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U.S. Environmental Protection Agency  
EPA Docket Center  
Mailcode 2822IT  
Attention: Docket ID No. EPA-HQ-OW-2019-0166  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Comments on 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**

Dear Docket Clerk:

GPA Midstream Association (“GPA Midstream”) appreciates this opportunity to submit comments to the U.S. Environmental Agency (“EPA”) in response to its notice and request for comments regarding its Interpretative 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 (April 23, 2019).

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

**Summary**

GPA Midstream appreciates EPA clarifying its “mixed record of prior agency statements addressing” whether discharges to groundwater may be regulated as point source discharges under the Clean Water Act. 84 Fed. Reg. at 16,811. GPA Midstream supports EPA’s interpretive statement, as EPA correctly points out that the legislative history unequivocally demonstrates that

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Congress knew of the relationship between surface water and groundwater and rejected regulating groundwater. See 84 Fed. Reg. at 16,815-16. However, GPA Midstream believes that the statute itself provides the strongest support for EPA’s interpretation because groundwater is neither a “navigable water” subject to Clean Water Act jurisdiction nor a “point source” subject to Clean Water Act regulation. Hence, with the statute being unambiguous with respect to groundwater, EPA need not resort to the Act’s legislative history to support its interpretation. Nevertheless, when this history is examined, GPA Midstream agrees fully with EPA’s determination that it conclusively demonstrates that the best, and we think only, interpretation of the Clean Water Act is that it does not regulate groundwater pollutants even where they may eventually migrate to jurisdictional waters. Congress expressly rejected any other view in voting down the Aspin Amendment.

## **Discussion**

### **I. Groundwater is Neither a “Navigable Water” Nor a “Point Source”**

Statutory interpretation must begin with “whether the language at issue has a plain and unambiguous meaning” and “must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)). With respect to the Clean Water Act, its plain language defines “navigable waters” and “point source” in a manner that excludes groundwater.

#### *A. Groundwater is not a “Navigable Water”*

The Clean Water Act regulates discharges from point sources to “navigable waters.” 33 U.S.C. § 1362(12). “Navigable waters” are “the waters of the United States, including the territorial seas.” Id. § 1362(7). Although “waters of the United States” is difficult to define with precision, the term is not so amorphous as to include groundwater. The Supreme Court has characterized “waters of the United States” as “rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters’” as well as “wetlands adjacent to but not regularly flooded by” those water bodies. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985); see also id. at 132 (upholding regulation of the features somewhere “between open waters and dry land” such as “shallows, marshes, mudflats, swamps, bogs”). Groundwater, however, cannot be in any sense “navigable,” a term that still has meaning under the Clean Water Act. “We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute ... The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” Solid Waste Agency of Northern Cook County v. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001).

Groundwater cannot, under any plausible interpretation, be navigable or reasonably made navigable. It exists underground in “the spaces between grains of gravel, sand, silt, clay, and cracks within rocks.” USGS, *Ground Water and Surface Water, A Single Resource*, Circular 1139 (1998) at 6. Groundwater has consistently been treated as something different from “navigable waters” under the Clean Water Act. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1450-51 (1st Cir. 1992) (groundwaters are not waters of the United States); *Chevron USA, Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 817 (D. Md. 2015) (“As several courts have observed, in other provisions of the CWA, Congress refers to ‘navigable waters’ and ‘ground waters’ as separate concepts, thus indicating them to be distinct.”); EPA, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 26, 2015) at 16 (“EPA has never interpreted ‘waters of the United States’ to include groundwater.”). The Interpretive Statement agrees with this. 84 Fed. Reg. at 16,813 (“EPA’s regulations have never defined ‘waters of the United States’ to include groundwater.”). The term “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source...” 33 U.S.C. § 1362(12). Since groundwater is not a navigable water, the Clean Water Act cannot regulate the addition of pollutants to groundwater as a “discharge of a pollutant.”

