters. *See El Paso Gold Mines*, 421 F.3d at 1140 (summarizing the "ongoing migration cases" in which there was "an identifiable discharge from a point source that *occurred in the past* . . . ," but "[a]t the time of suit, the discharging activity *from a point source* . . . had ceased," and citizen suits were dismissed). The majority notes that "[t]he CWA's language does not require that the point source continue to

release a pollutant for a violation to be ongoing." Maj. Op. at 16. It is difficult to see how there could be an ongoing CWA violation—defined as "any addition of pollutants . . . from any point source"—without an ongoing discharging activity from a point source. In my view, to constitute an ongoing CWA violation (i.e. ongoing point source pollution), the point source's discharging, adding, conveying, transporting, or introducing of pollutants must be continuous.

Kinder Morgan's pipeline is not presently leaking or releasing gasoline; therefore, the only relevant point source is not currently discharging—adding, conveying, transporting, or introducing—pollutants to navigable waters. *Cf. Miccosukee Tribe*, 541 U.S. at 105; *Catskill Mts.*, 273 F.3d at 491. Thus, in my view, there is no ongoing violation under the meaning of the CWA. This should therefore end the Appellants' citizen suit, which requires an ongoing CWA violation. *See* 33 U.S.C. §§ 1362(12); 1365(a); *Gwaltney*, 484 U.S. at 57. The majority also seemingly recognizes that pollutants must be actively "*originating* from a point source." Maj. Op. at 17 (emphasis added). However, the majority's theory is that since the pollutants in the spill site *once came* from the pipeline, the continuing addition from the spill site is thus a continuing discharge from a point source. But accepting this position would effectively erase the phrase *from any point source* out of the CWA, 33 U.S.C. § 1362(12), and find an ongoing CWA violation even though no pollutant is originating or being added from a point source any longer. Thus, in my view, the majority disregards point source as an element of a CWA violation and invents a violation not cognizable under the CWA.

Because the pipeline is not actively and continuously discharging pollutants, there is no ongoing violation, but only a wholly past violation, under the meaning of the CWA.

B.

In my view, this is an ongoing migration case, which does not amount to an ongoing CWA violation and cannot support a citizen suit. Kinder Morgan is a past violator—that is, it indirectly added pollutants to navigable waters from its point source when its pipeline leaked and released a large amount of gasoline that reached navigable waters. Although Kinder Morgan's pipeline itself is not currently leaking, the effects of Kinder Morgan's past violation continue. The spill site continues to introduce gasoline into navigable waters as gasoline migrates through the ground or as ground water washes off and carries gasoline to navigable waters. This Court has not addressed whether a past discharge with lasting effects—through an ongoing migration of pollutants through groundwater movement—can support a citizen suit. *See Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 597 (S.D. W. Va. 2013) (observing there is no Fourth Circuit precedent directly on point).

Given similar circumstances, however, several federal courts have concluded that ongoing migration of pollutants from a past discharge does not amount to an ongoing discharge necessary to support a citizen suit under the CWA. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312–13 (2d Cir. 1993) (finding no ongoing CWA violation because the alleged polluter had "ceased operation of the Gun Club" that deposited lead shot and clay target debris into navigable waters "by the time plaintiff filed suit"); *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094

(1st Cir. 1986) (finding no ongoing CWA violation because "[a]t the time plaintiffs brought suit, . . . defendant had ceased operating"); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (finding no ongoing CWA violation because "the complaint alleges . . . only that there are continuing *effects* from the past discharge, and such an allegation is insufficient for the purposes of section 1365."); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120–21 (E.D.N.Y. 2001) (concluding that the ongoing migration of residual leachate plume from a past violation is not an ongoing CWA violation), *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975–76 (D. Wyo. 1998); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995) ("Migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the Act."); *Brewer v. Ravan*, 680 F. Supp. 1176, 1183 (M.D. Tenn. 1988); *cf. El Paso*, 421 F.3d at 1140.

Like those courts, I would conclude that the lasting effects of Kinder Morgan's past violation cannot give rise to a citizen suit under the CWA for two reasons. First, ongoing migration does not involve a point source, thus negating an essential element of a CWA violation. Second, ongoing migration is, by definition, nonpoint source pollution, which is outside of the CWA's reach.

i.

Ongoing migration from a site contaminated by a past discharge does not involve a point source and is thus not a cognizable violation under the CWA. *See* 33 U.S.C. § 1362(12). Indeed, the lack of a discharging activity from a point source was the

decisive factor for many courts in concluding that ongoing migration cannot support a CWA citizen suit. As the Tenth Circuit has summarized:

> The ongoing migration cases [in which the courts dismissed the citizen suits] . . . all involve an identifiable discharge from a point source that *occurred in the past*, whether it be a spill, *Wilson*, 989 F. Supp. at 1163, the accidental leakage at a chemical plant, *Hamker*, 756 F.2d at 394, the discharge of lead shot and clay targets at a firing range, *Remington Arms*, 989 F.2d at 1309, or dumping of waste rock at a mine, *LAC Minerals*, 892 F. Supp. at 1337. At the time of suit, the discharging activity *from a point source* in all of these cases had ceased; all that remained was the migration, decomposition, or diffusion of the pollutants into a waterway.

El Paso, 421 F.3d at 1140. Likewise, at the time of the Appellants' suit, the discharging activity from Kinder Morgan's point source (i.e., the gasoline leak) had ceased, and all that remained was migration of gasoline from the spill site to navigable waters. "Migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [CWA]," *LAC Minerals*, 892 F. Supp. at 1354, because the point source itself is not conveying or introducing a pollutant into navigable waters, *see Miccosukee Tribe*, 541 U.S. at 105; *Gorsuch*, 693 F.2d at 175.

The majority attempts to distinguish one of these migration cases from the Fifth Circuit, *Hamker*, 756 F.2d at 397, by observing that *Hamker* only dealt with an alleged discharge into groundwater and not navigable waters. *See* Maj. Op. at 19. But the court's analysis in *Hamker* did not turn on the issue of navigable waters; rather, it turned on the fact that the continuing addition of pollutants did not come from any point source. *Hamker*, 756 F.2d at 397. The majority further states in a footnote that "to the extent that *Hamker*'s reasoning suggests that an ongoing violation requires that the point source continually discharge a pollutant, *Hamker* contravenes our decision in *Goldfarb*." Maj.

Op. at 19 n.9. The majority misplaces reliance on *Goldfarb*. This Court in *Goldfarb* observed that, under the Resource Conservation and Recovery Act's (RCRA) citizen suit provision, 42 U.S.C. § 6972(a)(1)(A), "although a defendant's *conduct* that is causing a *violation* may have ceased in the past . . . what is relevant is that the *violation* is continuous or ongoing." *Goldfarb*, 791 F.3d at 513. The statement in *Goldfarb* presumes that there already is an ongoing violation, does not help us in determining whether a polluter's past action with lasting effects should be viewed as past or ongoing violation, and is inapplicable to Kinder Morgan's situation because Kinder Morgan's CWA violation had ceased when its point source ceased discharging pollutants.

ii.

Moreover, migration of pollutants from the spill site amounts to an ongoing nonpoint source pollution. As discussed above, Congress chose not to regulate nonpoint source pollution through the NPDES permitting program. *See, e.g.*, *El Paso*, 421 F.3d at 1140 n.4; *Forsgren*, 309 F.3d at 1183; *Gorsuch*, 693 F.2d at 166; *Appalachian Power*, 545 F.2d at 1373–74. Nonpoint source pollution is commonly caused by the natural movements of rainfall or groundwater that wash off and carry pollutants from a large, diffuse area to navigable waters. *Codiano*, 575 F.3d at 220 ("[N]onpoint source pollution . . . generally results from land runoff, precipitation, atmospheric deposition, or percolation."); *El Paso*, 421 F.3d at 1140 n.4 ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting."); *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 44 (5th Cir. 1980) ("The focus of [the CWA] is on the 'discernible, confined and discrete' conveyance of

the pollutant, which would exclude natural rainfall drainage over a broad area."); *Tr. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) ("Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants."). Nonpoint source pollution—caused by movements of rain or groundwater—"is very difficult to regulate through individual [NPDES] permits" because it "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *Forsgren*, 309 F.3d at 1184.

Here, the Appellants have alleged ongoing migration from the spill site, which does not amount to a CWA violation. The Appellants have alleged that the groundwater flow from the spill site is introducing pollutants to navigable waters. Appendix ("App.") 8. Indeed, the Appellants' CWA case is built on the novel theory that the introduction of pollutants through the movement of hydrologically connected *groundwater* amounted to a CWA violation. Appellant Br. 26. As the record plainly shows, groundwater is carrying gasoline from the spill site, which spans in three different directions from the pipeline and covers a vast area. App. 99, 173. This kind of migration of pollutants through the natural movements of groundwater amounts to nonpoint source pollution. *El Paso*, 421 F.3d at 1140 n.4; *see also Forsgren*, 309 F.3d at 1184. While there is no doubt this kind of nonpoint source pollution affects the quality navigable waters, Congress deliberately chose not to place nonpoint source pollution within the CWA's reach.[3] *See,*

[3] An exception to this general rule is that the "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the [polluter] at least initially collected or channeled the water and other materials." *Abston* (Continued)

e.g., *Abston Constr.*, 620 F.2d at 44. In my view, therefore, because ongoing migration of pollutants is nonpoint source pollution, it is not cognizable under the CWA.

In sum, I would conclude that ongoing migration of pollutants from a past discharge does not amount to an ongoing CWA violation.

C.

I do not take lightly the allegations of the severe environmental harm caused by Kinder Morgan. The Appellants have alleged facts suggesting a serious environmental disaster that cannot be easily overlooked as a mere peccadillo on the part of Kinder Morgan's operation and management. The allegations indicate that a full restoration will take many years and require tremendous resources.

The severity of the situation alone, however, does not and cannot give rise to a citizen suit under the CWA. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In creating a citizen suit provision under the CWA, Congress deliberately limited federal courts' jurisdiction such that they may entertain citizen suits only for allegations of ongoing CWA violations. 33 U.S.C. §

Contr., 620 F.2d at 45. This is because, once a polluter attempts to channel, collect, or otherwise redirect the flow of water, such an effort becomes a "discernible, confined and discrete" conveyance. 33 U.S.C. § 1362(14); *see also Sierra Club v. Va. Elec. Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017) ("Dominion built the piles and ponds to concentrate [pollutants] in one location . . . [which] channels and conveys [pollutants] directly into groundwater and thence into the surface waters. Essentially they are discrete mechanisms . . . . "). The Appellants have not alleged that Kinder Morgan has at all attempted to channel, collect, or redirect the free flow of groundwater. *See* App. 419.

1365(a); *Gwaltney*, 484 U.S. at 57. And Congress precisely defined a CWA violation as a point source discharge without an NPDES permit. The critical element—the addition from a point source—cannot be satisfied here because Kinder Morgan has repaired its pipeline and the pipeline is not currently leaking or adding pollutants to navigable waters. The Appellants can only point to nonpoint pollution from the spill site or the past violation, which cannot give rise to a citizen suit under the CWA.

Barring the Appellants' citizen suit would not necessarily mean that Kinder Morgan will evade accountability. Under the CWA, the primary responsibility for enforcement rests with the state and federal governments. *The Piney Run*, 523 F.3d at 456. In fact, the State of South Carolina, through DHEC, has stepped in and is actively overseeing the remediation efforts. DHEC has directed Kinder Morgan to investigate the impact of the spill and implement corrective action plans. After a series of back and forth revisions between DHEC and Kinder Morgan, on March 1, 2017, DHEC approved the "Startup Plan for Surface Water Protection Measures" that was meant to implement additional remedial measures in the spill site. App. 351. Thus, even without a CWA citizen suit, the State of South Carolina is protecting and remediating the waters and natural resources within its borders. In addition to ordering Kinder Morgan to remediate the spill site, the state and federal governments are also empowered to use criminal, civil, and administrative enforcement actions for even for *past* violations of the CWA.

Moreover, if a CWA citizen suit fails for lack of subject matter jurisdiction, other state and federal laws may provide actionable claims against Kinder Morgan. South Carolina state law may provide a more encompassing response. As the *amici* States have

pointed out, Brief of the *Amici* States 22–23, South Carolina law provides for the state to recover monetarily from polluters for violations that includes even nonpoint source pollution, *see* S.C. Code § 48-1-90(a)(1). In addition to the enforcement mechanism under state law, other federal laws could provide recourse. In response to Kinder Morgan's past spill, a federal citizen suit may perhaps be more appropriate under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, which is "designed to effectuate the cleanup of toxic waste sites" and to impose cleanup costs, *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (citations omitted), or under the RCRA, 42 U.S.C. § 6901 *et seq.*, which concerns with the disposal of hazardous waste, *Aiello*, 136 F. Supp. 2d at 121 ("It is RCRA, rather than the CWA, that appropriately addresses liability for ongoing contamination by past polluters.").

The Appellants have raised serious allegations but, in my view, the CWA citizen suit is not the proper mechanism to seek redress. Therefore, the district court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief can be granted.

IV.

For the reasons above, I would affirm the district court's dismissal of the Appellants' complaint. I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWAI'I WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB - MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, *Plaintiffs-Appellees*, v. COUNTY OF MAUI, *Defendant-Appellant.*	No. 15-17447 D.C. No. 1:12-cv-00198-SOM-BMK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, Senior District Judge, Presiding

Argued and Submitted October 12, 2017
University of Hawaii Manoa

Filed February 1, 2018
Amended March 30, 2018

Before: Mary M. Schroeder, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

Order;
Opinion by Judge D.W. Nelson

SUMMARY*

Environmental Law

The panel filed (1) an order amending its opinion and, on behalf of the court, denying a petition for rehearing en banc; and (2) an amended opinion affirming the district court's summary judgment rulings finding that the County of Maui violated the Clean Water Act when it discharged pollutants from its wells into the Pacific Ocean, and further finding that the County had fair notice of its violations.

The panel concluded that the County's four discrete wells were "point sources" from which the County discharged "pollutants" in the form of treated effluent into groundwater, through which the pollutants then entered a "navigable water," the Pacific Ocean. The wells therefore were subject to National Pollutant Discharge Elimination System regulation. Agreeing with other circuits, the panel held that the Clean Water Act does not require that the point source itself convey the pollutants directly into the navigable water. The panel held that the County was liable under the Act because it discharged pollutants from a point source, the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

pollutants were fairly traceable from the point source to a navigable water such that the discharge was the functional equivalent of a discharge into the navigable water, and the pollutant levels reaching navigable water were more than *de minimis*. The panel rejected the argument that the County's effluent injections were disposals of pollutants into wells and therefore exempt from the NPDES permitting requirements.

The panel also held that the Clean Water Act provided fair notice, as required by due process, of what conduct was prohibited.

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ORDER

The Opinion filed on February 1, 2018, is amended as follows:

1. On slip opinion page 12, footnote 2, the following text was added to the end of the footnote: <Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. *See Rice v. Harken Expl.*, 250 F.3d 264, 270 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). 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 when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*, where the Seventh Circuit only considered allegations of a "potential [rather than an actual] connection between ground waters and surface waters," 24 F.3d at 965.>

2. On slip opinion page 19, footnote 3, the following text was added to the end of the footnote: <Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. *See* § 1365. Our approach is firmly grounded in our case law, which distinguishes between point source and nonpoint source pollution based on whether pollutants can be "traced" or are "traceable" back to a point source. *See Alaska*, 749 F.2d at 558; *Ecological Rights*, 713 F.3d at 508; *supra*, at 12–15.>

3. On slip opinion at page 19, the following text replaces the sentence after the citation to *Haw. Wildlife*, 24 F. Supp. 3d at 1000: <Here, the Tracer Dye Study and the County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells' pollutants reaching the ocean. The Study also traced a southwesterly path from the wells' point source discharges to the ocean.>

With these amendments, Judge McKeown voted to deny County of Maui's Petition for Rehearing En Banc. Judge Schroeder and Judge Nelson recommended denial of petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

The petition for rehearing en banc is **DENIED**. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

D.W. NELSON, Senior Circuit Judge:

The County of Maui ("County") appeals the district court's summary judgment rulings finding the County violated the Clean Water Act ("CWA") when it discharged pollutants from its wells into the Pacific Ocean, and further finding it had fair notice of its violations. Hawai'i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association ("Associations") urge us to uphold these rulings. For the reasons set forth below, we affirm the district court.

BACKGROUND

1. The Lahaina Wells and the Effluent Injections

The County owns and operates four wells at the Lahaina Wastewater Reclamation Facility ("LWRF"), the principal municipal wastewater treatment plant for West Maui. Wells 1 and 2 were installed in 1979 as part of the original 1975 plant design, and Wells 3 and 4 were added in 1985 as part of an expansion project. Although constructed initially to serve as a backup disposal method for water reclamation, the wells have since become the County's primary means of effluent disposal into groundwater and the Pacific Ocean.

The LWRF receives approximately 4 million gallons of sewage per day from a collection system serving approximately 40,000 people. That sewage is treated at the Facility and then either sold to customers for irrigation purposes or injected into the wells for disposal. The County disposes of almost all the sewage it receives—it injects

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approximately 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells.

That some of the treated effluent then reaches the Pacific Ocean is undisputed. The County expressly conceded below and its expert confirmed that wastewater injected into Wells 1 and 2 enters the Pacific Ocean. The Associations submitted various studies and expert declarations establishing a connection between Wells 3 and 4 and the ocean. Although the County quibbles with how much effluent enters the ocean and by what paths the pollutants travel to get there, it concedes that effluent from all four wells reaches the ocean.

The County has known this since the Facility's inception. The record establishes the County considered building an ocean outfall to dispose of effluent directly into the ocean but decided against it because it would be too harmful to the coastal waters. It opted instead for injection wells it knew would affect these waters indirectly. When the Facility underwent environmental review in February 1973, the County's consultant—Dr. Michael Chun—stated effluent that was not used for reclamation purposes would be injected into the wells and that these pollutants would then enter the ocean some distance from the shore. The County further confirmed this in its reassessment of the Facility in 1991.

According to the County's expert, when the wells inject 2.8 million gallons of effluent per day, the flow of effluent into the ocean is about 3,456 gallons per meter of coastline per day—roughly the equivalent of installing a permanently-running garden hose at every meter along the 800 meters of coastline. About one out of every seven gallons of groundwater entering the ocean near the LWRF is comprised of effluent from the wells.

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2. The Tracer Dye Study

In June 2013, the U.S. Environmental Protection Agency ("EPA"), the Hawaii Department of Health ("HDOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study (the "Tracer Dye Study" or "Study") on Wells 2, 3, and 4 to gather data on, among other things, the "hydrological connections between the injected treated wastewater effluent and the coastal waters." The Study involved placing tracer dye into Wells 2, 3, and 4, and monitoring the submarine seeps off Kahekili Beach to see if and when the dye would appear in the ocean.

The Study concluded "a hydrogeologic connection exists between . . . Wells 3 and 4 and the nearby coastal waters of West Maui." Eighty-four days after injection, tracer dye introduced to Wells 3 and 4 began to emerge "from very nearshore seafloor along North Kaanapali Beach," near Kahekili Beach Park, about a half-mile southwest of the LWRF. According to the Study, the effluent travels in this southwesterly path "due to geologic controls that include a hydraulic barrier created by valley fills to the northwest." The Study found "64 percent of the treated wastewater injected into [Wells 3 and 4] currently discharges [into the ocean]." It further concluded "[t]he major discharge areas are confined to two clusters, only several meters wide, with very little discharge [occurring] in between and around them."

Tracer dye from Well 2 was not detected in the ocean. But this was because Wells 3 and 4—located between Well 2 and the areas in the ocean where the wastewater discharges—"inject the majority of effluent," which likely diverted the injected wastewater from Well 2 into taking "a

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different path other than directly towards the submarine springs" where the wastewater from Wells 3 and 4 discharges. If Well 2 were to receive most of the effluent at the Facility, that effluent would also take the southwesterly path taken by the wastewater from Wells 3 and 4. And "[b]ecause Well 1 is located in very close proximity to Well 2, . . . the [T]racer [S]tudy's predictions for the fate of effluent from Well 2 can be used to predict the fate of effluent from Well 1," according to the Associations' expert Dr. Jean Moran.

3. The District Court's Summary Judgment Rulings

The County appeals three of the district court's summary judgment rulings. In the first, the district court found the County liable as to Wells 3 and 4 for discharging effluent through groundwater and into the ocean without the National Pollutant Discharge Elimination System ("NPDES") permit required by the CWA. *Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 1005 (D. Haw. 2014). The court based its decision on three independent grounds: (1) the County "indirectly discharge[d] a pollutant into the ocean through a groundwater conduit," (2) the groundwater is a "point source" under the CWA, and (3) the groundwater is a "navigable water" under the Act. *Id.* at 993, 999, 1005.

In its second order, the district court held the County liable as to Wells 1 and 2 based largely on the same reasons it found the County liable on Wells 3 and 4. *Haw. Wildlife Fund v. Cty. of Maui*, Civil No. 12-00198 SOM/BMK, 2015 WL 328227, at *5–6 (D. Haw. Jan. 23, 2015). The court acknowledged that no study confirms the "point of entry into the ocean of flow from [W]ells 1 and 2." *Id.* at *2. But it nonetheless held against the County after "repeatedly

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confirm[ing] at the [summary judgment] hearing . . . that the County was expressly conceding that pollutants introduced by the County into [W]ells 1 and 2 were making their way to the ocean." *Id.*

Finally, the district court found the County could not claim a due process violation because it had fair notice under the plain language of the CWA that it could not discharge effluent via groundwater into the ocean.

This appeal followed.

STANDARD OF REVIEW

The Ninth Circuit "review[s] the district court's grant or denial of motions for summary judgment *de novo*." *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (citation and internal quotation marks omitted). "Thus, on appellate review, [the] [Court] employ[s] the same standard used by the trial court under Federal Rule of Civil Procedure 56(c)." *Id.* "As required by that standard, [the Court] view[s] the evidence in the light most favorable to the nonmoving party, determine[s] whether there are any genuine issues of material fact, and decide[s] whether the district court correctly applied the relevant substantive law." *Id.* at 989 (citation omitted).

DISCUSSION

The Clean Water Act is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the "discharge of any pollutant by any person," *id.* § 1311(a), and defines "discharge of a

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pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12) (internal quotation marks omitted). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (internal quotation marks omitted). A party who obtains an NPDES permit is exempt from the general prohibition on point source pollution. *Id.* §§ 1311(a), 1342(a)(1). Under these provisions, a party violates the CWA when it does not obtain such a permit and "(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001) (citation omitted).

1. Liability under the CWA

The County argues the district court erred in concluding it was liable under the CWA as to all four of its wells. We disagree.

a. Point Source Discharges

Neither side here disputes that each of the four wells constitutes a "point source" under the CWA. Given the wells here are "discernible, confined and discrete conveyance[s] . . . from which pollutants are . . . discharged," and the plain language of the statute expressly includes a "well" as an example of a "point source," the County could not plausibly deny the wells are "point source[s]" under the statute. § 1362(14) (internal quotation marks omitted). The record further establishes that from these point sources the County discharges "pollutants" in the form of treated effluent into groundwater, through which the pollutants then enter a

"navigable water[]," the Pacific Ocean. *See id.* §§ 1362(7)–(8), (12), (14). As the pollutants here enter navigable waters and can be "traced [back] to . . . identifiable point[s] of discharge," "[the wells] are subject to NPDES regulation, as are all point sources" under the plain language of the CWA. *Trs. for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) (citations omitted).

