No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAIʻI WILDLIFE FUND, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER EPA OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former officials of the United States Environmental Protection Agency (EPA). Collectively, they have many decades of experience in the implementation of the Clean Water Act (CWA) and therefore have an interest in its proper interpretation. They have seen first-hand that EPA has applied the National Pollutant Discharge Elimination System (NPDES) permitting program to discharges from point sources that reach surface waters by passing through groundwater for decades. This experience has shown them that such permitting is feasible and that it is needed to address a variety of environmental and public health risks. They are concerned that a reversal of the decision of the Court of Appeals will disrupt the implementation of the CWA and create a significant regulatory loophole.

Amicus Judith Enck served as Regional Administrator for EPA Region 2 from December 2009 to January 2017.

Amicus J. Charles Fox served as EPA Assistant Administrator for Water from July 1998 to January 2001; as Senior Advisor to the Administrator for the Chesapeake Bay from March 2009 until January 2011; and as Associate Administrator from February

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief either in whole or in part and that no person or entity, aside from *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that counsel of record for Petitioners and Respondents have consented to the filing of this brief.

1997 to July 1998. He also served as the Secretary of the Maryland Department of Natural Resources from August 2001 to January 2003.

Amicus Susan Hedman served as Regional Administrator for EPA Region 5 and as EPA Great Lakes National Program Manager from April 2010 to February 2016. She was previously environmental counsel and senior assistant attorney general in the Illinois Attorney General's office.

Amicus Kenneth Kopocis served as the Deputy Assistant Administrator in EPA's Office of Water from 2014 to 2015. Previously, he spent close to three decades working on Capitol Hill, holding several senior positions on the staffs of both the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate.

Amicus Dennis McLerran served as the Regional Administrator for EPA Region 10 from February 2010 to January 2017.

Amicus H. Curtis Spalding served as the Regional Administrator for EPA Region 1 from December 2009 to January 2017.

Amicus Nancy Stoner worked at EPA for many years, including serving as Acting Assistant Administrator for Water from 2011 to 2014 and previously as Director of the Office of Policy Analysis in the Office of Enforcement and Compliance Assurance.

SUMMARY OF ARGUMENT

Affirmance of the Court of Appeals will maintain the legal status quo that has been in place for dec-

ades. For at least thirty years, until a few months ago, EPA interpreted the CWA to allow the regulation of point source discharges that pass through hydrologically-connected groundwater to jurisdictional surface waters under the NPDES program. It has repeatedly expressed this interpretation in regulatory preambles, permit writers' manuals, and other guidance documents. It has regulated such discharges in both general and individual NPDES permits. It has brought enforcement actions against entities that make such discharges without a permit. Similarly, many states with authorized permitting programs have expressed this interpretation in their own permit writers' manuals and have regulated discharges that pass through hydrologically-connected groundwater in both general and individual permits. In short, the decision of the Court of Appeals is consistent with decades of practice.

That practice, as embodied in individual and general NPDES permits issued by both EPA and state agencies, demonstrates that the permitting of discharges that pass through groundwater is feasible. These agencies have tools for determining when discharges necessitating a NPDES permit occur, establishing discharge limits or other permit requirements, and identifying monitoring locations to ensure compliance. Moreover, the requirements imposed under such permits are not overly burdensome on EPA, states, or regulated parties.

Reversal of the Court of Appeals would invalidate these permits and leave a serious gap in legal protections for surface waters. Other laws, such as the Safe Drinking Water Act (SDWA) and state ground-

water protection laws, are no substitute for the CWA because they do not protect against the same harms or address the same pollutants. Discharges that pass through groundwater to surface waters from sources such as concentrated animal feeding operations, mines, and coal ash impoundments can cause significant harms to public health and the environment. A decision to reverse the Court of Appeals would eliminate CWA protections against these discharges. Contrary to the County of Maui's contention, it is a *reversal* of the Ninth Circuit's judgment that would have "sweeping and transformative consequences." Pet. Br. 52.

ARGUMENT

I. Affirming the Decision of the Court of Appeals Will Maintain the Legal Status Quo

The plain language of the CWA prohibits "*any* addition of *any* pollutant to navigable waters from *any* point source," except in compliance with a NPDES permit (or other exceptions not applicable here). 33 U.S.C. § 1362(12)(A) (emphasis added); *see id.* §§ 1311(a), 1342(a). This prohibition on its face applies to the County's injection of treated sewage into the wells of the Lahaina Wastewater Reclamation Facility—given that it is factually undisputed that the wells are point sources, the treated sewage contains pollutants, and that those pollutants are added to the Pacific Ocean, a navigable water.

However, the County and its *amici*, including EPA, would have the Court graft novel exceptions onto the bare statutory text, either requiring that discharges enter navigable waters directly from a

point source or uninterrupted series of point sources, Pet. Br. 19, or prohibiting the regulation of discharges that pass through groundwater before reaching navigable waters, U.S. Br. 15.

Lacking a sound basis for their positions in the statutory text, the County and EPA resort to a variety of other arguments, including statutory purpose, legislative history, and policy concerns. Chief among these policy arguments is the assertion that upholding the Ninth Circuit's decision would "vastly expand NPDES permitting" by "transform[ing] a long-extant statute." Pet. Br. 45, 49. Such fears are groundless, however. In fact, the opposite would be true. The Court need not hypothesize about the result of subjecting the discharge of pollutants from point sources to surface waters via groundwater to regulation under the NPDES permitting program. Such discharges have already been regulated under that program for decades.

