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AMERICAN PUBLIC POWER ASSOCIATION
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Mr. Scott Wilson
Office of Wastewater Management
Water Permits Division
MC 4203M
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Docket ID No. EPA-HQ-OW-2018-0063
Submitted electronically via www.regulations.gov

RE: Comments of the American Public Power Association on the Clean Water Act's Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water (Fed. Reg. 7, 126 (February 26, 2018), Docket ID. No. EPA-HQ-OW-2018-0063))

Dear Mr. Wilson,

The American Public Power Association, (Association or APPA) appreciations the opportunity to provide comments regarding the Environmental Protection Agency's (EPA or Agency) "previous statements on the Clean Water Act (CWA or Act) and whether pollutants discharge 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."[1] (EPA's Notice). The Association submits these comments in response to EPA's Notice.

I. Background

The Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to

[1] 83 Fed. Reg. 7,126 (Feb 20, 2018).

protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. The Association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

Association members own and operate public power utilities that operate pursuant to the National Pollutant Discharge Elimination System (NPDES) permits that regulate the discharge of pollutants to surface waters. As a segment of the electric utility sector, pubic power utilities produce wastewater and other waste products that must be managed and properly disposed. These activities require the use of surface impoundments, tanks, ditches, landfills, and other features used to transport, store, recycle, and treat water and wastewater. Regulations of discharges to groundwater that have a direct hydrologic connection to surface water will significantly impact Association members' permits and the operation of their facilities, as well as burden the NPDES permit program. APPA members work closely with state and federal agencies to understand and comply with the CWA, the NPDES, and Nonpoint Source Control programs. Therefore, the Association has a direct interest in EPA's statements and position on whether the CWA NPDES program applies to pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flows that have a hydrological connection (also referred to as the conduit theory).

II. Executive Summary

The CWA is one of the most successful environmental statues in the nation's history and public power utilities continue to be partners in that success by working closely with state and federal regulators. The Association believes pollutant discharges from point sources that reach jurisdictional waters via groundwater *are already* regulated under other provisions of the CWA,

other federal environmental statues, and state law, in accordance with Congressional intent. To that end, the Association recommends that EPA review the position it took in "previous statements" that advanced its "hydrologic connection" interpretation of the CWA and move quickly to renounce those statements. EPA should replace those statements with a clear statement confirming that the introduction of pollutants into navigable water via groundwater is not a "discharge of pollutant" subject to CWA §§301(a) and 402. EPA should conduct an expedited notice and comment rulemaking to revise its NPDES rule to add an exclusion clearly stating that the introduction of pollutants into groundwaters does not require an NPDES permit, even if groundwater subsequently transports those pollutants to navigable waters.

III. Responses to EPA's Request for Comment

A. Whether EPA should review and revise its previous statements?

APPA believes that EPA must promptly review and retract all statements that reflect an interpretation of § 301(a) under which discharges to groundwater are, or could be, subject to the NPDES program if groundwater carries or may carry pollutants to navigable waters. EPA should promptly replace all such statements with a clear statement on discharges to the contrary.

The direct hydrologic theory in EPA's Notice is not representative of any "longstanding" EPA position. These previous statements conflict with the position reflected in many EPA statements confirming that the movement of pollution into groundwater to navigable waters constitute nonpoint source pollution regardless of their original source and regardless of any hydrological connection to navigable waters. EPA's most recent and most comprehensive guidance for groundwater protection emphasizes state authority to control releases to groundwater, again without ever alluding to a direct hydrological connection theory or

mentioning the possibility that some pollutants releases to groundwater could require an NPDES permit if such a connection exists between ground and surface waters. In its 1992 guidance, EPA explained that "EPA and the States regulate facilities [under the CWA] that either discharge wastewaters directly to surface waters or discharge to municipal wastewater treatment systems."[2] In addition, "[w]hile a number of States have incorporated ground water discharges into their NPDES permits and pretreatment requirements," EPA confirmed that "there is no national requirement to do so."[3]

B. Whether EPA's interpretation in its previous statements is consistent with the text, structure, and purposes of the CWA?

APPA believes that the interpretation expressed in the statements identified in EPA's Notice is contrary to the text, structure, and policy of the CWA as demonstrated through its legislative history and well-reasoned case law. The Association supports the legal arguments and comments on the CWA's legislative history submitted by the Utility Water Act Group (UWAG) in response to EPA's Notice.