That the County's activities constitute "point source" discharges becomes clearer once we consider our jurisprudence on "nonpoint source pollution": "[Such] pollution . . . arises from many dispersed activities over large areas," "is not traceable to any single discrete source," and due to its "diffuse" nature, "is very difficult to regulate through individual permits." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013) (citations omitted). "The most common example of nonpoint source pollution is the residue left on roadways by automobiles" which rainwater "wash[es] off . . . the streets and . . . carrie[s] along by runoff in a polluted soup [to] creeks, rivers, bays, and the ocean." *Id.* Our cases have consistently held that such runoff constitutes nonpoint source pollution unless it is later collected, channeled, and discharged through a point source. *See, e.g.*, *id.* (citations omitted); *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841 n.8 (9th Cir. 2003) (citation omitted). Applying these principles in *Ecological Rights*, we held that rainwater runoff carrying pollutants from the defendants' utility poles to navigable waters constituted nonpoint source pollution under the CWA. 713 F.3d at 509 (citations omitted).

Ours is a different case entirely. Unlike the "millions of cars" discussed in *Ecological Rights*, here we have four "discrete" wells that have been identified and can be

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"regulate[d] through individual permits." *Id.* at 508 (citations omitted). Furthermore, the automobiles and the utility poles discussed in *Ecological Rights* did nothing themselves to "discretely collect[] and convey[]" the pollutants to a navigable water, and hence could not constitute "point source[s]" under § 1362(14). *Id.* at 508–10 (citations omitted). The Lahaina Wells, by contrast, collect and inject pollutants in four discrete wells into groundwater connected to the Pacific Ocean, thereby "discretely collect[ing] and convey[ing]" pollutants to a navigable water. *Id.* at 509 (citations omitted); § 1362(14). The Tracer Dye Study confirms this connection as to Wells 3 and 4, and the County conceded as much as to Wells 1 and 2. Given the County knew of these effects well before the LWRF's inception, the record further establishes it "constructed [the wells] for the express purpose of storing pollutants [and] moving them from [the Lahaina Facility] to [the Pacific Ocean]." *Ecological Rights*, 713 F.3d at 509 (citations omitted).[1] This is simply not a case of "nonpoint source pollution . . . caused primarily by rainfall around activities that employ or create pollutants," where the resulting "runoff [can]not be traced to any identifiable point of discharge." *Alaska*, 749 F.2d at 558

[1] We do not mean to suggest that a CWA violation requires some form of intent. It does not. *See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (recognizing CWA "categorically prohibits any discharge of a pollutant from a point source without a permit" (citations omitted)); *accord Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015) (recognizing "regime of strict liability" under the CWA (citation and internal quotation marks omitted)); *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 265 (4th Cir. 2001) (same). But the County's purpose in constructing the wells certainly informs whether they are "conveyance[s]" under the CWA, § 1362(14), and hence, regulable point sources under the statute. *See Ecological Rights*, 713 F.3d at 509 (citations omitted).

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(citing *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)). As the "[County's] activities release[d] pollutants from . . . discernible conveyance[s]" to navigable waters, the County is liable under the CWA. *Id.* (citations omitted).

b. Indirect Discharges

The County contends, however, that under the CWA, it is not sufficient to focus exclusively on the original pollutant source to determine whether an NPDES permit is needed and that how pollutants travel from the original point source to navigable waters matters. More specifically, the County contends the point source itself must convey the pollutants *directly* into the navigable water under the CWA. As the wells here discharge into groundwater, and then *indirectly* into the Pacific Ocean, the County asserts they do not come within the ambit of the statute.[2]

[2] We assume without deciding the 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. *See Rice v. Harken Expl.*, 250 F.3d 264, 270 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). 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 when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*, where the Seventh Circuit only considered allegations of a "potential [rather than an actual] connection between ground waters and surface waters," 24 F.3d at 965.

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The County first cites *Alaska*, where we held that point source pollution occurs when "the pollution reaches the water through a confined, discrete conveyance," regardless of "the kind of pollution" at issue or "the activity causing [it]." *Id.* at 558 (citation omitted). As the effluent here reaches the Pacific Ocean "through" groundwater—a nonpoint source—the County contends it is not liable under the CWA. The County reads *Alaska* out of context. First, we never addressed in *Alaska* whether a polluter may be liable under the CWA for indirect discharges because the issue was not before us. *See id.* Furthermore, when we stated the "pollution [must] reach[] the water through a confined, discrete conveyance," we were merely stating the pollution must come "*from* a discernible conveyance" as opposed to some "[un]identifiable point of discharge." *Id.* (emphasis added) (citations omitted). As the "discharge water [there] [was] released *from* a sluice box, a confined channel within the statutory definition," the activity came within the ambit of the CWA. *Id.* (emphasis added). This case is no different—the effluent comes "from" the four wells and travels "through" them before entering navigable waters. *Id.* It just also travels through groundwater before entering the Pacific Ocean.

A more recent case *Greater Yellowstone Coalition v. Lewis* supports the Associations' contention that the CWA governs indirect discharges. We held there that precipitation flowing into pits containing "newly extracted waste rock," "filter[ed]" hundreds of feet underground, and "eventually entering the surface water" did not constitute point source pollution under the CWA. 628 F.3d 1143, 1147, 1153 (9th Cir. 2010) (citation omitted). The "pits that collect[ed] the waste rock [did] not constitute point sources" because "there [was] no confinement or containment of the [polluted] water"

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before it entered navigable waters, as prohibited by the statute. *Id.* We also concluded, however, that precipitation flowing into a "stormwater drain system" before "enter[ing] the ground and, eventually, surface water" constituted a point source discharge—the "stormwater system [was] exactly the type of collection or channeling contemplated by the CWA." *Id.* at 1152.

The wells here are more akin to the stormwater drain system in *Greater Yellowstone* than they are to the pits that collected the waste rock. Unlike the pits that "[did] not constitute points sources within the meaning of the CWA," the wells here "confine[] [and] contain[] . . . the [effluent]" before discharging it "[into] the ground and, eventually, surface water." *Id.* at 1152–53. And it was of no import to us in *Greater Yellowstone* that the pollutants—as here—had to travel through the ground before "eventually, [entering] surface water." *Id.* at 1152. The Court was only concerned with whether there was a point source *from which* the defendant discharged the pollutants. As the stormwater drain system constituted this point source, the Court concluded the defendant was required to "obtain[] the requisite . . . certification for that system." *Id.* at 1153. As the County also discharges its pollutants from a point source, it, too, must obtain an NPDES permit under the CWA.

Our sister circuits agree that an indirect discharge from a point source to a navigable water suffices for CWA liability to attach. In *Concerned Area Residents for Environment v. Southview Farm*, the Second Circuit held "[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law." 34 F.3d 114, 119 (2d Cir. 1994). Regardless of whether the field itself was

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a point source, the court concluded there was a "point source discharge[]" under the CWA because (1) the pollutant itself was released from the tanker, a point source, and (2) there was a "direct[]" connection between the field and the navigable water. *See id.* Both elements are present here. The wells are point sources under the statute, § 1362(14), and the Tracer Dye Study along with the County's concessions establish an undeniable connection between the wells and the Pacific Ocean. The Study establishes effluent injected into the wells travels a southwesterly path from the Facility, appearing in submarine springs only a half-mile away.

Furthermore, in *Sierra Club v. Abston Construction*, the Fifth Circuit recognized that the "ultimate question [as to CWA liability] is whether pollutants [are] discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means." 620 F.2d 41, 45 (5th Cir. 1980). It went on to hold that "[s]ediment basins dug by the miners and designed to collect sediment are . . . point sources . . . *even though the materials [are] carried away from the basins by gravity flow of rainwater*." *Id.* (emphasis added). "Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner *at least initially collected or channeled the water and other materials*." *Id.* (emphasis added). That is what occurred here. The County "initially collected [and] channeled" the pollutants in its wells and injected them into the ground, where they were "carried away from the [wells] by the gravity flow of [ground]water." *Id.* And based on the overwhelming evidence in this case establishing a connection between the wells and the Pacific Ocean, it cannot be disputed the wells are "reasonably likely to be the means by which [the] [effluent] [is] ultimately deposited into a navigable body of water." *Id.* Indeed, the County has known

since the LWRF's inception that effluent from the wells would eventually reach the ocean some distance from the shore. That the groundwater plays a role in delivering the pollutants from the wells to the navigable water does not preclude liability under the statute. *See id.*

The Second Circuit further recognized the indirect discharge theory in *Peconic Baykeeper, Inc. v. Suffolk County*, where it rejected the district court's conclusion that "because the trucks and helicopters discharged pesticides into the air, any discharge was indirect, and thus not from a point source." 600 F.3d 180, 188 (2d Cir. 2010). As the pesticides there were "discharged 'from' the source, *and not from the air*," the court concluded the "spray apparatus . . . attached to [the] trucks and helicopters" constituted a point source under the CWA. *Id.* at 188–89 (emphasis added). The Ninth Circuit has similarly held discharges through the air can constitute "point source pollution" under the statute. *League of Wilderness Def./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1185, 1192–93 (9th Cir. 2002).

But accepting the County's position—that pollutants must "travel via a 'confined and discrete conveyance'" to navigable waters for CWA liability to attach—would necessarily preclude liability in cases such as *Peconic Baykeeper* and *League of Wilderness*. The pollutants in both cases traveled to navigable waters via the air, and not via the point sources from which they were released. *See Peconic Baykeeper*, 600 F.3d at 188; *League of Wilderness*, 309 F.3d at 1185. Taken to its logical conclusion, the County's theory would only support liability in cases where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch. That the circuits have recognized CWA liability

where such a direct connection does not exist counsels against accepting the County's theory.

Indeed, writing for the plurality in *Rapanos v. United States*, Justice Scalia recognized the CWA does not forbid the "'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. 715, 743 (2006) (plurality opinion) (emphasis in original) (quoting §§ 1311(a), 1362(12)(A)). He further recognized that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* (emphasis in original) (citations omitted). In support of his "'indirect discharge' rationale," Justice Scalia cited *Concerned Area Residents*, where, as described above, the Second Circuit held the discharge of manure from point sources onto fields (which were not necessarily point sources themselves) and eventually into navigable waters constituted point source discharges under the CWA. *Id.* at 744.

Although the Court in *Rapanos* splintered on other issues, no Justice disagreed with the plurality opinion that the CWA holds liable those who discharge a pollutant from a defined point source to the ocean. Justice Kennedy's opinion concurring in the judgment objected only to the plurality opinion's creation of certain limitations on the Executive Branch's authority to enforce the CWA's environmental purpose and statutory mandate. *Id.* at 778. Similarly, the four-Justice dissent cited the CWA's prohibition of "any addition of any pollutant to navigable waters from any point

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source" as strong evidence of the law's wide sweep, and disagreed with the plurality opinion's creation of two limitations on CWA enforcement. *Id.* at 787, 800–06 (Stevens, J., dissenting).

In past cases, we have recognized Justice Kennedy's concurrence in *Rapanos*, not Justice Scalia's plurality opinion, as controlling. But we have only done so in the context of "determin[ing] whether a wetland that is not adjacent to and does not contain a navigable-in-fact water is subject to the CWA." *United States v. Robertson*, 875 F.3d 1281, 1288–89 (9th Cir. 2017) (citations omitted); *see also N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007). As this is not a case about wetlands, and we do not decide whether groundwater is a "navigable water" under the statute, we do not apply Justice Kennedy's concurrence here, and consider Justice Scalia's plurality opinion only for its persuasive value, *United States v. Brobst*, 558 F.3d 982, 991 (9th Cir. 2009) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987)) (internal quotation marks omitted). *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) ("No Justice [in *Rapanos*], even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.").

Justice Scalia's plurality opinion demonstrates the County is reading into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged "directly" to navigable waters from a point source. As "the plain language of a statute should be enforced according to its terms," we therefore reject the County's reading of the CWA and affirm the district court's rulings finding the County

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liable under the Act. *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015) (citations omitted).

We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*.[3] The second point in particular is an important one. We therefore disagree with the district court that "liability under the Clean Water Act is triggered when pollutants reach navigable water, *regardless of how they get there*." *Haw. Wildlife*, 24 F. Supp. 3d at 1000 (emphasis added). Here, the Tracer Dye Study and the County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells' pollutants reaching the ocean. The Study also traced a southwesterly path from the wells' point source discharges to the ocean. We leave for another day the task of determining when, if ever, the connection between a

[3] The EPA as *amicus curiae* proposes a liability rule requiring a "direct hydrological connection" between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA ("direct" and "hydrological") that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a "fairly traceable" connection, consistent with Article III standing principles. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. *See* § 1365. Our approach is firmly grounded in our case law, which distinguishes between point source and nonpoint source pollution based on whether pollutants can be "traced" or are "traceable" back to a point source. *See Alaska*, 749 F.2d at 558; *Ecological Rights*, 713 F.3d at 508; *supra*, at 12–15.

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point source and a navigable water is too tenuous to support liability under the CWA.

c. Disposals of Pollutants into Wells

Finally, the County contends its effluent injections are not discharges into navigable waters but "disposal[s] of pollutants into wells," and that the Act categorically excludes well disposals from the permitting requirements of § 1342. *See, e.g.*, § 1342(b)(1)(D). As the County urges a "construction that the statute on its face does not permit," we "reject" it here. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (citation and internal quotation marks omitted).

The County first relies on § 1342(b), which permits the EPA to delegate CWA authority to "each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction." So long as the State "submit[s] to the Administrator a full and complete description of [its] program" and "a statement . . . that the laws of [the] State . . . provide adequate authority to carry out the described program," the State may "issue [NPDES] permits which[,] [among other things] *control the disposal of pollutants into wells*." § 1342(b)(1)(D) (emphasis added). The County contends based on this language the NPDES permitting requirements do not apply at all to well disposals. Not so. The plain language of the statute clearly permits States to issue NDPES permits for well disposals, and such permits are required only for "discharges into navigable waters." *Id.* § 131242(b); *see also id.* § 1342(a)(1). The provision furthermore makes no judgment about whether a "disposal" always constitutes a "discharge" requiring a NPDES permit. Indeed, only when a "disposal" is also a

"discharge" is a permit required. *See Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1422 (7th Cir. 1990) (noting § 1342(b)(1)(D) "was not intended to authorize [States to] regulat[e] . . . *all* wells used to dispose of pollutants, regardless of absence of any effects on navigable waters" (emphasis in original)).

The County also argues that under § 1342(b)(1)(D), *only the State*, not the EPA, has authority to regulate well disposals. This Court, however, has already concluded the Act does not "expressly grant[] to the EPA or [the administering] state agency the exclusive authority to decide whether [there is a CWA violation]," even while recognizing § 1342 "suspend[s] the availability of federal NPDES permits once a state-permitting program has been submitted and approved by the EPA." *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1010–12 (9th Cir. 2002) (citing § 1342(c)(1)). That the administering state agency, HDOH, has "cho[sen] to sit on the sidelines . . . is not a barrier to a citizen's otherwise proper federal suit to enforce the Clean Water Act" and does not somehow "divest [this Court] of jurisdiction" over this case. *Id.* at 1012; *see also Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 949–50 (9th Cir. 2002) ("Under the CWA[,] private citizens may sue any person alleged to be in violation of the conditions of an effluent standard or limitation under the Act or of an order issued with respect to such a standard or limitation by the Administrator of the [EPA] or any state." (citation omitted)).

The County next relies on § 1314(f)(2)(D), which "directs the [EPA] to give States information on the evaluation and control of [nonpoint source] 'pollution resulting from . . . [the disposal of pollutants in wells].'" *S. Fla. Water Mgmt. Dist.*

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v. Miccosukee Tribe of Indians, 541 U.S. 95, 106 (2004) (citing and quoting § 1314(f)(2)). According to the County, § 1314(f)(2)(D) affirmatively establishes disposals into wells constitute nonpoint source pollution and that it need not obtain NPDES permits under the CWA. But the Supreme Court itself acknowledged in *South Florida* that while § 1314(f)(2) listed a variety of circumstances constituting "nonpoint source[] [pollution]"—including well disposals—the provision "does not explicitly exempt [these] nonpoint pollution sources from the NPDES program *if they also fall within the 'point source' definition*." *Id.* (emphasis added). Consistent with our reading of § 1342(b)(1)(D), the implication here is that well disposals do not *always* constitute nonpoint source pollution. If pollutants from those wells are discharged into a navigable water from a discrete source, that is point source pollution, and the polluter must obtain an NPDES permit if it wants to avoid liability under the CWA. *See* §§ 1311(a), 1342(a)(1).

The CWA's definition of "pollutant" also supports this reading. *See* § 1362(6)(B). Under the Act, "[t]his term [excludes] . . . water derived in association with oil or gas production and disposed of in a well, if [1] the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and [2] such State *determines that such injection or disposal will not result in the degradation of ground or surface water resources*." *Id.* (emphasis added). By contrast, pollutants "disposed of in . . . well[s]" that "alter the water quality" of "surface water[s]" are "subject to NPDES permitting requirements." *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1161–62 (9th Cir. 2003) (citing § 1362(6)(B)). Section 1362(6)(B), therefore, confirms that contrary to the County's contentions, the CWA

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does not categorically exempt all well disposals from the NPDES requirements. "Were we to conclude otherwise," and create out of whole cloth a categorical exemption for well disposals, we would improperly amend the statute and "undermine the integrity of [the CWA's] prohibitions." *Id.* at 1162 (citation and internal quotation marks omitted). We decline to do so here.

2. Fair Notice

"Due process requires that [a statute] provide fair notice of what conduct is prohibited before a sanction can be imposed." *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) (citation and internal quotation marks omitted). "To provide sufficient notice, a statute . . . must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) (internal quotation marks omitted). If the "[p]lain [l]anguage of the [s]tatute" is "sufficiently clear to warn a party about what is expected," a court may find the party had "fair notice" under the due process clause. *Id.*; *see also Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 584 (D.C. Cir. 1999) (finding the defendant had "fair notice" based on "plain language" of regulation).

In determining whether there has been fair notice, this Court must "first look to the language of the statute itself." *Shark Fins*, 520 F.3d at 980 (citation omitted). Here, the Clean Water Act prohibits the "discharge of any pollutant by any person." § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (internal

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quotation marks omitted). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (internal quotation marks omitted). Finally, there is an exception to the general prohibition on point source pollution if a party obtains an NPDES permit. *Id.* §§ 1311(a), 1342(a)(1).

It is undisputed the County "add[s] . . . pollutants"—treated effluent—"to navigable waters"—the Pacific Ocean—"from . . . point source[s]"—its four injection wells. *See id.* §§ 1362(6), (12), (14). As its actions fall squarely within the "[p]lain [l]anguage of the [s]tatute," we conclude the County had "fair notice" its actions violated the CWA. *See Shark Fins*, 520 F.3d at 980; *Garvey*, 190 F.3d at 584; *Lee v. Enter. Leasing Co.-West, LLC*, 30 F. Supp. 3d 1002, 1012 (D. Nev. 2014) (finding "reasonable reading of the statute . . . afforded [the] [d]efendants fair notice that their conduct was at risk").

But the County contends it did not have "fair notice" because the statutory text can be fairly read to exclude the wells from the NPDES permit requirements. It argues again that pollution via its wells and the groundwater is nonpoint source pollution not subject to the CWA's prohibitions. Even so, "due process does not demand unattainable feats of statutory clarity." *Planned Parenthood of Cent. and N. Ariz. v. State of Ariz.*, 718 F.2d 938, 948 (9th Cir. 1983) (citation and internal quotation marks omitted). That there is a "difference[] of opinion" on "the precise meaning of [the CWA]" is "[]not . . . enough to render [it]" violative of the due process clause. *Id.*

The County further contends it did not have "fair notice" because HDOH—the state agency tasked with administering

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the NPDES permit program—has maintained an NPDES permit is unnecessary for the wells. The County does not describe HDOH's position accurately. As late as April 2014, HDOH stated in a letter to the County it was still "in the process of determining if an NPDES permit is applicable" to the wells. That HDOH has not solidified its position on the issue does not affirmatively demonstrate it believes the permits are unnecessary, as the County contends. And the fact that the County "has been unable to receive an interpretation of the [CWA] from . . . [HDOH] officials administering the program" is also "[]not . . . enough to render [enforcement of the CWA]" unconstitutional. *Id.* As a "reasonable person would [have] underst[oo]d the [CWA]" as prohibiting the discharges here, enforcement of the statute does not violate the due process clause. *Id.* at 948–49; *see also Shark Fins*, 520 F.3d at 980 (holding liability would attach if "regulation is . . . sufficiently clear to warn a party about what is expected of it" (citation and internal quotation marks omitted)).

CONCLUSION

At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions. Under the circumstances of this case, we therefore affirm the district court's summary judgment rulings finding the County discharged pollutants from its

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wells into the Pacific Ocean, in violation of the CWA, and further finding the County had fair notice of what was prohibited.

AFFIRMED.

ED_001667C_00004549-00029

From: Neugeboren, Steven
Location: EPA Headquarters, 1200 Penn. Ave. NW, 4th Floor, Room 4000
Importance: Normal
Subject: Accepted: FW: Direct Hydrological Connection Discussion w/EEI (Call in number: 1-866-299-3188, Code: Ex. 6 - Personal Privacy
Start Date/Time: Fri 5/4/2018 6:00:00 PM
End Date/Time: Fri 5/4/2018 6:45:00 PM

To: Schwab, Justin[Schwab.Justin@epa.gov]
From: Sarah Peterman Bell, Farella Braun + Martel
Sent: Thur 5/31/2018 12:55:37 PM
Subject: CWA: Expanded Liability After Upstate Forever & Hawai'i Wildlife CLE: THURS., JUNE 28TH, @1 PM EDT

View as web page

Strafford Live CLE Webinars

I am pleased to announce that I will be speaking in an upcoming Strafford live webinar, "Expanding Scope of Clean Water Act Jurisdiction and Liability: Impact of Recent Circuit Court Opinions" scheduled for Thursday, June 28, 1:00pm-2:30pm EDT.

Two recent federal Circuit Court opinions indicate expansion of the scope of Clean Water Act (CWA) jurisdiction under the CWA and the National Pollution Discharge Elimination System (NPDES) permit program. In *Upstate Forever v. Kinder Morgan Energy Partners* (4th Cir. Apr. 12, 2018), and in *Hawai'i Wildlife Fund v. County of Maui* (9th Cir. Feb. 1, 2018), the Fourth Circuit and Ninth Circuit, respectively, held unpermitted discharges indirectly introduced into navigable waters via groundwater may result in CWA liability.

Together, these cases constitute a significant expansion of CWA jurisdiction and potential liability. Companies now may need to obtain a CWA permit under the NPDES program for discharges to groundwater that result in indirect discharges to jurisdictional waters or face potential CWA liability.

Our panel will examine the two recent U.S. Circuit Court opinions on CWA jurisdiction and potential liability. The panel will explore the potential differences in the courts' standards and the impact on the CWA landscape. The panel will also offer insight regarding what companies and other dischargers need to do to minimize liability risk.

We will review these and other high priority issues:

- How do the Fourth Circuit and Ninth Circuit decisions change the CWA landscape?
- What interplay is there between the rollback of the Waters of the U.S. Rule and the recent court decisions?
- What steps should companies take in light of *Upstate Forever* and *Hawaii Wildlife Fund*?

After our presentations, we will engage in a live question and answer session with participants so we can answer your questions about these important issues directly.

I hope you'll join us.

For more information or to register >

Or call 1-800-926-7926
Ask for Expanding Scope of Clean Water Act Jurisdiction on 6/28/2018
Mention code: VA5VG2-X5ODZY

Sincerely,

Sarah Peterman Bell, Partner
Farella Braun + Martel, LLP
San Francisco

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To: Maher, Lauren[Maher.Lauren@epa.gov]
Cc: Wehling, Carrie[Wehling.Carrie@epa.gov]
From: wendelowski.karyn@epa.gov
Sent: Thur 6/7/2018 7:27:57 PM
Subject: Re: DHC: Update and Question

Hi Lauren-I checked in with the program and they are finalizing the contract soon and will then have a better sense of timing for comment summaries. Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Karyn Wendelowski
Office of General Counsel
(202)564-5493

On Jun 6, 2018, at 1:55 PM, Maher, Lauren <Maher.Lauren@epa.gov> wrote:

Hi Karyn,

I met with Matt on DHC this morning, and here are the takeaways:

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Thanks!