#### B. *Groundwater is not a “Point Source”*

Nor can the Clean Water Act regulated groundwater as a “point source,” which is foreclosed by the statute’s plain language. A “point source” is “any discernible, confined and discrete conveyance,” 33 U.S.C. § 1362. While courts have construed the term “point source” broadly, they always have maintained the requirement that it be “discernible, confined and discrete” in nature. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (“The concept of a point source was designed to further” the Clean Water Act’s permitting scheme “by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.”); *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 629-30 (D. R.I. 1990) (“The courts in these cases have broadly interpreted the definition of point source to reach all pollution that comes from a confined system.”).

Groundwater is not a discrete, confined conveyance, but a diffuse medium that may transport pollutants to differing degrees. Movement can be “exceedingly slow” and groundwater can discharge through springs, seepage into surface waters, well withdrawal, evaporation, or plant withdrawal. USGS, *Basic Ground-Water Hydrology* (1983) at 1, 14. Discharges of contaminants to groundwater, whether they be from a discernible above-ground source or a natural source (e.g., the leaching of metals from bedrock), are widely dispersed in three dimensions and diluted in concentration depending on the nature of the pollutant, groundwater, and soil. *See Studies in Geophysics, Groundwater Contamination* (Nat’l Academies Press 1984) at 37. The lateral and longitudinal dispersion of pollutants depend upon complex factors such as stratification, ion exchange, filtration, soil chemistry, and many other conditions. *Id.* at 19; EPA, *Understanding Variation in Partition Coefficient,  $K_d$ , Values*, Vol. I (1998) at 2.1. The wide dispersion of groundwater contamination and dilution of contaminant concentrations makes groundwater

analogous to nonpoint source pollution. See Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 620 (D. Md. 2011) (“Discharge from migrations of groundwater or soil runoff is not point source pollution...”); Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1140, n.4 (10th Cir. 2005) (“Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.”); Friends of Santa Fe County v. LAC Minerals, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (“the seepages are non-point source carriers of pollutants similar to stormwater, and are therefore not subject to the Act’s permitting requirements.”).

Yet, to establish Clean Water Act jurisdiction over pollutants that pass through groundwater, one must treat the groundwater itself as a point source even though it does not meet the definition of a “point source.” For instance, in Hawaii Wildlife Fund v. County of Maui, 886 F.3d 737, 749 (9th Cir. 2018), the Ninth Circuit upheld the lower court’s determination that groundwater was a “conduit” through which pollutants passed into the Pacific Ocean, *id.* at 759, and declared that groundwater is “no different” from any other point source in that effluent “travels through groundwater before entering the Pacific Ocean.” *Id.* at 762. The court’s rationale ignores the nature of groundwater, how it interacts with pollutants, and the definition of “point source” under the Clean Water Act.

The Fourth Circuit, in Upstate Forever v. Kinder Morgan Energy Partners, 887 F.3d 637, 651-52 (4th Cir. 2018), was even more explicit in treating groundwater as a point source and not the pipeline which released petroleum products. There, the court found that the Clean Water Act reached an un-remediated gasoline plume that was slowly migrating through soil and groundwater over the course of two years. 887 F.3d at 644. At the time of the plaintiffs’ suit, the pipeline had been repaired and was no longer discharging any pollutants to soil, surface water, or groundwater. *Id.* at 643. Indeed, the entire suit was not about the pipeline’s discharge, but the approximately 160,000 gallons of free product that could not be recovered from the soil and groundwater. *Id.* Thus, the only putative “point source” that was “adding” any pollutant to a navigable water was the groundwater, not the pipeline.

The “indirect discharge” theory where groundwater becomes the “point source” relies heavily on dicta in United States v. Rapanos, 547 U.S. 715, 743 (2006) (plurality opinion) for the premise that the Clean Water Act does not require “direct” discharges to navigable water and that groundwater may serve as a “conduit” without breaking Clean Water Act jurisdiction.<sup>1</sup> This theory ignores the fact that the Rapanos plurality explicitly stated that “we do not decide this issue.” 547 U.S. at 743. It also ignores the context of the Court’s discussion of “indirect” discharges, which centered on “discharge[s] into intermittent channels.” See *id.* at 743 (Clean Water Act liability can

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<sup>1</sup> See, e.g., Hawaii Wildlife Fund, 881 F.3d at 759; Upstate Forever, 887 F.3d at 649-50; Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, Hawaii Wildlife Fund, Case No. 15-17447, Dkt Entry 40 (9th Cir. May 31, 2016) at 10 (“2016 Amicus Brief”).

attach to “pollutants discharged from a point source [that] do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”) (quoting United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976)) (emphasis added). Critically, there was no dispute or discussion about whether groundwater could serve as a point source or can otherwise be a covered water. Thus, the most that Rapanos could stand for is that Clean Water Act jurisdiction may attach where discharges move from an original covered point source to an intermediate covered point source, making the often quoted language of Rapanos inapplicable to groundwater.

