

I. THE AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure Rule 29, the California Association of Sanitation Agencies (“CASA”), the Association of California Water Agencies (“ACWA”), and the Association of Metropolitan Sewerage Agencies (“AMSA”) (collectively hereafter the “Associations”) respectfully submit this *Amicus Curiae* brief in support of Defendant/Appellant City of Healdsburg (“City”).

CASA is a California non-profit public benefit corporation created to further the common interests of publicly-owned wastewater collection, treatment, and reclamation agencies located within the State of California in their effort to provide cost-effective treatment, disposal, reclamation, and reuse of wastewater so that sound public health and environmental goals may be achieved. CASA is currently comprised of 110 public agencies in California that operate publicly owned treatment works (“POTWs”). CASA actively participates in legislative and regulatory advocacy relating to the field of water quality. CASA also conducts ongoing programs to educate its members on recent legislation, regulatory enactments, and developments and innovations in wastewater management and technologies.

ACWA is a voluntary, statewide, non-profit association comprised of 488 public water agencies that was founded in 1910. Together, these agencies are

responsible for more than 90% of the water delivered in the state. In addition to public agency members, ACWA also includes mutual water companies and other private, non-profit water related agencies and 302 associate members, including firms and corporations in the legal and engineering fields with an interest in California water issues. ACWA's mission is to assist its members in promoting the development, management, and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner.

AMSA is a trade association that represents the interests of nearly 300 of the nation's POTWs. AMSA membership includes 32 California agencies and more than 60 agencies within the jurisdiction of the Ninth Circuit Court of Appeals. Collectively, AMSA member agencies serve the majority of the sewered population in the United States and, together, treat and reclaim more than 18 billion gallons of wastewater each day. A central function of AMSA is to represent the legislative and regulatory interests of its member wastewater treatment agencies.

Many members of the Associations are regulated under the Clean Water Act ("CWA"), including the National Pollutant Discharge Elimination System ("NPDES") permit program. *See* 33 U.S.C. §§1251, *et seq.* Many of the Associations' members are also concurrently and/or separately regulated under state laws regarding water conservation, reclamation, disposal, recharge, and

storage projects involving discharges to, or the use of, groundwater. The Associations are concerned that these vitally important water projects, as well as the entire regulatory structure of many agencies operating in the State of California and other states subject to the jurisdiction of this Court, will be drastically and unnecessarily altered if this Court affirms the District Court's decision.

## II. ISSUES PRESENTED FOR REVIEW

1. Whether a treatment pond and the groundwater underlying that treatment pond can be defined as "waters of the United States" for purposes of regulation under the CWA by characterizing the groundwater and the pond as "tributaries" of the Russian River, a navigable surface water of the United States.

2. Whether the federal "waste treatment system" exception, which exempts treatment ponds or lagoons from the federal regulatory definition of "waters of the United States" and eliminates the need for a federal NPDES permit for discharges into such treatment ponds or lagoons, applies to Basalt Pond.

## III. ARGUMENT

### A. The District Court Based Its Decision On Flawed and Erroneous Conclusions.

The District Court's Findings of Fact and Conclusions of Law contained two flawed conclusions that, if upheld, will detrimentally affect the Associations' members. The first flawed conclusion was the District Court's finding that "Basalt

Pond and the subterranean groundwater that flows through it are ‘tributaries’ of the Russian River.” (Appellant’s Excerpts of Record (“AER”), Tab 10: Opinion at 17:23-25). Based on this finding, which relied on a small number of district court cases expressing a minority line of reasoning, the District Court held that the CWA extends federal jurisdiction over discharges to groundwater that is hydrologically connected to surface waters classified as navigable “waters of the United States.” Thus, the District Court held that the City must obtain a federal NPDES permit for any discharge to Basalt Pond and the underlying groundwater. (AER 10: Opinion at 17:26-18:2 and 27:2-3). As demonstrated below, the District Court’s reasoning contradicts Congress’ explicit and unequivocal decision not to extend the jurisdictional reach of the CWA to any type of groundwater, including groundwater that is hydrologically connected to a navigable surface water, and therefore, should be rejected by this Court.