Lauren Maher

Attorney Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

202-564-9888

maher.lauren@epa.gov

From: Maher, Lauren
Sent: Tuesday, June 5, 2018 4:57 PM
To: Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>
Subject: DHC: Update and Question

Hi Karyn,

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Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Thanks!

Lauren Maher

Attorney Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

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To: Ex. 6 - Personal Privacy @gmail.com[Ex. 6 - Personal Privacy @gmail.com]; michbolt@nc-cherokee.com[michbolt@nc-cherokee.com]; dan.kusnierz@penobscotnation.org[dan.kusnierz@penobscotnation.org]; rrickard@hetf.org[rrickard@hetf.org]; memarthla@sctribe.com[memarthla@sctribe.com]; clarrick@utemountain.org[clarrick@utemountain.org]; emorrison-dia@gci.net[emorrison-dia@gci.net]; Ex. 6 - Personal Privacy @hotmail.com[Ex. 6 - Personal Privacy @hotmail.com]; philc@cdatribe-nsn.gov[philc@cdatribe-nsn.gov]; slivermore@pci-nsn.gov[slivermore@pci-nsn.gov]; kbrosemer@saulttribe.net[kbrosemer@saulttribe.net]; ann-marie.chischilly@nau.edu[ann-marie.chischilly@nau.edu]; Elaine Hale Wilson[Elaine.Wilson@nau.edu]; Pamela Blasdell[pbblasdell@attain.com]; nancyschuldt@fdlrez.com[nancyschuldt@fdlrez.com]; denise.jensen@winnebagotribe.com[denise.jensen@winnebagotribe.com]; Russell, Sam[russell.sam@epa.gov]; Williams, Bo (James)[Williams.James@epa.gov]; Lopez-Carbo, Maria[Lopez-Carbo.Maria@epa.gov]; Buffo, Corey[Buffo.Corey@epa.gov]; Anderson, Danielle[Anderson.Danielle@epa.gov]; Leutner, Fred[Leutner.Fred@epa.gov]; Ruge, Zoe[ruge.zoe@epa.gov]; Bathersfield, Nizanna[Bathersfield.Nizanna@epa.gov]; Delehanty, Robyn[Delehanty.Robyn@epa.gov]; Epting, Steve[epting.steve@epa.gov]; Holdsworth, Susan[Holdsworth.Susan@epa.gov]; Shumway, Laura[Shumway.Laura@epa.gov]; Kutschenreuter, Kathleen[Kutschenreuter.Kathleen@epa.gov]; Davis, CatherineM[Davis.CatherineM@epa.gov]; Temple, Leslie[temple.leslie@epa.gov]; Richardson, Matthew[Richardson.Matthew@epa.gov]; Allen, Catherine[Allen.Catherine@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Gardner, Thomas[Gardner.Thomas@epa.gov]; Carey, Kyle[Carey.Kyle@epa.gov]; Havard, James[Havard.James@epa.gov]; Rose, Bob[Rose.Bob@epa.gov]; Byrne, Andrew[Byrne.Andrew@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Hough, Palmer[Hough.Palmer@epa.gov]; Barr, Janine[barr.janine@epa.gov]; Martinez, Menchu[martinez.menchu-c@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Rodia, Monica[Rodia.Monica@epa.gov]
From: Gude, Karen
Sent: Tue 5/8/2018 5:55:16 PM
Subject: RE: Draft NTWC/EPA Call Summaries for Review: Jan - Mar
NTWC-EPA Monthly Meeting 01-10-18 Draft for Review.docx
2-14-18 NTWC-EPA Monthly Call Draft for Review.docx
3-14-18 NTWC-EPA Monthly Call Draft for Review.docx

All,

Just a reminder that if you have any comments or edits to the draft NTWC/EPA monthly conference call notes for the January – March 2018 calls, to please let me know by COB tomorrow, 5/09. If for any reason you should need additional time to review the drafts, if you could please just let me know by the end of the day tomorrow. The finalized summaries will be posted to the NTWC website. Thank you.

Karen Gude

Tribal Program Coordinator

U.S. EPA/Office of Water

Phone: (202) 564-0831

From: Gude, Karen
Sent: Friday, April 6, 2018 12:32 PM
To: Ex. 6 - Personal Privacy @gmail.com; 'michbolt@nc-cherokee.com' <michbolt@nc-cherokee.com>; 'dan.kusnierz@penobscotnation.org' <dan.kusnierz@penobscotnation.org>; rrickard@hetf.org; memarthla@sctribe.com; clarrick@utemountain.org; 'emorrison-dia@gci.net' <emorrison-dia@gci.net>; Ex. 6 - Personal Privacy @hotmail.com; philc@cdatribe-nsn.gov; 'slivermore@pci-nsn.gov' <slivermore@pci-nsn.gov>; kbrosemer@saulttribe.net; ann-marie.chischilly@nau.edu; 'Elaine Hale Wilson' <Elaine.Wilson@nau.edu>; 'Pamela Blasdell' <pbblasdell@attain.com>; nancyschuldt@fdlrez.com; denise.jensen@winnebagotribe.com; Russell, Sam <Russell.Sam@epa.gov>; Williams, Bo (James) <Williams.James@epa.gov>; Lopez-Carbo, Maria <Lopez-Carbo.Maria@epa.gov>; Buffo, Corey <Buffo.Corey@epa.gov>; Anderson, Danielle <Anderson.Danielle@epa.gov>; Leutner, Fred <Leutner.Fred@epa.gov>; Ruge, Zoe <ruge.zoe@epa.gov>; Bathersfield, Nizanna <Bathersfield.Nizanna@epa.gov>; Delehanty, Robyn <Delehanty.Robyn@epa.gov>; Epting, Steve <epting.steve@epa.gov>; Holdsworth, Susan <Holdsworth.Susan@epa.gov>; Shumway, Laura <Shumway.Laura@epa.gov>; Kutschenreuter, Kathleen <Kutschenreuter.Kathleen@epa.gov>; Davis, CatherineM <Davis.CatherineM@epa.gov>; Temple, Leslie <temple.leslie@epa.gov>; Richardson, Matthew <Richardson.Matthew@epa.gov>; Allen, Catherine <Allen.Catherine@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Gardner, Thomas <Gardner.Thomas@epa.gov>; Carey, Kyle <Carey.Kyle@epa.gov>; Havard, James <Havard.James@epa.gov>; Rose, Bob <Rose.Bob@epa.gov>; Byrne, Andrew <Byrne.Andrew@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Hough, Palmer <Hough.Palmer@epa.gov>; Barr, Janine <barr.janine@epa.gov>; Martinez, Menchu <martinez.menchu-c@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Rodia, Monica <Rodia.Monica@epa.gov>
Subject: Draft NTWC/EPA Call Summaries for Review: Jan - Mar

All,

Attached please find the draft NTWC/EPA monthly conference call notes for the January – March 2018 calls. My sincere apologies to everyone for the delay in providing the previous draft call summaries for review and comment; I will commit to a more timely review process in the future. If you should have comments, edits, or questions regarding any of the three draft call summaries, if you could please let me know by **COB, Monday, May 9**. Once finalized, the summary will be posted to the NTWC website. Thank you.

Karen Gude

Tribal Program Coordinator

U.S. EPA/Office of Water

Phone: (202) 564-0831

National Tribal Water Council and EPA
Monthly Conference Call
Wednesday, March 14, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EST
Conference Number: (202) 991-0477; ID Code: Ex. 6 - Personal Privacy

Reminder: Next NTWC & NTWC/EPA calls are scheduled for April 11, 2018

1) Introductions
2) Drinking Water Workshop
3) Update from Prior NTWC Call
4) EPA Office of Research and Development: Strategic Research Action Plans
5) Report Out on Hypoxia Task Force Meeting
6) Regulatory Updates & Tribal Consultation Information
   a) Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water
   b) Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop
   c) Tribal Consultation Opportunity, Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 C.F.R. § 25.5
   d) Tribal Consultation and Coordination on the National Primary Drinking Water Regulation for Lead and Copper
7) Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements
   a) Planning for Spring NTWC in-person meeting in Washington, DC
   b) Re-launch of NTWC website
   c) Reminders: Planning for 2018 Tribal Lands and Environment Conference

Participants:

Name	Tribe/Organization	Region
NTWC		
Ken Norton, NTWC Chair	Hoopa Valley Tribe	R9
Michael Bolt, NTWC Vice Chair	Cherokee Nation	R4
Rene Rickard	Tuscarora Nation/Haudenosaunee	R2
Shaun Livermore	Poarch Creek Indians	R4
Kathleen Brosemer	Sault Ste. Marie Chippewa Tribe	R5
Micco Emarthla	Seneca-Cayuga Nation	R6
Denise Jensen	Winnebago Tribe of Nebraska	R7
Colin Larrick	Ute Mountain Ute Tribe	R8

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Alex Cabillo	Hualapai Tribe	R9
Phillip Cernera	Coeur d'Alene Tribe	R10
Eric Morrison	Salamantof Tribe	R10
EPA		
Karen Gude	OW	
Sam Russell	OW/OGWDW	
Zoe Ruge	OW/OST	
Janine Barr	OW/OST	
Menchu Martinez	OW/OST	
Danielle Anderson	OW/OST	
Tom Gardner	OW/OST	
Scott Wilson	OW/OWM	
Rose Kwok	OW/OWOW	
Steve Epting	OW/OWOW	
Kyra Reumann-Moore	OW/OWOW	
Tom Wall	OW/OWOW	
Suzanne Van Drunick	ORD	
Monica Rodia	ORD	
Andrew Baca	AIEO	
Institute for Tribal Professionals		
Ann Marie Chischilly		
Elaine Wilson		
ATTAIN, LLC		
Pamela Blasdell		

1) **Introductions**

2) **Drinking Water Workshop** – Sam Russell, OW/OGWDW
A National Capacity Development and Operator Workshop is scheduled for August 8 – 10, 2018, in Indianapolis, Indiana. The triennial workshop is a partnership between the Association of State Drinking Water Administrators and EPA. This year there is a tribally focused discussion on August 8, followed by tribally focused breakout sessions on the August 9-10. Participation is limited to 25 tribal attendees. Tribes interested in attending or with questions should contact Sam Russell.

3) **Update from Prior NTWC Call** – Ken Norton, NTWC
The NTWC spent a large portion of the call discussing the Waters of the U.S. (WOTUS) Step 2 rulemaking tribal workshop. Michael Bolt and Denise Jensen participated in the workshop and provided an overview, with their thoughts and reflections on the workshop.

It was brought to the Council's attention that EPA Regions have asked the tribes that participated in the workshop to provide comments on how the WOTUS under the Clean Water Act (CWA) regulatory reform will impact their tribal laws or abilities to enact their CWA responsibilities. The NTWC wants to provide their input; however the March 19, 2018 deadline and narrowing the activity request for just the workshop participants is

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unacceptable.

The NTWC also discussed procedures for new applicants to the NTWC and meeting dates for the bi-annual spring meeting at EPA headquarters.

4) **EPA Office of Research and Development: Strategic Research Action Plans** – Suzanne Van Drunick, National Program Director (NPD), EPA ORD Safe and Sustainable Water Resources Research Program & Monica Rodia, ORD

EPA's Office of Research and Development (ORD) has issued six Strategic Research Action Plans (StRAPs) laying out its research agenda. The plans may be of interest to the tribes, especially the Safe and Sustainable Water Resources Research Program, which includes significant nutrient work. Over the next six months, ORD will lead a refresh of its StRAPs, which affords a unique opportunity to engage with tribes during this research planning phase to build partnerships that can help ensure ORD will build tribal research capacity. These StRAPs will outline a four-year strategy, 2019 to 2022, for delivering research and results to support EPA's mission to protect human health and the environment. ORD will do this through interactions with tribes supported by a combination of teleconferences, in-person meetings, and informational sessions with EPA tribal partnership groups and RTOCs, ahead of tribal consultation.

Suzanne presented a PowerPoint presentation of ORD efforts regarding its refresh of its StRAPs, Suzanne indicated that ORD is interested in receiving input from tribes (in addition to state and Regional input) on tribal research priorities. She noted that with diminishing resources, the Agency will need to be strategic in identifying its greatest research needs and the resources available to meet those needs.

ORD plans to reach out to tribes first through the Regional Tribal Operations Committees and the Agency's tribal partnership groups. Formal consultations is anticipated to start this summer. The first draft is anticipated by September 2018 and will be reviewed in the fall by the Regional science liaisons.

Ken Norton followed-up by explaining the NTWC is worried about limited ORD resources under the allocation process and sees it as a detriment to tribes accessing ORD's technology. He noted that the NTWC is working on their priorities and objectives for FY19, with cyanobacteria and nutrient pollution being key interests.

5) **Report Out on Hypoxia Task Force Meeting** – Michael Bolt, NTWC & Kyra Reumann-Moore, OW/OWOW

Kyra gave an overview of the mission and activities of the Hypoxia Task Force (HTF), noting that the task force is comprised of 12 states and five federal agencies, and includes NTWC representation. The HTF works together towards the reduction of nutrient pollution in the Mississippi River Basin (MRB) and the Gulf of Mexico (GOM). The goal is to reduce five of the known hypoxics in the GOM to less than 5,000 kilometers squared by 2035 and reduce nutrient load to the GOM by 20% by 2025.

The last HTF meeting was held in Arlington, VA, in late January/February 2018. The

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National Associations of State Departments of Agriculture participated. States reported out on their reduction strategies. The nonpoint source and point source HTF subgroups provided report outs. There were also updates on recent scientific and modeling advances. The HTF also discussed different opportunities for communication and outreach, as well as relationship development.

Michael Bolt participates in the HTF, and gave a presentation at the HTF meeting. He noted that the largest hypoxia zone was recorded this past year in the GOM, which was roughly comparable to size of New Jersey.

During the HTF, Michael presented on how to better engage tribes to the HTF. The MRB covers a large portion of the U.S., and there are many tribes in the area. He focused on two key issues:

- *The need for continuous water quality monitoring* – He noted that the biggest barrier to continuous monitoring is the cost of implementing a U.S. Geological Survey (USGS) gauging station. Michael indicated that if EPA and USGS could come up with a more affordable approach to stream gauge technology, more tribes could potentially be able to take part in this initiative. He also noted that the Cherokee Nation has initiated a dialog with USGS with respect to affordable technologies, and offered that once there was more information, to share with the NTWC.
- *Encouraging tribes to work more with the U.S. Department of Agriculture (USDA)* - Michael noted that USDA has more funding than EPA for dealing with nutrient pollution, though he noted that USDA's funding structure can be can be problematic for tribes. During the meeting, Michael provided information from a report authored by authored by Janie Hipp and Colby Duren of the Indigenous Food and Agriculture Initiative at the University of Arkansas School of Law---Regaining Our Future: An Assessment of Risks and Opportunities for Native Communities in the 2018 Farm Bill---which provides information on Farm Bill issues as they relate to Indigenous populations in the U.S. Michael noted that the USDA indicated that the document will be under consideration when the next farm bill is considered.

Denise Jensen asked whether the continuous monitoring stations being discussed monitored for total phosphorous, nitrogen, or both. Michael indicated that it largely depends on the cost of the monitoring station in question, and that the station that the Cherokee Nation has monitors nitrates. However, he noted that he is encouraged by the constantly evolving technology, which hopefully will yield low cost monitoring of both N and P.

6) Regulatory Updates & Tribal Consultation Information

a) Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water – Scott Wilson, OW/OWM

On February 20, 2018, EPA published a Federal Register notice requesting comment on how pollutants that are discharged into groundwater that flows through a direct connection into jurisdictional surface waters should be treated

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under the Clean Water Act (CWA). Over the years, the courts, EPA, states, tribes and local communities have addressed this type of pollutant source in different ways under the CWA. EPA is seeking comment on whether it should consider providing guidance or rulemaking to potentially clarify how discharges from point sources that reach jurisdictional surface waters through groundwater are treated under the CWA and in the NPDES permitting program. The comment period is open till May 21, 2018.

In response to clarifying questions, Scott noted that the action is not a rulemaking, guidance document, or amendment to an existing guidance document, rather the Agency is seeking comment on whether additional clarification on this issue is needed.

b) **Update: Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop –** Rose Kwok, OW/OWOW

The NTWC discussed the release of a recent draft document, *Draft Summary of Potential Effects to Clean Water Act Programs for Tribal Waters*. EPA developed the draft summary of current tribal CWA programs to assist in its consideration of tribal programs in light of the EPA and the Army's rulemaking to revise the definition of WOTUS under the Clean Water Act, and are seeking review by tribes of the draft document. EPA drafted this assessment from existing publicly available sources and EPA's in-house expertise, and would like tribal input on this draft document.

When the draft document was distributed, it was sent to the EPA Regional Wetland Managers, who were asked to work with the Regional Indian Coordinators to distribute the draft document to the tribes in their Region. NTWC members expressed concerns that they had not received a copy of the draft document, and would need at least 30 days to be able to provide comments. Rose commented to following up with her management on this request.

- Action: Karen Gude will follow-up management about extending the time line past March 19, 2018.

The NTWC also discussed the recent In-Person Tribal Technical Workshop that was held in early March and the upcoming proposed step 2 rulemaking. In response to a question from Ken regarding how the step 2 proposed rule comment period and outreach effort would occur, Rose noted that typically, the EPA provides at least a 60-90 day comment period, though the Agency does not currently have a timeframe for this proposed rule. Rose acknowledged that the agencies have heard from tribes who felt that they had not been given a lot of time to provide comments on the recent rulemaking, which added an applicability date to 2015 Clean Water Rule. A public docket will be opened once the proposed rule is issued, and will include the supporting documentation for the proposed (e.g., the draft tribal assessment and draft economic assessment). The agencies are

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currently working to develop a list of potential tribal outreach and engagement opportunities with tribes and tribal representatives once the proposed rule is issued.

c) **Tribal Consultation Opportunity, Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 C.F.R. § 25.5** – Janine Barr, OW/OST
This action was discussed in detail during the February NTWC/EPA call. Janine reminded the Council that an informational webinar is scheduled for Thursday, March 15, 2018. Registration for the webinar is on https://tcots.epa.gov.

d) **Tribal Consultation and Coordination on the National Primary Drinking Water Regulation for Lead and Copper** – Karen Gude, OW
This action has been discussed in detail during previous NTWC/EPA calls. Karen reminded the Council that the comment period closes this Friday, March 16, 2018. Comments should be sent to: lcrconsultation@epa.gov. Ken noted the NTWC intends to submit comments.

7) **Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements**

a) **Planning for Spring NTWC in-person meeting in Washington, DC – Ann Marie Chischilly & Elaine Wilson, ITEP** – The NTWC has identified scheduling conflicts regarding the initial proposed meeting dates that the Council had voted on. Elaine will send out another doodle poll to the NTWC members to identify another meeting date.

b) **Re-launch of NTWC website** – Ann Marie Chischilly & Elaine Wilson, ITEP

Elaine announced the launch of the NTWC's new website, which can be found at: **http://www.nau.edu/ntwc.**

c) **Reminders: Planning for 2018 Tribal Lands and Environment Conference**
- Spokane Convention Center in Spokane, WA, August 13-16, 2018; Deadline for Session Proposals: May 4, 2018
- More information: https://www7.nau.edu/itep/main/Conferences/confr_tlef

There are seven tracks planned, and two are slated for water programs. Training will be available on the first day.

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To: Zobrist, Marcus[Zobrist.Marcus@epa.gov]
Cc: Wilson, Scott[Wilson.Js@epa.gov]; Ramach, Sean[Ramach.Sean@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Maher, Lauren[Maher.Lauren@epa.gov]
From: Wehling, Carrie
Sent: Fri 5/11/2018 6:08:49 PM
Subject: RE: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater
DHC.Record of Meeting on Direct Hydrological Connection.docx

Here are my notes of the EEI meeting last week. Matt is aware that I have drafted this for the docket.

Thanks.

Carrie

Caroline (Carrie) Wehling

Assistant General Counsel

Water Law Office

U.S. Environmental Protection Agency

Washington DC 20004

202-564-5492

wehling.carrie@epa.gov

From: Zobrist, Marcus
Sent: Friday, May 11, 2018 12:49 PM
To: Wehling, Carrie <Wehling.Carrie@epa.gov>
Cc: Wilson, Scott <Wilson.Js@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater

Carrie,

79 comments in the docket, so far. Comments available at:

https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface

Send you notes to Scott and I. We can see about how to add them to the docket.

- Marcus

From: Wehling, Carrie
Sent: Friday, May 11, 2018 11:49 AM
To: Zobrist, Marcus <Zobrist.Marcus@epa.gov>
Cc: Wilson, Scott <Wilson.Js@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater

Thanks, Marcus. Do you all have a sense for how the docket is coming on this issue?

PS I have notes from a meeting with EEI on this that Lee, Dave and Matt attended that I will draft up for the docket – who should I send it to for putting into the docket?

Caroline (Carrie) Wehling

Assistant General Counsel

Water Law Office

U.S. Environmental Protection Agency

Washington DC 20004

202-564-5492

wehling.carrie@epa.gov

From: Zobrist, Marcus
Sent: Wednesday, May 09, 2018 11:37 AM
To: Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Gutierrez, Sally <Gutierrez.Sally@epa.gov>
Cc: Klinger, Adam <Klinger.Adam@epa.gov>; Wilson, Scott <Wilson.Js@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater

Andrew, Sally:

FYI: Attached is testimony at the April 17th "Hearing on Hearing on the Appropriate Role of States and the Federal Government in Protecting Groundwater" before the Senate Committee on Environment and Public Works.

It is worth a read.

The attachment is also available at:
https://www.epw.senate.gov/public/_cache/files/9/6/9630882d-145e-45b7-9b4a-f10923f50821/BB6DB70BC61346A61043F2DC35E48C48.spw-041818.pdf

Marcus Zobrist |

Chief, Industrial Branch

U.S. Environmental Protection Agency

Office of Wastewater Management | Water Permits Division

Office: (202) 564-8311 Ex. 6 - Personal Privacy

Zobrist.Marcus@epa.gov

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To: Wehling, Carrie[Wehling.Carrie@epa.gov]
Cc: Wilson, Scott[Wilson.Js@epa.gov]; Ramach, Sean[Ramach.Sean@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]
From: Zobrist, Marcus
Sent: Fri 5/11/2018 4:48:42 PM
Subject: RE: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater

Carrie,

79 comments in the docket, so far. Comments available at:

https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface

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- Marcus

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To: Zobrist, Marcus <Zobrist.Marcus@epa.gov>
Cc: Wilson, Scott <Wilson.Js@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater

Thanks, Marcus. Do you all have a sense for how the docket is coming on this issue?

PS I have notes from a meeting with EEI on this that Lee, Dave and Matt attended that I will draft up for the docket – who should I send it to for putting into the docket?

Caroline (Carrie) Wehling

Assistant General Counsel

Water Law Office

U.S. Environmental Protection Agency

Washington DC 20004

202-564-5492

wehling.carrie@epa.gov

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Sent: Wednesday, May 09, 2018 11:37 AM
To: Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Gutierrez, Sally <Gutierrez.Sally@epa.gov>
Cc: Klinger, Adam <Klinger.Adam@epa.gov>; Wilson, Scott <Wilson.Js@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: FYI: Testimony at Senate EPW hearing in on the Appropriate Role of States and the Federal Government in Protecting Groundwater

Andrew, Sally:

FYI: Attached is testimony at the April 17th "Hearing on Hearing on the Appropriate Role of States and the Federal Government in Protecting Groundwater" before the Senate Committee on Environment and Public Works.

It is worth a read.

