THE CLEAN WATER ACT AND PROTECTION OF THE NATION'S WATERS: UNPERMITTED POLLUTION CARRIED FROM A POINT SOURCE TO A WATERWAY BY GROUNDWATER WITH A DIRECT HYDROLOGICAL CONNECTION

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Introduction

The position taken by the coal ash and pipeline polluters and suggested by the U.S. Environmental Protection Agency (EPA) in its recent notice would blast a hole in the protections of the Clean Water Act and undermine the integrity of the Nation's water resources.

The Clean Water Act (CWA), by its plain terms, prohibits unpermitted pollution of the Nation's waters from a point source. The Clean Water Act does not create an exception for polluters who dump or inject pollution short of the water's edge and then allow the pollution to flow over and under the ground and with groundwater to a river, lake, stream, or ocean. If the Clean Water Act contained such a nonsensical exception, any polluter could pull its pipe, ditch, or container one foot, two feet, ten feet, or any other distance back from the water's edge or inject its pollution into the ground any distance from the river's bank and avoid the Clean Water Act entirely. It would be open season for polluters across the country, and the progress made since the enactment of the Clean Water Act in 1972 would be eroded.

Communities and water resources across the country – and particularly in the Southeast – are being harmed today by pollution from unlined leaking coal ash pits and other toxic pollution that flows with groundwater from irresponsibly sited and poorly designed waste containers near to and sometimes on the banks of drinking water reservoirs, rivers, lakes, and streams. State

agencies have been ineffective in enforcing all laws to protect communities and clean water from these dangerous and polluting point sources. The Tennessee Valley Authority's (TVA) Kingston disaster and Duke Energy's Dan River catastrophe are just two notable examples of long standing threats that state agencies have ignored or failed to address. In 2015, Duke Energy companies – key parts of the country's largest utility – were successfully prosecuted for Clean Water Act coal ash crimes, based on illegal pollution of which the state agency had long been aware. These are only a few examples.

For four decades, courts and the EPA have long held that the Clean Water Act bars this category of pollution. This issue is arising now only because citizens across the country and especially in the Southeast have tired of waiting for government agencies to act and have taken the law into their own hands by enforcing the Clean Water Act. They are fighting to protect their drinking water supplies; to stop the erosion of their property values; to protect their irrigation sources on their agricultural lands; to restore fisheries that are contaminated by heavy metals; to eliminate from public drinking water carcinogens that have appeared due to coal ash pollution in rivers; and to stop the continual flow of coal ash pollutants into popular lakes and rivers. The coal ash and petroleum polluters are rushing to the Congress and the EPA today because finally the law is being enforced and because they are finally being held accountable for their pollution. This regulatory and political activity is designed to stop this citizen enforcement, pure and simple.

For decades since the enactment of the Clean Water Act (CWA), the Environmental Protection Agency (EPA) has repeatedly – during administrations of both parties – followed the plain language of the Clean Water Act and stated that the Clean Water Act forbids unpermitted pollution of the nation's rivers, lakes, oceans, and streams when the polluter's unlawful

contamination travels from a point source to the jurisdictional surface water via groundwater that has a direct hydrological connection to the jurisdictional surface water. This is a point on which the administrations of Ronald Regan and Barak Obama agreed. The EPA can reach no other conclusion because the plain language of the Clean Water Act requires this conclusion. The EPA has no authority to create a loophole in the Clean Water Act for polluters who dump their unpermitted pollution short of the water's edge, because the EPA cannot defensibly disregard the plain language of the Clean Water Act.

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

Questionable Timing of the EPA's Request. To date, the EPA has followed the plain language of the Clean Water Act, correctly recognizing that the Clean Water Act protects the nation's waters from unpermitted pollution dumped short of the banks of a waterway and transmitted over or under the earth or through hydrologically connected groundwater to surface

water. There is no legitimate reason for the EPA to call into question what it has repeatedly said over the course of almost half a century, and the EPA's Notice gives none.