The second erroneous conclusion was the District Court’s finding that Basalt Pond does not qualify for the regulatory “waste treatment system” exception, which would have thereby removed the pond from the definition of “waters of the United States.” *See* 33 C.F.R. §328.3(a) and 40 C.F.R. §122.2. In reaching this conclusion, the District Court found that while the City’s wastewater treatment facility was “designed” to take advantage of mining pits like Basalt Pond, the pit existed prior to construction of the City’s facility and the enactment of the CWA,

and therefore, Basalt Pond itself was not “designed” to meet the requirements of the CWA or “designed” to be part of the waste-treatment system. (AER 10: Opinion at 17:16-22). The District Court reached this decision despite the fact that the United States Environmental Protection Agency (“EPA”) had previously deemed Basalt Pond to be part of the City’s waste treatment system.

If upheld, the District Court’s decision will create an absurd result. A public entity, such as the City, offering cost-effective, beneficial wastewater treatment to citizen ratepayers will be unable to use existing man-made ponds or incorporate other existing terrain into its treatment system without those ponds being deemed “waters of the United States.” However, if the same public entity were to *construct* an identical *new* pond specifically as part of its treatment system, the new pond would not be considered a “water of the United States.” This result defies logic, discourages the cost-effective, beneficial reuse of existing man-made ponds or other terrain, and encourages unnecessary disturbance of additional, potentially undeveloped land. For this, and other reasons set forth below, this Court should reject and reverse the District Court’s decision.

**B. The Plain Language of the Statute and Legislative History Demonstrate that Congress Did Not Intend Groundwater to Fall Within the Purview of CWA Permitting Requirements.**

As a general rule of statutory construction, when interpreting a statute, courts must look to the specific language of the statute at issue, as well as the

language and design of the statute as a whole. If the plain language of the statute is unclear, then courts must turn to the legislative history surrounding the statute. If the legislative history demonstrates that Congress has spoken to the question at issue, the court must give effect to the unambiguously expressed intent of Congress. *Dole v. United Steel Workers of America*, 494 U.S. 26, 35 (1990); *see accord, Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001). Here, both the plain language of the CWA and the legislative history of Congress' adoption of the CWA provide clear evidence that Congress did not intend for *any* groundwater to fall within the purview of the CWA. Rather, Congress left regulation of groundwater to the individual states.

1. **The CWA Refers to Both “Navigable Waters” and “Groundwaters” But Only Requires NPDES Permits for Discharges to “Navigable Waters.”**

- a. *Defining “Navigable Waters.”*

The CWA provides that in the absence of a NPDES permit, “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. §1311(a). The term “discharge of a pollutant” is defined as “any addition of any pollutant to *navigable waters* from any point source [or] any addition of any pollutant to the waters of the *contiguous zone* or the *ocean* from any point source....” 33 U.S.C. §1362(12) (emphasis added). “Navigable waters” is defined as “waters of the United States, including the territorial sea.” 33 U.S.C. §1362(7).

The term “waters of the United States” has been defined by EPA and includes, in relevant part,

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate “wetlands;”

(c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition; and

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition.

*See* 40 C.F.R. § 122.2; *see also* 33 C.F.R. §328.3(a) (Army Corps of Engineers similarly defining “waters of the United States” ). Importantly, EPA’s definition does not include any specific reference to groundwater.

b. *The CWA Specifically Excludes Groundwater From NPDES Permitting Requirements.*

A simple reading of the CWA shows that when Congress wanted certain provisions of the CWA to apply to groundwater, it stated so explicitly. For example, CWA section 102(a) identifies groundwater as distinct and separate from navigable surface waters, by stating:

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, ... prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the *navigable waters* and *groundwaters* and improving the sanitary condition of *surface and underground waters*.

33 U.S.C. §1251(a) (emphasis added).

Similarly, CWA section 104(a) states that the EPA Administrator shall:

in cooperation with the States ... establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the *navigable waters* and *groundwaters* and the *contiguous zone*, and the *oceans* ....

33 U.S.C. §1254(a) (emphasis added). Thus, Congress specifically identified four different and distinct types of water bodies in the CWA: (1) navigable waters, (2) groundwater, (3) the contiguous zone, and (4) oceans.<sup>1</sup>

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<sup>1</sup> Other sections of the CWA also refer to navigable waters and groundwater as distinct and separate. *See e.g.*, 33 U.S.C. §1256(e) (“...the Administrator shall not make any grant ... which has not provided or is not carrying out as part of its program – (1) the establishment ... of appropriate devices ... necessary to monitor and to compile data on ... the quality of *navigable waters* and, to the extent



