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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

May 21, 2018

David P. Ross
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *EPA Docket ID No. EPA-HQ-OW-2018-0063, Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water*

Dear Assistant Administrator Ross:

We commend you for requesting comment on whether the Environmental Protection Agency (EPA) should consider clarification or revision of past statements on Clean Water Act (CWA) jurisdiction as it relates to groundwater. Specifically, the proposal solicits comment on whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation.

We urge you to clarify that discharges through groundwater are not subject to regulation as point sources under the CWA.

On February 1, 2018, the U.S. Circuit Court of Appeals for the Ninth Circuit ruled that discharges into groundwater by the County of Maui wastewater treatment plant conflicted with the National Pollution Discharge Elimination System (NPDES) permitting program under the CWA. Soon after, Congress weighed in, and explained how recent court decisions were inconsistent with Congress's intended reach of the program. The report language accompanying the Consolidated Appropriations Act of 2018 stated:

Regulation of Groundwater.—Since enactment in 1972, the Clean Water Act (CWA) has regulated impacts to navigable waters, while regulation of groundwater has remained outside of the Act's jurisdiction. Instead, legislative history surrounding the CWA indicates that Congress intended for groundwater pollution to be regulated through CWA's nonpoint source programs and other Federal and State laws. For example, releases into groundwater from solid waste units are regulated at a Federal level by the Resource Conservation and Recovery Act (RCRA). Recently, some courts have imposed a broad view of CWA liability based on a theory of hydrological connection between groundwater and surface water. Other courts have taken a more narrow view and have focused on statutory distinctions between surface water and groundwater. The

Committees are aware that the Agency has requested comment on its previous statements ‘regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation.’ After completing the public comment process, the Committees encourage the Agency to consider whether it is appropriate to promulgate a rule to clarify that groundwater releases from solid waste units are regulated under RCRA and are not considered point sources, and, that releases of pollutants through groundwater are not subject to regulation as point sources under the CWA. The Agency is directed to brief the Committees about its findings and any plans for future rulemaking.

In a follow-up to the report, on April 18, 2018, the Senate Committee on Environment and Public Works (EPW Committee) held a hearing entitled, “*The Appropriate Role of States and the Federal Government in Protecting Groundwater.*” During that hearing, EPW Committee members heard testimony from experts and stakeholders on this important issue, and how an expanded view of the CWA’s point source program to include groundwater could have significant negative impacts on municipal, state, and agricultural interests.

We submit this comment letter and enclosures providing materials from the hearing for your consideration.

The CWA Does Not Require NPDES Permits For Discharges Into Groundwater.

The CWA is a profoundly important law that protects the environment and public health. It is the primary federal law governing pollution of surface waters, and was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹

To carry out this objective, the CWA relies on a framework of cooperative federalism. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA) established a regulatory framework for point source pollution control. A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”² The 1987 amendments to the CWA gave states primary authority to regulate nonpoint source pollution, including groundwater. Thus, the CWA does not regulate all sources of pollution at the federal level; rather, the Act distinguishes between point source and nonpoint source pollution, and does not directly regulate the latter, reserving such authority for the states.³

Regarding groundwater, the question is not *whether* it should be protected, but rather *how*. It is clear that groundwater is not a point source under the Clean Water Act. Considering that

¹ 33 U.S.C. § 1251(a).

² *Id.* § 1362(14).

³ “[The CWA] contains no mechanism for direct federal regulation of nonpoint source pollution.” *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988).

discharges into groundwater are complex and site-specific, states are uniquely positioned to address these types of discharges.⁴ As such, every state regulates discharges into groundwater in some manner.⁵ Further, other federal environmental laws, such as RCRA and CERCLA, regulate discharges into groundwater under specific circumstances.

Congress's decision not to include discharges into groundwater under the CWA's point source program is supported by the legislative history. Congress explicitly rejected amendments that would have extended CWA point source regulation to groundwater. The Senate Committee on Public Works report for the 1972 amendments stated: "Several bills pending before the Committee provided authority to establish federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation."⁶ This is a clear indication of intent that discharges traveling through groundwater are to be excluded from NPDES regulation.

Courts have stated that the Senate report language is unambiguous:

- *Exxon Corp. v. Train*, 554 F.2d 1310, 1326 (5th Cir. 1977) ("[A]s we read the Senate report, the committee did not intend to interfere with or displace the 'complex and varied' state jurisdictions over groundwaters. Rather, it meant only to help provide the states with the information needed to operate their own groundwater pollution control programs.")
- *Rice v. Harken Expl. Co.*, 250 F.3d 264, 271 (5th Cir. 2001) ("Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA.")
- *Kelley ex rel. Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985) ("[T]he unmistakably clear legislative history ... demonstrate[s] that Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination. Rather, such authority was to be left to the states.")

Likewise, courts have held that the regulation of groundwater under the NPDES program would frustrate Congressional intent:

- *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters ... The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated ...")