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

Today, these powerful polluters with close ties to the administration are facing accountability for their unlawful pollution in numerous courts across the country. Both the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Ninth Circuit recently rejected their arguments and held that the Clean Water Act, by its clear terms, protects the Savannah River watershed and the Pacific Ocean from unpermitted pollution that was spilled or injected just uphill from a tributary or on the ocean's shore and that flows into the Nation's waters under the land's surface through hydrologically connected groundwater. The Ninth Circuit's decision was recommended by the EPA itself in an amicus brief presented by the United States Department of Justice, and the rulings of both the Fourth and the Ninth Circuits were opposed by amici representing petroleum companies, the coal-fired utilities, and mining companies.[2]

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[1] Kevin Bogardus, *Meetings with Energy Chiefs Filled Pruitt's Calendar*, Greenwire (June 15, 2017), https://www.eenews.net/greenwire/stories/1060056130.

[2] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (April 12, 2018); *Haw. Wildlife Fund v. Cnty of Maui*, --- F.3d ----, 2018 WL 1569313 (9th Cir. 2018), denying rehearing en banc and amending opinion reported at 881 F.3d 754 (9th Cir. 2018).

In Tennessee, a United States District Court found that TVA has for years violated the Clean Water Act at its Gallatin coal-fired plant by polluting the Cumberland River with coal ash and heavy metals that flow into the river with groundwater through sinkholes, seeps, and leaks in its coal ash lagoons on the river's banks.[3] That case is on appeal to the Sixth Circuit, and TVA will face the EPA's longstanding position based on the plain text of the statute, as did the polluter in the Fourth and Ninth Circuit cases. Once more, the usual polluter amici – coal-fired utilities and mining companies – have shown up to support TVA in its defiance of the text of the Clean Water Act and the EPA's established position based thereon.

In Virginia, another United States District Court found that Dominion Energy is violating the Clean Water Act at its Chesapeake coal-fired plant by polluting the Elizabeth River with arsenic flowing out of its riverfront coal ash lagoon via groundwater into the river.[4] An appeal of that case is pending before the United States Court of Appeals for the Fourth Circuit. In all the briefs, Dominion and other polluters struggle to deal with the EPA's many statements that contradict the polluters' attempt to create a counter-textual loophole in the Clean Water Act.

And across North Carolina, Duke Energy faces significant liabilities for its dangerous, leaking, and polluting disposal of coal ash in riverfront unlined pits. Citizen groups have repeatedly enforced the Clean Water Act against Duke Energy in federal court for coal ash pollution (including arsenic, mercury, and selenium) that flows with subsurface groundwater into North Carolina's waterways from nearby unlined coal ash pits. Duke Energy companies have

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[3] *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775 (M.D. Tenn. 2017), *appeal docketed*, No. 17-6155 (6th Cir. Oct. 3, 2017).

[4] *Sierra Club v. Va. Elec. & Power Co.*, 2017 WL 4476832 (E.D. Va. July 31, 2017), *appeal docketed*, No. 17-1895 (4th Cir. Aug. 2, 2017).

pleaded guilty[5] to federal coal ash Clean Water Act crimes across the state and currently face three Clean Water Act enforcement actions pending in federal court.[6] Duke Energy created unlined waterfront pits and dumped millions of tons of coal ash into those pits despite the EPA's warnings in the 1970s that this irresponsible behavior risked pollution of ground and surface waters. At eight of its fourteen North Carolina coal ash sites, Duke Energy has been required by state court orders and a settlement agreement of a federal Clean Water Act suit[7] to remove its coal ash from these leaking pits to eliminate the ongoing source of this pollution. Duke Energy must contemplate the possibility of further Clean Water Act enforcement against its leaking unlined coal ash pits.

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

Indeed, Dominion has already made use of the EPA's Notice, filing it as purportedly "supplemental authority" with the United States Court of Appeals for the Fourth Circuit in its pending appeal and quoting the carefully-crafted phraseology of the EPA's new political leaders in a thinly-veiled attempt to undercut the force of the EPA's decades-long bipartisan position.