The CWA provides that a permit must be issued for the discharge of any pollutant to: (1) *navigable waters*, (2) the *contiguous zone*, or (3) the *ocean*. 33 U.S.C. §1362(12). Thus, of the four types of waters recognized in the CWA, only “navigable waters,” the “contiguous zone,” and the “oceans” are included within the definition of “discharge of pollutant,” and thereby require a NPDES permit to discharge to these waters. *Id.* The omission of “groundwater” from the definition of “discharge of a pollutant” clearly indicates that Congress did not consider discharges to groundwater to be discharges that would trigger the need for an NPDES permit. *See Russello v. United States*, 464 U.S. 16, 23, 78 L.Ed. 2d 17, 104 S. Ct. 296 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

2. **Legislative History Clearly Indicates Congress’ Intent to Exclude All Groundwater, Including Hydrologically Connected Groundwater, From the CWA’s Reach.**

The argument that Congress intended to exclude groundwater from NPDES permitting requirements is confirmed by legislative history. While the CWA was being drafted, there were numerous attempts by various members of the House of

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practicable, *groundwaters*”) (emphasis added); *see also* 33 U.S.C. §§1288(b), 1314(a), and 1314(e).

Representatives and the Senate to expressly include groundwater within the NPDES permitting requirements of CWA Section 402. 33 U.S.C. §1342. For example, the report accompanying the Senate's version of the CWA stated:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction. Thus, the Committee bill requires in section 402 that each State include in its program for approval under Section 402 affirmative controls over the injection or placement in wells of any pollutants that may affect groundwater. This is designed to protect groundwaters and eliminate the use of deep well disposal . . .

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3739 (emphasis added). Thus, the Senate Committee recognized the link between surface and ground waters, yet expressed a clear intent that states, not the federal government, regulate groundwater.

In addition, the House of Representatives specifically rejected an amendment that would have brought groundwater within the jurisdiction of the CWA. When the amendment was introduced, Representative Aspin stated:

Groundwater is that water which lies below the surface of the earth. It is in reservoirs and pools, it is well water, it is drinking water. In other words, it is subsurface water.

The amendment does two things, two very simple things. First, the amendment brings groundwater into the subject of the bill, into the

enforcement of the bill. Groundwater appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study groundwater. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then groundwater is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of groundwaters through seepage and other means, groundwater gets into navigable waters, and to control only the navigable water and not the groundwater makes no sense at all.”

118 Cong. Rec. 10666-10667, 1 Leg. Hist. 589 (1972). After considerable debate, the amendment was rejected. *Id.*

Congress understood that the distinction between surface and ground waters might be “artificial” in some instances. Even so, Congress decided that each state, rather than the federal government via the CWA, should be responsible for the regulation of groundwater quality. To that end, Congress enacted specific statutory provisions in the CWA to encourage states to be diligent in assessing groundwater quality. *See, e.g.*, 33 U.S.C. §§1254(a), 1256(e), 1288(b), 1314(a), and 1314(e).

The State of California has effectively implemented Congress’ intent in adopting a regulatory program for the City’s discharge to Basalt Pond. Here, that discharge is regulated by Waste Discharge Requirements issued by the State of California’s Regional Water Quality Control Board, North Coast Region. (AER 9: Defendant’s Findings of Fact (as adopted by the District Court) (“FOF”) 38(M); FOF 38(P); FOF 38(Q)). Thus, given that the water quality implications of the City’s discharge have been duly considered and controlled by the State, the District

Court erred by finding – against Congress’ clear direction – that additional federal regulation is mandated and necessary pursuant to the CWA. This Court must give effect to the unambiguously expressed intent of Congress, and accordingly, reverse the District Court’s decision.

3. **The Failure of Some District Courts to Consider the Legislative History of the CWA Led to a Split Within the District Courts in the Ninth Circuit.**

Despite the plain language of the CWA and the unequivocal intent of Congress found in the legislative history, a split in authority exists among federal district courts in the Ninth Circuit on whether discharges to groundwater, especially groundwater that is hydrologically connected to a navigable surface water, falls within the purview of the CWA. While some district courts within the Ninth Circuit have held that the CWA’s jurisdiction extends to discharges into groundwater that is hydrologically connected to surface waters (*see e.g.*, *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 989-90 (E.D. Wash. 1994)<sup>2</sup>), other district courts within the Ninth Circuit have more accurately held that even hydrologically connected groundwater is not subject to

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<sup>2</sup> *See also Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001) (holding that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are waters of the United States); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1196 (E.D. Cal. 1988) (holding that groundwater would fall within the regulatory purview of the CWA if it were established that the groundwater was naturally connected to navigable waters).

the NPDES permitting requirements of the CWA (*see, e.g., Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312 (D. Ore 1997)<sup>3</sup>).