The questions EPA poses in its request for comment suggest that the statue gives EPA a choice in revising its previous statements concerning the applicability of the CWA NPDES permit program to discharges from point sources that reach jurisdictional surface water via groundwater or other surface water flows that have a direct hydrologic connection to jurisdictional surface water.[4] Rather the better question to pose is *how* should releases to groundwater be regulated, specifically, should a release of a pollutant that reaches groundwater

[2] EPA, Final Comprehensive State Groundwater Protection Guidance, EPA 100-R-93-001, at 1-27 (Dec. 1992).
[3] *Id.* (emphasis added).
[4] 83 Fed. Reg. 7,128.

and thereafter enters a CWA jurisdictional surface water be considered a "point source" discharge triggering the CWA NPDES permit requirements. The statute clearly mandates that pollutants added to groundwater, or via groundwater to surface waters, be controlled as "nonpoint" sources for purposes of achieving the CWA's goals and purposes.

The statutory text, structure, and legislative history of the CWA is unambiguous that the addition of pollutants into groundwater that flows to navigable waters is not an "addition…to navigable waters from any point source" triggering NPDES permitting requirements.[5] The CWA defines a "point source" as;

> any discernible, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[6]

Although the CWA's definition of "point source" includes "may be" discharged, Section 301(a) only prohibits the discharge of pollutants to navigable waters, which requires an actual discharge of pollutants from a point source into such waters. Therefore, the only possible reading is that the point source program applies only where pollutions reach and are added into navigable water by something "discernable, confined and discrete". Congress did not extend the program to the addition of pollutants to navigable waters from simply any kind of "discernable, confined and discrete" source. Were that true, the statue might plausibly include the release of pollutants from discernable, confined, and discrete sources where the pollutants eventually, through some other

[5] 33 U.S. C. §1362(12).
[6] 33 U.S.C. §1362(14).

means, reach and are added to a navigable water. Rather, Congress specifically required the pollutants come "from" a "conveyance" "from which pollutants are or may be discharged," *i.e.*, something that both carries and discharges pollutants into navigable waters.

The Supreme Court agrees that the CWA makes plain that a point source "need[s] [to] *convey* the pollutant to 'navigable waters'" to be subject to NPDES permitting.[7] *Miccosukee* makes clear that is the nature of the conveyance from which pollutants are added to navigable waters that determines if an addition is subject to the NPDES program. Emphasizing "conveyance", the Supreme Court has said that a point source "need not be the original source of pollution," but it does "need [to] convey the pollutant to 'navigable waters.[8]'" This is the only reading that maintains any meaningful distinction between point source and nonpoint source pollution. The requirement that a pollutant reach and be added to the navigable water by a point source, and not just have been emitted by a point source at some time before reaching the navigable water, prevents the point source program from encompassing virtually *all* water pollution.

1. The Other Aspects of the Statute's Text and Structure Do Not Support the Direct Hydrologic Connection Theory

Other CWA provisions linked to the point source program make sense only if the program is limited to circumstances where pollutants are being carried into a navigable water by a "discernable, discrete and confined conveyance." For example, discharges under the point source program are subject to "effluent limitations," *i.e.*, restrictions on quantities, rates, or

[7] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).
[8] *Id.*

concentrations of chemicals or other substances in the discharge.[9] Moreover, these effluent limitations require identifiable discharge points where the released pollutants can be measured and assigned a permit limitation. Restricting quantities, rates, and concentrations only works if pollutants are being added into navigable waters by a "discernable, discrete and confined conveyances," such as a pipe, but it cannot occur if pollutants migrate from groundwater into navigable waters.

Conversely, many CWA provisions recognize that not all pollution is point source pollution measurable through effluent limitations, including the release of pollutants into groundwater.[10] In 1972, Congress enacted 1314(f), directing EPA to issue "guidelines for identifying and evaluating the nature and extent of *nonpoint* source of pollutants," as well as "process, procedures, and methods to control pollution" from "subsurface excavations" that potentially discharge pollutants to groundwater.[11] Likewise, in § 208(b), Congress required states to develop waste management plans to include "a process to control disposal of pollutants on land or in *subsurface excavations* within such area to protect *ground and surface water quality.*"[12] It is also instructive to review provisions of §319, which set out a framework for identifying navigable water impaired by nonpoint sources and controlling those sources. Further, §319 includes express provisions allowing state grants for protection of groundwater where the Administrator determines that the activity is warranted to advance the objective of the nonpoint source program- *i.e.,* protection and improvement of navigable waters.