A. For at Least Three Decades, EPA Interpreted the CWA to Apply to Point Source Discharges that Reach Surface Waters via Groundwater

For decades, EPA interpreted the CWA to subject discharges from point sources that reach waters of the United States by passing through groundwater to the NPDES permitting program. For example, in 1989, in ruling on an administrative appeal involving three underground injection control (UIC) permits under the SDWA, EPA Administrator Lee Thomas discussed the interrelationship between the CWA, SDWA, and the Resource Conservation and Recovery Act (RCRA). With regard to discharges that pass

through groundwater in particular, he observed that EPA "declines to exercise CWA jurisdiction over injection wells (*except those that inject into groundwater with a physically and temporally direct hydrologic connection to surface water*)." *In re Bethlehem Steel Corp.*, 2 E.A.D. 715, 718 (1989) (emphasis added). In ruling that the well injections at issue in the case were not "discharges" under the CWA, the Administrator repeatedly emphasized that they were injections into "isolated groundwaters" and noted that petitioner did not allege "that its wells inject waste into groundwater with a direct hydrologic connection to surface water. Today's decision should not be read to suggest that waste disposal into such groundwater may never be a 'discharge' under CWA § 402." *Id.* at 720 & n.9.

The next year, EPA promulgated a regulation to implement some of the 1987 amendments to the CWA respecting industrial stormwater discharges. In the preamble to the final rule, EPA specified that "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*)."[2]

In the succeeding years, EPA made many similar statements. For example, in 1991, in the preamble to an amendment to the water quality regulations for tribal lands, EPA reiterated that

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[2] National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added) (citations omitted).

> *the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters*. In these situations, the affected groundwaters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.[3]

Many other statements to the same effect followed in subsequent years.[4]

Contrary to EPA's recent characterization of its prior statements as "collateral" or not "focused on and explaining the basis for the position,"[5] some of

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[3] Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (emphasis added).

[4] *See, e.g.*, National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610 (Feb. 8, 1993); Proposed General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho, 60 Fed. Reg. 44,489, 44,493 (Aug. 28, 1995); Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000, 62 Fed. Reg. 20,177, 20,178 (Apr. 25, 1997); Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities, 63 Fed. Reg. 7858, 7878, 7881 (Feb. 17, 1998); Hazardous Waste Identification Rule (HWIR): Revisions to the Mixture and Derived-From Rules, 66 Fed. Reg. 27,266, 27,272 n.4 (May 16, 2001).

[5] Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,819–20 (Apr. 23, 2019).

these documents provided thorough and directed analyses of the appropriateness of regulating point source discharges that pass through groundwater. For example, EPA's 2001 notice for proposed CAFO regulations addressed the issue at length, discussing case law, academic commentary, and the agency's prior statements. It concluded that:

> 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. The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations.[6]

The 2001 proposal also discussed at length the types of evidence that could be used to determine whether there was a direct hydrologic connection between a point source and jurisdictional surface waters.[7]

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[6] National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (proposed Jan. 12, 2001).

[7] *Id.* at 3018-20. The 2003 final rule did not incorporate the specific requirements included in the proposal, instead adopting a case-by-case approach while noting that "[n]othing in this rule shall be construed to expand, diminish, or otherwise affect the jurisdiction of the Clean Water Act over discharges to surface water via groundwater that has a direct hydrologic connection to surface water." National Pollutant Discharge Elimination

In addition, a 1995 memorandum from the Director of the Office of Solid Waste reached the same conclusion after explicitly considering the relationship between the CWA and RCRA with respect to discharges through hydrologically-connected groundwater.[8] The memorandum explained that the exclusion from the definition of "solid waste" of "[i]ndustrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act," 40 C.F.R. § 261.4(a)(2), applied only to "the traditional pipe outfall-type situation" because its purpose was "to avoid duplicative regulation under two statutes for discharges that occur at the end-of-the-pipe (i.e., discharges directly to surface water). EPA did not intend that the exclusion cover groundwater discharges from treatment processes that occur prior to the 'end-of-the-pipe' discharge."[9] Therefore, the memorandum concluded, discharges that pass through "groundwater from treatment and holding facilities" were subject to regulation both under RCRA and under the NPDES program "where there is a direct hydrologic

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System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7216–17 (Feb. 12, 2003).

[8] Memorandum from Michael Shapiro, Director, Office of Solid Waste & Lisa K. Friedman, Associate General Counsel, Solid Waste and Emergency Response Division, EPA, to Waste Management Division Directors, *Interpretation of Industrial Wastewater Discharge Exclusion From the Definition of Solid Waste* (Feb. 17, 1995), https://www3.epa.gov/npdes/pubs/owm607.pdf.

[9] *Id.* at 2–3.

connection to nearby surface waters of the United States."[10]

Notably, at no point in any of these documents did EPA claim to discern a reason to treat discharges that pass through groundwater any differently from other indirect discharges. Instead, EPA repeatedly made the distinction between "regulat[ing] releases of pollu[t]ants to groundwater," on the one hand, 63 Fed. Reg. at 7878, and regulating "discharges to surface water which occur via ground water because of a direct hydrologic connection between the contaminated ground water and nearby surface water," on the other, 66 Fed. Reg. at 3016; *see also* 63 Fed. Reg. at 7881. It was EPA's understanding that only the latter situation is subject to the NPDES program.

EPA continued to interpret the CWA in this fashion until a few months ago. Indeed, it articulated this interpretation in its amicus brief before the Court of Appeals in this case. EPA C.A. Br. 3–5, 11–24. In the technical support document for the 2015 Clean Water Rule, EPA explained that "the agency has a *longstanding and consistent interpretation* that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water."[11] The decision of the

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[10] *Id.* at 3. This memorandum therefore anticipates and rebuts the argument of *amici* Edison Electric Institute, et al., that regulating discharges that pass through hydrologically connected groundwater under the NPDES program "would *supplant* regulations promulgated under RCRA." EEI Br. 33.

[11] EPA, *Response to Comments – Topic 10: Legal Analysis* 383

Court of Appeals is consistent with this longstanding interpretation and therefore represents no change in the law.