The discrepancy among the district courts can be readily explained, and resolved by this Court. Those district courts that have extended the CWA's jurisdiction to discharges into groundwater that is hydrologically connected to a navigable surface water either failed to consider or simply ignored explicit action and statements regarding groundwater made by leading members of Congress at the time the CWA was adopted.

In the *Washington Wilderness Coalition* and *Idaho Rural Council* cases, the federal district courts expressed the view that the legislative history of the CWA only demonstrates that “the CWA does not regulate ‘*isolated/nontributary groundwater*’ which has no affect on surface water.” *Idaho Rural Council v. Bosma*, 143 F.Supp.2d at 1180 *citing Washington Wilderness Coalition*, 870 F.Supp. at 989-990 (emphasis added). This revisionist interpretation of the legislative history by both courts is simply wrong – a conclusion fueled by the fact

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<sup>3</sup> *See also Woodward v. Goodwin*, 2000 U.S. Dist. LEXIS 7642, \*43 (N.D. Cal. 2000) (“The only possible remaining claim is the claim of general seepage of the sewage pipe into the groundwater to the surrounding streams and rivers. However, as this means of establishing jurisdiction on this record would necessarily rely on groundwater conveyance of waste . . . it is beyond the purview of the CWA.”).

that no citation to the statute or actual legislative history was provided by either court to support their result. In fact, nowhere in the legislative history does Congress ever suggest it intends to limit the jurisdictional reach of the CWA to “isolated/nontributary groundwater which has no affect on surface water.” *Id.* On the contrary, as discussed above, the legislative history clearly demonstrates that Congress meant to exclude discharges to all groundwater, even hydrologically connected groundwater, from the CWA’s permitting requirements, not just discharges to isolated groundwater. *See, e.g., supra*, 118 Cong. Rec. 10666-10667, S. Rep. No. 414, 92d Cong., 1st Sess. 73, U.S. Code Cong. & Admin. News 1972, pp. 3739.

Federal district courts that have found that regulation of activities potentially affecting groundwater is not within the purview of the CWA recognized and gave effect to the unambiguously expressed intent of Congress. For example, in the *Umatilla Waterquality Protective Association, Inc.* case, a citizen suit alleged violations of the CWA where sodium and chloride from a brine lagoon were leaching into groundwater that was hydrologically connected to Pine Creek, a “navigable” water of the United States. The district court held that discharges to the groundwater at issue were not within the jurisdiction of the CWA. *Umatilla Waterquality Protective Association, Inc.*, 962 F.Supp. at 1320. In contrast to the

*Washington Wilderness Coalition* and *Idaho Rural Council* cases, the district court in *Umatilla* found a strong indication in the legislative history, partially cited above, that Congress considered groundwater to be entirely distinct from navigable waters, and that Congress did not intend to regulate groundwater in any form. *Id.* at 1318-1319. The Associations strongly urge this Court to accord the same respect to the unambiguously expressed intent of Congress, and reverse the District Court’s decision.

4. **Other Circuits Have Considered This Same Issue and Found That Hydrologically Connected Groundwater Is Not Subject to the Requirements of the CWA.**

The issue of whether discharges into groundwater hydrologically connected to a navigable “water of the United States” is subject to the permitting requirements of the CWA has been considered by other circuit courts of appeal. These circuits have consistently held that discharges to hydrologically connected groundwater are *not* subject to the requirements of the CWA. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992); *Exxon Corp. v. Train*, 554 F.2d 1310, 1331 (5th Cir. 1997)<sup>4</sup>; *Oconomowoc Lake v. Dayton Hudson Co.*, 24 F.3d 962, 965 (7th Cir. 1994). Thus, though the district

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<sup>4</sup> Although *Exxon* only considered the issue of whether discharges to isolated groundwaters fell within the purview of the CWA, in *Rice v. Harken*, 250 F.3d 264 (5th Cir. 2001), the Fifth Circuit Court of Appeals found that “the law in this Circuit is clear that ground waters are not protected waters under the CWA.” (*Id.* at 269).

courts within the Ninth Circuit are divided on this issue, the issue is well-settled nationwide. Every circuit that has addressed the issue has concluded that the CWA does not apply to discharges to hydrologically connected groundwater.<sup>5</sup> These cases are well-reasoned, and the holdings are consistent with the language of the CWA and Congressional intent. The Associations urge this Court to follow its fellow circuits and provide clear direction to the district courts of the Ninth Circuit.