Others argue that Clean Water Act jurisdiction attaches to any pollutant if it eventually makes its way to a navigable water, regardless of the method, means, or time required. In its 2016 Amicus Brief, the government claimed that the Clean Water Act regulates groundwater contamination because the statute “defines ‘discharge of pollutant’ as ‘any addition of any pollutant to navigable waters from any point source.’” 2016 Amicus Brief at 3 (citing 33 U.S.C. § 1362(12)(A) (emphasis in original)). However, the United States’ emphasis on the word “to” is not an argument. In fact, it only emphasizes that the types of discharges at issue are discharges to groundwater, not navigable waters. Since the United States conceded that groundwater is not a “point source” itself, the jurisdictional chain is broken, just as if a pollutant was discharged from a point source into a parking lot.<sup>2</sup>

Moreover, if Clean Water Act jurisdiction applies whenever a pollutant eventually migrates to a navigable water, Section 402 would sweep in all non-point source pollution that Congress explicitly excluded from its scope. See 2016 Amicus Brief at 17 (“pollutants from a point source need not be emitted directly into covered waters.”). The Hawaii Wildlife Fund opinion reasoned that, if one can identify the source of pollution, then it cannot be non-point source pollution. 886 F.3d at 744-45; see also Upstate Forever v. Kinder Morgan Energy Partners L.P., 887 F.3d at 647, n.7 (claiming that any pollution that “is traceable not to dispersed activities” but “a discrete source” cannot be nonpoint source pollution). Congress, however, clearly recognized that some non-point source pollution could be traced back to specific sources. See 33 U.S.C. § 1314(f) (identifying nonpoint source runoff pollution from “agricultural and silvicultural activities,” “mining activities,” “construction activity,” and the “disposal of pollutants in wells or in subsurface excavations”). Yet, Congress did not deem these to be “point sources” because they lack the statutorily required “discernible, confined and discrete conveyance.”

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<sup>2</sup> “The most common example of nonpoint source pollution is the residue left on roadways by automobiles ... drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the ... gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays and the ocean.” League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002). Yet, the automobiles themselves are point sources. See Avolyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes are point sources); Concerned Residents for Environment v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994) (“the manure spreading vehicles themselves were point sources.”).

Contrary to the holdings of Hawaii Wildlife Fund and Upstate Forever, it is the question of whether or not pollution is discharged directly from a point source to a navigable water through a discrete conveyance that distinguishes point source pollution from non-point source pollution. For instance, a car may leak motor oil onto a grocery store parking lot that is swept by rain through a storm drain into a nearby stream that is a tributary of a water of the United States. Even though this is a textbook example of nonpoint source pollution, see Forsgren, 309 F.3d at 1184, the reasoning in the Hawaii Wildlife Fund and Upstate Forever cases would demand that every car that does, or may, leak oil obtain a NPDES permit. The same would be true of every parking lot in the nation. These examples (and there are many others) demonstrate that the “indirect discharge” theory has no logical stopping point and ignores the lines Congress expressly drew in the Act between point source and non-point source pollution. Accordingly, EPA’s interpretive memo rightly rejects the theory.

## **II. Treating Groundwater Pollutants as Conveying Point Source Discharges is Inconsistent with the Clean Water Act’s Treatment of Nonpoint Source Pollution**

GPA Midstream agrees that treating groundwater contaminants as point source discharges subject to Clean Water Act jurisdiction is inconsistent with the Act’s structure and treatment of nonpoint source pollution. See generally 84 Fed. Reg. 16,813-17. The characterization of groundwater as a “conduit” to accommodate the “indirect discharge” theory of Clean Water Act jurisdiction is contrary to Congress’ determination that non-point source pollution should not be directly regulated under the Act.