The attachment is also available at:
https://www.epw.senate.gov/public/_cache/files/9/6/9630882d-145e-45b7-9b4a-f10923f50821/BB6DB70BC61346A61043F2DC35E48C48.spw-041818.pdf

Marcus Zobrist |

Chief, Industrial Branch

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Office of Wastewater Management | Water Permits Division

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To: Gutierrez, Sally[Gutierrez.Sally@epa.gov]; Zobrist, Marcus[Zobrist.Marcus@epa.gov]; Wilson, Scott[Wilson.Js@epa.gov]
Cc: Scott Thomas (sthomas@fclaw.com)[sthomas@fclaw.com]; Paul Gutermann (Ex. 6 - Personal Privacy @gmail.com)[Ex. 6 - Personal Privacy @gmail.com]
From: Nancy Johannesmeyer
Sent: Tue 5/1/2018 2:34:14 PM
Subject: Thank you

Dear Ms. Gutierrez, Mr. Zobrist and Mr. Wilson:

I would like to thank you for taking the time to speak with Mr. Thomas, Mr. Gutermann and me last Friday concerning the request for comment on Clean Water Act coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water. It is our hope that you can see the difficulty and complications that may arise in applying Clean Water Act coverage of this sort to a mining facility such as was described in our meeting. Asarco intends to submit written comments which will largely cover what we discussed our meeting.

If you have any questions or if we can provide any clarifying information, please do not hesitate to contact one of us.

Regards,

Nancy Johannesmeyer

Sr. Manager, Environmental Affairs

Office: (520) 798-7792

Ex. 6 - Personal Privacy

njohannesmeyer@asarco.com

To: Wilson, Scott[Wilson.Js@epa.gov]
From: Arnie Schiffman
Sent: Mon 4/23/2018 3:44:29 PM
Subject: Re: DOCKET ID: EPA-HQ-OW-2018-0063-0001

Thanks

On Mon, Apr 23, 2018 at 11:24 AM, Wilson, Scott <Wilson.Js@epa.gov> wrote:

Hi Arnie:

There is a list of permits on page 12 of the attached document. As I mentioned, there are not a lot.

Scott Wilson

Energy Permitting Coordinator

Industrial Permits Branch

USEPA Office of Wastewater Management

1200 Pennsylvania Ave., NW

Washington, DC 20460

202-564-6087

Mail Code: 4203m

From: Arnie Schiffman [mailto:[redacted]@gmail.com]
Sent: Monday, April 23, 2018 9:46 AM
To: Wilson, Scott <Wilson.Js@epa.gov>
Subject: DOCKET ID: EPA-HQ-OW-2018-0063-0001

Hi

Follow up to my call today. I would appreciate a list (and a description, if available) of permits issued under the current EPA policy of:

"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."

Thanks

Arnold Schiffman

609-371-5966

West Windsor, NJ 08550

To: Ex. 6 - Personal Privacy @gmail.com[k Ex. 6 - Personal Privacy @gmail.com]; michbolt@nc-cherokee.com[michbolt@nc-cherokee.com]; dan.kusnierz@penobscotnation.org[dan.kusnierz@penobscotnation.org]; rrickard@hetf.org[rrickard@hetf.org]; nancyschuldt@fdlrez.com[nancyschuldt@fdlrez.com]; memarthla@sctribe.com[memarthla@sctribe.com]; clarrick@utemountain.org[clarrick@utemountain.org]; emorrison-dia@gci.net[emorrison-dia@gci.net]; Ex. 6 - Personal Privacy @hotmail.com[Ex. 6 - Personal Privacy @hotmail.com]; philc@cdatribe-nsn.gov[philc@cdatribe-nsn.gov]; slivermore@pci-nsn.gov[slivermore@pci-nsn.gov]; kbrosemer@saulttribe.net[kbrosemer@saulttribe.net]; Russell, Sam[russell.sam@epa.gov]; Williams, Bo (James)[Williams.James@epa.gov]; Lopez-Carbo, Maria[Lopez-Carbo.Maria@epa.gov]; Buffo, Corey[Buffo.Corey@epa.gov]; Anderson, Danielle[Anderson.Danielle@epa.gov]; Leutner, Fred[Leutner.Fred@epa.gov]; Ruge, Zoe[ruge.zoe@epa.gov]; Bathersfield, Nizanna[Bathersfield.Nizanna@epa.gov]; Delehanty, Robyn[Delehanty.Robyn@epa.gov]; Epting, Steve[epting.steve@epa.gov]; Holdsworth, Susan[Holdsworth.Susan@epa.gov]; Shumway, Laura[Shumway.Laura@epa.gov]; Kutschenreuter, Kathleen[Kutschenreuter.Kathleen@epa.gov]; Davis, CatherineM[Davis.CatherineM@epa.gov]; Temple, Leslie[temple.leslie@epa.gov]; Richardson, Matthew[Richardson.Matthew@epa.gov]; Allen, Catherine[Allen.Catherine@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Gardner, Thomas[Gardner.Thomas@epa.gov]; Carey, Kyle[Carey.Kyle@epa.gov]; Havard, James[Havard.James@epa.gov]; Binder, Jonathan[Binder.Jonathan@epa.gov]; Willson, Damian[WILLSON.DAMIAN@EPA.GOV]; Byrne, Andrew[Byrne.Andrew@epa.gov]; Wilson, Scott[Wilson.Js@epa.gov]; denise.jensen@winnebagotribe.com[denise.jensen@winnebagotribe.com]; Soscia, Mary Lou[Soscia.Marylou@epa.gov]; Negash, Lily[Negash.Lily@epa.gov]; Jonesi, Fran[Jonesi.Fran@epa.gov]
From: Gude, Karen
Sent: Tue 5/8/2018 6:00:44 PM
Subject: Draft NTWC/EPA April 2018 Call Summaries for Review and Comment by COB 6/4
Draft 4-11-18 NTWC EPA Call Summary for Review.docx

All,

Attached please find the draft NTWC/EPA monthly conference call notes for the April 2018 NTWC-EPA conference call. If you should have comments, edits, or questions regarding any of the three draft call summaries, if you could please let me know by **COB, Monday, June 4**. Once finalized, the summary will be posted to the NTWC website. Thank you.

Karen Gude

Tribal Program Coordinator

U.S. EPA/Office of Water

National Tribal Water Council and EPA
Monthly Conference Call
Wednesday, April 11, 2018
EPA Conference Room: East 2369B
2:00-3:30 pm EDT

1) Introductions
2) Update from Prior NTWC Call
3) Regulatory Updates & Tribal Consultation Information
   a) Reminder: Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water
   b) Update: Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop
   c) Tribal Consultation Opportunity, Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions
4) Budget Update
5) Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements
   a) TAS Application Update
   b) National Leadership Summit on PFAS
   c) Planning for Spring NTWC in-person meeting in Washington, DC
   d) Reminder: Planning for 2018 Tribal Lands and Environment Conference

Reminder: Next NTWC & NTWC/EPA calls are scheduled for May 9, 2018

1) Introductions – Karen Gude, OW

Name	Tribe/Organization	Region
NTWC		
Ken Norton, NTWC Chair	Hoopa Valley Tribe	R9
Dan Kusnierz	Penobscot Indian Nation	R1
Rene Rickard	Tuscarora Nation/Haudenosaunee	R2
Shaun Livermore	Poarch Creek Indians	R4
Nancy Schuldt	Fond Du Lac Band of Lake Superior Chippewa	R5
Micco Emarthla	Seneca-Cayuga Nation	R6
Denise Jensen	Winnebago Tribe of Nebraska	R7
EPA		
Karen Gude	OW/IO	
Danielle Anderson	OW/OST	
Zoe Ruge	OW/OST	
Scott Wilson	OW/OWM	
Steve Epting	OW/OWOW	
Rose Kwok	OW/OWOW	
ITEP		

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Ann Marie Chischilly		
Elaine Wilson		
ATTAIN, LLC		
Pamela Blasdell		

2) **Update from Prior NTWC Call** – Ken Norton, NTWC
The National Tribal Water Council (NTWC) discussed planning for the upcoming in-person meeting in Washington, DC, scheduled for June 5 – 7, 2018. The NTWC reviewed the draft agenda topics and worked to formulate the draft agenda. Ken will share the draft agenda with Karen Gude once it has been developed.

A majority of the call was spent discussing the NTWC's comments on the draft Waters of the U.S. (WOTUS) tribal assessment, looking at potential effects for tribes. Colin Larrick and Elaine Wilson are working on drafting comments on the draft tribal assessment.

The NTWC is also working on a framework and strategy for drafting comments on the discharge of pollutants through a hydrologic connection to surface water.

3) **Regulatory Updates & Tribal Consultation Information**
   a) **Reminder: Opportunity for Public Comment: Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water** – Scott Wilson, OW/OWM

For more information: https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface

Scott reminded the NTWC this effort is not to be confused with the WOTUS rulemaking.

There have been several court cases with differing opinions as to what is and is not a direct hydrologic connection to surface water regulated under a National Pollutant Discharge Elimination System (NPDES) permit. The administration has asked for public comment on whether EPA should take action to clarify this issue. The public comment period ends on May 21, 2018.

In response to a question from Ken regarding whether there are additional EPA technical documents relating to this issue, Scott noted that the only Agency document that references a hydrologic connection to surface water is in the preamble to the Concentrated Animal Feeding Operation (CAFO) proposed rule.

Nancy Schuldt explained she is working with the Council to prepare comments on this action, noting that it is an important issue for the tribes in northwest Minnesota. She indicated that EPA Region 5 has been clear on their current mining permitting recommendations; however, the state is not been following the recommendations. She noted that there are clear examples where there is a connection via shallow groundwater from mining pollutants in tailing basins that have degraded downstream aquatic

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resources. She is planning to present this as a case study at her Clean Water Act (CWA) Tribal Forum presentation in May.

- Action: Karen Gude provide the preamble statement from the CAFO proposed rule to the NWTC.
- Action: Nancy Schuldt will provide the NTWC with the recommendations from EPA Region 5 to the state where they cite relevant case law and the arguments for why it is relevant.

b) Update: Forthcoming Proposal to Revise the Definition of "Waters of the United States" & Report Out on In-Person Tribal Technical Workshop – Rose Kwok, OW/OWOW

For more information: https://www.epa.gov/wotus-rule

EPA plans to distribute a summary from the March in-person tribal workshop on the WOTUS rulemaking to workshop participants before it is released to the public. NTWC participants, Denise Jensen and Michael Bolt, will receive a copy of the summary.

Step 2 Update -
EPA is working on the proposed step 2 rule. It is anticipated that the proposed rule will be released in late spring/early summer. Before the proposed rule is issued, it will undergo interagency review at the Office of Management and Budget (OMB), which generally can take up to 90 days. Following interagency review, the proposed rule will be published in the Federal Register for public comment.

EPA will continue to honor requests for tribal consultation. Once the proposed rule is issued, EPA anticipates that there will likely be additional requests for individual tribal consultation.

EPA has released a draft tribal assessment on the current status of tribes across the country regarding CWA programs. Comments on the draft tribal assessment are due by April 15, 2018. To date, a few tribes have provided comments. Comments should be sent to: CWAWOTUS@epa.gov. Rose noted that the tribal assessment will be included with other technical support documents in the docket once the proposed rule is issued, and the public will have an additional opportunity to comment on the assessment at that time.

Per a question from Ken, Rose noted that prior to the proposed rulemaking, the Agency is looking to update analytical studies, including the economic analysis for the proposed rule, and that those documents would be available for review in the docket of the proposed rule. Ken asked whether the Agency was considering revising its economic analysis for the proposed rule, specifically to address the economic benefit of wetlands. Rose noted that economists were at one point interested in adding additional studies to the economic analysis relating to value of wetlands that met peer review standards and that were more recent than those used in 2015 Clean Water Rule. She indicated that she

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was not sure whether additional literature has been identified for the proposed rule's economic analysis.

Ken indicated that he would like to further discuss the WOTUS rulemaking at the June NTWC-EPA in-person meeting, and that he would provide a summary of questions that the Council was interested in having addressed to the EPA in advance of the meeting.

c) **Tribal Consultation Opportunity, Draft Informational Document, Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 C.F.R. § 25.5** – Karen Gude, OW
EPA developed a draft document that provides possible options for WQS-authorized tribes and states interested in using modernized technology to meet relevant public hearing requirements. EPA created a draft informational document to help WQS-authorized tribes chose whether to integrate technology by making minor changes or substantial changes for public hearings. EPA initiated formal tribal consultation to receive input from tribes on the draft informational document. Comments on the draft document are due April 20, 2018. EPA held an informational webinar for tribes on this action on March 15, 2018. It was attended by about two dozen tribal representatives. A copy of the webinar presentation slides is available on https://tcots.epa.gov.

4) **Budget Update** – Karen Gude, OW
Karen provided a brief overview of the Agency's FY18 budget, which Congress signed into law on March 23. Overall, the Agency's FY 18 budget maintains EPA funding at FY17 levels, but includes major infrastructure investments, including $2.9 billion for the State Revolving Funds and $63 million for the Water Infrastructure Finance and Innovation Act (WIFIA) program. No significant riders were included for EPA's Office of Water, and the proposed OW program eliminations from the FY18 President's Budget were not accepted by Congress.

The FY18 budget includes funding for three new grant programs relating to drinking water, which tribes will be eligible for, including: $20M for small and disadvantaged communities to help public water systems meet SDWA requirements; $10M for replacement of lead service lines, treatment, and testing; and $20M for lead testing in schools and child care facilities. More information on these grant programs is anticipated later this summer.

The FY18 budget also includes $10M for a new multipurpose grant program for states and tribes. Information on how this funding will be allocated and administered is still being determined.

5) **Additional OW Program and Tribal Updates for Upcoming OW or Tribal Activities/Announcements**
a) **TAS Application Update** – Karen Gude, OW
Karen reported that there has been movement on the regulatory TAS applications awaiting approval, with three of the four CWA and SDWA-related TAS regulatory applications that had been pending approval being approved.

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b) **National Leadership Summit on PFAS**, May 22-23, Washington, DC – Karen Gude, OW

On May 22-23, EPA will hold a National Leadership Summit in Washington, DC, for EPA to engage with states, tribes, and other partners on the issue of per- and polyfluoroalkyl substances (PFAS). Following the summit, EPA will travel to states with communities impacted by PFAS to further engage on ways the Agency can best support the work that is being done at the state, local, and tribal levels. Karen distributed information about the leadership summit to NTWC members via email, and the Agency has sent letters to the leaders of all federally recognized tribes alerting them to this engagement opportunity.

c) **Planning for Spring NTWC in-person meeting in Washington, DC** – Ann Marie Chischilly & Elaine Wilson, ITEP

The NTWC in-person meeting is scheduled for June 5-7, in Washington, DC. ITEP continues planning for the meeting, in coordination with the NTWC and EPA. ITEP will coordinated with Karen Gude to arrange for a possible catered lunch at the meeting. Ken will provide a summary of the topics the NTWC will request to discuss with EPA.

d) **Reminder: Planning for 2018 Tribal Lands and Environment Forum** – Karen Gude, OW

The forum is scheduled to take place at the Spokane Convention Center in Spokane, WA, August 13-16, 2018. The deadline for submitting session proposals is May 4, 2018.
For more information: https://www7.nau.edu/itep/main/Conferences/confr_tlef.

A session is being scheduled for the NTWC at the forum. Ken noted the National Tribal Caucus and NTWC may schedule meetings at the forum.

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To: Gutierrez, Sally[Gutierrez.Sally@epa.gov]; Zobrist, Marcus[Zobrist.Marcus@epa.gov]; Wilson, Scott[Wilson.Js@epa.gov]
Cc: Nancy Johannesmeyer[NJohannesmeyer@asarco.com]; Paul Gutermann[Ex. 6 - Personal Privacy@gmail.com]
From: THOMAS, SCOTT
Sent: Fri 5/4/2018 11:40:21 PM
Subject: RE: Thank you

Ms. Gutierrez, Mr. Zobrist and Mr. Wilson,

I also wanted to (belatedly) thank you for taking the time to meet with us last week. I know you are all insanely busy, so we really do appreciate you finding a little time to sit down with us.

I also wanted to confirm that we will follow a suggestion Marcus made at the meeting. We will address the question of the applicability of the technology-based effluent limitation guidelines to seepage in our comments submitted in response to the Federal Register notice on discharges to hydrologically connected groundwater (due May 21), but we will also send a letter to Marcus and Rob Wood raising the same question independently of that process.

Thanks again for taking some time to meet with us.

Scott

Scott H. Thomas, Of Counsel

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From: Nancy Johannesmeyer [mailto:NJohannesmeyer@asarco.com]
Sent: Tuesday, May 01, 2018 7:34 AM
To: gutierrez.sally@epa.gov; zobrist.marcus@epa.gov; wilson.js@epa.gov
Cc: THOMAS, SCOTT; Paul Guterman Ex. 6 - Personal Privacy @gmail.com)
Subject: Thank you

Dear Ms. Gutierrez, Mr. Zobrist and Mr. Wilson:

I would like to thank you for taking the time to speak with Mr. Thomas, Mr. Gutermann and me last Friday concerning the request for comment on Clean Water Act coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water. It is our hope that you can see the difficulty and complications that may arise in applying Clean Water Act coverage of this sort to a mining facility such as was described in our meeting. Asarco intends to submit written comments which will largely cover what we discussed our meeting.

If you have any questions or if we can provide any clarifying information, please do not hesitate to contact one of us.

Regards,

Nancy Johannesmeyer

Sr. Manager, Environmental Affairs

Ex. 6 - Personal Privacy

Cell: (520) 237-6293

njohannesmeyer@asarco.com

ASARCO
GRUPO MEXICO

To: Debby@sawtoothlaw.com[Debby@sawtoothlaw.com]
Cc: david@sawtoothlaw.com[david@sawtoothlaw.com]; Wilson, Scott[Wilson.Js@epa.gov]
From: Zobrist, Marcus
Sent: Mon 5/21/2018 8:42:55 PM
Subject: FW: Docket ID No. EPA-HQ-OW-2018-0063

Dear Ms. Long:

Thank you for your letter and email dated May 18, 2018 to Scott Wilson of my staff, regarding the request for comment on point source discharges made through a direct hydrologic connection. You letter requests an extension of the comment period for 60 days.

After considering your request, we believe that the 90-day public comment period was appropriate and we have not chosen to grant an extension. Please note that this was only a request for comment on whether the EPA should take an action such as a rulemaking or provide additional guidance. No formal decision has been made regarding a future action; however, your organization will have an opportunity to comment on any action that the EPA may propose in the future.

Thank you again for your interest in this issue. Please feel free to contact me if you should have any additional questions.

Marcus Zobrist |

Chief, Industrial Branch

U.S. Environmental Protection Agency

Office of Wastewater Management | Water Permits Division

Office: (202) 564-8311 Ex. 6 - Personal Privacy

Zobrist.Marcus@epa.gov

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From: Debby Long [mailto:Debby@sawtoothlaw.com]
Sent: Friday, May 18, 2018 3:57 PM
To: Wilson, Scott <Wilson.Js@epa.gov>
Cc: David Claiborne <david@sawtoothlaw.com>
Subject: Docket ID No. EPA-HQ-OW-2018-0063

Dear Mr. Wilson,

Please find attached correspondence of today's date from David Claiborne concerning Docket ID No. EPA-HQ-OW-2018-0063, Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water.

Please contact our office if you have any questions. Thank you.

Debby Long

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To: Arnie Schiffman[Ex. 6 - Personal Privacy]@gmail.com]
From: Wilson, Scott
Sent: Mon 4/23/2018 3:24:29 PM
Subject: RE: DOCKET ID: EPA-HQ-OW-2018-0063-0001
molycorp fact-2f_bmps.docx

Hi Arnie:

There is a list of permits on page 12 of the attached document. As I mentioned, there are not a lot.

Scott Wilson

Energy Permitting Coordinator

Industrial Permits Branch

USEPA Office of Wastewater Management

1200 Pennsylvania Ave., NW

Washington, DC 20460

202-564-6087

Mail Code: 4203m

From: Arnie Schiffman [mailto:[Ex. 6 - Personal Privacy]@gmail.com]
Sent: Monday, April 23, 2018 9:46 AM
To: Wilson, Scott <Wilson.Js@epa.gov>
Subject: DOCKET ID: EPA-HQ-OW-2018-0063-0001

Hi

Follow up to my call today. I would appreciate a list (and a description, if available) of permits issued under the current EPA policy of:

"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."

Thanks

Arnold Schiffman

Ex. 6 - Personal Privacy

West Windsor, NJ 08550

NPDES PERMIT NO. NM0022306
FACT SHEET

FOR THE DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES

APPLICANT:	Molycorp, Inc. P.O. Box 469 Questa, NM 87556
ISSUING OFFICE:	U.S. Environmental Protection Agency Region 6 1445 Ross Avenue Dallas, Texas 75202-2733
PREPARED BY:	J. Scott Wilson Environmental Scientist NPDES Permits Branch (6WQ-P) Water Quality Protection Division TELEPHONE: 214-665-7511 FAX: 214-665-2191 EMAIL: wilson.js@epa.gov
PERMIT ACTION:	Proposed reissuance of the current permit issued September 10, 1993 with an effective date of October 15, 1993 and an expiration date of October 14, 1998.
DATE PREPARED:	May 17, 2000

40CFR CITATIONS: Unless otherwise stated, citations to 40CFR refer to promulgated regulations listed at Title 40, Code of Federal Regulations, revised as of 7/1/98.

CERTIFICATION: The permit is in the process of certification by the State agency following regulations promulgated at 40CFR124.53. A draft permit and draft public notice will be sent to the District Engineer, Corps of Engineers; to the Regional Director of the U.S. Fish and Wildlife Service; and to the National Marine Fisheries Service prior to the publication of that notice.

FINAL DETERMINATION: The public notice describes the procedures for the formulation of final determinations.

I. PROPOSED CHANGES FROM PREVIOUS PERMIT

It is proposed that the current permit be reissued for a 5-year term.
The changes from the current permit issued September 10, 1993 with an effective date of October 15, 1993 and an expiration date of October 14, 1998 are:

(A) At Outfalls 001 and 002, limits for aluminum, arsenic, cadmium, copper, cyanide, lead, mercury, and molybdenum were recalculated and are proposed to be revised based on water quality standards.

(B) The discharge of pollutants traceable to point source mine operations through a hydrologic connection to the Red River is prohibited. Best Management Practices are required for capturing those hydrologically connected discharges. A compliance schedule to accomplish those practices is also included.

(C) Monitoring requirements for beryllium, chlordane, cobalt, selenium, silver, total residual chlorine, temperature, and vanadium, are proposed to be discontinued at Outfalls 001 and 002.

(G) Limits for chlordane, silver, and total residual chlorine are proposed to be removed at Outfalls 001 and 002.

(E) A compliance schedule of two years is proposed for new, more stringent limits at Outfalls 001 and 002 for aluminum, arsenic, cadmium, copper, cyanide, lead, and mercury.

(F) Limits at storm water Outfalls 004 and 005 for cadmium, copper, mercury, aluminum, silver, chlordane, and total residual chorine were revised based on water quality standards.

(M) Limits for COD, TSS, fluoride, iron, manganese, molybdenum, and zinc were recalculated based on current discharge rates.

The specific effluent limitations and/or conditions will be found in the draft permit.

II. APPLICANT ACTIVITY

Under the Standard Industrial Classification (SIC) Code(s) 1061, the applicant currently operates a mine and mill producing Molybdenum Disulfide.

III. DISCHARGE LOCATION

As described in the application, the plant site is located in Taos County, New Mexico. The discharge(s) are to receiving water(s) named the Red River, in Waterbody Segment Code No. 2119 of the Rio Grande Basin.

IV. RECEIVING WATER USES

The known uses of the receiving water(s) are:

Secondary Contact
Fish Culture
Coldwater Fishery
Irrigation
Livestock Watering
Wildlife Habitat

V. STREAM STANDARDS

The general and specific stream standards are provided in "Water Quality Standards for Interstate and Intrastate Streams in New Mexico," (20NMAC6.1, effective 2/15/00).