**5. The District Court Erred In Determining That Basalt Pond and the Underlying Groundwater Are “Tributaries” to the Russian River.**

In this case, the District Court found that since tributaries fall within the definition of “navigable waters” under the CWA, and Basalt Pond and the subterranean groundwater that flows through it are “tributaries” [hydrologically connected] of the Russian River, the City’s discharge into Basalt Pond requires a NPDES Permit. (AER 10:Opinion at 17:23-18:11). However, the District Court’s flawed reasoning simply presumed, without explanation or justification, that the term “tributary” applies to groundwater.

When the CWA was being drafted, Congress stated that the term “navigable waters” encompassed all water bodies, including main stem streams and their

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<sup>5</sup> Numerous district courts across the country have also reached the same conclusion. *See e.g., Patterson Farm, Inc. v. City of Britton, South Dakota*, 22 F. Supp. 2d 1085, 1091-92 (D. S.D. 1998); *Kelley, et al. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985).



“tributaries,” for water quality purposes. *See* 118 Cong. Rec. 22756-57 (1972). At the same time, as noted above, Congress rejected numerous attempts in both the House of Representatives and the Senate to include groundwater within the regulatory jurisdiction and permitting requirements of the CWA. Given the legislative history, no reasonable interpretation of the CWA or its legislative history could support the conclusion that Congress meant implicitly to include groundwater as a “tributary” of “navigable waters,” and bring these waters within the purview of the permitting requirements of the CWA. Congress explicitly rejected the inclusion of groundwater within any of the permitting requirements of the CWA. Thus, the Act and the legislative history use the terms “tributaries” and “groundwater” as distinct categories of water bodies under the CWA, a distinction that should not be blurred by this Court.

In addition, judicial opinions discussing what constitutes a “tributary” refer to tributaries solely in terms of surface waters. *See U.S. v. Deaton*, 332 F.3d 698, 710 (4th Cir. 2003) (holding that all of the streams whose water eventually flows into navigable waters are “tributaries” under the CWA); *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (surface irrigation canals are tributaries to “waters of the United States”); *U.S. v. Eidson*, 108 F.3d 1336, 1341-1342 (11th Cir. 1997), *cert. denied*, 522 U.S. 899, 139 L.Ed.2d 177, 118 S. Ct. 248

(1997) (manmade ditches and canals that flow intermittently into creeks may be tributaries).

The plain language of the CWA, the implementing regulations, the legislative history of the CWA, and case law describing “tributaries,” taken together, demonstrate that groundwater cannot be considered a “tributary” of “navigable waters.” Thus, no NPDES permit is required for discharges to groundwater. Rather, California’s comprehensive scheme of state requirements governs discharges that might affect groundwater. For these reasons, this Court should reverse the District Court’s decision.

C. **The District Court Erred By Not Applying the “Waste Treatment System” Exception to the Definition of “Waters of the United States” to Basalt Pond.**

The EPA and the U.S. Army Corps of Engineers each define by regulation the term “waters of the United States” for purposes of the CWA Section 402 NPDES permitting program under 33 U.S.C. §1342 and the CWA Section 404 dredge and fill permitting program under 33 U.S.C. §1344. *See* 40 C.F.R. §122.2 and 33 C.F.R. §328.3(a), respectively. Virtually identical definitions for both permitting programs except the following from the definition of “waters of the United States”: “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA....” *Id.*

In the event that Basalt Pond and the underlying groundwater were found to

be “tributaries” to navigable “waters of the United States” (which the Associations contest as discussed above), the City urged the District Court to apply the “waste treatment system” exception from the definition of “waters of the United States” to Basalt Pond, given that Basalt Pond constitutes an integral part of the City’s waste treatment system. In rejecting the City’s request, the District Court concluded that<sup>6</sup>:

Although the Healdsburg waste-treatment system was designed so as to use a former mining pit like the Basalt Pond as a percolation pond, and it was intended that natural filtration would occur as fluid percolated through the lining of the pond, this order holds that Basalt Pond itself was not “designed” to meet the requirements of the Clean Water Act or “designed” to be part of the waste-treatment system. The pond preexisted the plant. It preexisted the Clean Water Act. The pond was not “designed” with sewage disposal in mind. The pond was simply the result of digging a pit in the earth that filled with groundwater. No doubt, the actual plant was “designed” to take advantage of abandoned mining pits like Basalt Pond, but the pits themselves were not so “designed.”