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[5] Press Release, U.S. Dep't of Justice, Duke Energy Subsidiaries Plead Guilty and Sentenced to Pay $102 Million for Clean Water Act Crimes (May 14, 2015), *available at* https://www.justice.gov/opa/pr/duke-energy-subsidiaries-plead-guilty-and-sentenced-pay-102-million-clean-water-act-crimes.

[6] *Appalachian Voices v. Duke Energy Carolinas*, LLC, No 1:17-CV-1097 (M.D.N.C. filed Dec. 5, 2017); *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 1:17-cv-452 (M.D.N.C. filed May 16, 2017); *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 1:16-cv-607 (M.D.N.C. filed June 13, 2016).

[7] *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428 (M.D.N.C. 2015).

To stay true to its legitimate mission[8] of protecting human health and the environment by safeguarding the nation's waters, the EPA should withdraw this dubious request and focus its attention on protecting communities and natural resources from pollution. The EPA should end this effort to help the polluters who damage those resources and threaten those communities and to facilitate the pollution that contaminates the nation's surface waters.

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

The language of the Clean Water Act is clear and unqualified: Except as otherwise in compliance with Clean Water Act requirements, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). A "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Clean Water Act does *not* provide, as some polluters would like, that a discharge is an addition of a pollutant "directly" to navigable waters, or "by" a point source. The language contains no such limitation or loophole. Instead, the language is intentionally written broadly to encompass "any" addition of "any" pollutant "to" navigable waters "from" any point source. *Id.*

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[8] *See, e.g.*, EPA, "Our Mission and What We Do", *available at* https://www.epa.gov/aboutepa/our-mission-and-what-we-do (accessed March 2, 2018); 33 U.S.C. § 1251(a) (Clean Water Act: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

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

This administration and the current political leadership of the EPA have looked to Justice Scalia as their guide on Clean Water Act measures. The administration has proposed to use Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), as the definition of the waters of the United States, even though a majority of the Supreme Court rejected his definitional approach. President Trump's Executive Order on Waters of the United States (Feb. 28, 2017) Section 3.

However, Justice Scalia's opinion rejects this effort of the EPA's political leadership to rewrite the Clean Water Act through re-examination of the EPA's longstanding position on discharges via hydrologically connected groundwater. As Justice Scalia explained in *Rapanos*, "[t]he Act does not forbid the 'addition of any pollutant ***directly*** to navigable waters from any point source,' but rather the 'addition of any pollutant ***to*** navigable waters.'" 547 U.S. at 743 (citing 33 U.S.C. § 1362(12)(A) and § 1311(a)) (emphases in original). In this respect, unlike the plurality opinion's approach to the definition of the "waters of the United States," Justice Scalia's opinion was accepted by the entire Court. If this administration embraces Justice

Scalia's opinion for a point which was rejected by a majority of the Court, it certainly cannot disavow his opinion on a point to which no member of the Court objected.

In trying to dodge the plain language of the Clean Water Act, polluters have constructed arguments from scattered pieces of legislative history – when in fact the legislative history cannot support the polluters' efforts to create a loophole that the Act itself does not contain. Again Justice Scalia – a Justice whom this administration has favorably cited -- has condemned exactly this kind of statutory interpretation: "[I]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of 'history' that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law." *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in judgment) (emphases in original).

The text of the Clean Water Act is clear. When unpermitted pollution travels from a point source to a river or lake or ocean via hydrologically connected groundwater, there is an illegal "addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12).

This conclusion is also dictated by the statutory purposes of the Clean Water Act, set out by the Congress in the Act itself. The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), by setting a goal to "eliminate[]" "the discharge of pollutants into the navigable waters[,]" *id.* § 1251(a)(1). If irresponsible industries were allowed to pollute the nation's waters with abandon as long as they pulled their point sources back from the water's edge, a huge hole would be blasted in the protections of the Clean Water Act and these fundamental statutory purposes would be entirely undercut. Instead of a landmark protection of the nation's waters, the Clean

Water Act would become a porous requirement subject to easy manipulation by polluters, their lawyers, and friendly regulators.