VI. FACILITY DESCRIPTION

Molycorp's mine is located in the southern margin of the Questa Caldera. The Caldera was formed in relation to regional continental rifting and the Rio Grande rift which is located to the west. The mine area consists of Pre-Cambrian igneous rocks and sedimentary and igneous based metamorphic rocks. Overlaying those rocks is a thick layer of Tertiary ashflow tuffs and andesitic lava flows. The area also has intrusions of granitic rocks containing mineralized quartz veins which were formed in the late magmatic, post-caldera hydrothermal stage. Those intrusions and the resulting hydrothermal fluid circulation caused intense fracturing of the area's formations and alteration along the margin of the caldera (Allen, et.al., 1999, SPRI, 1995, Molycorp, 1998). The alteration led to widespread pyritization and the deposition of economically important deposits of Molybdenum (Allen, et.al., 1999). In the area of Molycorp's mine, the rock formations contain 1% to 5% Iron Pyrite (Molycorp, Sept. 15, 1998). The presence of Pyrite and other rocks containing sulfide is of concern because chemical reactions which take place during weathering result in acidic drainage which severely impacts water quality.

Operations at Molycorp's Molybdenum mine located near Questa, New Mexico initially began in 1918 and were limited to underground mining until 1965. During those first 46 years, ore milling operations were conducted at the southeast corner of mine's property, near the Red River. Waste rock from those operations was deposited near the mill. In 1965, open pit mining was initiated at the site. During operation of the open pit mine, an estimated 328 million tons of waste rock were removed and deposited in piles, known as waste rock dumps, located on mine property. A new mill was built at the facility, and a pipeline was constructed to carry milling waste to tailings ponds located on Bureau of Land Management lands west of Questa. Open pit mining was discontinued in 1983. Operations since that time have consisted solely of underground mining. All tailings and spent ore are presently piped as a slurry to the tailings ponds.

Mining can be a fairly volatile industry due to fluctuations in the price of minerals. Molycorp has placed the mine on standby on several instances in reaction to depressed prices of Molybdenum. In recent times the Molycorp Questa mine has existed under shut down operations from 1986 until 1989 and from 1992 until 1995. During the more recent period when the mine was shut down (1992-1995) pumping of ground water from the underground workings was also halted. Water filled the underground workings to an elevation of 7,600 feet. They extend down to 7,099 feet whereas the elevation of the portal of the Molycorp tunnel is 7,972 feet and the elevation of the Red River nearest the portal is 7,940 feet.

VII. DISCHARGE DESCRIPTION

Molycorp has discharges in two distinctly different locations, the mine located in the Red River Canyon east of the town of Questa, and at the tailings ponds located just west of Questa. Discharges at the tailings ponds are made through Outfalls 001 and 002. A quantitative description of the discharges at Outfalls 001 and 002, as described in the EPA Permit Application Forms 1 and 2C dated April 13, 1998, are presented in Appendix A of this Fact Sheet. The previous permit authorizes the discharge of storm water from the mine area at outfalls 004 and 005. Molycorp has not discharged at Outfalls 004 or 005; therefore analytical data are not available and are not presented for those outfalls.

In addition to the authorized discharges listed above, other potential discharges to the Red River from seeps and springs in the vicinity of the mine have been raised as issues of concern. Some sources suggest that there is a discharge of waste water originating from waste rock piles and flowing through shallow aquifers in a direct hydrologic connection to the seeps and springs. A discussion of the available information and literature which are relevant to this issue follows.

Direct Hydrologic Connection

In many cases the Clean Water Act does not authorize the regulation of discharges to ground water by an NPDES permit. An example of this is a discharge to non-tributary ground water. Non-tributary ground water is an isolated pocket of ground water which does not flow into surface waters. Those types of discharges to ground water do not have a direct hydrologic connection to Waters of the United States and are not thought to be subject to the NPDES program. Conversely, instances where discharges to ground water have been regulated under NPDES permits are where there is a direct hydrological connection between the discharge, which flows into ground water, and a receiving stream. Such as a case where the soils and/or underground formations are simply a conduit between the discharge and a surface water. NPDES permits and court cases relevant to this issue are discussed later in this Fact Sheet.

Discharges at the Molycorp facility, which have the potential to result from a direct hydrologic connection between waste materials and waters of the United States, have been raised as issues of concern at both the tailings ponds and the mine site. EPA received several

comments on discharges from seeps when the permit authorizing Molycorp's discharges was last reissued in 1993. The permit writer for that action responded that the discharges were not believed to be point source discharges and referred commentors to the New Mexico Environment Division. Since that time more information on the seeps has become available and EPA has gained a much more thorough understanding of the seeps at both the Mine and tailings ponds. This is made evident in later correspondence from the 1993 permit's author to Molycorp's attorney (Humke, 1997). That letter discusses the 1993 Response to Comments and more recent case law on the hydrologic connection issue. It states that at the time of issuance in 1993 EPA did not recognize seepages associated with waste rock piles at the mine, but in future permitting actions they may be considered "point sources" subject to permitting.

From the tailings ponds, leachate infiltrates to groundwater which flows toward the Red River (Abshire, 1998). Vail (September 4, 1993, August 24, 1989) documented this direct hydrologic connection between the tailings ponds and the Red River. Molycorp has installed interception wells to capture the plume from the tailings pond and discharges that water at Outfall 002 as authorized by its NPDES permit. Available information suggests that the ground water plume from the tailings ponds is successfully captured by Molycorp and is not an issue at this time. Therefore, historic seeps to the Red River in the vicinity of the tailings ponds are not proposed to be addressed in the reissued permit.

Seeps in the vicinity of the mine site have been investigated extensively during the time since the last permit was issued. Much has been learned about their characteristics, origin, and effects on water quality in the Red River. Molycorp has hired consultants to produce numerous studies of seeps located at the mine and their possible impacts to the Red River (Vail, 1993, South Pass Resources, Inc.[SPRI], 1995, SRK, 1995, Hutchison, 1997, Schafer, 1997, Chadwick, 1997, Chadwick, 1998, and Robertson, 1999). The State of New Mexico has also examined the mine and its impacts to the Red River (Kent, 1995 and Allen, et.al., 1999). Additional information on the mine and potential impacts to the Red River has also become available through expert testimony for the plaintiffs from the Amigos Bravos versus Molycorp, Inc. case in the United States District Court for the State of New Mexico (Kelsey, 1997, Mink, 1997, and Williams, 1997). Citizens' concerns about water quality in the Red River and impacts resulting from the mine have also prompted EPA to study the issue of mine related seeps in greater detail. In addition to reviewing the various studies on Molycorp's mine and its seeps, EPA had a staff geologist examine the available information on the mine and conduct a site visit (see Abshire, 1998).

Specifically, the issue of concern at Molycorp's mine site is acid rock drainage, which could potentially originate from waste rock piles, flow through the soils and strata at the site, and discharge to the Red River from seeps. During open pit mining, Molycorp significantly modified the mine's rocks by blasting and excavating the pit. The rock was placed in waste piles presently described as: the Sugar Shack West Pile, Sugar Shack South Pile, Spring Gulch Pile, Sulphur Gulch Waste Rock Pile, Capulin Waste Rock Pile, Goathill Waste Rock Pile, and the Middle Waste Rock Pile. This alteration greatly increased the surface area of the rock and made it susceptible to oxidation in the presence of atmospheric oxygen (Allen, et.al., 1999). The result

of oxidation is that sulfide in the waste rock becomes sulfuric acid. The chemical reaction for oxidation of pyrite can be represented as follows:

$$4FeS_2 + 15O_2 + 8H_2O = 2Fe_2O_3 + 8SO_4^{-2} + 16H^+$$

The actual reaction in the field involves intermediate reactions and bacterial catalysts; however, the basic result is that sulfur is reduced to sulfate ions and acidity is increased (Allen, et.al., 1999 and Robertson GeoConsultants, Inc., 1999). As a result of this process, if water from rainfall or snow melt percolates through the waste rock piles it can become highly acidic and metals from the rocks can dissolve in the solution. Acid rock drainage such as this is a nationally significant long term environmental threat (USEPA, June, 1997). At many mine sites across the country acid rock drainage has caused severe water quality impacts. In the National Forests there are estimated to be 5,000 to 10,000 miles of acid drainage impacted streams resulting from mining (USEPA, Sept., 1997).

Several studies have suggested that acid rock drainage from Molycorp's waste rock piles may flow through a direct hydrologic connection to the Red River (Abshire, 1998; Kelsey, 1997; Mink, 1997; SRK, 1995; SPRI, 1995; and Williams, 1997). Those studies all seem to agree that the potential exists for waste water to flow from waste rock piles, through the soils and strata and discharge to the River. The studies also note that the natural hydrothermal scar areas can contribute acidic drainage and metals loading to the river and the greatest concentration of scaring is located in the vicinity of the mine .

Hydrologic Cone of Depression

In its permit renewal application Molycorp asserts that by pumping water from the underground workings it is drawing local groundwater toward the mine and creating a cone of depression (Molycorp, 1998). Such a cone of depression could potentially draw a portion of ground water, which would normally enter the Red River, toward the underground workings instead. Molycorp (1998) suggests that its activities, such as mine de-watering cause reductions of pollutant loadings to the Red River. Data from Molycorp's groundwater monitoring wells indicate that some of the ground water is redirected toward the mine and that portions of the bedrock aquifer may be affected by mine de-watering (Abshire, 1998, SPRI, 1995, and SRK, 1995). Those sources also suggest that ground water may flow from the waste rock piles to the Red River through the more permeable shallow alluvial and upper fractured bedrock perched water systems (see also Schafer, 1997). However, site visits to the mine area and communications with New Mexico Environment Division personnel show that some of the historic springs and seeps to the Red River are not presently flowing (Wilson, February 1, 2000 and February 28, 2000). Whether this change is the result of mine de-watering or other variables such as a change in the precipitation pattern is not known for certain.

Potential Sources of Pollutant Loadings to the Red River

Hydrothermal alteration scars exist in the north side of the Red River Canyon at the mine site as well as both upstream and downstream from the site. The scars are made up of rhyolite and andesite and contain varying amounts of sulfide bearing minerals such as pyrite (Shoemaker, 1998). Erosion of the scars is cited as a source of contaminants (acidic drainage, metals, sediments, and sulfates) to the Red River throughout the available literature (Abshire, 1998; Allen et. Al., 1999; Hutchison, 1997; Kent, 1995; Molycorp, 1998; SRK, 1995; and SPRI, 1995).

Several sources site the waste rock piles at the Molycorp mine as a potential additional source of contaminant loading to the Red River (Abshire, 1998; Allen et.al., 1999; Kelsey, 1997; Kent, 1995; Mink, 1997; SPRI, 1995; SRK, 1995; and Williams, 1997). It is however difficult to differentiate pollutant loadings to the Red River from the alteration scars as opposed to those resulting from Molycorp's mining activities or waste rock piles. There are several reasons for this complication. The highest predominance of alteration scars exists in the area of the mine. Molycorp's waste rock piles contain many of the same minerals found in the erosional scars and could potentially contribute many of the same contaminants to the river as contributed by the scars. In some places, Molycorp laid the waste rock piles directly on top of alteration scars. Also, the waste rock piles are made up partly of scar material. Molycorp has made the assertion that pollutant contributions to the river are not resulting from activities or waste materials at the mine but are instead solely contributed by erosion of the alteration scars (Molycorp, 1998). Other sources have suggested that there may potentially be a contribution of pollutants from Molycorp's waste rock to the Red River (Abshire, 1998; Allen et.al., 1999; Kelsey, 1997; Kent, 1995; Mink, 1997; SPRI, 1995; SRK, 1995; and Williams, 1997).

Several studies of the mine site have attempted to collect data which would show the differences in loadings from the hydrothermal alterations scars as opposed to those from Molycorp's waste rock piles. Kent (1995) collected and analyzed samples of waste rock, scar material, and surrounding soils in an attempt to quantify the impacts from both sources. That study reported average concentrations of molybdenum, zinc, copper, and manganese which were two to five times higher in the samples from the waste rock piles than those from the alteration scars. Kent's report also compared analyses of water from hydrothermal scars with leachate from Molycorp's waste rock piles. That comparison showed significantly higher concentrations of metals in the waste rock pile leachate than in water draining to the Red River from the alteration scars. SRK (1995) also found higher concentrations of sulfate and metals in mine impacted drainage as opposed to scar impacted drainage. The most notable of those were sulfate, aluminum, manganese, and zinc.

Another, more recent, study of Molycorp's impact on the Red River was produced by the New Mexico Natural Resources Trustee (Allen et.al, 1999). The intent of the study was to determine whether there is a difference in the pollutant loading to the Red River from Molycorp's activities compared to those naturally occurring in the vicinity of the mine. Historic effects, before and after Molycorp's open pit mining, were also examined as a part of the study. Sampling conducted for the study included stream water, modern and older stream sediments,

pond sediments, stream bed crusts and cements, and macroinvertebrates. Results of these analyses show that, while there is a general increase in the concentration of most metals in the downstream direction, there is a significant increase corresponding to the area of the mine. The Superfund division of EPA Region 6 is presently studying the issue of potential mine related impacts to the Red River versus potential impacts from the erosional scars in the area.

As described later in this Fact Sheet, Best Management Practice are included in the proposed permit to minimize the potential to discharge process related pollutants via seeps located adjacent to the Red River.

VIII. DRAFT PERMIT RATIONALE

The following section sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. Also set forth are any calculations or other necessary explanations of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard provisions as required under 40CFR122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

A. REASON FOR PERMIT REISSUANCE (EXPIRING PERMIT)

It is proposed that the current permit be reissued for a 5-year term following regulations promulgated at 40CFR122.46(a). The current permit was issued September 10, 1993 with an effective date of October 15, 1993 and an expiration date of October 14, 1998. The permit renewal application was dated April 13, 1998.

B. TECHNOLOGY-BASED VERSUS WATER QUALITY STANDARDS-BASED EFFLUENT LIMITATIONS AND CONDITIONS

Following regulations promulgated at 40CFR122.44(l)(2)(ii), the draft permit limits are based on either technology-based effluent limits pursuant to 40CFR122.44(a) or on State water quality standards and requirements pursuant to 40CFR122.44(d), whichever are more stringent.

C. TECHNOLOGY-BASED EFFLUENT LIMITATIONS/CONDITIONS

1. GENERAL COMMENTS

Regulations promulgated at 40CFR122.44(a) require technology-based effluent limitations to be placed in NPDES permits based on effluent limitations guidelines where applicable, on BPJ (best professional judgment) in the absence of guidelines, or on a combination of the two.

(C) EFFLUENT LIMITATIONS

This facility is covered by the Ore Mining and Dressing Effluent Limitations Guidelines Subpart J - Copper, Lead, Zinc, Gold, Silver, and Molybdenum Subcategory at 40 CFR PART 440.

a. OUTFALLS 001 and 002

Outfall 001, located at the tailings ponds, discharges treated process waste water from milling operations and tailings disposal as well as mine drainage, runoff from waste rock piles, and water from interceptor wells. Outfall 002 discharges seepage from the tailings ponds which has been captured in the seepage interception system. The draft permit includes technology-based effluent limitations for chemical oxygen demand, total suspended solids, arsenic, fluoride, iron, manganese, and molybdenum which were developed using the technology basis established in the expired permit. Mass limits were calculated using the concentration limits and representative discharge rates reported on the permit renewal application and discharge monitoring reports of 4.29 MGD at Outfall 001 and 0.35 MGD at Outfall 002. Molycorp has requested changes to the concentration basis of the permit's limits for fluoride and molybdenum. No clear rationale of how the previous limitations were determined appears in the administrative record.

Although limited, available effluent data for Outfall 001 show that the concentration limits for both fluoride and molybdenum are achievable with the existing treatment. The maximum reported value for fluoride is 2 mg/l whereas the limit is 3 mg/l. For molybdenum, the maximum reported effluent concentration is 0.68 mg/l, while the daily maximum limit is 2 mg/l and the monthly average limit is 1 mg/l. Changes to the concentration limits at Outfall 001 do not appear justifiable and are not proposed.

At Outfall 002 Molycorp has requested fluoride limitations of 19.9 mg/l for a monthly average and 35 mg/l for a daily maximum and molybdenum limits of 3.3 mg/l for a monthly average and 5.03 mg/l for a daily maximum. Analysis of that request was made based on available effluent data. The requested molybdenum concentration limits appear to be reasonable and are proposed to be included in the permit for Outfall 002. The concentration of molybdenum was not limited in the previous permit at Outfall 002 only the sum of the mass from the combined discharge from outfalls 002 and 001. In the previous permit the concentration of fluoride was limited to 3 mg/l for both a daily maximum and monthly average at Outfall 002. Like at Outfall 001, available data show that fluoride limits are achievable. The concentration of fluoride is generally less than 2 mg/l and the maximum reported is 2.25 mg/l.

The expired permit applied mass limits to the sum of the discharges at Outfalls 001 and 002. Since Molycorp has not discharged at Outfall 001 recently, mass limits for the sum of the two discharges are not appropriate and are not proposed to be continued in the reissued permit. Technology based mass limits were calculated for the two separate outfalls as follows:

Outfall 001

	Concentration (mg/l)		Mass (lbs/day)	
Pollutant	Daily Avg.	Daily Max.	Daily Avg.	Daily Max.
Chemical Oxygen Demand	60	90	2147	3220
Total Suspended Solids	20	30	716	1073
Arsenic	0.5	1.0	17.9	35.8
Fluoride	3.0	3.0	107	107
Iron	0.6	0.6	21.5	21.5
Manganese	1.0	1.5	35.8	53.7
Molybdenum	1.0	2.0	35.8	71.6
Zinc	0.2	0.2	7.16	7.16

Outfall 002

	Concentration (mg/l)		Mass (lbs/day)	
Pollutant	Daily Avg.	Daily Max.	Daily Avg.	Daily Max.
Chemical Oxygen Demand	60	90	175	263
Total Suspended Solids	20	30	58	87.6
Arsenic	0.5	1.0	1.46	2.9
Fluoride	3.0	3.0	8.75	8.75
Iron	0.6	0.6	1.75	1.75
Manganese	1.0	1.5	2.9	4.38
Molybdenum	3.3	5.03	9.6	14.7
Zinc	0.2	0.2	0.58	0.58

A comparison of the expired permit's mass technology based limits and those included in the proposed permit follows. For the sake of comparison, the old limits were divided between the two outfalls based on the discharge rates used to derive the limits. In the expired permit, mass limits were calculated based on the combined flow from Outfall 001 (4.29 MGD) and Outfall 002 (0.41 MGD).

Outfall 001

	Expired permit's Limits (lbs/day)	Proposed Permit's Limits (lbs/day)	
Parameter	Monthly Avg.	Monthly Avg.	Daily Max.
COD	2,158	2147	3220
TSS	719	716	1073
Arsenic	17.9	17.9	35.8
Fluoride	107.7	107	107
Iron	21.5	21.5	21.5
Manganese	36	35.8	53.7
Molybdenum	22.8	35.8	71.6
Zinc	7.16	7.16	7.16

Outfall 002

	Expired permit's Limits (lbs/day)	Proposed Permit's Limits (lbs/day)	
Parameter	Monthly Avg.	Monthly Avg.	Daily Max.
COD	206	175	263
TSS	68.7	58	87.6
Arsenic	1.71	1.46	2.9
Fluoride	10.3	8.75	8.75
Iron	2.06	1.75	1.75
Manganese	3.44	2.9	4.38
Molybdenum	2.18	9.6	14.7
Zinc	0.68	0.58	0.58

Water quality based limits for arsenic, cadmium, copper, cyanide, lead, mercury, and molybdenum are more stringent than the technology based limits established in the previous permit and are discussed later in this Fact Sheet. The previous permit also limited silver, chlordane, and total residual chlorine and required monitoring for cobalt, selenium, beryllium, vanadium, and temperature based on water quality. Those limits and monitoring requirements are discussed later in this Fact Sheet.

b. OUTFALLS 004 AND 005

Outfalls 004 and 005 were included in the previous permit for storm water discharges at the mine site. Molycorp has not discharged at these outfalls and no effluent data are available. Technology based limits and monitoring requirements at Outfalls 004 and 005 are not proposed to be changed in the reissued permit.

3. MONITORING FREQUENCIES FOR LIMITED PARAMETERS

Regulations require permits to establish monitoring requirements to yield data representative of the monitored activity [40CFR122.48(b)] and to assure compliance with permit limitations [40CFR122.44(i)(1)]. Based on available effluent data for Outfall 001 the monitoring frequency for chemical oxygen demand, total suspended solids, and iron are proposed to be reduced to once per month. The discharge has been compliant with the existing permit's limits and analysis presented later in this Fact Sheet do not show exceedances of water quality standards for these parameters. The quality of the discharge is not expected to be highly variable; thus, once per month monitoring is sufficient to measure changes in the effluent over time. Monitoring for molybdenum and fluoride is proposed to be required at a frequency of once per week as it was in the expired permit.

Similarly, the monitoring frequency for chemical oxygen demand, total suspended solids, arsenic, fluoride, manganese, molybdenum, and zinc at Outfall 002 is proposed to be reduced to once per month based on the facility's compliance history. Effluent data demonstrate a low degree of variability in this discharge which also support a reduced monitoring frequency. The

monitoring frequency for parameters which are limited based on water quality standards is discussed later in this Fact Sheet.

Monitoring frequencies at Outfalls 004 and 005 are not proposed to be changed, as data are not available on which to base a change in frequencies.

D. BEST MANAGEMENT PRACTICES

Seeps of waters in mine impacted areas to surface waters have been an issue throughout the United States. When exposed to oxygen and precipitation, sulfide minerals at mines often have the potential to produce acid mine drainage. Such drainage consists of low pH water which can contain high concentrations of metals. In many cases acid mine drainage flows into ground water which is hydrologically connected to surface waters. Seep like discharges can then result which heavily impact surface waters.

EPA Regions VIII and IX have dealt extensively with the issue of seeps at mine sites. Region VIII's position on this issue is described in a 1993 letter to the Montana Water Quality Bureau which states that facilities discharging through such hydrologically connected seeps are required to obtain NPDES permits for those discharges. This includes ground water discharges determined to be hydrologically connected to surface waters (Dodson, 1993). Region IX has regulated seeps from mines in several NPDES permits (see AZ0022705, 1999, AZ0020389, 2000, and AZ0020516, 2000). Those permits require implementation of Best Management Practices to identify and inspect potential seep zones, analyze water flowing from mine area seeps, and ensure compliance with State water quality standards.

EPA Region 6 has issued several permits which address discharges having the potential to flow into ground water which is hydrologically connected to surface waters. Three such permits are: the NPDES General Permit for Discharges from Concentrated Animal Feeding Operations (CAFO) (USEPA, 1993), the NPDES permit for US Liquids of Louisiana, Ltd. (USEPA, 1999), and the NPDES permit for Texas Eastman (USEPA, 1976). Those permits require operators of facilities to implement management practices to control or eliminate discharges to ground water which have direct hydrologic connections to waters of the United States.

EPA's authority to regulate discharges resulting from a direct hydrologic connection between ground water and surface waters has been the subject of several court cases. In the following cases, the courts have ruled that EPA has the authority to regulate discharges, such as seeps, which result from a direct hydrologic connection:

Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (S.D. Iowa, 1997)
Friends of the Coast Fork v. County of Lane, 1997 U.S. Dist. LEXIS 22705 (D. Ore. 1997)
Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994)

Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993)
U.S. v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979).

At Molycorp's Questa mine, pollutants resulting from mining activities may have the potential to be discharged to surface waters of the United States, through a direct hydrologic connection. In order to prevent this type of potential discharge, Best Management Practices (BMPs) are proposed to be required by the permit. The proposed BMPs, which are described in detail in the draft permit, consist of french drains and a ground water withdrawal well to intercept ground water at seeps located just upstream of the mouth of Capuline Canyon, near the mouth of Goathill Gulch, and below the Sugar Shack South waste rock pile. The water collected by the interception systems may be pre-treated as necessary to ensure the integrity of the tailings pipeline and then pumped into the tailings pipeline and sent to the tailings ponds located west of Questa or pumped to the mine for use as process water. When installed, the seepage interception systems described in the permit will prevent the potential discharge of pollutants traceable to point source mining operations to the Red River.

