**Attorneys General of Maryland, California, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Michigan, Oregon, Rhode Island, and Vermont**

June 7, 2019

Via Electronic Transmission

Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: 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 (EPA-HQ-OW-2019-0166; FRL-9991-72-OW)

Dear Mr. Wilson:

The undersigned Attorneys General write in response to the United States Environmental Protection Agency's ("EPA") 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 (Apr. 23, 2019) (the "Statement"). In the Statement, EPA concludes that the Clean Water Act "is best read as excluding all releases of pollutants from a point source to groundwater" from the scope of the National Pollutant Discharge Elimination System ("NPDES") program, "regardless of a hydrologic connection between the groundwater and jurisdictional surface water." *Id.* at 16,810. We write to object to the Statement on both substantive and procedural grounds.[1]

As a number of this letter's signatories have previously argued,[2] it is simply wrong to conclude that discharges to navigable waters via groundwater can never be covered by the NPDES program. Congress passed the Clean Water Act with the primary objective of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, Congress barred "any addition of any pollutant to navigable

[1] The question addressed by the Statement is distinct from the question of how "navigable waters" or "waters of the United States" should be defined under the Clean Water Act. *See* Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019). This letter does not address the latter question; in submitting this letter, none of the undersigned Attorneys General intends to change his or her previously articulated position concerning the proper definition of "navigable waters" or "waters of the United States."

[2] *See* Comments of Attorneys General of Maryland, California, Massachusetts, Oregon, and Vermont, EPA-HQ-OW-2018-0063; FRL-9973-41-OW (May 21, 2018). We respectfully incorporate by reference herein the arguments advanced in those comments.

waters from any point source" unless otherwise permitted in accordance with the NPDES program. 33 U.S.C. §§ 1342(a), 1362(12); *see id.* § 1311(a) ("Except as in compliance with this section [and other sections, including § 1342], the discharge of any pollutant by any person shall be unlawful."). The Clean Water Act's prohibition of unpermitted point source discharges, as Justice Scalia's plurality opinion in *Rapanos v. United States* recognized, encompasses both direct and indirect discharges: "The 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. 715, 743 (2006). Nor does the prohibition contain an exception—such as the one that the Statement articulates—carving out discharges that travel through groundwater before reaching navigable waters. Indeed, some NPDES permits today cover discharges that move through groundwater to hydrologically connected surface water. *See, e.g.*, Colorado Discharge Permit CO0041351 (Western Sugar, Fort Morgan, Colorado).

In addition to disregarding the statutory language's breadth, the Statement frustrates Congress's stated purpose of protecting and improving the quality of navigable waters. Indeed, under the erroneous exception to Clean Water Act jurisdiction set forth in the Statement, it would appear that the operator of a point source that otherwise would discharge directly into navigable waters could avoid the obligation to obtain an NPDES permit simply by directing pollutants into groundwater immediately adjacent to navigable waters—even if the pollutants are certain to reach those waters. It flouts the Clean Water Act's goals for EPA to give polluters a road map to skirt the Act's application in this fashion.

The existence of other environmental statutes in no way justifies the creation of a Clean Water Act exception for discharges to navigable waters via groundwater. Despite EPA's assurances in the Statement, *see* 84 Fed. Reg. at 16,824-26, these other statutes do not eliminate the threats that such an exception poses to surface waters. Unlike the Clean Water Act and its NPDES program, the Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Safe Drinking Water Act (SDWA) are not primarily concerned with the introduction of pollutants affecting the quality of the nation's surface waters. Not only that, but these statutes target arrays of pollutants that are, in various respects, more limited than those targeted by the Clean Water Act. *Compare* 33 U.S.C. § 1362(6) (broadly defining "pollutant" in the Clean Water Act to include, among other things, "sewage, . . . biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, [and] cellar dirt"), *with* 42 U.S.C. §§ 6903(5) (defining "hazardous waste" for purposes of RCRA) and 6903(27) (defining "solid waste" for purposes of RCRA); 40 C.F.R. § 261.4 (regulatory exclusions from definitions of "hazardous waste" and "solid waste" for purposes of RCRA); 42 U.S.C. § 9601(14) (defining "hazardous substance" for purposes of CERCLA); *and* 42 U.S.C. § 300g-1(b)(1)(A)-(B) (directing regulation only of contaminants that, among other things, have the potential to adversely affect human health and are sufficiently likely to occur in public water systems "with a frequency and at levels of public health concern"). And even if discharges to navigable waters via groundwater may in some instances be subject to multiple regulatory regimes, that is not a justification for reading a groundwater exception into the NPDES program, which is designed specifically to address pollutant discharges that adversely impact the quality of the Nation's waters.

In addition to these and other substantive deficiencies, the Statement should have undergone a complete notice-and-comment process pursuant to the Administrative Procedure Act ("APA"). Although EPA has described the Statement as "interpretive guidance," the circumstances here suggest that the Statement actually is a substantive rule subject to notice-and-comment requirements. In particular, contrary to EPA's prior position, the Statement categorically determines that point source discharges of pollutants to navigable waters via groundwater are *never* subject to NPDES permitting and thus ensures that a broad array of point sources will never be regulated by the NPDES program. *See Mendoza v. Perez*, 754 F. 3d 1002, 1021 (D.C. Cir. 2014) (question is "whether the new rule effects a substantive regulatory change to the statutory or regulatory regime"); *Electronic Privacy Information Ctr. v. U.S. Dep't of Homeland Security*, 653 F.3d 1, 7 (D.C. Cir. 2011) (rule not merely "interpretive" because it "substantially changes the experience of airline passengers"); *Abington Mem. Hosp. v. Burwell*, 216 F. Supp. 3d 110, 130 (D.D.C. 2016) (explaining that EPA's characterization of its pronouncement as "interpretive" is not dispositive).

Finally, the Statement is clearly designed to influence the result of *County of Maui v. Hawaii Wildlife Fund* (U.S. No. 18-260) by blunting the impact of EPA's previous statement—at an earlier stage of the same case—that the agency's "*longstanding position* has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a 'direct hydrological connection' between the groundwater and the surface water." Br. for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 22-23, *Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018) (No. 15-17447) (emphasis added). Indeed, the Statement admits as much, asserting that it is meant to "provide[] necessary clarity on the Agency's interpretation of the statute" in connection with the grant of certiorari in *County of Maui*. 84 Fed. Reg. at 16,812. That admission is consistent with the timeline of the Statement's issuance: EPA first solicited pre-proposal comment on this matter on February 20, 2018, and the comment period closed on May 21, 2018. *See* Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (Feb. 20, 2018). EPA did not issue the Statement until nearly a year later—after the Supreme Court had already granted certiorari in *County of Maui*, but still in time for the petitioner and supportive amici to rely upon the Statement in their briefing to the Court. Under these circumstances, the Statement constitutes nothing more than EPA's litigation position and, accordingly, is entitled to none of the deference that otherwise might befit EPA's interpretation of a law that it administers. *See, e.g.*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (deference unwarranted "when the agency's interpretation conflicts with a prior interpretation or when it appears that the interpretation is nothing more than a 'convenient litigating position'" (citation omitted)).

In light of the Statement's legal infirmities, the flawed procedure EPA employed to issue it, and its function as a litigation tactic, we respectfully request that the Statement be withdrawn.

Respectfully submitted,

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