[9] 33 U.S.C 1362(11); see also 71 Fed. Reg. 32887, 32891 (June 7, 2006).
[10] *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492,529-30 (2nd Cir. 2017).
[11] 33 U.S.C. §1314(f).
[12] 33 U.S.C.§1288(b)(2)(K).

2. Application of the Statue as a Whole Precludes EPA from Adopting an Interpretation of the CWA Classifying an Addition Via Groundwater as a "Discharge of Pollutants"

Even if some ambiguity exists (which it does not), the same statutory signals, as well as important practical considerations, advise against stretching a statutory interpretation requiring NPDES permits for discharges to groundwater connected to surface water. Absent clear direction from Congress, courts view statutory interpretations that work an extraordinary expansion of regulatory jurisdiction with skepticism.[13] For example, the Supreme Court has "been reluctant to read into ambiguous statutory text" the "power to require permits for … thousands, and the operation of millions, of small sources nationwide."[14] Likewise, "excessive demand on limited governmental resources is … a good reason for rejecting [an interpretation of an ambiguous statute]."[15] The Supreme Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[16]

An interpretation of the CWA that subject releases to groundwater with a "direct hydrologic connection" to surface water triggers this skepticism. This interpretation would extend the NPDES permitting program to millions of sources never previously regulated under this program. Septic systems, for example, historically have not required NPDES permits.[17] But they release wastewater into soil and groundwater and thus, arguably, come into an interpretation that subject such releases to NPDES permitting requirements when there is a "direct hydologic

[13] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014).
[14] *Id*. at 2444.
[15] *Id*.
[16] *Id*. (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).
[17] *United States v. Smithfield Foods, Inc*., 972 f. Supp. 338,345 (E.D. Va. 1997) (holding that septic systems are non-point sources).

connection" between ground and surface water. According to the U.S. Department of Housing and Urban Development and U.S. Census Bureau, there are more than 22.2 million homes with septic systems.[18] Subjecting this dramatic number of sources to NPDES permitting would require states to devote significant resources to create new (or modify existing) regulatory and permitting programs, placing "excessive demands on limited governmental resources."[19] This is the type of regulatory expansion the Supreme Court identified in *UARG*.

C. Whether releases into groundwater would be better addressed through other federal authorities as opposed to the CWA NPDES program?

APPA believes Congress has enacted and clearly intends that EPA and the states apply other, more comprehensive, carefully tailored, and appropriate means of addressing the release of pollutants into groundwater; that misinterpreting the CWA to apply the NPDES program to such releases would duplicate and disrupt application of the programs Congress has specified be used; and that implementing Congress's instructions in that regard is both necessary and, by definition, better than applying the NPDES program.

1. EPA's NPDES Program Rule Does Not Reflect the Direct Hydrologic Connection Theory

EPA's NPDES program rules neither reflect the direct hydrologic connection theory nor do they indicate that the permitting authority or the regulated community could require a permit for releases to groundwater with a direct hydrologic connection to surface water. The term

[18] American Housing Survey for the United States: 2011 Current Rousing Report, H150/11, at 14 Tbl. C-04-AO (Sept 2013).
[19] UARG, 134 S. Ct. at 2444.

"direct hydrologic connection" does not appear in any part of the NPDES Permit rules, nor do the permit application requirements in 40 C.F.R. Part 122, Subpart B, include any requirements to report on, or investigate, any connection between groundwater and surface water. Further, the provisions governing the substantive requirements applicable to issuance of NPDES permits provides no further guidance. The NPDES rule specifies the minimum terms and conditions that all NPDES permits for industrial facilities' point source discharges must include; prescribes how technology-based effluent limits will be set or expressed; and explains how permit writers should set about determining the need for water quality-based effluent limitations and deriving any such limits they determine are necessary.[20] None of the NPDES permit provisions mentions development of limits, monitoring, reporting, or recordkeeping requirements from discharges to or via groundwater. Surely, if the NPDES program were to require permits for discharges to or via groundwater, EPA would have amended the existing program to include a "direct hydrologic connection" test. EPA has not.