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

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

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

1. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (April 12, 2018).
2. *Haw. Wildlife Fund v. Cnty of Maui*, --- F.3d ----, 2018 WL 1569313 (9th Cir. 2018), denying rehearing en banc and amending opinion reported at 881 F.3d 754 (9th Cir. 2018).
3. *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 515 (2d Cir. 2005) (upholding the EPA's case-by-case approach to regulating feedlot pollutant discharges to surface waters through connected groundwater);

4. *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126, 130 (10th Cir. 1985) (finding CWA coverage where discharges ultimately affected navigable-in-fact streams via underground flows);
5. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (CWA "authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters."), *overruled on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983);
6. *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775 (M.D. Tenn. 2017), *appeal docketed*, No. 17-6155 (6th Cir. Oct. 3, 2017).
7. *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1367 (M.D. Ga. 2017), *aff'd*, 261 F.Supp.3d 1345 (M.D. Ga. 2017) (discharge via groundwater with direct hydrological connection);
8. *Sierra Club v. Va. Elec. & Power Co.*, 247 F.Supp.3d 753, 761 (E.D. Va. 2017) ("The [Act] regulates the discharge of arsenic into navigable surface waters through hydrologically connected groundwater");
9. *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. CIV.A. 3:14-11333, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015) (CWA jurisdiction includes discharges to surface water via hydrologically connected groundwater);
10. *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015);
11. *Haw. Wildlife Fund v. Cnty. of Maui*, No. CIV. 12-00198 SOM/BMK, 2015 WL 328227, at *5 (D. Haw. Jan. 23, 2015) ("exempting discharges of pollutants from a

point source merely because the polluter is lucky [or clever] enough to have a nonpoint source at the tail end of a pathway to navigable waters would undermine the very purpose of the Clean Water Act");

12. *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013) (Clean Water Act covers hydrologically connected groundwater);
13. *Tenn. Riverkeeper v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022 (N.D. Ala. Aug. 20, 2013);
14. *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10–00084, 2011 WL 1357690, at *17–18 (M.D. Tenn. Apr. 11, 2011) ("groundwater is subject to the CWA provided an impact [sic] on federal waters");
15. *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009) ("In light of the EPA's regulatory pronouncements, this court concludes that . . . the CWA covers discharges to navigable surface waters via hydrologically connected groundwater.");
16. *Hernandez v. Esso Std. Oil Co.*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States.");
17. *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) ("there is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to" the Clean Water Act);

18. *Coldani v. Hamm*, No. S-07-660 RRB EFB, 2007 WL 2345016, at *7–8 (E.D. Cal. Aug. 16, 2007) (pollution of groundwater that is hydrologically connected to navigable surface waters falls within the purview of the Clean Water Act);
19. *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005), *aff'd*, 496 F.3d 993 ("the regulations of the CWA do encompass the discharge of pollutants from wastewater basins to navigable waters via connecting groundwaters");
20. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States");
21. *Mut. Life Ins. Co. of N.Y. v. Mobil Corp.*, No. CIVA96CV1781RSP/DNH, 1998 WL 160820, at *2–3 (N.D.N.Y. Mar. 31, 1998) (denying motion to dismiss Clean Water Act claim—plaintiff's complaint alleged that groundwater contaminated by underground storage tank failures three years prior was hydrologically connected to navigable waters);
22. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997) (where groundwater flows toward surface waters, there is "more than the mere possibility that pollutants discharged into groundwater will enter 'waters of the United States,'" and discharge of petroleum into this hydrologically-connected groundwater violates the Clean Water Act);
23. *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("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");

24. *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("discharge of any pollutant into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater");
25. *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195–96 (E.D. Cal. 1988) (Clean Water Act covers groundwater "naturally connected to surface waters that constitute 'navigable waters'"), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995);
26. *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985) (groundwater discharges threatening navigable waters subject to Clean Water Act).

At the time the EPA issued its notice, the leading case was *Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018). This was the most recent decision on the issue, and a directly on-point decision by a United States Court of Appeals. This unanimous decision was rendered after the issue was squarely presented and briefed. The Ninth Circuit reached the outcome urged by the EPA itself in an amicus brief filed by the United States Department of Justice less than two years ago, concurrently rejecting the arguments of the usual industry amici. Yet, the Notice mentions this case only in passing, in the final sentence of the last paragraph of the discussion of the decisions of the federal courts.