B. EPA and State Guidance Documents Instruct Permit Writers to Address Discharges through Hydrologically-Connected Groundwater

Permit writers are EPA or state agency staff who carry out the day-to-day implementation of the CWA by incorporating its requirements into NPDES permits—issued either to individual dischargers (in the case of individual permits) or to categories of dischargers (in the case of general permits). EPA and state agencies issue manuals and other guidance documents to assist permit writers in this task. These guidance documents are therefore key evidence regarding the practical implementation of the CWA. For decades, EPA and state manuals and guidance documents have directed permit writers to account for discharges that pass through hydrologically-connected groundwater when issuing NPDES permits. EPA's "longstanding and consistent interpretation" was not merely a series of abstract statements. Rather, it has been—and still is—the day-to-day practical reality for permit writers.

EPA instructed permit writers to regulate point source discharges that pass through groundwater in both the 1996 and 2010 editions of its NPDES Per-

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(June 30, 2015) (emphasis added), https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

mit Writers' Manual. The 1996 edition of this manual stated that if "there is a discharge to groundwater that results in a 'hydrological connection' to a nearby surface water, the Director may require the discharger to apply for an NPDES permit."[12] Similarly, the 2010 edition—which is the current version of the manual—explained that "[i]f a discharge of pollutants to ground water reaches waters of the United States, however, it could be a discharge to the surface water . . . that needs an NPDES permit."[13]

EPA included similar instructions in more specific guidance to writers of particular kinds of NPDES permits. In a 1993 manual regarding the development of best management practices for NPDES permits to avoid discharges of toxic or hazardous chemicals, EPA explained that "[w]hen identifying pathways and receptors, all logical alternative pathways should be considered," including through "groundwater," and cautioned that in the construction and operation of "[s]ludge and waste storage disposal areas including landfills, pits, ponds, lagoons, and deep-well injection sites, . . . there may be a potential for leaching of toxic pollutants or hazardous substance to groundwater, which can eventually reach surface waters."[14] A decade later, another guidance docu-

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[12] EPA, EPA-833-B-96-003, *U.S. EPA Permit Writers' Manual* 13 (1996), https://www3.epa.gov/npdes/pubs/owm0243.pdf.

[13] EPA, EPA-833-K-10-001, *NPDES Permit Writers' Manual*, at 1-7 (2010), https://www3.epa.gov/npdes/pubs/pwm_2010.pdf; *accord* EPA Office of Wastewater Management, *Water Permitting 101*, at 6 (2002), https://www3.epa.gov/npdes/pubs/101pape.pdf.

[14] EPA Office of Water, EPA-833-B-93-004, *Guidance Manual*

ment explained that "[i]f contamination from storm water that entered [an] aquifer shows up in a nearby stream, it could be considered a discharge to waters of the U.S. due to the hydrologic connection."[15]

Similarly, the 1995, 2003, and 2012 EPA guidance documents for NPDES permitting for concentrated animal feeding operations (CAFOs) all describe the release of pollutants to surface water through groundwater as potential point source discharges. The 1995 guidance stated that "[m]any discharges of pollutants from a point source to surface water through groundwater (that constitutes a direct hydrologic connection) also may be a point source discharge to waters of the United States."[16] The 2003 guidance document identified "[d]epth to ground water, [and] direct hydrologic connection to waters of the United States"[17] as among those factors

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for Developing Best Management Practices (BMP), at 2-21, 2-3 (1993), https://www3.epa.gov/npdes/pubs/owm0274.pdf.

[15] EPA, *National Pollutant Discharge Elimination System (NPDES) Storm Water Program Questions and Answers* 7 (2004), https://www3.epa.gov/npdes/pubs/sw_qanda_entiredocument.pdf.

[16] EPA Office of Water, EPA-833-B-95-001, *Guide Manual On NPDES Regulations For Concentrated Animal Feeding Operations* 3 (1995), https://www3.epa.gov/npdes/pubs/owm0266.pdf.

[17] EPA Office of Wastewater Management, EPA-833-B-04-001, *NPDES Permit Writers' Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations* 3-11, tbl. 3-3 (2003), https://www3.epa.gov/npdes/pubs/cafo_permit_guidance_entirepub.pdf [hereinafter "2003 CAFO Manual"].

for permit writers to consider in determining whether an animal feeding operation is a significant contributor of pollutants to waters of the United States, and therefore a CAFO subject to NPDES permitting. The most recent and current version of this manual retains this factor.[18] In addition, an "Example Letter in Follow-up to an Inspection" included as an appendix to the 2003 manual stated: "Please be advised that any illicit discharges to surface water or *to surface water through ground water* are violations of the Clean Water Act and subject to enforcement action with penalties."[19] A reversal of the Court of Appeals would disrupt permit writers' current implementation of these EPA guidance documents.

The CWA initially assigned NPDES permitting authority to EPA. Under the cooperative federalism scheme created by the statute, however, states can take over permitting for facilities within their borders as long as they satisfy certain minimum requirements and receive approval from EPA. 33 U.S.C. § 1342(b). At present, 47 states have assumed that authority.[20] A number of states have included instructions similar to those in the EPA

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[18] EPA Office of Water, EPA-833-F-12-001, *NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations* 2-14, tbl. 2-3 (2012), https://www3.epa.gov/npdes/pubs/cafo_permitmanual_entire.pdf [hereinafter "2012 CAFO Manual"].

[19] 2003 CAFO Manual, *supra* note 17, at App. C-3 (emphasis added).

[20] *State Program Authority*, Tab 2 of *NPDES State Program Information*, EPA, https://www.epa.gov/npdes/npdes-state-program-information#tab-2 (last visited July 17, 2019).

manuals described above in their permit writing guidance. Thus, for example, Oregon has issued guidance for municipal wastewater treatment plants that, like the County's, discharge to surface water via groundwater.[21] That guidance is unequivocal: "the appropriate permit to use for this type of system is an NDPES permit because the indirect discharge by design will reach surface water."[22] Similarly, Washington's Department of Ecology has explained that it "believes the best guidance on this issue comes from" *Washington Wilderness Coalition v. Hecla Mining*, 870 F. Supp. 983, 990 (E.D. Wash. 1994), which held that discharges that enter jurisdictional surface waters through groundwater required a NPDES permit if the pollutants could "be traced from their source to surface waters."[23] An EPA-

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[21] Oregon Dep't of Envtl. Quality, *Disposal of Municipal Wastewater Treatment Plant Effluent by Indirect Discharge to Surface Water via Groundwater or Hyporheic Water, Internal Management Directive (IMD)* (2007), https://www.oregon.gov/deq/Filtered%20Library/IMDindirectdischarge.pdf.