(AER 10: Opinion at 17:14-22). The District Court’s rationale is flawed, in that it fails to consider that the CWA specifically demands, as discussed below, that POTWs employ the most cost-effective treatment methods. The practical result of the District Court’s holding is the elimination of any sensible and cost-efficient reuse of pre-existing man-made ponds or lagoons within a treatment system. The

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<sup>6</sup> While the District Court only cited the “waste treatment system” exception contained in 33 C.F.R. §328.3(a) in its opinion, the City urged application of the exception via both 33 C.F.R. §328.3(a) and 40 C.F.R. §122.2. (AER 9: Proposed Conclusions of Law No. 14, at 19:15-26).

District Court further failed to consider the specific facts in this case demonstrating that the EPA had already taken final agency action to deem the Basalt Pond to be part of the City’s “waste treatment system” for purposes of providing grant funding under the CWA, and that action was never challenged.

1. **This Court Will Undermine A Clear Congressional Mandate that POTWs Employ the Most “Cost-Effective” Treatment Methods If Pre-Existing Ponds or Lagoons Cannot Be Incorporated Into The Waste Treatment System Exception to the Definition of “Waters of The United States.”**

When enacting the CWA, Congress adopted specific statutory rules regarding the cost-effectiveness of POTWs, such as the City’s treatment facility. This statutory scheme created a method for ensuring that scarce public funds were spent efficiently on wastewater treatment facilities. Specifically, Congress set forth a statement of policy as follows:

It is the policy of Congress that a project for waste treatment and management undertaken with Federal financial assistance under this chapter by any State, municipality, or intermunicipal or interstate agency shall be considered as an overall waste treatment system for waste treatment and management, and shall be that system which constitutes the most economical and cost-effective combination of devised and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes ... over the estimated life of the works, *including ...improvements, remodeling, additions, and alterations thereof....*

33 U.S.C. §1298(a) (emphasis added). Congress then adopted a whole subchapter devoted to the cost-effective treatment of waste by POTWs, under which the

federal government initially provided money in the form of grants to municipalities to construct new or to improve existing POTWs. *See* 33 U.S.C. §§1281-1298.

Other provisions of the CWA also require review of “practicable means of treating municipal sewage” over the life of the POTW and research “in order to reduce the requirements for, and the costs of, sewage and waste treatment services.” 33

U.S.C. §§1254(d)(1) and 1254(o)(1).

By including these provisions in the CWA, Congress made abundantly clear that POTWs were to be constructed, maintained, improved, and expanded as cost-effectively as possible. To subject a municipality, such as the City, to additional and unnecessary federal regulation for taking advantage of a suitable, existing, man-made pond and incorporating that pond into its waste treatment system would defy logic, and would severely undermine clear Congressional goals.

2. **EPA Recognized Basalt Pond Is Precisely the Type of Treatment Pond That the Waste Treatment System Exception Was Meant to Address.**

Congress was particularly concerned that the limited federal funds set aside for building and upgrading POTWs not be wasted. For this reason, before the EPA could approve any grant funding for a municipal treatment facility for the “erection, building, acquisition, *alteration, remodeling, improvement, or extension* of any treatment works, the [EPA] shall determine that the facilities plan of which such treatment works are an integral part constitutes the most economical and cost-

effective combination of treatment works over the life of the project to meet the requirements of this chapter, including, but not limited to, consideration of construction costs, operation, maintenance, and replacement costs.” 33 U.S.C. §1298(b) (emphasis added). “Treatment works” is broadly defined, and incorporates the phrase “including the acquisition of land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment...” 49 Fed. Reg. 6224 (Feb. 17, 1984). Furthermore, Congress did not expect municipalities to build brand new facilities in every case. The federal grant program allowed municipalities to use grant funds to acquire *existing* treatment facilities, as well as build new ones. *Id.*

In this case, the City applied for and received a Clean Water Grant to upgrade its wastewater treatment facility, including the use of the Basalt Pond, to comply with the secondary treatment standards set forth in the CWA (33 U.S.C. §1311(b)(1)(B)). (AER 7: Pusich at 381:5-10). The City chose the site of its wastewater treatment plant to take advantage of the existing terrace mining pits, including Basalt Pond. (AER 8: 075, ¶1; AER 9:Defendant’s Findings of Fact (adopted by Court), page 6, No 38(I)). It did so specifically to avoid the cost to its residents of excavating a new percolation pond like the existing pond. *Id.*

Since EPA was under Congressional mandate to disapprove that grant unless it found that the City’s *entire* waste treatment system, including the use of Basalt

Pond, “constitute[d] the most economical and cost-effective combination of treatment works over the life of the project to meet the requirements of [the Clean Water Act],” it is undisputed that the City’s facility, including Basalt Pond, was *designed* to meet, and does meet, those secondary treatment standards. (AER 10: Opinion at 6:21: *see also* Testimony of L. Russell at RT 655:13-21). The fact that the EPA approved the City’s grant based on the City’s design, and the City’s waste treatment system was constructed using federal funds, confirms that the waste treatment exception applied.