Another United States Court of Appeals has joined the long list of courts that have followed the Clean Water Act's plain language – the Fourth Circuit. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (April 12, 2018).

As the Ninth Circuit noted, other circuits have also concluded that the Clean Water Act forbids unpermitted pollution from point sources that travels on or under the ground or through groundwater to surface water. While the Notice acknowledges the Fifth Circuit's decision in *Sierra Club v. Abston Construction*, 620 F.2d 41, 45 (5th Cir. 1980), the EPA omits *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). The EPA's Notice cites *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), where the plaintiffs alluded only to the "possibility" of a hydrological connection, but overlooks the Seventh Circuit's decision in *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (emphasis added), *overruled on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983), where the Seventh Circuit upheld the Clean Water Act's jurisdiction over surface water impacts from injections into wells. Nor does the Notice recognize that the Tenth Circuit has upheld the Clean Water Act's coverage of surface water pollution conveyed to a point source by groundwater flow. *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126, 130 (10th Cir. 1985) ("the flow continues regularly through underground acquifers [sic] fed by the surface flow of the San Mateo Creek and Arroyo del Puerto [where uranium mining waste was regularly discharged] into navigable-in-fact streams."); *see also Friends of Santa Fe Cnty. v. LAC Minerals Inc.*, 892 F. Supp. 1333, 1357–59 (D.N.M. 1995) (applying *Quivira* to find that "discharges into groundwaters that eventually move into surface waters are prohibited" by the Clean Water Act).

As of today, every United States Court of Appeals that has decided a case where unpermitted pollution travelled from a point source to surface water via hydrologically-connected groundwater has found a violation of the Clean Water Act – the Second, Fourth, Seventh, Ninth, and Tenth Circuits.

Finally, the notice cites *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 809-810 (E.D.N.C. 2014), without recognizing that it has been specifically disavowed by other courts, including another U.S. District Court in North Carolina. *Sierra Club*, 247 F. Supp. 3d at 761 n.11; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445. As set out in the *Yadkin Riverkeeper* case, the court in *Cape Fear*, like some of the other courts in the small minority, mistakenly declined to exercise jurisdiction over hydrologically connected groundwater "under the theory that the groundwater is not *itself* 'water of the United States.'" *Yadkin Riverkeeper*, 141 F. Supp. 3d at 445 (internal quotation omitted). The protection afforded by the Act applies to pollution of *surface waters* via groundwater flows from a point source.

And of course now, *Cape Fear* has been rendered invalid by the Fourth Circuit's contrary ruling.

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

Not A New Situation. As the list of cases demonstrates, courts have been enforcing the plain language of the Clean Water Act in these circumstances for over 40 years. The jurisdictions that recognize Clean Water Act coverage of such discharges span some twenty-nine states that could not be more diverse—Alabama, Alaska, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Montana, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina,

Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming— as well as Puerto Rico. Many of those decisions have been in place for decades.

The EPA's Longstanding Position. Since the enactment of the Clean Water Act and through every administration up to the present one, the EPA has recognized the clear words of the Act and stated that the Clean Water Act applies to surface water pollution flowing from a point source with groundwater that has a direct hydrologic connection to the surface water. The current leadership of the EPA must know the long history of the EPA's consistent interpretation of the Clean Water Act, since the EPA itself laid out that history in its own amicus brief in the Ninth Circuit less than two years ago.