Along with a detailed description of the seepage interception system required as best management practices, the draft permit includes corresponding language prohibiting the discharge of pollutants traceable to point source mining operations, except in trace amounts. EPA has determined that installation and operation of the interception system will sufficiently eliminate the potential for such discharges and comply with the proposed permit's prohibition. A compliance schedule of two years has also been included in the permit to allow time to construct the seepage interception system. Two years is a sufficient amount of time to obtain necessary permits or modifications of permits required by other Federal or State agencies, construct the system, and bring it into operation. As part of that construction Molycorp will be required to conduct an evaluation of the ground water to determine its elevation, direction of flow, and gradient. That information will be used to verify the efficiency of the seepage interception system and determine potential improvements to the proposed design. The permittee will be required to submit the results of the ground water evaluation to EPA Region 6. Any changes to the system design will require written approval from the Agency.

Monitoring requirements are also included in the proposed permit. The permittee will be required to visually inspect the Red River on a monthly basis to determine the effectiveness of the seepage interception system and identify potential seepage areas.

E. WATER QUALITY-BASED EFFLUENT LIMITATIONS/CONDITIONS

1. GENERAL COMMENTS

Effluent limitations and/or conditions established in the draft permit are in compliance with State water quality standards and the applicable water quality management plan.

2. POST THIRD ROUND POLICY AND STRATEGY

Section 101 of the Clean Water Act (CWA) states that "...it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited..." To insure that the CWA's prohibitions on toxic discharges are met, EPA has issued a "Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants (49 FR 9016-9019, 3/9/84)." In support of the national policy, Region 6 adopted the "Policy for Post Third Round NPDES Permitting" and the "Post Third Round NPDES Permit Implementation Strategy" on October 1, 1992. The Regional policy and strategy are designed to insure that no source will be allowed to discharge any wastewater which (1) results in in-stream aquatic toxicity; (2) causes a violation of an applicable narrative or numerical State water quality standard resulting in nonconformance with the provisions of 40CFR122.44(d); (3) results in the endangerment of a drinking water supply; or (4) results in aquatic bioaccumulation which threatens human health.

3. IMPLEMENTATION

The Region is currently implementing its post third round policy (Appendix C) in conformance with the Regional strategy (Appendix D). The 5-year NPDES permits contain technology-based effluent limitations reflecting the best controls available. Where these technology-based permit limits do not protect water quality or the designated uses, additional water quality-based effluent limitations and/or conditions are included in the NPDES permits. State narrative and numerical water quality standards are used in conjunction with EPA criteria and other available toxicity information to determine the adequacy of technology-based permit limits and the need for additional water quality-based controls.

4. STATE WATER QUALITY NUMERICAL STANDARDS

a. GENERAL COMMENTS

The Red River is classified for the uses of Secondary Contact Recreation, Fish Culture, Coldwater Fishery, Irrigation, Livestock Watering, and Wildlife Habitat. A spread sheet Analysis of the effluent and its potential to exceed State water quality standards is presented in Appendix B of this Fact Sheet. The calculation of the limits is also shown.

b. WATER QUALITY ANALYSIS - OUTFALLS 001 AND 002

Molycorp is presently only discharging at Outfall 002 but intends to also discharge at Outfall 001 in the future. Since the two outfalls will discharge to the Red River in relatively close proximity, they are in the same mixing zone and water quality based limits will apply to the combined discharges when they are discharging concurrently. Therefore, two water quality analyses were conducted, one for Outfall 002 separately and another for the combined discharge from both outfalls. Those analyses are shown in Appendix B-1 of this Fact Sheet. Based on the potential to exceed water quality standards, limits are required on the separate discharge from Outfall 002 for: aluminum, arsenic, cadmium, copper, cyanide, lead, and mercury. Limits are also required on the combined discharge of Outfalls 001 and 002 for: aluminum, arsenic, cadmium, copper, cyanide, gross alpha particles, lead, mercury, and molybdenum. The previous

permit required limits and/or monitoring for beryllium, chlordane, cobalt, selenium, silver, total residual chlorine, temperature, and vanadium based on State water quality standards. Available data for these parameters do not show a potential to exceed water quality standard; therefore, those limits and monitoring requirements are not proposed to be retained in the reissued permit.

A comparison of the proposed concentration limits with those contained in the expired permit follows. In cases where the expired permit only contains mass limitations the concentration basis for the limit was obtained from the Response to Comments for the expired permit.

Outfalls 001 and 002 Combined Discharges

	Expired permit's Limits (ug/l)		Proposed Limits (ug/l)	
Parameter	Monthly Avg.	Daily Max.	Monthly Avg.	Daily Max.
Total Aluminum		87	58	87
Total Arsenic	500	1000	254	381
Total Cadmium	50	50	3.58	5.37
Total Copper	150	300	32.5	48.7
Total Cyanide	25	50	7	10
Gross Alpha			20.1 (pCi/l)	30.1 (pCi/l)
Total Lead	300	600	23.8	35.7
Total Mercury	1	2	0.0161	0.024
Total Molybdenum			1341	2011
Total Zinc	200	200	200	200

The expired permit's limits for arsenic, cadmium, copper, lead, and mercury are based on effluent limitations guidelines and will be replaced by the more stringent water quality based limitations. The cyanide and zinc limits listed in the expired permit were developed based on the best professional judgement of the permit writer as a technology based limits. The zinc limits are not proposed to be changed; however, the cyanide limits are proposed to be replaced by the more stringent water quality based limits. Cyanide is no longer used in Molycorp's milling process and there is no known source of cyanide at the facility. However, analysis of available effluent data shows a potential to cause an exceedance of water quality standards and limits are required. If the permittee can supply more current effluent data during the comment period which show there is no longer a potential to cause violations of water quality standards, the cyanide limits will not be required in the final permit. Technology based limits for Molybdenum at Outfall 001 are more stringent than the water quality based limits shown above; however, the water quality based limits are more stringent at Outfall 002 when both discharges are occurring simultaneously. The more stringent water quality based limits for molybdenum are proposed at Outfall 002 which are effective after commencement of discharge at Outfall 001.

d. WATER QUALITY ANALYSIS - OUTFALLS 004 AND 005

The previous permit contained mass water quality based limits for the sum of the discharges from Outfalls 001, 002, 004, and 005. Those limits were calculated based on the

discharge rate for Outfalls 001 and 002. Mass limits are not appropriate for Outfalls 004 and 005 because they discharge solely storm water. These discharges are intermittent in nature and the volume of water discharged is solely the result of the quantity of precipitation and is not related to any plant process. Concentration limits are included in the proposed permit for Outfalls 004 and 005 which are based on the acute water quality standards shown in Appendix B.

e. SCHEDULE OF COMPLIANCE

Part I.B of the draft permit establishes a schedule of compliance and reporting requirements leading to the attainment no later than two (2) years from the effective date of the permit of state water quality standards-based effluent limitations established for aluminum, cadmium, copper, lead, mercury, and cyanide at Final Outfalls 001 and 002.

f. MONITORING FREQUENCIES FOR LIMITED PARAMETERS

Regulations require permits to establish monitoring requirements to yield data representative of the monitored activity [40CFR122.48(b)] and to assure compliance with permit limitations [40CFR122.44(i)(1)].

MONITORING OPTION-NEW WQ LIMITS - OUTFALLS 001 AND 002

Aluminum, arsenic, cadmium, copper, cyanide, lead, mercury, and zinc are limited under the expired permit and have a required monitoring frequency of 1/week. That frequency is not proposed to be changed. The calculated water quality standards based limits for arsenic, cadmium, copper, cyanide, lead, mercury, and molybdenum (in some cases) are more stringent than the existing limits. A compliance schedule of two years is proposed for Molycorp to meet the new limits; however, since the existing monitoring frequency is 1/week no change in frequency is proposed.

5. AQUATIC TOXICITY TESTING

a. GENERAL COMMENTS

The provisions of this section apply to Final Outfall(s) 001 and 002.

EPA has determined that there may be pollutants present in the effluent(s) which have the reasonable potential to cause, or contribute to, an instream excursion above the narrative criterion within the applicable State water quality standards in violation of Section 101(a)(3) of the Clean Water Act. In addition, EPA is required under 40CFR122.44(d)(1) to include conditions as necessary to achieve the States' water quality standards as established under

Section 303 of the Clean Water Act. The State has established narrative criteria which, in part, state that

> "Surface waters of the State shall be free of toxic substances attributable to point or non-point source discharge in amounts, concentrations or combinations which are toxic to fish or other aquatic organisms; ..." (NMWQS 1102.F)

b. PERMIT ACTION

Whole effluent biomonitoring is the most direct measure of potential toxicity which incorporates both the effects of synergism of effluent components and receiving stream water quality characteristics. Biomonitoring of the effluent is, therefore, required as a condition of this permit to assess potential toxicity.

(1) TESTING AND REPORTING REQUIREMENTS

The draft permit establishes the following testing and reporting requirements:

TOXICITY TESTS	FREQUENCY
Chronic static renewal 7-day survival and reproduction test using Ceriodaphnia dubia [Method 1002.0]	1/Six (6) Months
Chronic static renewal 7-day larval survival and growth test using fathead minnow (Pimephales promelas) [Method 1000.0]	1/Year

Toxicity tests shall be performed in accordance with protocols described in the latest revision of the "Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, EPA/600/4-89/001, March 1989." The stipulated test species are appropriate to measure the toxicity of the effluent consistent with the requirements of the State water quality standards.

The biomonitoring frequency has been established to reflect the likelihood of ambient toxicity and to provide data representative of the toxic potential of the facility's discharge in accordance with regulations promulgated at 40CFR122.48. Toxicity testing established in the current permit has not demonstrated ambient aquatic toxicity; however, the discharges result in exceedances of State water quality standards. Therefore, a minimum monitoring frequency of 1/six months is established in the draft permit as allowed by 40CFR122.44(i)(2). Toxicity

testing is retained in the draft permit to assure compliance with state water quality standards narrative requirements governing ambient aquatic toxicity.

Results of all dilutions as well as the associated chemical monitoring of pH, temperature, hardness, dissolved oxygen, conductivity, and alkalinity shall be documented in a full report according to the test method publication mentioned in the previous paragraph. This full report need not be submitted unless requested. However, the full report is to be retained for three (3) years following the provisions of Part III.C.3 of this permit. The permit requires the submission of certain toxicity testing information as an attachment to the Discharge Monitoring Report.

This permit may be reopened to require effluent limits, additional testing, and/or other appropriate actions to address toxicity if biomonitoring data show actual or potential ambient toxicity to be the result of the permittee's discharge to the receiving stream or water body. Modification or revocation of the permit is subject to the provisions of 40CFR124.5. Accelerated or intensified toxicity testing may be required in accordance with Section 308 of the Clean Water Act.

(2) DILUTION SERIES

The permit requires five (5) dilutions in addition to the control (0% effluent) to be used in the toxicity tests. These additional effluent concentrations shall be 21%, 28%, 38%, 50%, and 67% based on a 0.75 dilution series with the low-flow effluent concentration (critical low-flow dilution) defined as 50% effluent. The effluent dilution series were obtained from the implementation guidance for New Mexico's Standards (USEPA, 1995).

6. WATER QUALITY SCREENING FOR EPA HUMAN HEALTH PROTECTION BIOACCUMULATION CRITERIA

a. GENERAL COMMENTS

Where an exceedance of the EPA bioaccumulation water quality criteria for aquatic organism consumption is discovered and no state human health standard has been promulgated for that pollutant, the permitting sections will take the following three actions:

Notify the EPA Region 6 Watershed Management Section (6WQ-EW) of the potential exceedance upon issuance of the final permit.

Require effluent monitoring in the permit for the parameter of concern at a frequency of 1/month. The monitoring requirements shall expire one (1) year after the effective date of the permit.

Place a reopener clause in the permit. This will allow EPA to modify the permit for inclusion of a limit for the parameter of concern after the state has adopted an appropriate water quality standard.

The Watershed Management Section (6WQ-EW) will be provided the information generated through the effluent monitoring to assist in determining where additional state standards are necessary.

In conducting effluent screening, the permitting sections will utilize all EPA human health criteria for which the state has not adopted standards. Specifically, EPA will use the values promulgated by the National Toxics Rule (57 FR 60848, 12/22/92). This is currently the most reliable toxicity information available presented in a readily accessible format. The National Toxics Rule criteria have been based on Gold Book values updated by IRIS. These values have the added advantage of public notice and comment.

For evaluation purposes, the permitting sections will utilize the state assigned values for carcinogen risk factor and fish consumption rate. The EPA default assumptions for a 10^{-6} risk factor for carcinogens and a fish consumption rate of 6.5 g/day will be used in their absence. The permitting sections will utilize the appropriate critical dilution at the edge of the human health mixing zone.

The water quality screening for EPA human health protection bioaccumulation criteria is presented at Appendix B. EPA aquatic organism consumption criteria are exceeded for the following pollutants: arsenic for the combined discharges at Outfalls 001 and 002.

b. PERMIT ACTION

Molycorp is presently required to monitor for arsenic; therefore, no additional monitoring requirements are proposed. A permit re-opener clause has been added to the permit stating "Should the State adopt a State water quality standard, this permit may be reopened to established effluent limitations for the parameter(s) to be consistent with that approved State standard in accordance with 40CFR122.44(d). Modification of the permit is subject to the provisions of 40CFR124.5."

X. ENDANGERED SPECIES

The Environmental Protection Agency has evaluated the potential effects of reissuance of this permit upon listed or proposed endangered or threatened species. Using available tools, primarily the Biota Information System of New Mexico (BISON-M), Version 9/97, EPA finds data which lead to a determination of “no effect” upon listed or proposed endangered or threatened species or their critical habitat as a result of this permit reissuance. The facility currently holds an NPDES permit with USEPA which limits aluminum, cadmium, chromium, copper, fluoride, iron, lead, mercury, molybdenum, silver, chlordane, and total residual chlorine

in its discharges. The proposed permit includes more stringent limits for many of those pollutants as well as requirements for biomonitoring. It also contains new requirements to prevent the discharge of pollutants from seeps located near the mine.

Six species are listed or proposed to be listed as threatened or endangered in Taos County. These are the Black-footed ferret, Bald eagle, Mexican spotted owl, Southwestern willow flycatcher, Mountain plover, and Chiricahua dock.

Review of available material reveals that the primary cause for population declines leading to threatened or endangered status for all six species to be destruction of habitat. Reissuance of this permit is found to have no impact on the habitat of the species since no construction is authorized by this permitting action. All pollutants in the discharges proposed to be authorized, which have the potential to impact the habitat of the species are proposed to be limited by the permit to ensure compliance with New Mexico's water quality standards. In addition, the reissued permit proposes to limit pollutants in seep discharges at the mine which were previously not limited. Therefore, EPA has determined that reissuance of the permit will have no effect on listed or proposed threatened or endangered species.

XI. VARIANCE REQUESTS

No variance requests have been received.

XII. 303(d) LIST

The 1998-2000 Clean Water Act section 303(d) list for New Mexico indicates the uses not fully supported in the stream segment 2-119 are cold water fishery. The specific pollutants of concern are aluminum (acute and chronic), cadmium (acute), copper (acute), and zinc (acute and chronic) as well as stream bottom deposits. Discharges from the facility are likely to contribute to exceedances of water quality standards. Therefore, the proposed permit contains limitations and conditions at Outfalls 001 and 002 which reduce the impact of these discharges. Additionally, the proposed new seep interception system will help to ensure that potential mine related discharges of 303(d) listed metals are prevented.

EPA understands that based on more current data the New Mexico Environment Division plans to update the 303(d) list in the near future. Cadmium, copper, and zinc, which are presently listed for the Red River (Segment Number 2119), are expected to be proposed to be removed. However, effluent data show a potential to exceed water quality standards for cadmium and copper. Copper and zinc are required to be limited by effluent limitations guidelines. Therefore, a change in the 303 (d) list will not effect the final permit's limits or monitoring requirements.

XIII. ADMINISTRATIVE RECORD

The following section is a list of the fact sheet citations to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by 40CFR124.9:

A. PERMIT(S)

NPDES Permit No. NM0022306 effective October 15, 1993, expired October 14, 1998.

NPDES Permit No. AZ0022705, Phelps Dodge, Morenci Mine, effective October 3, 1999.

NPDES Permit No. AZ0022389, BHP Copper, Superior Operations, effective February 13, 2000.

NPDES Permit No. AZ0020516, Cyprus Miami Mining Corp., Christmas Facility, effective February 13, 2000.

NPDES Permit No. TX0000949, Texas Eastman, November, 18, 1976.

NPDES Permit No. LA0068420, US Liquids of Louisiana, Ltd., Permit Number, August 6, 1999.

NPDES General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, 58 FR 7610, February 8, 1993.

B. APPLICATION(S)

EPA Application Forms 1 and 2C and Supplemental Information, dated April 13, 1998.

C. CLEAN WATER ACT CITATIONS

Section 101
Section 101(a)(3)
Section 303
Section 304(e)
Section 308
Section 401(a)(1)
Section 401(a)(2)

D. 40CFR CITATIONS

STANDARD CITATIONS
122.44
122.44(a)
122.44(d)
122.44(d)(1)
122.44(i)(1)
122.44(i)(2)
122.44(l)(2)(ii)
122.45(c)(3)
122.46(a)
122.47
122.48
122.48(b)
124.5
124.53
131 amended at 57FR60848, 12/22/92

E. STATE WATER QUALITY REFERENCES

STATE ADMINSTRATIVE CODE

The general and specific stream standards are provided in "Water Quality Standards for Interstate and Intrastate Streams in New Mexico," (20NMAC6.1, effective 2/23/00)

WATER QUALITY STANDARDS IMPLEMENTATION

USEPA, Region 6 Implementation Guidance for State of New Mexico Standards for Interstate and Intrastate Stream, 5/5/95.

F. MISCELLANEOUS REFERENCES

Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants [49FR9016-9019, 3/9/84]

EPA Region 6 "Policy for Post Third Round NPDES Permitting" and "Post Third Round NPDES Permit Implementation Strategy," 1October 1, 1992.

Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, EPA/600/4-89/001, March 1989.

National Toxics Rule, 57FR60848, December 22, 1992.

Abshire, D, *Report on Hydrological Connection Associated with Molycorp Mining Activity, Questa, New Mexico,* USEPA, Region 6, February 13, 1998.

Allen, B.D., A.R. Groffman, M.C. Moles Jr., R.Y. Anderson, and L.J. Crossey, *Geochemistry of the Red River Stream System Before and After Ope-Pit Mining, Questa Area, Taos County, New Mexico,* October, 1999.

Avanti Corporation, *Compliance Costs and Pollutant Removals for Coastal Gulf of Mexico Produced Water Assuming Compliance with Zero Discharge Under the EPA Region 6 General Permit,* September 16, 1996.

Chadwick Ecological Consultants, Inc., *Aquatic Biological Assessment of the Red River, New Mexico, in the Vicinity of the Questa Molybdenum Mine*, April, 1997.

Chadwick Ecological Consultants, Inc., *Fall, 1998 Data Addendum, Red River Aquatic Biological Assessment,* February, 1998.

Hutchison, I, *Questa Mine Site Expert Report,* TRC Environmental Solutions, Inc., April 23, 1997.

Kelsey, R.K., Plaintiffs Rule 26(a)(2)(B) Expert Report, U.S. District Court, New Mexico, March 17, 1997

Kent, S., *Expanded Site Inspection Report on Molycorp, Inc., Questa Division, Taos County, New Mexico,* New Mexico Environment Department, 1995

Mink, L.L., Plaintiffs Rule 26(a)(2)(B) Expert Report, U.S. District Court, New Mexico, March 17, 1997.

Molycorp, Inc., NPDES Permit Renewal Application and Supporting Documentation, April 13, 1998.

Molycorp, Inc., Letter from Shoemaker (Molycorp) to Wilson (EPA, Region 6) commenting on the Abshire (1998) report, September 15, 1998.

Rae, S., Correspondence from Vail Engineering to Molycorp, September 11, 1979.

Robertson GeoConsultants, Inc., *Interim Report: Questa Waste Rock Pile Drilling, Instrumentation and Characterization Study,* September 13, 1999.

Robertson GeoConsultants, Inc., *Study of Groundwater Flow and Tailings Seepage near Questa, New Mexico*, October, 1997.

Robertson GeoConsultants, Inc., *Study of Groundwater Flow and Tailings Seepage near Questa, New Mexico, Appendice A - E* , October, 1997.

Robertson GeoConsultants, Inc., *Three Dimensional Geometric Model of Molycorp's Questa Tailings Facility*, October, 1997.

Schafer, W.M., *Expert Report,* April 23, 1997.

Smolka, L.R., *Special Water Quality Survey of the Red River*, Taos County, New Mexico, February - December, 1992.

Souder, Miller, and Associates, *Evaluation of Tailings Area Seepage Interception System, Molycorp, Inc., Questa, New Mexico,* September 30, 1998.

South Pass Resources, Inc. (SPRI), *Progress Report on the Geology, Hydrology, and Water Quality of the Mine Area, Molycorp Facility, Taos County, New Mexico,* April 21, 1995.

South Pass Resources, Inc. (SPRI), *Discussion of Geology, Hydrology, and Water Quality of the Tailings Area, Molycorp Facility, Taos County, New Mexico,* April 13, 1995.

South Pass Resources, Inc. (SPRI), *Remediation Plan for the Tailings Area, Molycorp Facility, Taos County, New Mexico,* April 13, 1995.

South Pass Resources, Inc. (SPRI), *Hydrogeologic Evaluation of Tailings Ponds, Molycorp, Questa Division, Questa, New Mexico,* September 23, 1993.

Stephen, Robertson, and Kirsten, Inc. (SRK), *Questa Molybdenum Mine Geochemical Assessment,* SRK Project No. 09206, April 13, 1995.

Stephen, Robertson, and Kirsten, Inc. (SRK), *Questa Tailings Facility Geochemical Testing Final Report*, SRK Report No. 09211/2, November 4, 1997

U.S. Environmental Protection Agency (USEPA), *Cost of Remediation at Mine Sites,* Office of Solid Waste, April, 1998.

U.S. Environmental Protection Agency (USEPA), *EPA's National Hardrock Mining Framework,* September, 1997.

U.S. Environmental Protection Agency (USEPA), *EPA Can do More to Help Minimize Hardrock Mining Liabilities*, Audit Report, Office of the Inspector General, June 11, 1997.

U.S. Environmental Protection Agency (USEPA), *Development Document for Effluent Limitations Guidelines and Standards for the Ore Mining and Dressing Point Source Category,* Effluent Guidelines Division, EPA 440/1-82/061, November, 1982.

Vail Engineering, Inc., *Report on Ground Water Seepage Below Molycorp's Existing Tailings Dams Near Questa, New Mexico,* August 24, 1989.

Vail Engineering, Inc., *Interim Study of the Acidic Drainage to the Middle Red River, Taos County, New Mexico,* July 9, 1993.

Williams, B.C., Plaintiffs Rule 26(a)(2)(B) Expert Report, U.S. District Court, New Mexico, March 17, 1997

Schafer, W, *Expert Report,* April 23, 1997

Response to Comments, Final Permit Decision, Permit Number NM0022306, Molycorp, Inc., issued September 10, 1993

G. LETTERS/MEMORANDA/RECORDS OF COMMUNICATION, ETC.

Dodson, M.H. (EPA Region VIII), Letter to Dan Fraser (Water Quality Bureau, Montana Department of Health), concerning permitting at mine sites, December 22, 1993

Humke. F.O. (EPA), Letter to Brian Shields (Amigos Bravos), concerning seeps associated with waste rock piles at Molycorp, April 30, 1997.

Humke, Frederick O. (EPA), Letter to Richard E. Schwartz (Attorney for Molycorp), concerning seepage associated with Molycorp's waste rock piles, May 6, 1997.