The NPDES program was not designed to address the diffuse migration of pollutants through groundwater, nor methods to remove pollutants though infiltration and percolation. The NPDES program focuses on end-of-pipe discharges directly into surface waters.[21] For pollutants that percolate from a structure or facility via groundwater, it may not be possible to determine where the groundwater ultimately connects with navigable water. Meaning, there is no identifiable discharge point that can be used to develop NPDES permit conditions.[22]

There are numerous other federal and state environmental programs designed to prevent groundwater pollution and protect connected surface waters (*e.g.,* Resource Conservation and

[20] See 40 CFR Part 122, Subpart C.
[21] 40 CFR §122.45(a).
[22] 40 CFR Part 122 Subpart C- Permit conditions.

Recovery Act, 42 U.S.C §6901 et. seq.; Safe Drinking Water Act, 42 U.S.C §300f et. seq.; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C § 9601 et. seq.). The CWA also contains better tools to address nonpoint source pollution, including the release of pollutants into groundwater that may migrate to surface waters.

The CWA§319 Nonpoint Source Management Program adequately addresses discharges to groundwater.[23] Since the addition of §319, all states have "adopted state [nonpoint source] management programs to control [nonpoint source] pollution."[24] EPA notes on its website several case studies highlighting the success of the Nonpoint Source Program. Alaska, for example, used the Section 319 program to address contaminated groundwater caused by a leaky storage tank at a United Air Force facility.[25] In this case, the groundwater migrated to surface water, creating a noticeable hydrocarbon sheen. Clean up efforts have restored the surface waters but EPA recognized that some groundwater contamination remined onsite and could seep into adjacent waters. Therefore, EPA indicated the Air Force would indefinitely monitor the site until groundwater levels fall below the cleanup standards outlined in the Section 319 program.[26] Funding is only available for nonpoint source pollution under the Section 319 Program, therefore, efforts to reclassify releases to groundwater as point source pollution could lead to a reduction in federal funds for these types of programs.

The Total Maximum Daily Load (TMDL) program is another important component of the CWA that addresses groundwater pollution migrating to surface waters. Under the TMDL program, states identify waters that are unable to meet state water quality standards (WQS) (*i.e.*,

[23] 33 U.S.C §1339.
[24] EPA, Nonpoint Source Program and Grants Guidelines for States and Territories at 7-8 (April 12, 2013).
[25] See EPA Section 319 Nonpoint Source Program Success Story: Alaska 841-F-09-001G (June 2009).
[26] Id.

impaired or threatened).[27] These waters are assigned TMDLs for certain pollutants allowed to enter a water body so that the waterbody will meet WQS.[28] Based on the TMDL number, point sources (*i.e.*, subject to the NPDES program) receive waste load allocations and all remaining source of pollutants, as well as natural background sourced pollutants (*i.e.*, nonpoint sources), received load allocations. Waste load allocations are incorporated into the NPDES permits, and load allocations are implemented through state, local, and federal regulatory and incentive-based programs. Both Section 319 and TMDL programs are better suited to address additions via groundwater due to their flexibility. TMDL's are tied to WQS and, therefore, can exclude *de minimis* sources in appropriate circumstances. Thus, an expansive interpretation of "direct hydologic connection" would force all groundwater additions to obtain a permit, without responding to specific state or local concerns, all while expending significant resources.

The "direct hydrologic connection" theory would impede other federal statutes that address groundwater releases, such as the Resource Conservation and Recovery Act (RCRA). RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid waste and hazardous wastes. Congress specifically created RCRA to avoid, minimize, and remediate releases to groundwater, including those that affect or could affect surface water.[29] In fact, RCRA and CWA *cannot both* apply to releases to surface water via groundwater, as point source discharges subject to CWA §402, they are statutorily excluded from the definition of "solid waste" under RCRA.

In 2015, EPA promulgated a rule under RCRA designed, in part, to control and remediate groundwater discharges from coal ash impoundments: The Coal Combustion Residuals Rule

[27] 33 U.S.C. 1313(d)(1).
[28] Id.
[29] *Meghrig v. KFC W., Inc*., 516 U.S. 479,483 (1996).