[22] *Id.* at 1.

[23] Wash. Dep't of Ecology, *Water Quality Program Permit Writer's Manual* 9 (2018), https://fortress.wa.gov/ecy/publications/documents/92109.pdf; *see also* Arizona Dep't of Mines & Mineral Resources, *Arizona Mining Permitting Guide* 109 (2011), http://repository.azgs.az.gov/sites/default/files/dlio/files/nid1128/arizona_mining_permitting_guide_2011.pdf ("[I]f there is a discharge to ground water which results in a hydrologic connection to nearby surface waters, ADEQ may require the discharger to apply for an AZPDES permit."); Virginia Dep't of Envtl. Quality, *VPDES Permit Manual*, at III-18 (2014), https://www.deq.virginia.gov/Portals/0/DEQ/Water/PollutionDischargeElimination/VPDESPermitManual.pdf ("Storm water

funded evaluation of the potential development and implementation of an authorized NPDES program by the Lummi Nation also included similar guidance.[24]

C. EPA and the States Have Issued Many NPDES Permits that Address Discharges that Pass through Groundwater to Jurisdictional Surface Waters

Most importantly, both EPA and authorized states have in fact regulated—and continue to regulate—point source discharges that enter navigable waters via groundwater in both individual and general NPDES permits. The existence of these permits, some of which date back almost three decades, demonstrates both that the decision of the Court of Appeals represents the regulatory status quo and—as will be discussed in more detail below—that the regulation of such discharges is administratively feasible.

EPA has issued many such permits itself. For example, at various times EPA has issued general permits that address discharges through hydrologically-connected groundwater for CAFOs in Idaho, New Mexico, Louisiana, New Mexico, Oklahoma, and

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discharges to ground water are exempt from the permitting requirements, unless there is a hydrological connection between the ground water and a nearby surface waterbody.").

[24] Lummi Natural Resources Dep't, *Evaluation Report on the Development and Implementation of a Lummi Nation NPDES Program* 16–17 (2005), https://www.lummi-nsn.gov/userfiles/83_NPDES%20Delegation%20ReportFINAL.pdf.

Texas, and on tribal lands in New Mexico and Oklahoma.[25] It has also issued individual permits that address such discharges to wastewater treatment plants,[26] mines,[27] and an oil field fluids treatment

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[25] EPA Region 10, Authorization to Discharge Under the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations, No. IDG010000, Part III.D.1 (p. 30) (Mar. 29, 2012), https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-idaho-cafo-gp-id010000-final-permit-2012.pdf; EPA Region 6, National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from Concentrated Animal Feeding Operations (CAFOs) in New Mexico, No. NMG010000, at Part II.A.2(b)(vi) (pp. 3–4 of Part II) (July 14, 2016), https://www.env.nm.gov/wp-content/uploads/2017/07/NMG010000-CAFO-NM-20160901.pdf; National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610 , 7631 (Feb. 8, 1993).

[26] EPA Region 10, Authorization to Discharge Under the National Pollutant Discharge Elimination System, Taholah Village Wastewater Treatment Plant, No. WA0023434 (June 4, 2015), https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf [hereinafter "Taholah Permit"]; EPA Region 5, Authorization to Discharge Under the National Pollutant Discharge Elimination System, Neopit Wastewater Treatment Facility, No. WI-0073059-2 (Sept. 22, 2016), https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf [hereinafter "Neopit Permit"].

[27] EPA Region 6, Authorization to Discharge Under the National Pollutant Discharge Elimination System, Questa Mine, No. NM0022306, at Part II.D (Sept. 30, 2013), https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf; EPA Region 6, Fact Sheet, Molycorp, Inc., NPDES Permit No. NM0022306, at 4-6 (May 16, 2006), http://clinics.law.harvard.edu/environment/files/2019/07/Molycorp-Fact-Sheet.pdf [hereinafter "Molycorp Fact Sheet"].

and disposal facility.[28] As recently as last year, EPA issued a draft individual permit for a CAFO in New Hampshire that:

> requires the permittee to document that no direct hydrologic connection exists between the contained wastewater and surface waters of the United States. Where the permittee cannot document that no direct hydrologic connection exists, the ponds, lagoons and basins of the containment facilities must have a liner which will prevent the potential contamination of surface waters."[29]

This permit tracks EPA's guidance that "requirements might address, for example, the use of liners in areas where there is the potential to discharge to groundwater that has a direct hydrologic connection to waters of the U.S."[30]

Similarly, many states with authorized NPDES programs have issued draft or final permits that

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[28] EPA Region 6, Statement of Basis, US Liquids of Louisiana, Ltd., NPDES Permit No. LA0068420 (May 9, 1997), http://clinics.law.harvard.edu/environment/files/2019/07/US-Liquids-of-Louisiana-Statement-of-Basis.pdf; *see* Molycorp Fact Sheet, *supra* note 27, at 7 (mentioning final US Liquids of Louisiana, Ltd. permit from 1999 as an example of a permit that "address[es] discharges having the potential to flow into ground water which is hydrologically connected to surface waters").

[29] EPA Region 1, Fact Sheet, Forbes Farm Partnership, Inc., NPDES Permit No. NH0023540, at 30 (2018), https://www.epa.gov/sites/production/files/2018-04/documents/draftnh0023540permit.pdf.