Had the City excavated and created its own pond, that pond would have fallen squarely within the language of the “waste treatment system” exception. The fact the City was able to take advantage of an opportunity to achieve an identical waste treatment result while allowing its residents to conserve scarce public resources by using an existing, man-made pond does not cause the City’s waste treatment system to fall outside the exception. Instead, compelling the City to construct a duplicative pond to take advantage of the exception wastes scarce public resources and fails to give the CWA a practical and reasonable construction. Nothing in the CWA or the regulations suggests that Congress intended such a result. On the contrary, the clear statement of Congressional intent that federal construction grant funds be spent wisely compels the conclusion urged by the City in its appeal. For these reasons, the District Court’s decision should be rejected.

**D. Upholding the District Court’s Decision Will Cause Unintended and Detrimental Consequences to Long-Standing and Effective Regulatory Programs in California and Other States that Manage All Types of Projects Involving Groundwater.**

Congress’ decision not to include any type of groundwater within the permitting provisions of the CWA was a logical, bright-line conclusion which prevented the federal government from becoming involved in each and every intrastate activity that might affect groundwater. Congress understood that individual states are better equipped than the federal government to determine the appropriateness of various intrastate activities that might affect the state’s groundwater supplies. *See, supra*, Argument Section I.A.2. herein. Further, Congress recognized the unnecessary and increased transaction costs of administering NPDES permits for each and every activity within each state that might affect groundwater. *Id.*

California, like many arid states in the West, relies heavily on a myriad of water conservation, conveyance, reclamation, disposal, recharge, and storage projects in order to serve the urban, agricultural and ecological interests that place demands on the state’s limited water resources. The Associations’ members are pioneers of such projects. Until now, these projects, which often involve direct or indirect discharges to groundwater, have been regulated pursuant to state law, via the issuance of state only, non-federal, Waste Discharge Requirements and/or Water Reclamation Requirements. *See* Cal. Water Code §§13263 and 13523,



respectively. Should this Court uphold the District Court's decision, the regulatory programs in California that oversee and manage these types of projects will be thrown into a state of upheaval. Programs that have been consistently administered for over a quarter century pursuant to established and complex state law and regulations, which are designed to preserve and ultimately maximize the use of California's water resources, will be suddenly and unnecessarily thrust into a state of flux and disorder.

Furthermore, the Associations' members, as well as the state regulatory agencies that oversee projects undertaken by member agencies, will be subject to additional, unnecessary, and expensive federal regulation and lengthy federal processes in order to administer and obtain federal NPDES permits for beneficial projects, such as irrigation of local parks and golf courses with recycled water, water reclamation and/or reuse on agricultural lands, and the storage or banking of water in groundwater basins for extraction during peak use seasons. NPDES permits can carry additional annual fees to the regulatory agencies as well as increased transaction costs for ongoing regulation, and the federal processes involved in the issuance of NPDES permits can unnecessarily and severely delay approval of beneficial projects. *See, e.g.*, 23 Cal. Code Regs. §2200 (NPDES permit fees) and 40 C.F.R. Part 124 (EPA regulations governing the issuance of NPDES permits and EPA's approval/disapproval processes).

The extensive reach of a decision by this Court to uphold the District Court's decision cannot be overstated. A determination by this Court that NPDES permits are required for the myriad of ongoing or upcoming water resource management projects that may involve hydrologically connected groundwater may result in ongoing regulatory approval processes coming to a standstill, thereby jeopardizing the availability and stability of California's precious water resources.

Finally, if the District Court's decision is not reversed, the scope of the CWA's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. According to EPA, "more than 135,000 facilities nationwide" currently have NPDES permits. *See* <http://www.epa.gov/compliance/planning/data/water/index.html> (last updated February 10, 2004). Even with the current universe of permitted entities, EPA and the delegated states have not been able to administer the NPDES program in accordance with the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B). In fact, in December 1998, EPA identified NPDES permit backlog as a "material weakness" at the Agency. *See* EPA, Fiscal Year 1998 Integrity Act Report to the President and Congress, <http://epa.gov/ocfo/integrity/integrity.pdf> at B-3 (December 29, 1998). This deficiency has not been cured.