The EPA has set out that position in formal policy positions, in regulation, in response to public comments, and in federal court. The EPA's application of the Clean Water Act to such discharges reaches back forty years to its 1977 injection well permitting and has been crystal clear for decades. In 2001, the EPA set forth a comprehensive analysis—a "general jurisdictional determination" and an "agency policy determination." 66 Fed. Reg. 2,960, 3,018 (Jan. 12, 2001). The EPA clarified subsequently that "nothing in the 2003 [final] rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the [Act] over discharges to surface water via groundwater that has a direct hydrologic connection to surface water." 73 Fed. Reg. 70,418, 70,420 (Nov. 20, 2008). In 2015, the EPA again reaffirmed its "longstanding and consistent interpretation" and noted that it is unaffected by "the exclusion of groundwater from the definition of 'waters of the United States.'"[9]

[9] EPA, *Response to Comments—Topic 10 Legal Analysis*, 386 (June 30, 2015), https://19january2017snapshot.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

The EPA has implemented its approach consistently by issuing individual and general National Pollutant Discharge Elimination System (NPDES) permits subject to notice, comment, and judicial review. "EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities."[10] For example, an EPA permit prohibits concentrated animal feeding operations from discharging "manure, litter, or process wastewater from retention or control structures to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters" and requires a liner for these structures where such connections exist.[11]

Since the EPA first acknowledged that the Clean Water Act addresses pollution carried from a point source to surface waters by groundwater with a direct hydrologic connection, Congress has amended the Clean Water Act on several occasions, yet, notably, it has never acted to change the plain meaning of the statutory language.[12]

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

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[10] *See* EPA Ninth Circuit Amicus Brief, No. 15-17447, Dkt. 40, at 29-30 (citing NPDES Permit No. NM0022306, *available at* https://www.env.nm.gov/swqb/Permits/; NPDES Permit No. WA0023434, *available at* https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821).

[11] General NPDES Permit for Discharges from Concentrated Animal Feeding Operations in New Mexico (NMG010000) (Sept. 1, 2016), at Parts II.A.2(b)(vi) and II.D.1, *available at* https://www3.epa.gov/region6/water/npdes/cafo/NMG010000%20FINAL%20Permit%20NM%20CAFO-signed%20eff%209-1-16.pdf.

[12] EPA, *History of the Clean Water Act*, https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Sept. 27, 2017).

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

The Clean Water Act provides comprehensive, nationwide protection of our waters, working to ensure they are drinkable, swimmable, and fishable. It provides for robust citizen enforcement in federal court to hold polluters accountable for unpermitted discharges when government agencies cannot or will not take action. As the wide range of past and pending enforcement actions shows, pollution through hydrologic connection to jurisdictional waters happens across different industries and different sources, from pipelines to coal ash ponds. A patchwork of state programs and narrowly focused regulatory schemes, like the underground injection control regulations, cannot adequately make up for the crucial role the Clean Water Act plays in regulating these discharges. Moreover, relying on state regulatory programs to control these pollution sources would cut off citizen access to courts and undermine federal enforcement of federal law.

Conclusion. There is no need for the EPA to reconsider its position or take any further action. It should adhere to its longstanding, correct position, as it did in its Ninth Circuit amicus brief. As the EPA has stated, the determination of whether groundwater is hydrologically connected to surface water is "a factual inquiry like all point source determinations."[13] The courts are well able to apply the plain language to the facts of particular cases, as the Fourth and

[13] Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 66 Fed. Reg. 2,960, 3,017 (Jan. 12, 2001).

Ninth Circuits have recently done.[14] Indeed, the Fourth Circuit in its opinion was careful to underscore that the specific facts of the case determine the application of the Clean Water Act.[15] Slip Opinion at 26. The type of pollutant, the geology, the direction of groundwater flow, and the fact that the pollutant can or does reach jurisdictional surface water can all help a court determine whether there is a qualifying connection, as the EPA has itself recognized.[16]

Any action by the EPA to reverse its longstanding position, which to date has been faithful to the requirements of the plain statutory text, would be unlawful. Further, it would only disrupt the enforcement of the law, create uncertainty, sow unhelpful confusion, foster increased litigation, and serve powerful polluting interests at the expense of the EPA's core mission to protect public health and the environment. And it would undercut the rights of the Nation's citizens.

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[14] *See supra*; *see also Greater Yellowstone Coal. v. Larsen*, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009) (connection too attenuated where movement to surface water could take up to 420 years and pollutants would have to travel underground up to four miles).

[15] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, Slip Opinion at 26 (April 12, 2018)

[16] *See, e.g.*, 66 Fed. Reg. at 3,017.