[30] 2012 CAFO Manual, *supra* note 18, at 5-17; *see id.* O-25.

address discharges that pass through hydrologically-connected groundwater. These permits include CAFO general permits issued by Oklahoma, Tennessee, and Texas,[31] California's 2014 General Permit for Storm Water Discharges Associated with Industrial Activities,[32] Colorado's General Permit for Discharges from Sand and Gravel Mining and Processing,[33] as well as draft or final individual permits from Arizona,[34] Colorado,[35] Minnesota,[36] and Mon-

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[31] Tex. Comm'n on Envtl. Quality, General Permit to Discharge Wastes, TPDES General Permit No. TXG920000, at 33–36 (July 10, 2014), https://www.tceq.texas.gov/assets/public/permitting/wastewater/general/txg920000.pdf; Tenn. Dep't of Env't & Conservation, General State Operating Permit for Concentrated Animal Feeding Operations, No. SOPC00000, at 12–13 (Aug. 1, 2015), https://www.tn.gov/content/dam/tn/environment/water/documents/permit_water_sopc00000_pmt.pdf; Oklahoma Dep't of Agric., Food, & Forestry, Agriculture Pollutant Discharge Elimination System (AgPDES) General Permit for Discharges from Concentrated Animal Feeding Operations (CAFOs) in Oklahoma, AgPDES Permit No. OKG010000, at II-4, III-10-11 (Mar. 30, 2017), https://www.oda.state.ok.us/aems/Oklaho-ma%20AgPDES%20CAFO%20General%20Permit%20OKG01000%202017-2022.pdf.

[32] Cal. State Water Resources Control Board, NPDES General Permit For Storm Water Discharges Associated With Industrial Activities, Order NPDES No. CAS000001, Fact Sheet at 72 (Apr. 1, 2014), https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0057_dwq_rev_mar2015.pdf [hereinafter "California Storm Water Permit"].

[33] Colo. Dep't of Public Health & Env't, Colorado Discharge Permit System (CDPS) Fact Sheet to Permit Number COG5000000, at 12 (Oct. 13, 2016), https://www.colorado.gov/pacific/sites/default/files/WQ_PER_COG500000_FS_1.pdf.

[34] Ariz. Dep't of Envtl. Quality, Draft Fact Sheet, Arizona Pollu-

tana.[37] Cumulatively, these permits represent decades of experience, current practice, and—given the

tion Discharge Elimination System (AZPDES) Permit No. AZ0026174, at 3 (July 14, 2017), http://static.azdeq.gov/pn/fs_azpdes_alpine.pdf [hereinafter "Alpine Fact Sheet"].

[35] Authorization to Discharge under the Colorado Discharge Permit System (Jan. 26, 2012); Colorado Discharge Permit System (CDPS) Fact Sheet to Permit Number CO0041351, Western Sugar Cooperative, Fort Morgan Facility (Jan. 26, 2012) [hereinafter "Western Sugar Cooperative Fact Sheet"]. Both documents can be downloaded from https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record?q=containerEx:32656.

[36] Minn. Pollution Control Agency, National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Permit Program Fact Sheet, Permit No. MN0071013, at 62 (Jan. 31, 2018), https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-51gg.pdf; *see also* Letter from Kevin M. Pierard, Chief NPDES Programs Branch, EPA Region 5, to Ann Foss, Metallic Mining Sector Director, Minnesota Pollution Control Agency, at 2 (Nov. 3, 2016), https://www.eenews.net/assets/2019/01/16/document_daily_01.pdf ("EPA's position as explained above is consistent with EPA's past interpretation that the CWA applies to discharges of pollutants from a point source to waters of the United States, including those made through a ground water hydrologic connection.").

[37] Mont. Dep't of Envtl. Quality, Authorization to Discharge Under the Montana Pollutant Discharge Elimination System, Permit No. MT0021849, at 3 (Jan. 11, 2014), http://deq.mt.gov/Portals/112/Water/WPB/MPDES/Majors/MT0021849PER.pdf [hereinafter "City of Sidney Permit"]; Tintina Montana, Inc., Integrated Discharge Permit Application Narrative Black Butte Copper Project Meagher County, Montana, at 3-1 (Dec. 11, 2017), https://deq.mt.gov/Portals/112/Land/Hardrock/Documents/TintinaMines/R17%20Permit%20Application%20Narrative.pdf.

broad applicability of the general permits cited above—the likely regulation of thousands of facilities.[38]

II. Regulating Discharges that Pass through Groundwater is Administratively Feasible

An examination of the NPDES permits issued by EPA and the States that address discharges through hydrologically-connected groundwater demonstrates the feasibility of regulating such discharges. Agencies have well-established tools for determining when discharges necessitating a NPDES permit occur, establishing discharge limits, and identifying monitoring locations to ensure compliance. In addition, the requirements imposed under such permits are not overly burdensome on EPA, states, or regulated parties.

A. It is Feasible to Determine when a Facility Needs a NPDES Permit for Discharges that Pass through Groundwater

As EPA has explained, "[t]he determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an

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[38] EPA has also brought at least one enforcement action against an entity that EPA alleged was violating the CWA by discharging pollutants to navigable waters via groundwater without a NPDES permit. *See* Notice of Lodging of Consent Decree Pursuant to the Clean Water Act; ConAgra, Inc., 63 Fed. Reg. 55,409 (Oct. 15, 1998) (explaining that a consent decree terminating an EPA enforcement action addresses "violations of the CWA . . . including . . . unauthorized discharges of pollutants to surface waters via . . . hydrologically connected groundwater").

NPDES permit is a factual inquiry, like all point source determinations." 66 Fed. Reg. at 3017. Such determinations are manageable both for agencies and dischargers.

In many cases, it will be readily apparent to the operator of a facility that its operations will lead to discharges to surface waters. For example, "[i]n the absence of appropriate precautions, the on-site impoundments" where coal-fired power plants located adjacent to navigable waters dispose of coal ash "obviously pose significant risks of leaks that contaminate navigable waters by traveling through groundwater."[39]

Even when the existence of a discharge is not so obvious, there are standard tools and sources of information that agencies and permittees can use. In the preamble to its 2001 proposed CAFO regulations, EPA identified several sources that could help regulated entities in determining whether their discharges to groundwater had a direct hydrologic connection to jurisdictional surface waters. These include proximity to surface waters; whether the discharge occurs in sensitive geologic or hydrogeologic settings, such as "karst, fractured bedrock or other shallow/unconsolidated aquifers;" and United States Geological Survey (USGS) maps of Hydrologic Landscape Regions (HLRs). 66 Fed. Reg. at 3018-20.