### *A. Groundwater Contamination is Nonpoint Source Pollution, Not Point Source Pollution*

The Clean Water Act’s permitting and liability provisions center on the discharge of pollutants from “point sources.” Distinct from “point sources” are “nonpoint sources of pollution.” 33 U.S.C. § 1314(f). Although Congress did not define non-point sources, Congress identified types of non-point source pollution as including, but not limited to, runoff from fields, crops, forest lands, mines, and construction sites. 33 U.S.C. § 1314(f). Most importantly, Congress did not directly regulate nonpoint source pollution in any way. Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000) (“The Act explicitly recognized the separate problems of point versus nonpoint pollution and established different approaches to mitigate them. Point sources were subjected to NPDES regulation (under Sections 301-02 and 402). Nonpoint sources were left subject to state regulation.”); Oregon Natural Res. Council v. U.S. Forest Serv., 835 F.2d 842, 849 (9th Cir. 1987) (Congress “drew a distinct line between point and nonpoint pollution sources . . . Nonpoint sources, because of their very nature, are not regulated under the NPDES.”). Instead of direct regulation, Congress required the EPA Administrator to collect information on the nature and extent of non-point source pollutants and methods for controlling them. See 33 U.S.C. § 1314(f).

The key distinction between the “point sources” and “nonpoint sources” of pollution is the existence of a discrete conveyance. See Northwest Env’tl Defense Center v. Brown, 640 F.3d 1063, 1071 (9th Cir. 2011) (distinction between a point source and non-point source depends “on

whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).”); Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1152 (9th Cir. 2010) (it is “clear that some type of collection or channeling is required to classify an activity as a point source”); LAC Minerals, Inc., 892 F. Supp. at 1358 (“In contrast, a nonpoint source should be understood as any source of water pollution or pollutants not associated with a discrete conveyance.”). Thus, the existence of a discrete, confined conveyance is the touchstone of point source pollution and, therefore, Clean Water Act regulation. As discussed above, groundwater by its very nature is almost always the opposite of a discrete, confined conveyance or channeling.

Congress clearly believed that groundwater contamination was a nonpoint source pollution issue. With respect to non-point source pollution, the Clean Water Act only requires States to study sources and create management plans, 33 U.S.C. §§ 1329(a)-(e), while EPA would provide grant funding for these purposes. Id. § 1329(h). In this same section of the Clean Water Act, titled “Nonpoint source management programs,” Congress directed EPA to prioritize grant funding for “management programs which will carry out ground water quality protection activities which the Administrator determines are part of a comprehensive nonpoint source pollution control program, including research, planning, ground water assessments ... and training to protect ground water quality from nonpoint sources of pollution.” Id. § 1329(h)(5); see also id. § 1329(i) (nonpoint source grant program for protecting groundwater quality). Nothing in § 1329 authorizes EPA to regulate groundwater (*i.e.*, require permits or establish standards). Similarly, there is an absence of references to groundwater in the Act’s sections establishing EPA’s regulatory authority.

*B. Regulating Groundwater as a “Conduit” Conflicts with State Groundwater Programs and Can Lead to Preemption Without a Clear Statement by Congress*

The reasoning for expansive Clean Water Act jurisdiction claims that the Clean Water Act merely regulates the source of groundwater contamination not the groundwater itself. See, e.g., Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 1180 (D. Id. 2001). However, that is a distinction without a difference. In reality, it is practically impossible to regulate the “indirect discharge” of pollutants into groundwater without interfering with State groundwater regulations directed at remediating or containing those groundwater pollutants. Unlike with navigable waters, which are waters of the United States, States have long viewed groundwater as exclusively waters of the State. See, e.g., Minnesota Min. & Mfg. v. Travelers Indem., 457 N.W.2d 175, 182 (Minn. 1990) (in Minnesota, “[p]ollution of the groundwater is damage to public property” with the Minnesota Pollution Control Agency acting as “the named trustee of the waters of the state.”); State Dep’t of Ecology v. Campbell & Gwinn, 43 P.3d 4, 8-9 (Wash. 2002) (ground waters are waters of the State and their beneficial use are subject to State regulatory program); Bausch & Lomb Inc. v. Utica Mutual, 625 A.2d 1021 (Md 1993) (groundwaters within Maryland’s boundaries are “waters of the State”). In fact, State groundwater regulatory programs that have occupied this field since before the Water Pollution Control Act Amendments of 1972. See S. Rep. No. 414, 92d Cong., 1st Sess. at 73 (1972) (noting existing State jurisdiction over groundwater).