(CCR Rule).[30] The CCR Rule's extensive groundwater monitoring and corrective action requirements were designed specifically to address risks from coal ash disposal, including impacts to downgradient surface water.[31] The CCR Rule includes a comprehensive groundwater protection program to "ensure that groundwater contamination at new and existing CCR units will be detected and cleaned up as necessary to protect human health and the environment."[32] The CCR rule requires monitoring of the constituents found in coal ash. If groundwater contamination is identified over background concentrations, then facilities must perform more "directed" groundwater monitoring to determine whether the constituents of concern are above the CCR Rule's groundwater protection standard.[33] If the groundwater protection standard is exceeded, then corrective action must be taken to remediate all contaminants until they are below the standard.[34] Under the CCR Rule, most groundwater protection standards are set at the maximum contaminant level (MCL). The MCL is a drinking water standard set by EPA. For constituents without an MCL, the ground water protection standard is set at background level for the site.

The CCR Rule's corrective action requirements are triggered upon the detection of an exceedance of a groundwater protection standard. The potential corrective action must not only attain the groundwater protection standard, but also (1) protect human health and the environment, (2) control the source(s) of the release to reduce or eliminate further releases of CCR constituents from the CCR unit, (3) remove from the environment as much of the contaminated material that was released from the CCR unit as possible, and (4) comply with all

[30] 80 Fed. Reg. 21,302 (April 17, 2015).
[31] 80 Fed. Reg. at 21322 (noting that EPA's risk assessment developed for the CCR Rule included consideration of the "potential impact from the "potential interception of contaminated groundwater plumes by surface water bodies").
[32] *Id*. at 21,396.
[33] 40 C.F.R §257.95 (a).
[34] *Id*. at §257.96(a) and §257.98(c).

applicable RCRA requirements for the management of wastes.[35] The corrective action provision in the CCR Rule requires the remediation of groundwater impacted by releases from CCR units and abatement of future groundwater contamination and any resulting downgradient impacts to surface water.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides appropriate authority to address threats to surface waters. CERCLA addresses releases of hazardous substances to the nation's surface water and groundwater, including leaching of hazardous substances from groundwater into surface water. Further, CERCLA provides the government the authority to order others to undertake investigation of releases or to conduct such investigations independently. The statute also provides options for requiring the cleanup of releases of hazardous substances or seek reimbursement for the costs associated with remediation from the responsible parties.

The Safe Drinking Water Act (SDWA) is designed to protect the quality of drinking water in the United States, and §300(h) specifically regulates underground injection of fluids through wells.[36] Class V injection wells are generally shallow waste disposal wells used to release fluids either directly into an underground source of drinking water (USDW) or into shallow surfaces that overlies USDWs.[37] Class V well operators can inject fluid in-to a well if they comply with regulatory conditions, usually via a permit. It is important to note that Class V wells must not allow contaminated fluid to move into USDWs where the presence of the

[35] 40 C.F.R. § 257.97(b).
[36] 42 USC §300 (h), States may apply to EPA for primary enforcement responsibility for the UIC program, referred to as "Primacy States".
[37] 40 C.F.R §144.3.

contaminants may case violation of primary drinking water regulations or otherwise adversely affect public health.[38]

D. Whether releases are adequately addressed through existing state statutory or regulatory programs or through other existing federal regulations and permit programs?

APPA's comments show that any releases to groundwater that may enter surface waters are already adequately addressed by other CWA authorities, other federal authorities, and other state authorities. States have environmental programs that protect groundwater. These state programs can provide greater regulatory controls to protect groundwater independent of the NPDES program.[39] States can use a diverse set of tools to regulate activities that generate nonpoint source pollution. Those tools include legislation, solid waste management programs, land conservation programs, sewage management programs, forestry management, and urban runoff control programs. Importantly, states have the authority to adopt more stringent requirements than EPA, and all 50 states have adopted laws and regulations that prohibit or regulate the releases of pollutants into groundwater. The CWA is a cooperative federalism statute and groundwater and nonpoint source pollution is primarily the responsibility of the states. An expansive interpretation of "direct hydologic connection" could create unnecessary conflicts between groundwater standards and surface water criteria, complicating state permitting