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[39] Comment of Attorneys General of Maryland, California, Massachusetts, Oregon, and Vermont on Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water (EPA-HQ-OW-2018-0063; FRL-9973-41-OW), at 8 (May 21, 2018).

Moreover, a standard requirement in NPDES general permits for facilities with disposal ponds, such as CAFOs, is that the permittee either install a liner around the pond or demonstrate the lack of a hydrologic connection between the pond and surface waters.[40] For example, Oklahoma's CAFO general permit requires a certification from an engineer that "leakage will not migrate to a surface water."[41] The certification must include "maps showing ground water flow paths, or that the leakage enters a confined environment" as well as "information on the hydraulic conductivity and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter."[42] Neither the County nor its *amici* have suggested that the requirement to make such determinations, which are likely in force for thousands of facilities around the country, are unmanageable.

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[40] *See* 2012 CAFO Manual, *supra* note 18, at O-25 to O-26 (providing EPA guidance on liner requirements).

[41] Oklahoma Dep't of Agric., Food, & Forestry, AgPDES Permit No. OKG010000, *supra* note 31, at III-11.

[42] *Id.* Other general permits including a similar requirement to document a lack of hydrological connection include EPA Region 6's 1993 CAFO general permit, 58 Fed. Reg. at 7631; California Storm Water Permit, *supra* note 32, at 72-73; EPA Region 10's 2012 general permit for CAFOs in Idaho, Authorization to Discharge Under the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations, No. IDG010000, *supra* note 25; Texas's 2014 CAFO general permit, Tex. Comm'n on Envtl. Quality, TPDES General Permit No. TXG920000, *supra* note 31, at 33-36; and Tennessee's 2015 CAFO general permit, Tenn. Dep't of Env't & Conservation, General State Operating Permit for Concentrated Animal Feeding Operations, No. SOPC00000, *supra* note 31, at 12-13.

B. NPDES Permitting Requirements for Discharges that Pass through Groundwater are not Overly Burdensome

Existing NPDES permits demonstrate the range of permitting strategies and requirements that can be applied to discharges that pass through groundwater. These methods include absolute prohibitions on discharges from certain locations, pre-treatment requirements, interception wells to remove contaminated water for treatment, and numeric effluent limitations that can be enforced at various locations, including downgradient monitoring wells. All of these requirements have successfully been incorporated into NPDES for many years, demonstrating the feasibility of these approaches.

A number of permits include complete prohibitions on discharges from particular locations. As mentioned above, it is common for CAFO general permits to specify that ponds, pits, or lagoons operated by the permittee be properly lined to prevent the migration of pollutants into groundwater. Thus a CAFO general permit issued in 1993 by EPA Region 6 required that permittees install a liner in all wastewater retention ponds, lagoons, and basins, unless the permittee could demonstrate that "no significant hydrologic connection exists between the contained wastewater and surface waters of the United States."[43]

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[43] 58 Fed. Reg. at 7631; *see* sources cited in footnote 42, *supra*. Another permit with a similar requirement is EPA Region 6's 1999 NPDES permit for the US Liquids of Louisiana oil field liquids treatment and disposal facility. According to the 1997 Statement of Basis for the permit, the facility "dewater[s] the

Another option for discharges from a disposal pond or similar structure is to require pre-treatment of the wastewater before it enters the pond. For example, the Arizona Department of Environmental Quality has issued a draft permit for the Alpine Sanitary District. The District treats its wastewater by disposing of it in "three lined lagoons which provide primary and secondary treatment through sedimentation and anaerobic digestion."[44] When these ponds do not have sufficient capacity, the permit authorizes the "discharge of excess effluent from Pond #3 to Pond #4, which will serve as an unlined infiltration/evaporation basin."[45] However,

> [d]ue to the shallow depth to groundwater, the close proximity of Pond # 4 to the San Francisco River, and Pond # 4 being in the 100 year flood plain, ADEQ considers the hydrologic connectivity of infiltration from Pond #4 to the San Francisco River as discharge to a water of the US.[46]

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fluids in large treatment cells, store[s] the solids, and inject[s] the associated water and storm water." EPA Region 6, Statement of Basis, US Liquids of Louisiana, Ltd., NPDES Permit No. LA0068420, *supra* note 28, at 3. EPA indicated that "[t]he permittee will be required to prove that there is no hydrologic connection between the treatment cells and surface waters. If they are unable to prove such a connection does not exist, they will be required to install liners in the treatment cells." *Id.* at 4.

[44] Alpine Fact Sheet, *supra* note 34, at 2.

[45] *Id.*

[46] *Id.* at 3.

Thus, to ensure that these discharges do not exceed applicable effluent limitations, the draft permit requires that "[e]ffluent from Pond #3 will be pumped to a disinfection system to be chlorinated and dechlorinated prior to being discharged to Pond #4" and that "phosphorus reduction will be achieved by applying ferric chloride to Pond #3 prior to discharging."[47]

Another approach is to require that the permittee intercept and remove contaminated water by means of pumping before it enters surface waters. For example, the 2006 NPDES permit for the Chevron Questa Mine in New Mexico (formerly owned by Molycorp Inc.) required that the facility operate a "seepage interception system" including extraction wells in order to prevent the discharge of pollutants to the Red River through groundwater.[48] EPA reissued the permit in 2013, retaining this requirement.[49] The Response to Comments for the 2013 permit explained that the permit imposed controls on

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[47] *Id.* at 2. Similarly, the permit for the City of Sidney Wastewater Treatment Facility in Montana requires ultraviolet disinfection before wastewater is discharged into infiltration/percolation cells, from which it is discharged through groundwater into the Yellowstone River. City of Sidney Permit, *supra* note 37, at 3.