States continue to regulate groundwater, commonly by establishing their own requirements for groundwater monitoring, reporting, well construction standards, groundwater classification, health-based pollutant-specific groundwater quality limitations, and standards for requiring corrective action. See, e.g., N.J. Admin. Code, Title 7, Chapter 9C (New Jersey groundwater quality standards); 15A NCAC, Subchapter 2L (North Carolina groundwater classification and standards); Or. Admin. R. Chap. 340, Division 40 (Oregon groundwater quality protection). State groundwater regulations have always been a necessary adjunct to other environmental regulatory programs left largely to State jurisdiction, such as the regulation of underground petroleum storage tanks, mining operations, landfills, septic tanks, oil and gas operations, wastewater impoundments, and drinking water wells. Yet, to regulate the “indirect discharge” of pollutants into groundwater would extend Clean Water Act jurisdiction over the groundwater itself, despite the absence of such authority in the Clean Water Act and Congress’ explicit refusal to grant it.<sup>3</sup> It would also inject massive confusion into long-established State groundwater regulatory programs. Instead, EPA’s interpretation of the Act to exclude groundwater as a “conduit” for point source regulation avoids conflicting with long established state authority over groundwater.

Viewing groundwater as a conduit to channel pollutants could improperly shift significant monitoring and management of that groundwater from State regulations to the federal Clean Water Act and its expansive permitting requirements, effectively preempting State groundwater management regulations. This outcome must be avoided absent a clear and manifest statement by Congress, which does not exist here. “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States....” Will v. Mich. Dep’t of State Police, 491 U.S. 58, 65 (1989) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The Clean Water Act not only lacks such a “clear and manifest” statement, the statute disclaims it. See 33 U.S.C. § 1370 (the Act states that it may not “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”). Moreover, the Supreme Court has directed that “conflicts between state and federal regulation” should be avoided “where none clearly exists.” English v. Gen’l Elec. Co., 496 U.S. 72, 90 (1990) (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960)). EPA’s interpretive statement would avoid not only creating a conflict with State regulations where none existed before but effecting a dramatic shift of regulatory authority from State law to federal law. “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” Whitman v. Amer. Trucking Ass’ns, Inc., 531 U.S. 457, 468 (2001).

Such a fundamental shift could actually discourage timely groundwater remediation at contaminated sites. Groundwater contamination, especially in older industrial areas, may include dozens of different contaminants from hundreds of sources, current and historic (e.g., abandoned industrial sites, military facilities, gas stations, septic tanks, wastewater impoundments, fields

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<sup>3</sup> See Section III supra.

receiving biosolids, road salts, applied pesticides, landfills, naturally occurring sources, etc.). Instead of managing groundwater contamination sites through existing state schemes, a citizen group could pick any existing potential sources, allege a hydrological connection with a navigable water, file a citizen suit, and force one or a few defendants to defend themselves in a Clean Water Act lawsuit, potentially for groundwater contamination reaching back decades. Although these defendants might be able to establish that they are not responsible for the addition of pollutants to groundwater, or that the groundwater does not interact with a navigable water, this often cannot be done until the summary judgment stage. Instead of negotiating with State agencies to study an area of groundwater contamination and move towards an expeditious corrective action plan, defendants would postpone any corrective action with the State until the citizen suit was resolved.