Under the District Court's interpretation of the CWA, thousands of projects

within the Ninth Circuit's jurisdiction currently operating without NPDES permits would be added to the already backlogged and overburdened NPDES program. In light of the manifest administrative problems with the NPDES program today, a significant increase in the number of entities requiring NPDES permits would, without question, overwhelm EPA and state permitting agencies. The scope of the NPDES program under this approach is significantly greater than either Congress or EPA envisioned in the more than thirty years since the CWA took effect.

Existing regulatory programs that will be detrimentally affected by this Court affirmation of the District Court's decision include, but are certainly not limited to the following:

- Water Supply and Conveyance: California relies heavily on an intricate and delicately balanced system of water conveyance systems operated by federal and state agencies, municipalities, and water districts statewide to deliver water to residents, farmers, and commercial/industrial establishments.

Portions of these water conveyance systems are unlined, and therefore, water contained in the system may reach groundwater hydrologically connected to surface water. By affirming the District Court's decision, this Court will be subjecting this already complicated system to a whole new layer of regulation that is costly and unnecessary.

- Water Reclamation: California regulates thousands of water recycling and reclamation projects by issuing Water Reclamation Requirements pursuant to California Water Code sections 13500, *et seq.* Recycling and reclamation projects, which include the irrigation of hundreds of thousands of acres of crops and the supply of water to parks, golf courses, and municipal landscaping projects, have become increasingly important in California given the demands on the state's water resources. In fact, the California Legislature has statutorily declared the importance of water recycling, stating that "a substantial portion of the future water requirements of this state may be economically met by beneficial use of recycled water." Cal. Water Code §13511(a). By affirming the District Court's decision, this Court will require NPDES permits for any reclamation project or recycling that may result in the discharge of a pollutant to hydrologically connected groundwater underlying the project area. Such regulation will no doubt have the effect of chilling the development, or causing the cessation, of recycling and reclamation projects statewide.
- Waste Discharges to Land: California also regulates thousands of waste/wastewater discharges to land by issuing Waste Discharge Requirements pursuant to California's Porter-Cologne Water Quality Control Act, Cal. Water Code sections 13000 *et seq.* By affirming the

District Court's decision, this Court will require NPDES permits for essentially any waste discharge (either to land or water), given the potential for connectivity between surface and ground waters in many regions. Such broad, sweeping federal regulation was clearly not envisioned by Congress, and should not be required by this Court.

- Groundwater Recharge Projects: Voluntary municipal and industrial groundwater recharge projects, a related but separate vein of reclamation, are exceptionally important in coastal cities in California. Groundwater recharge projects, regulated by the State of California via the issuance of permits under the California Water Code, are widely used in southern California as a means for halting saltwater intrusion into valuable fresh groundwater resources. Groundwater recharge projects elsewhere are important for recharging distressed groundwater aquifers to improve water quality and prevent subsidence. If this Court upholds the District Court's decision, all of these projects will require costly NPDES permits, which may result in the abandonment, reduction, or cessation of these valuable, voluntary projects.
- Water Storage/Banking: In the more arid areas of the west, the storage of water in groundwater aquifers/basins, also referred to as "banking," is used as a method of storing water during wet months for use during peak, dry

months. This method of storage is crucial to ensure the reliability of water supplies. Requiring NPDES permits for this type of beneficial activity will needlessly increase transaction costs, and simply require regulation for regulation's sake, given that this type of activity has been successfully and safely managed for years.

For these reasons, it is critical that this Court recognize the unequivocal actions of Congress, to limit the reach of the CWA described above, and reverse the District Court's decision so as not to transform much of the state's groundwater from "waters of the State" to "waters of the United States" on the premise that groundwater is hydrologically connected, and thus, a "tributary" of navigable surface waters.

#### **IV. CONCLUSION**

The District Court misapplied the federal regulatory "tributary" rule to Basalt Pond and the underlying groundwater, and mistakenly applied the NPDES permitting provisions of the CWA to groundwater in direct contravention of Congress' clear decision not to regulate discharges to groundwater. The District Court also incorrectly determined that Basalt Pond did not qualify for the waste treatment system exception to the definition of "waters of the U.S." Because of the widespread detrimental implications of the District Court's holdings throughout the region, it is imperative, and the Associations respectfully request, that this Court

reverse the District Court's decision on these issues.

Respectfully Submitted,

DATED: July 22, 2004

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