

The Appropriate Role of States and the Federal Government
in Protecting Groundwater

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Written Testimony of:

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Chairman John Barrasso
Ranking Member Thomas R. Carper

Chairman Barrasso, Ranking Member Carper and members of the Committee, thank you for the opportunity to appear before you today. My name is Amanda Waters and I am General Counsel for the National Association of Clean Water Agencies. NACWA is a not-for-profit trade association that represents the interests of over 300 public clean water utilities nationwide who share a common objective and responsibility to protect the environment and public health by providing wastewater and stormwater treatment services for their communities in compliance with the Clean Water Act (CWA). I have worked on clean water issues for nearly two decades having previously served as General Counsel for a NACWA clean water utility in Northern Kentucky and for the Departments of Environment Protection in Kentucky and West Virginia. I was fortunate to begin my legal career at the Hudson Riverkeeper. The experience I gained working as a regulator, for a regulated entity, and as an environmental advocate has given me a well-rounded perspective on the interplay between local government, states, and the US Environmental Protection Agency (EPA). As a result, I have a pragmatic passion for advancing and ensuring transparent and definitive science-based clean water policies that adhere to the statutory requirements contained in the CWA.

On behalf of NACWA, I sincerely thank the Committee for holding this hearing to gather input on regulating releases to groundwater.

The question before us is not *whether* releases to groundwater that reach surface water should be regulated, but *how* such releases are and should be regulated; specifically, should a release of a pollutant that reaches groundwater and thereafter enters a CWA jurisdictional surface water be considered a “point source” discharge triggering the requirement for a CWA National Pollutant Discharge Elimination System (NPDES) permit. The answer requires a review of fundamental CWA provisions and, moreover, an understanding of how such releases *are already* regulated under other provisions of the CWA, other federal environmental statutes, and state laws, in accordance with Congressional intent.

The CWA is one of the most successful environmental statutes in the nation’s history and public clean water utilities continue to be a paramount contributor to that success. Working closely with state and federal regulators, public utilities have collectively achieved an astonishing level of pollution reduction, both at their own facilities and at thousands of industrial facilities regulated by utilities under the federal pretreatment program, since the CWA was enacted.

These public utilities own, operate, and manage the nation’s most critical infrastructure systems for protecting public health and the environment. Approximately 76% of the US population relies on the nation’s treatment plants for wastewater treatment.

The CWA’s prohibition against “the discharge of any pollutant” unless authorized, in relevant part, by a NPDES permit, 33 U.S.C. §1311(a), is limited to the addition of pollutants to navigable waters from a “point source,” *id.* §1362(12), which means “any discernible, confined and discrete conveyance.” *Id.* §1362(14). In accordance with these provisions, clean water utilities that discharge to surface waters operate pursuant to the CWA’s NPDES permitting system, which is designed to be an “end-of-pipe” program under which pollutants can be effectively monitored and reported to permitting authorities. When the CWA was enacted, EPA asked Congress for authority over groundwater, in part, because EPA knew pollutants in groundwater can enter surface waters. Despite being aware that pollutants in groundwater may enter navigable waters, the Senate and the House rejected proposals to extend the

CWA's reach. *E.g.*, S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739 ("Several bills pending before the [Senate] Committee provided authority to establish Federally approved standards for groundwaters. ... Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.").

Congress foresaw that an NPDES permit is not always the solution to address pollutants that reach navigable waters; there is not a "loophole" to allow the unregulated pollution of groundwater and surface waters. The CWA itself contains other tools, including total maximum daily loads ("TMDLs"), grants, planning, and nonpoint source management programs.

There are other federal environmental laws that are better designed and are currently utilized to address releases of pollutants into groundwater including the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Most importantly, states may adopt more stringent requirements, *see* 33 U.S.C. §1370 (preserves states' ability to adopt any requirement to control pollution), and all 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. The CWA is a cooperative federalism statute and groundwater and nonpoint source pollution is primarily the responsibility of the states.

EPA's direct hydrologic connection theory is contrary to the text and structure of the CWA, perpetuates regulatory uncertainty, and will significantly expand the universe of sources that would require NPDES permits or run the risk of government and citizen suit enforcement.

Public utilities have a compelling public interest in ensuring that the NPDES permitting program, and attendant CWA liability, remains predictable and lawfully within the scope of the Act. Regulatory certainty is necessary to allow utilities to plan prudently for the expenditure and investment of public funds.

There are many different entities and interests that are impacted by the important question the committee examines today, but it is important to note that NACWA's members are the only public entities that are directly impacted from a regulatory perspective. NACWA's members do not make a profit from their operations, nor do they answer to shareholders. They answer only to their local communities and ratepayers, many of whom could bear additional and unnecessary financial cost if this issue is not correctly addressed.