[38] 40 C.F.R §144.12(a).
[39] See, e.g., Brief of Amici Curiae the State of West Virginia et al., Upstate Forever v. Kinder Morgan Energy Partners, L.P., No. 17-1640 (4th Cir. Sept. 8, 2017) (Doc. 55-1); Brief of the State of Alabama et al. as Amici Curiae, Tenn. Clean Water Network v. Tenn. Valley Auth., No. 17-6155 (6th Cir. Feb. 6, 2018) (Doc. 38); Brief of Amici Curiae States of Arizona et al., Hawai'i Wildlife Fund v. Cty. of Maui, No. 15-17447 (9th Cir. Mar. 12, 2018) (Doc. 75).

programs and increasing the burdens on not only the regulated community, but also on the agencies that implement these programs.

E. Whether EPA should clarify its previous statements to provide additional certainty for the public and the regulated community?

The integrity and proper implementation of the NPDES program depend on clarity, certainty, and notice. EPA's direct hydrologic connection theory does not provide any of those essential features. "Clarifying" the theory will not solve the problem. The Association recommends EPA replace those previous statements with a clear statement that the introduction of pollutants into groundwaters by any source, without regard to the potential for such pollutants to reach navigable waters, does not require an NPDES permit. EPA should take immediate steps to issue a legal memorandum from EPA's Office of General Counsel or a statement from the Assistant Administrator or Administrator to regional and state permitting authorities explaining the Agency's previous position advanced in the *Cnty. of Maui v. Hawai'i Wildlife Fund* brief no longer reflects the Agency's position and was based on a selective analysis of the statue's text, structure, policies, and legislative history.[40]

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

F. Are there consequences if EPA clarifies its previous statements and what issues should EPA examine to address those consequences?

There are many negative consequences to regulated entities and states if EPA maintains its previous statements or clarifies them, but keeps the direct hydrologic connection interpretations. There will be no negative impacts to water quality or the environment, or to the integrity of the NPDES program, if EPA rejects its previous statements given the other authorities that can address any releases to groundwater that may enter surface waters. If the Agency fails to reject its "direct hydrologic connection" statements, significant regulatory uncertainty will result as to whether public power utilities are subject to the severe CWA liability penalties. The CWA is a strict-liability regime with substantial criminal and civil penalties imposed for violations with civil penalties up to $54,414 per day, per violation. EPA also has powerful administrative enforcement tools such as compliance orders, notices of violation, and cease-and-desist orders, and it can assess administrative penalties up to $187,500.[41,42] Facilities may now be exposed to criminal and civil liability and face citizen suits based on grounds that have never been the basis for CWA liability.

In many cases, the only way to determine whether certain pollutants have direct hydrologic connection to a source is to conduct a detailed and expensive hydrologic study which may be inconclusive or unreliable. As a practical matter it is not always possible to determine exactly where pollutants reach navigable waters or whether certain conduct requires an NPDES permit and, if so, what requirements apply. The lingering uncertainty associated with this issue

[41] 33 U.S.C 1319(a).
[42] 40 C.F.R. Part 19, 82 Fed. Reg. 3633 (January 12, 2017).

and whether NPDES permits are required for certain infrastructure will dis-incentivize the development of critical private and public infrastructure (*e.g.*, groundwater recharge systems, spreading basins, natural treatment systems, injection wells and green infrastructure).

G. What format or process should EPA use to revise its previous statements?

EPA should undertake a two-step process. First, EPA should immediately retract all statements it has made endorsing the direct hydrologic connection theory in the form of a memorandum. Second, EPA should promptly initiate and expeditiously conclude a rulemaking to amend §122.3 of the NPDES rules to clearly exclude the introduction of pollutants into groundwater by any source, without regard to the potential for such pollutants to reach navigable waters.

IV. Conclusion

The Association appreciates EPA's efforts to clarify its previous statements as to whether the CWA's point source program covers the discharge of pollutants to groundwater and the opportunity to comment on this important matter. Please contact me if you require further information or have questions about these comments.

Sincerely,

Carolyn Slaughter

Carolyn Slaughter
Director, Environmental Policy
American Public Power Association