[48] EPA Region 6, Authorization to Discharge under the National Pollutant Discharge Elimination System, Permit No. NM0022306, at II-1 (Aug. 29, 2006), https://semspub.epa.gov/work/06/619835.pdf.

[49] EPA Region 6, Authorization to Discharge under the National Pollutant Discharge Elimination System, Permit No. NM0022306, at II-2 (Sept. 30, 2013), https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf.

seepage because "EPA has the jurisdiction under the CWA to regulate or eliminate seepage which reaches the waters of the US through hydrologic connection."[50] The fact sheet for the 2006 permit describes how the permittee "installed interception wells to capture the plume from the tailings pond."[51] EPA concluded that because "the ground water plume from the tailings ponds is successfully captured by" the permittee, "no additional permit requirements are proposed."[52]

In addition, some permits incorporate numeric effluent limitations. Thus the permit for the Western Sugar Cooperative sugar beet processing facility, issued by the Colorado Department of Public Health and Environment in 2012, requires that discharges into unlined disposal ponds meet numeric limits for oil and grease, pH, *E. coli*, ammonia, sulfide, chloride, temperature, and electrical conductivity.[53] Similarly, the draft Alpine Sanitary District permit described above includes numerical limits on, among

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[50] EPA Region 6, NPDES Permit No. NM0022306 – Response to Comments 18 (Sept. 30, 2013), https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf.

[51] Molycorp Fact Sheet, *supra* note 27, at 4.

[52] *Id.* The Fact Sheet cites several other NPDES permits that included similar requirements. *Id.* at 6-7 (citing NPDES permits AZ0022705 (1999), AZ0020389 (2000), and AZ0020516 (2000)).

[53] Western Sugar Cooperative Fact Sheet, *supra* note 35, at 18-23.

other things, chlorine, *E. coli*, and pH for discharges into the unlined infiltration/evaporation basin.[54]

Permits can require monitoring of compliance either with numeric limitations or with discharge prohibitions at various locations. For example, the 2016 NPDES permit for the Neopit Wastewater Treatment Facility operated by the Menominee Tribal Utilities in Wisconsin applies to a facility that discharges wastewater from a settling pond to seepage cells. From the seepage cells, the effluent passes through groundwater before reaching Tourtillotte Creek, a water of the United States.[55] The permit requires that the facility take effluent samples from the settling pond (before effluent enters the seepage cells) as well as samples from downgradient monitoring wells.[56] Similarly, the 2015 permit for the Taholah Village Wastewater Treatment Plant requires monitoring of effluent before it enters rapid infiltration basins as well as monitoring of the receiving water—the Quinault River.[57] Colorado's permit for the Western Sugar Cooperative sugar beet processing facility treats unlined ponds as a point source and requires samples from the ponds as dis-

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[54] Alpine Fact Sheet, *supra* note 34, at 8-10; *see also* Neopit Permit, *supra* note 26, at I-4 (describing limits for biological oxygen demand, total dissolved solids, chloride, nitrogen, nitrite, and nitrate); City of Sidney Permit, *supra* note 37, at 4 (containing numerical limits on biological oxygen demand, total suspended solids, pH, nitrogen, and phosphorus).

[55] Neopit Permit, *supra* note 26, at I-1.

[56] *Id.* at I-4, I-6.

[57] Taholah Permit, *supra* note 26, at 6-9.

charge monitoring.[58] In deciding on this monitoring strategy, the agency considered other compliance monitoring points, including monitoring wells and lysimeters, further demonstrating the variety of approaches available to permit writers.

These permits demonstrate the range of options available to address discharges that enter surface waters by passing through groundwater. It is feasible for agencies to identify when such discharges occur, to develop either numeric limits or other permit provisions to address them, and to monitor the permittee's compliance with the permit's requirements.

III. Reversal of the Court of Appeals Would Disrupt Existing Protections against Significant Harms that are not Addressed by Other Statutes

A ruling that discharges which reach surface waters by passing through groundwater are exempt from the NPDES program would disrupt the regulatory status quo and leave a significant gap in protection. Several of the County's *amici* suggest that NPDES permitting of such discharges is unnecessary and duplicative. *See, e.g.*, EEI Br. 32-40; KMEP Br. 20-26; NACWA Br. 29-37. As Respondents explain, however, these other laws are not adequate substitutes for the CWA's protections. Resp. Br. 49-52. For example, RCRA is aimed at the disposal of "hazardous" waste, but does not address many of the conventional pollutants such as pH, biological oxygen

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[58] Western Sugar Cooperative Fact Sheet, *supra* note 35, at 6, 30.

demand, and total suspended solids regulated by the NPDES permits described above. In addition, the SDWA and state groundwater protection laws are aimed at avoiding harm to groundwater (in the case of the SDWA, to underground drinking water sources in particular) rather than harm to surface waters. These statutes therefore do not provide a reason to ignore the plain text of the CWA. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) ("When two statutes complement each other, it would show disrespect for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.").[59]

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[59] Ironically, however, state groundwater protection laws—while not a substitute for the CWA's protections—do rebut Petitioner and EPA's arguments that NPDES permitting of discharges that pass through groundwater is impractical. Many of the tools included in the state groundwater protection laws that they tout are similar to the very aspects of NPDES permitting that they claim are unmanageable. For example, a number of states prohibit unpermitted discharges of pollutants into groundwater. West Virginia Br. 21-24. Moreover, some states prohibit groundwater discharges that adversely affect surface water quality or cause violations of surface water quality standards. *See, e.g.*, Ariz. Admin. Code R18-11-405.B; Fla. Admin. Code r. 62-520.-310(2); 314 Mass. Code Regs. 5.09(1). Permits that comply with these requirements raise many of the same practical concerns—such as the need to develop modeling or other methods to "account for how effluent changes physically and chemically between the point source" and the receiving water, NACWA Br. 19, or the permittee's inability to "control changes to its effluent quality between the outfall and entry into" the designated receiving water, *id.* at 20—that are potentially implicated by NPDES permits for discharges that pass through groundwater.