Rae, S. (Vail Engineering), Letter to Molycorp, September 11, 1979.

Sacrison, C.R. (Molycorp), Letter to Dick Whittington (EPA), Concerning process changes and achievability of molybdenum limits, November 26, 1984.

Saums, G.E. (NMED), Letter to Jane Watson, Ph.D. (USEPA), concerning applicable State Water Quality Standards and flows for the Red River, June 3, 1999.

Schwartz, R. E. (Attorney for Molycorp), Letter to Frederick O. Humke (EPA), concerning seepage associated with Molycorp's waste rock piles, May 5, 1997.

Wilson, J.S. (USEPA), Record of Communication to Rich Powell (NMED), Concerning location of seeps near the Molycorp Mine, February 1, 2000.

Wilson, J.S. (USEPA), Summary of site visit to the Red River and Molycorp on February 22 and 24, 2000, February 28, 2000.

Wynne, B.J. (EPA), Letter to Brian Shields (Amigos Bravos), concerning acid mine drainage at Molycorp, January 21, 1992.

H. LEGAL PROCEEDINGS.

Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (S.D. Iowa, 1997)

Friends of the Coast Fork v. County of Lane, 1997 U.S. Dist. LEXIS 22705 (D. Ore. 1997)

Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1357-58 (D.N.M.. 1995)

Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994)

Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993)

U.S. v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979).

APPENDICES DIRECTORY

APPENDIX A EFFLUENT ANALYSES

APPENDIX B1 WATER QUALITY STANDARDS, CALCULATION OF NUMERICAL STANDARDS-BASED EFFLUENT LIMITATIONS

APPENDIX B2 WATER QUALITY STANDARDS, MINIMUM QUANTIFICATION LEVELS (MQLs)

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APPENDIX A

EFFLUENT ANALYSIS

OUTFALL NO: 001
FREQUENCY: Continuous
SOURCE: EPA Form 2C Dated April 13, 1998

	FORM 2C NO.	UNITS	MONTH AVG	DAILY MAX
TSS	A.1.d	mg/L	3.5	5
Flow	A.1.f	MGD	0.7	4.29
COD	A.1.b	mg/L	10.4	12.8
Fluoride	B.1.e	ug/L	2150	2400
Iron (T)	B.1.s	ug/L	195	290
Molybdenum (T)	B.1.u	ug/L	630	770
Manganese (T)	B.1.v	ug/L	85	130
Arsenic (T)	2M	ug/L	NA	< 10
Cadmium (T)	4M	ug/L	NA	20
Copper (T)	6M	ug/L	65	80
Lead (T)	7M	ug/L	105	110
Mercury (T)	8M	ug/L	NA	0.24
Zinc (T)	13M	ug/L	14	17
Cyanide (T)	14M	ug/L	NA	< 1

OUTFALL NO: 002
FREQUENCY: Continuous
SOURCE: EPA Form 2C Dated April 13, 1998

	FORM 2C NO.	UNITS	MONTH AVG	DAILY MAX
BOD5	A.1.a	mg/L	NA	< 3
TSS	A.1.d	mg/L	10.8	20
Flow	A.1.f	MGD	0.35	0.48
COD	A.1.b	mg/L	12.4	18
TOC	A.1.c	mg/L	NA	2
Ammonia (as N)	A.1.e	mg/L	NA	0.07
Chlorine (Total Residual)	B.1.b	ug/L	NA	< 11
Fluoride	B.1.e	ug/L	1900	2100
Nitrate-Nitrite (N)	B.1.f	ug/L	NA	140
Phosphorus, Total (as P)	B.1.i	ug/L	NA	40
Radioactivity: Alpha, Total	B.1.j.(1)	pCi/L	NA	31.7
Radioactivity: Beta, Total	B.1.j.(2)	pCi/L	NA	10.2
Radioactivity: Radium, Total	B.1.j.(3)	pCi/L	NA	0.7
Radioactivity: Radium 226, Total	B.1.j.(4)	pCi/L	NA	0.01
Sulfate (as SO4)	B.1.k	ug/L	NA	900000
Sulfide (as S)	B.1.i	ug/L	NA	< 20
Sulfite: (as SO3)	B.1.m	ug/L	NA	2000
Aluminum (T)	B.1.o	ug/L	70	70
Barium (T)	B.1.p	ug/L	NA	26
Cobalt (T)	B.1.r	ug/L	NA	< 10
Iron (T)	B.1.s	ug/L	130	200
Magnesium (T)	B.1.t	ug/L	NA	48300
Molybdenum (T)	B.1.u	ug/L	2500	2600
Manganese (T)	B.1.v	ug/L	1800	1900
Phenolics (Total Recoverable)	15M	ug/L	NA	10

Antimony	(T)	1M	ug/L	NA	2
Arsenic	(T)	2M	ug/L	NA	5
Beryllium	(T)	3M	ug/L	NA	5
Cadmium	(T)	4M	ug/L	3.7	5
Chromium	(T)	5M	ug/L	NA	10
Copper	(T)	6M	ug/L	6	20
Lead	(T)	7M	ug/L	30	80
Mercury	(T)	8M	ug/L	0.2	0.2
Nickel	(T)	9M	ug/L	NA	10
Selenium	(T)	10M	ug/L	NA	5
Silver	(T)	11M	ug/L	NA	2
Thallium	(T)	12M	ug/L	NA	2
Zinc	(T)	13M	ug/L	27	39
Cyanide	(T)	14M	ug/L	8	40

APPENDIX B

New Mexico Water Quality Standards Analysis

CALCULATIONS OF NEW MEXICO WATER QUALITY-BASED EFFLUENT LIMITATIONS - Outfall 002

IMPLEMENTATION PROCEDURES

Limits based on New Mexico's water quality standards for Interstate and Intrastate streams of the State of New Mexico are calculated as follows:

FACILITY	**DATA INPUT**
Outfall No.(s)	002
Plant Effluent Flow (MGD)	0.35
Plant Effluent Flow (cfs)	0.5425

RECEIVING STREAM	**DATA INPUT**
Receiving Stream Name	Red River
Is a publicly owned lake or reservoir (enter "1" if yes 0 if no)	0
Are acute aquatic life criteria considered (1= yes, 0= no)	1
Are chronic aquatic life criteria considered (1= yes, 0= no)	1
Are domestic water supply criteria considered (1= yes)	1
Are irrigation water supply criteria considered (1= yes)	1
Livestock and wildlife habitat criteria apply to all streams	
Receiving Stream TSS (mg/l)	10
Receiving Stream Hardness (mg/l as CaCOs)	127
Receiving Stream Critical Low Flow (4Q3) (cfs)	7.05
Avg. Water Temperature (C)	5
pH (Avg)	7.72
Fraction of stream allowed for mixing (F)	1

Values below detection level which is smaller than the minimum quantification level will be counted as "0".
Values reported as "less than" but greater than MQL, the reported value is used.
Value below detection level and reported as "ND" will be counted as "0".

The following formula is used to calculate the In-stream Waste Concentration (Cd)

$$Cd = [(F*Qa*Ca) + (Qe*2.13*Ce)] / (F*Qa + Qe)$$

Where:

Cd = In-stream Waste Concentration
F = Fraction of stream allowed for mixing (see NM Implementation Guidance)
Ce = Reported concentration in effluent
Ca = Ambient stream concentration upstream of discharge
Qe = Plant effluent flow
Qa = Critical low flow of stream at discharge point expressed as the 4Q3

	"Ambient Stream Conc		"Effluent Conc.		Instream Waste Concentration, Cd (ug/l)			
POLLUTANT	Ca (ug/l)	Ca > MQL?	Ce (ug/l)	Ce > MQL?	2.13* Ce	100% 4Q3	F= 1	MQL
Total Phenols (4AAP)	NO DATA	NO DATA	NO DATA	NO DATA	0	0	0	5
Aluminum (T)	3822	3822	70	70	149.1	3553.912	3553.912	100
Barium (T)	0	0	26	26	55.38	1.857754	1.857754	100
Boron (T)	0	0	0	0	0	0	0	100
Chlorine Residual (T)	0	0	0	0	0	0	0	100
Chlordane (T)	0	0	0	0	0	0	0	0.2
Cobalt (T)	2.6	2.6	0	0	0	2.414225	2.414225	50
Molybdenum (T)	0	0	5030	5030	10714	349.2832	349.2832	10
Nitrate (as N) (T) (mg/l)	0	0	140	140	298.2	9.7216	9.7216	0.1
Uranium (T)	0	0	0	0	0	0	0	
Radium-226+Radium 228 (pCi/l)	0	0	0.01	0.01	0.0213	0.000715	0.000715	
Strontium-90 (pCi/l)	0	0	0	0	0	0	0	
Tritium (pCi/l)	0	0	0	0	0	0	0	
Gross Alpha (pCi/l)	0	0	0	0	0	0	0	
Vanadium	0	0	0	0	0	0	0	50
Antimony	0	0	2	2	4.26	0.142904	0.142904	60
Arsenic	0	0	1000	1000	2130	69.44	69.44	10
Beryllium	0	0	5	5	10.65	0.35726	0.35726	5
Cadmium	0	0	100	100	213	6.944	6.944	1
Chromium	0	0	10	10	21.3	0.6944	0.6944	10
Copper	3.5	3.5	300	300	639	24.0889	24.0889	10
Lead	0	0	600	600	1278	41.664	41.664	5
Mercury	0	0	0.2	0.2	0.426	0.01388	0.01388	0.2
Nickel	12	12	10	10	21.3	11.8571	11.8571	5
Selenium	0	0	5	5	10.65	0.35726	0.35726	5
Silver	0	0	2	2	4.26	0.142904	0.142904	2
Thallium	0	0	2	2	4.26	0.142904	0.142904	10
Zinc	196	196	200	200	426	196.278	196.278	20
Cyanide (T)	0	0	40	40	85.2	2.858084	2.858084	20

Effluent data for arsenic, cadmium, copper, lead, and zinc are based on the technology based limits for those parameters.

STEP 2: CALCULATE HARDNESS DEPENDENT CRITERIA CONVERT DISSOLVED METALS TO TOTAL FORM

This step calculate hardness dependent criteria, then convert these criteria from dissolved form to total form

The following formula is used to convert dissolved metals criteria to total form

Kp = Kpo * (TSS**a)

Where: Kp = Linear partition coefficient

Kpo and a can be found in table below

C/Ct = 1/ (1 + Kp*TSS* 1.0E-6)

TSS = Total suspended solids concentration found in receiving stream

C/Ct = Fraction of metal dissolved

Cr = Dissolved criteria value

Stream Linear Partition Coefficient

Metals	Kpo	alpha (a)	Kp	C/Ct
Arsenic	480000	-0.73	89380.18	0.528038
Chromium	3360000	-0.93	394765.6	0.202116
Copper	1040000	-0.74	189248.9	0.345723
Lead	2800000	-0.8	443770.1	0.183901
Nickel	490000	-0.57	131885.2	0.431248
Zinc	1250000	-0.7	249407.8	0.286199

The following formula is used to calculate hardness dependent criteria

		Dissolved	Total Stream	WQC (ug/l)	WQC (ug/l)
Cadmium (D)	Acute	e(1.128[ln(hardness)]-3.6867)*C	5.5249		
	Chronic	e(0.7852[ln(hardness)]-2.715)*C	2.670283		
Chromium (D)	Acute	e(0.819[ln(hardness)]+2.5736)	692.9717	3428.586	
	Chronic	e(0.819[ln(hardness)]+0.534)	90.14227	445.9929	
Copper (D)	Acute	e(0.9422[ln(hardness)]-1.7408)	16.83387	48.69179	
	Chronic	e(0.8545[ln(hardness)]-1.7428)	10.9853	31.77485	
Lead (D)	Acute	e(1.273[ln(hardness)]-1.46)*CF	83.6939	455.1024	
	Chronic	e(1.273[ln(hardness)]-4.705)*CF	3.261431	17.73469	
Nickel (D)	Acute	e(0.846[ln(hardness)]+2.253)	573.17	1329.096	
	Chronic	e(0.846[ln(hardness)]+0.0554)	63.66165	147.6219	
Zinc (D)	Acute	e(0.8473[ln(hardness)]+0.8618)	143.4921	501.3724	
	Chronic	e(0.8473[ln(hardness)]+0.8699)	144.6591	505.4501	
Silver (D)	Acute	e(1.72[ln(hardness)]-6.6825)	5.204386		

STEP 3: SCAN POTENTIAL IN-STREAM WASTE CONCENTRATIONS AGAINST WATER QUALITY CRITERIA AND ESTABLISH EFFLUENT LIMITATIONS FOR ALL APPLICABLE PARAMETERS

No limits are established if the potential in-stream waste concentrations are less than the chronic water quality criteria.
The most applicable stringent criteria are used to establish effluent limitations for a given parameter.
Water quality criteria apply at the end-of-pipe for acute aquatic life criteria and discharges to public lakes.
If background concentration exceeds the water quality criteria, water quality criteria apply.
Monthly avg concentration = daily max. / 1.5.

TABLE OF NM WATER QUALITY STANDARDS

STREAM CRITERIA	Potential IWC, (ug/l)			Livestock	Irrigation	Domestic	Aquatic Life Criteria	
	Conc. ug/100%	4Q3	IWC (ug/l)	Wildlife	Criteria	Criteria	Acute	Chronic
PARAMETERS	(2.13*Ce)	(Cd)	F=1	ug/l	ug/l	ug/l	ug/l	ug/l
Aluminum (T)	149.1	3561.461	3561.461	5000	5000	*******	750	87
Barium (T)	55.38	1.80544	1.80544	********	*********	2000	********	********
Boron (T)	0	0	0	5000	750	*******	********	********
Chlorine Residual (T)	0	0	0	11	*********	*******	19	11
Chlordane (T)	0	0	0	********	*********	*******	2.4	0.0043
Cobalt (T)	10.65	2.766656	2.766656	1000	50	*******	********	********
Molybdenum (T)	10713	349.2832	349.2832	********	1000	*******	********	********
Nitrate (as N) (T) (mg/l)	298.2	9.7216	9.7216	********	*********	10	********	********
Uranium (T)	0	0	0	********	*********	5000	********	********
Radium-226+Radium 228 (pCi/l)	0.0213	0.000694	0.000694	30	*********	5	********	********
Strontium-90 (pCi/l)	0	0	0	********	*********	8	********	********
Tritium (pCi/l)	0	0	0	20000	*********	20000	********	********
Gross Alpha (pCi/l)	67.521	2.2012	2.2012	15	*********	15	********	********
Vanadium	0	0	0	100	100	********	********	********
Antimony	4.26	0.13888	0.13888	********	*********	6	********	********
Arsenic (T)	2130	69.44	69.44	378.7604	189.3802	94.69009	643.8926	284.0703
Beryllium	10.65	0.3472	0.3472	********	*********	4	130	5.3
Cadmium	10.65	0.35726	0.35726	50	10	5	5.5249	2.670283
Chromium (T)	213	6.944	6.944	4947.656	494.7656	494.7656	3428.586	445.9929
Copper (T)	639	24.0889	24.0889	1446.244	578.4978	********	48.69179	31.77485
Lead (T)	1278	41.664	41.664	543.7701	27188.5	271.885	455.1024	17.73469
Mercury	0.426	0.01388	0.01388	0.77	*********	2	2.4	0.012
Nickel (T)	21.3	11.8612	11.8612	********	*********	231.8852	1329.096	147.6219
Selenium	10.65	0.3472	0.3472	5	130	50	20	5
Silver	4.26	0.13888	0.13888	********	********	********	5.204386	********
Thallium	4.26	0.13888	0.13888	********	********	2	********	********
Zinc	426	196.278	196.278	87351.95	6988.156	********	501.3724	505.4501
Cyanide (T)	85.2	2.858084	2.858084	5.2	*********	200	22	5.2

APPLICABLE WATER QUALITY-BASED LIMITS

The following formula is used to calculate the allowable daily maximum effluent concentration

Daily Max. Conc. = Cs + (Cs - Ca)(F*Qa/Qe)
Monthly Avg. Conc. = Daily Max. Conc. / 1.5

Where:
Cs = Applicable water quality standard
Ca = Ambient stream concentration
F = Fraction of stream allowed for mixing
Qe = Plant effluent flow
Qa = Criteria low flow (4Q3)

			Aquatic Life Criteria		Limiting Criteria				
	Livestock/ Wildlife Lim	Irrigation Limits	Domestic Limits	Acute Limits	Chronic Limits	Daily Max.	Daily Avg.	Max. Mass	Avg. Mass
PARAMETERS	ug/l	ug/l	ug/l	ug/l	ug/l	ug/l	ug/l	LBS/Day	LBS/Day
Aluminum (T)	No Limit	No Limit	No Limit	No Limit	87	87	58	0.253953	0.169302
Barium (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Boron (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Chlorine Residual (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Chlordane (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Cobalt (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Molybdenum (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Nitrate (as N) (T) (mg/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Uranium (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Radium-226+228(pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Strontium-90 (pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Tritium (pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Gross Alpha (pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Vanadium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Antimony	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Arsenic	No Limit	No Limit	No Limit	643.8926	No Limit	643.8926	429.2618	1.879523	1.253015
Beryllium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Cadmium	No Limit	No Limit	No Limit	5.5249	38.45454	5.5249	3.683267	0.016127	0.010751
Chromium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Copper	No Limit	No Limit	No Limit	48.69179	No Limit	48.69179	32.46119	0.144213	0.094754
Lead	No Limit	No Limit	No Limit	455.1024	255.3958	255.3958	170.2639	0.74551	0.497
Mercury	No Limit	No Limit	No Limit	No Limit	0.172811	0.172811	0.115207	0.000504	0.000336
Nickel	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit

Selenium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Silver	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Thalllium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Zinc	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Cyanide (T)	No Limit	No Limit	No Limit	22	No Limit	22	14.66667	0.064218	0.042812

Outfalls 001 and 002 Combined

CALCULATIONS OF NEW MEXICO WATER QUALITY-BASED EFFLUENT LIMITATIONS

IMPLEMENTATION PROCEDURES: Limits based on New Mexico's water quality standards for Interstate and Intrastate streams of the State of New Mexico are calculated as follows:

FACILITY	**DATA INPUT**
Outfall No.(s)	001 and 002
Plant Effluent Flow (MGD)	4.64 (Based on the monthly average flows reported in the permit renewal application)
Plant Effluent Flow (cfs)	7.192

RECEIVING STREAM	**DATA INPUT**
Receiving Stream Name	Red River
Waterbody Segment Code No.	2119
Is a publicly owned lake or reservoir (enter "1" if yes	0
Are acute aquatic life criteria considered (1= yes, 0= no)	1
Are chronic aquatic life criteria considered (1= yes)	1
Are domestic water supply criteria considered (1= yes)	0
Are irrigation water supply criteria considered (1= yes)	1
Livestock watering and wildlife habitat criteria applied to all streams	
Receiving Stream TSS (mg/l)	10
Receiving Stream Hardness (mg/l as CaCOs)	127
Receiving Stream Critical Low Flow (4Q3) (cfs)	7.05
Avg. Water Temperature (C)	5
pH (Avg)	7.72
Fraction of stream allowed for mixing (F)	1

Value below detection level which is smaller than the minimum quantification level will be counted as "0".
Value reported as "less than" but greater than MQL, the reported value is used.
Value below detection level and reported as "ND" will be counted as "0".

The following formula is used to calculate the In-stream Waste Concentration (Cd)

$$Cd = [(F*Qa*Ca) + (Qe*2.13*Ce)] / (F*Qa + Qe)$$

Where:

Cd = In-stream Waste Concentration
F = Fraction of stream allowed for mixing (see NM Implementation Guidance)
Ce = Reported concentration in effluent
Ca = Ambient stream concentration upstream of discharge
Qe = Plant effluent flow
Qa = Critical low flow of stream at discharge point expressed as the 4Q3

	Ambient Stream Conc.		Effluent Conc.		In-stream Waste Conc., Cd (ug/l)			
POLLUTANTS	Ca (ug/l)	Ca > MQL?	Ce (ug/l)	Ce > MQL?	2.13* Ce	100% 4Q3	F= 1	MQL
Total Phenols (4AAP)	NO DATA	NO DATA	0	0	0	0	0	5
Aluminum (T)	3822	3822	70	70	149.1	1956.118	1956.118	100
Barium (T)	0	0	26	26	55.38	12.92988	12.92988	100
Boron (T)	0	0	0	0	0	0	0	100
Chlorine Residual (T)	0	0	0	0	0	0	0	100
Chlordane (T)	0	0	0	0	0	0	0	0.2
Cobalt (T)	2.6	2.6	5	5	10.65	3.79353	3.79353	50
Molybdenum (T)	0	0	2229 *	2229 *	4748	1108.489	1108.489	10
Nitrate (as N) (T) (mg/l)	0	0	140	140	298.2	69.62246	60.62246	0.1
Uranium (T)	0	0	0	0	0	0	0	
Radium-226+Radium 228 (pCi/l)	0	0	0.7	0.7	1.491	0.348112	0.348112	
Strontium-90 (pCi/l)	0	0	0	0	0	0	0	
Tritium (pCi/l)	0	0	0	0	0	0	0	
Gross Alpha (pCi/l)	0	0	31.7	31.7	67.521	15.76451	15.76451	
Vanadium	0	0	0	0	0	0	0	50
Antimony	0	0	2	2	4.26	0.994607	0.994607	60
Arsenic	0	0	1000 *	1000 *	2130 *	497.3033	497.3033	10
Beryllium	0	0	5	5	10.65	2.48652	2.48652	5
Cadmium	0	0	100 *	100 *	213	49.7303	49.7303	1
Chromium	0	0	10	10	21.3	4.97303	4.97303	10
Copper	3.5	3.5	300 *	300 *	639	150.95	150.95	10
Lead	0	0	100 *	100 *	213	49.7303	49.7303	5
Mercury	0	0	0.23	0.23	0.4899	0.114379	0.114379	0.2
Nickel	12	12	10	10	21.3	11.00539	11.00539	5
Selenium	0	0	5	5	10.65	2.48652	2.48652	5
Selenium (SO4 >500 mg/l)	0	0	5	5	10.65	2.48652	2.48652	5
Silver	0	0	2	2	4.26	0.994607	0.994607	2
Thallium	0	0	2	2	4.26	0.994607	0.994607	10
Zinc	196	196	200 *	200 *	426	197.989	197.989	20
Cyanide (T)	0	0	40	40	85.2	19.89213	19.89213	20

* Effluent concentrations for molybdenum, lead and zinc are based on technology based limitations.