The prospect of subjecting groundwater contamination to Clean Water Act citizen suits and enforcement actions is especially troublesome given that some courts have held that Clean Water Act liability attaches even to passive landowners that did nothing to contaminate groundwater themselves or where the contamination occurred long ago. See Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141 (10th Cir. 2005) (Clean Water Act liability may accrue against “a passive landowner” that purchased former mining property which continued to discharge mine drainage); United States v. Sea Bay Develop. Corp., 2007 U.S. Dist. LEXIS 33734, at \*9-10 (E.D. Va. May 8, 2007) (imposing Clean Water Act liability on former site owner); North Carolina Wildlife Fed’n v. Woodbury, 1989 WL 106517, at \*1-2 (E.D.N.C. Apr. 25, 1989) (Clean Water Act liability for discharge of fill material six years prior to citizen suit); United States v. Reaves, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) (unpermitted discharge is a continuing violation so long as the pollutant remains); Marrero Hernandez v. Esso Standard Oil Co. (Puerto Rico), 597 F. Supp. 2d 272, 276 (D.P.R. 2009) (failure to remediate leaks from underground storage tank is a continuing violation even after the tank was removed). Such an approach would effectively convert the Clean Water Act into another CERCLA, imposing duties to remediate groundwater contamination even on innocent landowners, but with the addition of potential civil and criminal penalties. There is no statutory evidence (or any other kind of evidence) that Congress intended to make the Clean Water Act into a major tool for remediating contaminated groundwater sites that are currently and effectively handled under State law.

### **III. Congress’ Vote to Decline Regulating Groundwater Under the Clean Water Act Must be Respected**

GPA Midstream believes that the text of the Clean Water Act precludes the regulation of groundwater and that EPA is not required to support its interpretive statement with legislative history. See, e.g., Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) (“But we do not resort to legislative history to cloud a statutory text that is clear.”). Nevertheless, GPA Midstream agrees with EPA’s understanding of the Clean Water Act’s legislative history, 84 Fed. Reg. at 16,814-17, but wishes to emphasize the importance of a particular aspect of that history. Congress debated an amendment by Representative Les Aspin to the bill that became the Federal Water Pollution Control Act Amendments of 1972. That amendment would have regulated groundwater under the

Clean Water Act. Representative Aspin stated that the purpose of his amendment was to “bring[ ] ground water into the subject of the bill, into the enforcement of the bill. Ground water appears in this bill in every section, in every title except title IV ... when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.” 118 Cong. Rec. 10,666 (1972) (remarks of Rep. Aspin). Several members of Congress spoke in opposition to the Amendment. See, e.g., 118 Cong. Rec. 10,667 (remarks of Rep. Clausen); id. at 10,668 (remarks of Rep. Harsha); id. at 10,669 (remarks of Reps. Sisk and Harsha). After this debate, Congress defeated the Aspin Amendment by a vote of 86 to 34. 118 Cong. Rec. 10,669.

EPA’s interpretive statement recognizes the failed Aspin Amendment in determining Congress’ legislative intent, 84 Fed. Reg. at 16,815 (citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974)), but EPA may go further to find that Congress’ vote on the Aspin Amendment is dispositive, not merely evidence of intent. Gulf Oil Corp. involved the unexplained deletion of a phrase by a Conference Committee, 419 U.S. at 200, and courts have ignored such legislative alterations before. See In re Flo-Lizer, Inc., 916 F.2d 363, 365 (6th Cir. 1990) (imposing post-petition interest under a bankruptcy statute even though a compromise bill struck a post-petition interest provision originally in the Senate version); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 807-08 (S.D. Ohio 1983) (imposing joint and several liability under CERCLA even though a provision imposing joint and several liability was deleted from the bill).

In this case, Congress’ express debate and vote on regulating groundwater under the Clean Water Act is more than just evidence of Congress’ intent . See 84 Fed. Reg. at 16,820 (referring to Congress’ vote against the Aspin Amendment as “Congress’s evident intent”). Any interpretation that fails to abide by the Aspin Amendment vote raises significant separation of powers concerns. Indeed, there would be little point in Congress voting on amendments at all if an agency or court could subsequently disregard that vote as mere legislative history that is outweighed by competing legislative history, policy concerns, or the statute’s general purpose. EPA should consider itself bound by the Aspin Amendment vote as no agency should be afforded the discretion to create a law that the legislature voted down.

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GPA Midstream appreciates the opportunity to submit these comments in response to EPA's request and is standing by to answer any questions that it may have.

Respectfully submitted,

A handwritten signature in black ink that reads "Matt Hite". The signature is written in a cursive style with a large initial "M".

Matt Hite  
Vice President of Government Affairs  
GPA Midstream Association