To be clear—none of this is to suggest that such laws are a

Overturning the decision of the Court of Appeals would cause significant regulatory disruption. The number of dischargers who would be affected by the elimination of these existing NPDES permit protections is likely in the thousands. Many of the permits identified above are general permits, which therefore apply to large numbers of sources. NPDES general permits currently in effect that directly address discharges that pass through groundwater include CAFO general permits in Idaho, New Mexico, Oklahoma, Tennessee, and Texas.[60] They also include California's General Permit for Storm Water Discharges Associated with Industrial Activities and Colorado's General Permit for Discharges from Sand and Gravel Mining and Processing.[61]

In addition, discharges that pass through groundwater to surface waters can cause significant harms. For example, discharges from CAFOs can cause nitrate pollution, harmful algal blooms, and transmission of disease-causing microorganisms.[62]

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substitute for the CWA's protections. They do not address the same harms and they do not provide nationwide protection. But they do provide additional evidence—on top of the examples from the NPDES permits discussed above—of the feasibility of using permits to address the impacts to surface waters of discharges that pass through groundwater.

[60] *See* sources cited in footnotes 25 & 31, *supra*.

[61] *See* sources cited in footnotes 32–33, *supra*.

[62] *See, e.g.*, JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 Envtl. Health Persp. 308 (2007); U.S. Fish & Wildlife Service & EPA Region 6, *Environmental Contaminants Associated with a Swine Concentrated Animal Feeding Operation and Implica-*

These discharges are not infrequent. EPA noted in its response to comments on the 2009 New Mexico CAFO General Permit that "[s]ince the issuance of the 1993 permit, EPA has observed that *many liners leak and discharge to groundwater which eventually discharges to surface water*, via a hydrologic connection."[63] In 2004, EPA completed a *Risk Assessment Evaluation for Concentrated Animal Feeding Operations*, which noted that "[n]utrients, pathogenic organisms, hormones and metals may easily reach waterbodies" from, among other pathways, "groundwater flow."[64] The same report observed that "groundwater flow is the primary contributor of nitrate to surface water from agriculture."[65]

Mines are another important source of discharges through groundwater. A 1993 letter prepared by EPA Region 8 discusses the agency's evaluation of how "pollutants from some mining sites are moving

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tions for McMurtrey National Wildlife Refuge 7-19 (2004), https://ecos.fws.gov/ServCat/DownloadFile/21670?Reference=23151.

[63] Response to Comments on the Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from Concentrated Animal Feeding Operations (CAFOs) in New Mexico (NMG010000), at 21 (2009) (emphasis added), http://clinics.law.harvard.edu/environment/files/2019/07/NM-CAFO-General-Permit-Response-to-Comments.pdf.

[64] EPA, *Risk Assessment Evaluation for Concentrated Animal Feeding Operations* 4 (2004), https://nepis.epa.gov/Exe/ZyPDF.cgi/901V0100.PDF?Dockey=901V0100.PDF.

[65] *Id.* at 25.

into the ground water and then into nearby surface water" and how these discharges either were not authorized by the mines' NPDES permits or that the mines had claimed to be non-discharging and therefore did not have permits.[66] These discharges were causing "serious water quality problems at some mines."[67] To address these harms, the letter concluded, "facilities are now being required to obtain NPDES permits covering all outfalls including ground water discharges determined to be hydrologically connected to surface water."[68]

NPDES permit writers have continued to rely on this conclusion. Thirteen years later, the NPDES fact sheet for the Questa mine cited this letter in support of regulating discharges via groundwater.[69] And as EPA's hard rock mining framework observes, "[r]eleases of pollutants . . . indirectly via ground water that has a hydrological connection to surface water" are a potential environmental impact to surface water from mining.[70]

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[66] Letter from Max H. Dodson, Director, Water Management Division, EPA Region 8, to Dan Fraser, Chief, Water Quality Bureau, Montana Department of Health & Environmental Sciences, *NPDES Permit Issues Hard Rock Mines*, at 2 (Dec. 22, 1993), http://www.sec.nv.gov/appeal_docs/epa_letter_cwa_122293.pdf.

[67] *Id.*

[68] *Id.*

[69] Molycorp Fact Sheet, *supra* note 27, at 6-7.

[70] EPA Office of Water, *EPA's National Hardrock Mining Framework*, at B-3 (1997), https://www.epa.gov/sites/production/files/2015-10/documents/hardrock_mining_framework_0.pdf. EPA has been issuing NPDES permits to mines that address

Because of their need for cooling water, coal-fired power plants—and their associated coal ash impoundments—are typically located next to rivers or other navigable waters. These impoundments, such as those at issue in *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018), are sources of arsenic, chromium, selenium, lead, and other heavy metals.[71] These toxic pollutants leak from unlined impoundments into shallow groundwater, and from there, into adjacent surface waters.[72]

In short, the existing regime, under which discharges through hydrologically-connected groundwater are regulated under the NPDES program, is needed to address serious threats to water quality that are not dealt with by other statutes. A decision reversing the Court of Appeals would disrupt the implementation of these NPDES permits, create a

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their discharges that pass through groundwater for decades, yet there is no evidence that this practice has harmed the mining industry.

[71] EPA, EPA-600/R-09/151, *Characterization of Coal Combustion Residues from Electric Utilities – Leaching and Characterization Data Hazardous and Solid Waste Management System* (2009), https://nepis.epa.gov/Exe/ZyPDF.cgi/P1007JBD.PDF?Dockey=P1007JBD.PDF; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,456–57 (Apr. 17, 2015).

[72] Jennifer S. Harkness et al., *Evidence for Coal Ash Ponds Leaking in the Southeastern United States*, 50 Envtl. Sci. & Technology 6583, 6591 (2016) ("[T]he results presented in this study suggest significant releases of coal ash impacted water to the environment.").

significant loophole, and put the water bodies protected by these permits—and the people who depend upon them—at risk.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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