STEP 2: CALCULATE HARDNESS DEPENDENT CRITERIA CONVERT DISSOLVED METALS TO TOTAL FORM

This step calculate hardness dependent criteria, then convert these criteria from dissolved form to total form
The following formula is used to convert dissolved metals criteria to total form

Kp = Kpo * (TSS**a)

Where: Kp = Linear partition coefficient
Kpo and a can be found in table below
C/Ct = 1/ (1 + Kp*TSS* 1.0E-6)
TSS = Total suspended solids concentration found in receiving stream
C/Ct = Fraction of metal dissolved
Cr = Dissolved criteria value

Stream Linear Partition Coefficient

Metals	Kpo	alpha (a)	Kp	C/Ct
Arsenic	480000	-0.73	89380.18	0.528038
Chromium	3360000	-0.93	394765.6	0.202116
Copper	1040000	-0.74	189248.9	0.345723
Lead	2800000	-0.8	443770.1	0.183901
Nickel	490000	-0.57	131885.2	0.431248
Zinc	1250000	-0.7	249407.8	0.286199

The following formula is used to calculate hardness dependent criteria

			Dissolved WQC (ug/l)	Total Stream WQC (ug/l)
Cadmium (D)	Acute	e(1.128[ln(hardness)]-3.6867)*CF	5.5249	
	Chronic	e(0.7852[ln(hardness)]-2.715)*CF	2.670283	
Chromium (D)	Acute	e(0.819[ln(hardness)]+2.5736)	692.9717	3428.586
	Chronic	e(0.819[ln(hardness)]+0.534)	90.14227	445.9929
Copper (D)	Acute	e(0.9422[ln(hardness)]-1.7408)	16.83387	48.69179
	Chronic	e(0.8545[ln(hardness)]-1.7428)	10.9853	31.77485
Lead (D)	Acute	e(1.273[ln(hardness)]-1.46)*CF	83.6939	455.1024
	Chronic	e(1.273[ln(hardness)]-4.705)*CF	3.261431	17.73469

Nickel (D) Acute e(0.846[ln(hardness)]+2.253) 573.17 1329.096
Chronic e(0.846[ln(hardness)]+0.0554) 63.66165 147.6219

Zinc (D) Acute e(0.8473[ln(hardness)]+0.8618) 143.4921 501.3724
Chronic e(0.8473[ln(hardness)]+0.8699) 144.6591 505.4501

Silver (D) Acute e(1.72[ln(hardness)]-6.8825) 5.204386

STEP 3: SCAN POTENTIAL IN-STREAM WASTE CONCENTRATIONS AGAINST WATER QUALITY CRITERIA AND ESTABLISH EFFLUENT LIMITATIONS FOR ALL APPLICABLE PARAMETERS

No limits are established if the potential in-stream waste concentrations are less than the applicable water quality criteria.

The most stringent applicable criteria are used to establish effluent limitations for a given parameter.
Water quality criteria apply at the end-of-pipe for acute aquatic life criteria.
If background concentration exceeds the water quality criteria, water quality criteria apply.

TABLE OF NM WATER QUALITY STANDARDS

STREAM CRITERIA	Potential IWC, (ug/l) Conc. ug/100% 4Q3 (2.13*Ce)	IWC (ug/l F=1 (Cd)	Livestock Wildlife ug/l	Irrigation Criteria ug/l	Domestic Criteria ug/l	Aquatic Life Criteria Acute ug/l	Chronic ug/l
Aluminum (T)	149.1	1956.118	1956.118	5000	5000	*******	750	87
Barium (T)	55.38	12.92989	12.92989	********	********	2000	*******	********
Boron (T)	0	0	0	5000	750	*******	*******	********
Chlorine Residual (T)	0	0	0	11	********	*******	19	11
Chlordane (T)	0	0	0	********	********	*******	2.4	0.0043
Cobalt (T)	10.65	3.79353	3.79353	1000	50	*******	*******	********
Molybdenum (T)	4747	1108.489	1108.489	********	1000	*******	*******	********
Nitrate (as N) (T) (mg/l)	298.2	69.62246	69.62246	********	********	10	*******	********
Uranium (T)	0	0	0	********	********	5000	*******	********
Radium-226+228 (pCi/l)	1.491	0.348112	0.348112	30	********	5	*******	********
Strontium-90 (pCi/l)	0	0	0	********	********	8	*******	********
Tritium (pCi/l)	0	0	0	20000	********	20000	*******	********
Gross Alpha (pCi/l)	67.521	15.76451	15.76451	15	********	15	*******	********
Vanadium	0	0	0	100	100	********	*******	********
Antimony	4.26	0.994607	0.994607	********	********	6	*******	********
Arsenic (T)	2130	497.303	497.303	378.7604	189.3802	94.69009	643.8926	284.0703
Beryllium	10.65	2.48652	2.46852	********	********	4	130	5.3
Cadmium	213	49.7303	49.7303	50	10	5	5.5249	2.670283

Chromium (T)	21.3	4.97303	4.97303	4947.656	494.7656	494.7656	3428.586	445.9929
Copper (T)	639	150.95	150.95	1446.244	578.4978	********	48.69179	31.77485
Lead (T)	213	49.7303	49.7303	543.7701	27188.5	271.885	455.1024	17.73469
Mercury	0.4899	0.114379	0.114379	0.77	********	2	2.4	0.012
Nickel (T)	21.3	11.00539	11.00539	********	********	231.8852	1329.096	147.6219
Selenium	10.65	2.48651	2.48651	5	130	50	20	5
Silver	4.26	0.994607	0.994607	********	********	********	5.204386	********
Thallium	4.26	0.994607	0.994607	********	********	2	*******	********
Zinc	426	197.989	197.989	87351.95	6988.156	********	501.3724	505.4501
Cyanide (T)	85.2	19.89213	19.89213	5.2	********	200	22	5.2

APPLICABLE WATER QUALITY-BASED LIMITS

The following formula is used to calculate the allowable daily maximum effluent concentration

Daily Max. Conc. = Cs + (Cs - Ca)(F*Qa/Qe)
Monthly Avg. Conc. = Daily Max. Conc. / 1.5

Where: Cs = Applicable water quality standard
Ca = Ambient stream concentration
F = Fraction of stream allowed for mixing
Qe = Plant effluent flow
Qa = Criteria low flow (4Q3)

STREAM	Livestock/ Wildlife Lim	Irrigation Limits	Domestic Limits	Aquatic Life Criteria Acute Limits	Chronic Limits	Limiting Criteria Daily Max.	Monthly Avg.	Max. Mass	Avg. Mass
PARAMETER	ug/l	ug/l	ug/l	ug/l	ug/l	ug/l	ug/l	LBS/Day	LBS/Day
Aluminum (T)	No Limit	No Limit	No Limit	No Limit	87	87	58	3.366691	2.244461
Barium (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Boron (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Chlorine Residual (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Chlordane (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Cobalt (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Molybdenum (T)	No Limit	2010.845	No Limit	No Limit	No Limit	2010.845	1340.564	77.8149	51.876
Nitrate (as N)(mg/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Uranium (T)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Radium-226+228 (pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Strontium-90 (pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Tritium (pCi/l)	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Gross Alpha (pCi/l)	30.16268	No Limit	No Limit	No Limit	No Limit	30.1628	20.10845	1.167223	0.778149

Vanadium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Antimony	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Arsenic	761.6285	380.8143	No Limit	643.8926	571.2214	380.8143	253.8762	14.73659	9.824398
Beryllium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Cadmium	No Limit	No Limit	No Limit	5.5249	5.36952	5.36952	3.579684	0.207787	0.138525
Chromium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Copper	No Limit	No Limit	No Limit	48.69179	No Limit	48.69179	32.46119	1.884255	1.25617
Lead	No Limit	No Limit	No Limit	No Limit	35.66172	35.66172	23.77448	1.380023	0.920015
Mercury	No Limit	No Limit	No Limit	No Limit	0.02413	0.02413	0.016087	0.00093	0.0006225
Nickel	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Selenium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Silver	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Thallium	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Zinc	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit	No Limit
Cyanide (T)	27.72535	No Limit	No Limit	22	10.45639	10.45639	6.97093	0.404637	0.269758

STEP 4: EPA HUMAN HEALTH CRITERIA SCREENING

Stream harmonic flow is used to calculate the dilution fraction.
EOP Criteria = EPA Criteria / Dilution Fraction

Enter the stream harmonic flow (cfs): 25
HHC Dilution Fraction 1

	Ambient Stream Ca (ug/l)	Effluent Conc. Ce (ug/l)	Potential Effluent 2.13* Ce	Potential In-stream Conc. (ug/l)	EPA Criteria (ug/l)	conc. greater than instream criteria 1=YES; 0 = NO
Antimony	0	2	4.26	0.9517247	4300	0
Arsenic	0	5	10.65	2.3793116	0.14	1
Mercury	0	0.23	0.4899	0.1094483	0.15	0
Nickel	12	10	21.3	14.077709	4600	0
Thallium	0	2	4.26	0.9517247	6.3	0
Cyanide (T)	0	40	85.2	19.034493	220000	0

APPENDIX C

POLICY FOR POST THIRD ROUND NPDES PERMITTING

Original document signed September 9, 1992, by Myron O. Knudson, Director, Water Management Division, U.S. EPA Region 6

I. EPA NATIONAL POLICY

The Water Quality Act states that "...it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." In addressing this, the Environmental Protection Agency's national policy for issuance of third round NPDES permits was published in the Federal Register in March 9, 1984. This policy states that, "... the Environmental Protection Agency (EPA) will use an integrated strategy consisting of both biological and chemical methods to address toxic and nonconventional pollutants from industrial and municipal sources. In addition to enforcing specific numerical criteria, EPA and the States will use biological techniques and available data on chemical effects to assess toxicity impacts and human health hazards..."

II. EPA REGULATORY AUTHORITY

On June 2, 1989, EPA promulgated national regulations for the issuance of third round NPDES permits. Section 122.44(d)(1) of Title 40 of the Code of Federal Regulations requires EPA and the delegated states to evaluate each NPDES permit for the potential to exceed state numerical or narrative water quality standards, including those for toxics, and to establish effluent limitations for those facilities with the "reasonable potential" to exceed those standards. These regulations require both chemical specific limits, based on the state numerical water quality standards or other criteria developed by EPA, and whole effluent toxicity effluent limits, where appropriate.

III. EPA REGION 6 POLICY

A. The Region 6 implementation strategy is designed to support and implement the national policy. The regional policy is that no source (industrial, municipal, or federal facility) will be allowed to discharge any wastewater which:

1. Results in the endangerment of a drinking water supply;
2. Results in aquatic bioaccumulation which threatens human health;
3. Results in instream acute or chronic aquatic toxicity; or
4. Causes a violation of an applicable general or numerical state water quality standard.

B. In order to accomplish these objectives Region 6 will, as part of the post third round permit issuance procedures:

1. Ensure that no source will cause, or significantly contribute to, an exceedance of state water quality standards which protect public drinking water supplies;
2. Ensure that no source will cause, or significantly contribute to, an exceedance of state water quality standards for aquatic bioaccumulation which threatens human health;
3. Identify and address sources which may exceed EPA Water Quality Criteria for human health protection;
4. Address known aquatic toxicity by applying appropriate chemical specific and/or whole effluent toxicity limitations or toxicity reduction requirements when a reasonable potential for toxic conditions exists.

APPENDIX D
POST THIRD ROUND NPDES PERMIT IMPLEMENTATION STRATEGY

Adopted October 1, 1992

Original document signed September 9, 1992, by Jack V. Ferguson, Chief, Permits Branch, Water Management Division, U.S. EPA Region 6

I. PREAMBLE

A. BACKGROUND

Over the history of the NPDES permit program, the Environmental Protection Agency (EPA) has focused on two primary concepts to abate the discharge of pollutants. First, EPA has utilized a technology-based control approach. This was reflected in permits originally issued with requirements for secondary treatment (municipalities) and Best Practicable Control Technology Currently Available (industries). More recently permits have required implementation of the Best Conventional Pollutant Control Technology, Best Available Technology Economically Achievable (industries) and pretreatment program development (municipalities).

Secondly, EPA has addressed water quality as impacted primarily by conventional (or oxygen demanding) parameters. This has occurred through the use of specific state water quality standards (and the resulting water quality management plans) for specific pollutants.

EPA Region 6 moved into the "third round" of NPDES permits in 1987. The focus of these "post BAT" permits is to move beyond our first two phases of control and insure that adequate controls are being implemented to confirm that human health and aquatic life are being adequately protected on a site-specific receiving stream basis. Region 6 developed its third round policy on March 11, 1987, and adopted a strategy to implement this policy on April 1, 1987, revised October 31, 1989.

B. EPA NATIONAL POLICY

The Clean Water Act states that "...it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." In addressing this, the EPA outlined the national policy objectives for development of post-BAT NPDES permit limitations (third round) in the March 9, 1984, Federal Register. This policy states that "to control pollutants beyond Best Available Technology Economically Achievable (BAT), secondary treatment, and other Clean Water Technology-based requirements in order to meet state water quality standards, the EPA will use an integrated strategy consisting of both biological and chemical methods to address toxic and nonconventional pollutants from industrial and municipal sources. Where State standards contain numerical criteria

for toxic pollutants, NPDES permits will contain limits as necessary to assure compliance with these standards. In addition to enforcing specific numerical criteria, EPA and the States will use biological techniques and available data on chemical effects to assess toxicity impacts and human health hazards based on the general standard of 'no toxic materials in toxic amounts'."

Where violations of water quality standards are identified or projected, EPA and the States will develop water quality based effluent limits for inclusion in any issued permit. Where there is a significant likelihood of toxic effects to biota in the receiving stream, EPA and the States may impose permit limits on effluent toxicity and may require an NPDES permittee to conduct a toxicity reduction evaluation. Where toxic effects are present but there is a significant likelihood that compliance with technology based requirements will sufficiently mitigate the effects, EPA and the States may require chemical and toxicity testing after installation of treatment and may reopen the permit to incorporate additional limitations if needed to meet water quality standards.

C. NATIONAL REGULATIONS

Section 122.44(d)(1) of Title 40 of the Code of Federal Regulations requires EPA and the delegated states to evaluate each NPDES permit for the potential to exceed a state numerical or narrative water quality standards, including those for toxics, and to establish effluent limits for those facilities with the "reasonable potential" to exceed those standards. These regulations require chemical specific limits, based on state numerical water quality standards or other criteria developed by EPA, and whole effluent toxicity effluent limits.

D. EPA REGION 6 IMPLEMENTATION STRATEGY

The Region 6 implementation strategy is designed to support and implement the regional policy of March 11, 1987. The intent of this strategy is that there shall be no discharge of any wastewater from any source (industrial, municipal, or federal facility) which:

1. Results in the endangerment of any drinking water supply;
2. Results in aquatic bioaccumulation which endangers human health;
3. Results in any instream acute or chronic aquatic toxicity after dilution; or
4. Violates any other applicable general or numerical state water quality standard.

II. OVERVIEW

A. GOAL

The goal of the regional policy is to assure that there are "no toxic materials in toxic amounts" in waters of the United States; this is stated in the Water Quality Act as the national policy. The specific areas of concern are human health protection and aquatic biota protection. The goal of the Office of Water Third Round Permit Issuance Strategy (to eliminate toxics as expeditiously as possible) will be achieved by industrial, municipal, and federal discharges in Region 6.

B. GENERAL IMPLEMENTATION PROCEDURE

1. In accordance with the priorities listed below, all potential significant contributors to toxicity will be evaluated at permit issuance, or when modifications are requested for new processes or expansions. Also, discharges in known areas of ambient toxicity will be evaluated. This evaluation will consist of a review of both specific chemical data and toxicity testing data representative of the facility's discharge into the receiving water. The review will consist of a projection of ambient impacts at appropriate critical low river flow conditions or at the appropriate mixing zone conditions for bays, lakes, and estuaries.

2. Routine biomonitoring and, where appropriate, chemical specific monitoring of discharges will be required for all major dischargers. New sources shall be required to comply with appropriate whole effluent toxicity limits.

3. Increased monitoring of discharges may be required in areas of suspected ambient toxicity problems to confirm the presence and causes of ambient toxicity. Suspected toxicity will be verified by toxicity testing, specific chemical evaluations and/or bio-assessments.

4. Appropriate controls will be established to correct identified problems at permit reissuance, or by reopening the permit, if necessary to prevent ambient toxicity.

C. PRIORITIES

The regional policy will be implemented to the maximum extent possible given available EPA and state resources in accordance with the following priorities:

1. Facilities with known or suspected toxicity problems.
2. Facilities discharging to priority water bodies.

3. Other major industrial, municipal and federal facilities.

4. Other minor industrial and federal facilities.

5. Other minor municipal facilities.

6. Storm water only facilities.

D. CONTROL MEASURES

The following general control measures will be utilized to implement the policy:

1. Specific chemical effluent limits, and/or

2. Whole effluent toxicity testing on a flow weighted composite sample of all discharges from a facility into a receiving stream. The results of such testing may trigger a requirement to conduct a toxicity reduction evaluation and/or the imposition of whole effluent toxicity limitations; and/or

3. Pollution prevention measures and best management practices; and/or

4. No facility will be allowed to discharge in excess of the technology based limit for that specific chemical and discharge type.

III. HUMAN HEALTH PROTECTION (SPECIFIC CHEMICAL)

A. STATE NUMERICAL STANDARDS

Permits written under this strategy will establish effluent limits, if specific chemical state water quality standards, established for protection of human health, have a reasonable potential to be exceeded. Permits will implement all waste load allocations as specified in the water quality management plan.

B. FOOD CONSUMPTION

For pollutants for which there are no applicable state water quality standards:

1. EPA will calculate the instream concentrations of all pollutants for which EPA has published human health criteria in the current edition of EPA's "Quality Criteria for Water", or National Toxics Standards, as promulgated, or for which EPA has identified human health toxicological properties in EPA's Integrate Risk Information System (IRIS). These calculations will use an appropriate flow or mixing zone condition.

2. In using these criteria and information, EPA will follow the cancer risk level and fish consumption rate provided by the appropriate state regulatory agency. In the event no policy is provided by the state, EPA policy and/or guidance will be utilized, such as the manual "Assessment and Control of Bioconcentratable Contaminants in Surface Waters".

3. Where these dilution calculations indicate that instream pollutant concentrations may exceed the criteria referenced in paragraphs III.B.1 and III.B.2 above, the facility will be required to monitor for those pollutants. The State will be requested to consider the stream as a "priority water body" and to develop state water quality standards and a waste load allocation where appropriate. NPDES permits may be reopened for point sources that are shown to cause or significantly contribute to these ambient problems, when state water quality standards and waste load allocations are established.

C. FISH TISSUE INFORMATION

1. If available fish or shellfish tissue information identifies the potential threat to human health at a cancer risk greater than those specified in III.B.2, permittees discharging into the water body may be required, by way of a permit requirement or request for information under Section 308 of the Clean Water Act, to analyze their effluents for the subject pollutants and/or identify using a laboratory test the actual bioaccumulation or bio-concentration of the pollutant in fish tissue. The permits for facilities found to be causing or significantly contributing to this problem may be reopened to establish effluent limits based on the appropriate state water quality standards.

2. Enforcement action will be considered under Sections 309 and/or 504 of the Clean Water Act if available fish or shellfish flesh information confirms the existence of an imminent and substantial endangerment to the health or welfare of persons, such as an exceedance of the FDA Action Levels.

IV. CHEMICAL SPECIFIC CONTROLS FOR AQUATIC BIOTA PROTECTION

A. STATE NUMERICAL STANDARDS

Permits written under this strategy will establish effluent limits, if specific chemical water quality standards are or have a reasonable potential to be exceeded, and implement all waste load allocations as specified in the water quality management plan.

B. CHLORINE

Permits for facilities with the potential for a continuous discharge of chlorine will include water quality based effluent limits for Total Residual Chlorine. Water quality based limits will be derived from the state water quality standards giving consideration to appropriate dilution factors, state implementation procedures, or federal criteria if no state standard has been approved.

C. PRETREATMENT

POTWs with approved pretreatment programs controlling indirect discharges of toxic pollutants will be required to develop and adopt technically based local limits (or demonstrate that they are not necessary) which will protect against pass-through, interference and sludge contamination. Additionally POTWs with approved pretreatment programs will be required to monitor the influent, effluent and sludge concentration of toxic and hazardous pollutants, as applicable, in order to evaluate the adequacy of the local limits on an ongoing basis. Some non-pretreatment POTWs with substantial industrial contributions may be required to monitor influent and effluent for toxic pollutants on a case-specific basis.

V. BIOLOGICAL CONTROLS FOR AQUATIC BIOTA PROTECTION

A. Specific state required effluent limits or monitoring for whole effluent toxicity will be imposed as required by the state water quality standards and implementation plan.

B. Where ambient toxicity is identified as a result of a facility discharge, the Region will proceed with permit effluent limits to regulate controllable pollutants.

1. Effluent limits will be established using available state water quality standards and implementation procedures.

2. "Toxicity Reduction Evaluations" may be initially required to identify the source(s) of the toxicity and determine how the toxicity can be reduced as a part of a schedule leading to compliance with effluent limits.

C. Permits issued to dischargers with a potential for causing ambient toxicity will require that the permittee perform periodic toxicity screening using whole effluent biomonitoring techniques.

1. Permittees will typically be required to monitor for the duration of the permit. The monitoring frequency will be based on toxicity potential and effluent variability.

2. State mixing zone procedures will determine the applicability of acute or chronic test methods.

3. Discharge samples used for biomonitoring analysis will consist of flow weighted composite samples of all dry weather flows discharged into overlapping mixing zones within a receiving stream. Storm water flows may be considered if a significant threat of contamination exists. If a facility discharges (or may discharge) into two or more receiving streams, testing will be required for each stream.

4. Required biomonitoring will be performed in accordance with methods published in references 2, 3, and 4 in the attached bibliography. The permit will require a dilution series necessary to calculate the NOEL. One dilution will be reflective of the critical low flow dilution.

5. Tests on more than one species will be required. Some combination of the following test methods or methods specified in approved state water quality standards will be required for biomonitoring:

   *Freshwater receiving streams (salinity <2000 ppm)
   -- 48 hour Daphnia acute survival
   -- 48 hour Fathead Minnow acute survival
   -- 7 day Ceriodaphnia chronic survival/reproduction
   -- 7 day Fathead Minnow chronic survival/growth

   *Saline receiving streams (salinity >2000 ppm)
   -- 48 hour Mysid acute survival
   -- 48 hour Silverside Minnow acute survival
   -- 7 day Mysid chronic survival/growth
   -- 7 day Silverside Minnow chronic survival/growth

6. Dilution water used in the biomonitoring test will be receiving stream water collected at a point upstream of the discharge point(s) or other stream water if approved by the permitting authority. Synthetic laboratory water will be used if the upstream water is shown to already be toxic or if there is no acceptable natural water.

D. When the biomonitoring data shows actual or potential toxicity after dilution with the receiving stream, permittees will be required to retest their effluent to determine if toxicity is consistent or occurs on a periodic basis. If effluent toxicity is persistent, whole effluent toxicity limits and/or a TRE requirement will be applied, as appropriate.

VI. BIBLIOGRAPHY

1. "Quality Criteria for Water 1986," EPA 440/5-86-001, United States Environmental Protection Agency, May 1, 1986.

2. "Methods for Measuring the Acute Toxicity of Effluent to Freshwater and Marine Organisms," EPA 600/4-90/027, U.S. Environmental Protection Agency, September, 1991.

3. "Short Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms," EPA 600/4-89/001, U.S. Environmental Protection Agency, February 1989.

4. "Short Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms", EPA 600/4-87/028, U.S. Environmental Protection Agency, May 1988.

5. "Technical Support Document for Water Quality-based Toxics Control," EPA/505/2-90-001, PB91-127415, U.S. Environmental Protection Agency, March 1991.

6. "Permit Writer's Guide to Water Quality-based Permitting for Toxic Pollutants," EPA 440/4-87-005, U.S. Environmental Protection Agency, 1987.

7. National Policy for Development of Water Quality-based Permit Limitations for Toxic Pollutants, 49 Federal Register 9016, March 9, 1984.

8. "Methods for Aquatic Toxicity Identification Evaluations, Phase I: Toxicity Characterization Procedures", EPA 600/6-91/003, U.S. Environmental Protection Agency, February, 1991.

9. "Methods for Aquatic Toxicity Identification Evaluations, Phase II: Toxicity Identification Procedures", EPA 600/3-88/035, U.S. Environmental Protection Agency, February 1989.

10. "Methods for Aquatic Toxicity Identification Evaluations, Phase III: Toxicity Confirmation Procedures", EPA 600/3-88/036, U.S. Environmental Protection Agency, February 1989.

11. "Generalized Methodology for Conducting Industrial Toxicity Reduction Evaluations (TREs)", EPA 600/2-88/070, U.S. Environmental Protection Agency, March 1989.

12. "Toxicity Reduction Evaluation Protocol for Municipal Wastewater Treatment Plants", EPA 600/2-88/062, U.S. Environmental Protection Agency, April 1989.

13. "Toxicity Identification Evaluation: Characterization of Chronically Toxic Effluents, Phase I", EPA-600/6-91/005, U.S. Environmental Protection Agency, June, 1991.