In addition to the lack of statutory authority, there are considerable practical and policy reasons to avoid extending the CWA prohibition to pollutants entering groundwater.

The existence of a direct hydrological connection is a fact-specific inquiry. It depends on site-specific factors, such as topography, climate, the distance to a surface water, geologic factors, and will require technical assessments. Yet, there is no clarity on how long and how far pollutants can travel for a connection to be considered "direct." The Ninth Circuit's recent decision in *Hawai'i Wildlife Fund v. County of Maui* demonstrates the nebulous nature of liability: "We leave for another day the task of

determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.”

The costs to determine whether groundwater beneath a source has a direct hydrologic connection to navigable water will depend on the nature of the facility, its geographic location, and availability of trained hydrogeologists, among other factors. The real significance of the cost arises from the countless number of facilities upon which liability could be imposed. For example, systems that leak due to age or episodic failures include public water supply pipelines, recycled water pipelines, and sanitary sewer collection systems. These could all fall within the CWA prohibition under EPA’s direct hydrologic connection interpretation.

Critically, even if public utilities err on the side of caution and apply for a permit, there is no certainty a permit can be obtained. As previously mentioned, the NPDES permitting regulations are “end-of-pipe.” The permitting authority must calculate effluent limits, determine the potential to exceed water quality standards, ensure consistency with antidegradation policies, allocate load and waste loads as part of TMDLs, assess the need for mixing zones, and determine appropriate monitoring, among other critical functions.

Determinations necessary to issue a permit would often be infeasible (if not impossible) in the context of groundwater. If a permit cannot be obtained, the addition of pollutants must cease, or a public utility would be subject to federal enforcement and citizen suit challenges. The CWA is a strict liability statute and just one CWA violation can result in a civil penalty of \$52,414 per day, in addition to injunctive relief and legal fees. NACWA members are currently facing CWA citizen suits based on this direct hydrologic connection theory.

To reduce liability, significant public resources would be needed to remove and/or replace infrastructure. The nation is already facing a public water infrastructure crisis with approximately \$600 billion needed over the next 20 years to address aging public sewer lines and systems. There is no indication that Congress intended the CWA and citizen suit enforcement to be the tool used to address the nation’s infrastructure.

Expanding the NPDES universe would have the unintended consequence of impeding beneficial and innovative public infrastructure projects such as groundwater recharge systems that are used to convey stormwater or recycled wastewater into aquifers to augment public water supplies, create seawater intrusion barriers, prevent land subsidence, and eliminate surface outfalls to protect water quality. Green infrastructure, a wet weather management tool used to retain and infiltrate stormwater into the ground to minimize discharges of municipal stormwater and combined sewer overflows, could also be subject to NPDES regulation and enforcement despite already getting the broad stamp of approval from EPA and Congress.

The CWA is clear that the release of pollutants into groundwater which then flows to navigable waters is not an “addition . . . to navigable waters from a point source.” However, even if the CWA was not clear, EPA’s direct hydrologic connection theory is not a reasonable interpretation of the Act. As a matter of good government, EPA has never gone through rulemaking to establish this direct hydrologic connection theory. None of the costs or regulatory burdens to public utilities and their local ratepayers have ever been considered by EPA through a public process. EPA has bypassed the

transparency and due process safeguards in the Administrative Procedure Act, which Congress enacted to provide public notice of proposed agency action, to encourage public participation, and to afford agencies with the framework to carefully consider all relevant factors before taking final agency action.

Further, there has not been a consistent federal government position on this issue. For example, in litigation defending federal facilities against CWA citizen suits, the United States has argued that the CWA does not prohibit pollutants that enter navigable waters from spills into the soil and groundwater. *Kelley v. United States*, 618 F.Supp. 1103, 1105-06 (W.D. Mich. 1985). The bottom line is that the federal government needs to provide certainty and clarity on this issue so that regulated entities – especially public clean water utilities – know what is expected of them. Until it does so, regulators and regulated parties alike will face uncertainty, and the risks and costs that unavoidably accompany it.

Public clean water utilities are on the front lines of environmental and public health protection, and fully support a strong regulatory framework to protect water resources. But such regulations must be grounded in statute and consistent with Congress's intent under the CWA. The direct hydrologic connection theory fails to meet this standard and threatens to hamper public clean water agencies in carrying out their critical public missions. Moreover, using the ill-suited NPDES permitting program to regulate discharges that are better addressed by other federal regulatory programs or state law will have a ripple effect of deterring projects that are otherwise environmentally beneficial.

Thank you again for holding this important hearing. I know that all parties and all witnesses here today want the same thing – clean and safe water – and I would be happy to answer any questions.