⁴ Written testimony of Martha Clark Mettler before the EPW Committee (April 18, 2018).

⁵ Questions for the record responses of Amanda Waters before the EPW Committee (April 18, 2018).

⁶ See S. Rept. 92-414, 92nd Cong. 1st Sess. 73.

- *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *9 (D. Conn. July 11, 2017) (“[I]f the Clean Water Act were to apply as a routine matter to the discharge of pollution onto the ground that ends up seeping into the ground water, then Congress’s purpose to limit the scope of the Clean Water Act would be easily thwarted.”)
- *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) (“Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow ‘hydrologically connected’ to navigable surface waters.”)
- *Cooper Indus., Inc. v. Abbott Labs.*, 1995 WL 17079612, at *4 (W.D. Mich. May 5, 1995) (“[T]he fact that ... ground waters are hydrologically connected to some surface waters is insufficient to transform [a] case to a FWPCA cause of action.”)

NPDES Regulation of Groundwater Would Have Significant Negative Consequences.

Congress intentionally excluded groundwater from the scope of point source NPDES permitting because such regulation would be impractical and unfeasible. Nonetheless, some courts have recently held that discharges that travel through groundwater may be subject to NPDES regulation.⁷ If upheld and applied broadly, these courts’ rulings would have significant negative effects.

Eighteen states, led by the State of Arizona, explained how a recent Ninth Circuit court ruling threatens to “create an unworkable regulatory environment by extending an onerous federal regulatory structure over what has been a traditional area of state responsibility.”⁸ For example, NPDES permitting in Arizona alone could balloon 200,000% under the court’s expansive interpretation of the law.⁹

Expansion of the NPDES program’s reach would also hamper municipal water agencies from carrying out their critical mission, and threaten to derail or deter projects that are environmentally beneficial. For example, innovative public infrastructure projects, such as groundwater recharge systems and green infrastructure projects, could be stymied.¹⁰

⁷ *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018).

⁸ See Brief of Eighteen States as Amici Curiae in Support of Petition for Rehearing En Banc of *Hawai’i Wildlife Fund v. Cty. of Maui* at 7, No. 1:12-cv-00198-SOM-BMK (Mar. 12, 2018) at 7 (hereinafter “State Amici Brief”).

⁹ See *id.* at 8.

¹⁰ Written testimony of Amanda Waters before the EPW Committee (April 18, 2018).

This precedent also has the potential to cause confusion and harm private interests, such as the agricultural sector. Indeed, Joe Guild, Treasurer of the National Cattlemen’s Beef Association, stated in written testimony before the EPW Committee:

[A]ll sectors of the cattle industry will face additional federal regulation and scrutiny, with little to no environmental benefit. Without an incentive, farmers and ranchers will stop working voluntarily with state and federal conservation programs to protect water quality. As producers sell off their cattle out of frustration with further regulation, the industry will face further consolidation because smaller producers are unable to comply with overly burdensome permitting requirements.¹¹

Finally, allowing NPDES permitting to regulate discharges into groundwater could have a broad effect on residential areas, as even residential septic tanks could require NPDES permits. The State of Arizona estimates that 282,897 septic systems could suddenly become subject to CWA point source regulation.¹² Such an expansion of NPDES permitting requirements would represent an unprecedented erosion of the cooperative federalism framework of the CWA.

EPA Clarification Is Critical: The Clean Water Act’s NPDES Program Does Not Apply to Groundwater.

These inconsistent judicial rulings can be partially attributed to EPA’s inability to articulate a consistent stance on the matter over the years. EPA’s request for comment states that the Agency “has previously stated that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to CWA permitting requirements.” EPA has made statements that contradict this assertion. For example, EPA has stated:

- “[D]ischarges to groundwater are not regulated by the NPDES program ... *if* a discharge to groundwater requires a permit, the [NPDES] is not the permit program authority under which such discharges can be covered... Discharges directly or indirectly to the ground [are] subject to other program authority, including the Underground Injection Control (UIC) Program under authority of the Safe Drinking Water Act, a State groundwater discharge permit program, or a similar program authority.” EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, at 7 (March 9, 2017).
- “NPDES permits are applicable for point source discharges to waters of the U.S.; discharges to groundwater are not addressed in the NPDES program and as such are not addressed by this permit.” EPA, Fact Sheet, Draft General Permits for Stormwater Discharges Systems from Small Municipal Separate Sewer Systems in Massachusetts at 18 (Sept. 30, 2014).

¹¹ Written testimony of Joe Guild before the EPW Committee (April 18, 2018).

¹² See State Amici Brief at 9.

- “Under the Clean Water Act, EPA and the States regulate facilities either discharge wastewaters directly to surface waters or discharge to municipal treatment systems. ... While a number of States have incorporated ground water discharges into their NPDES permits and pretreatment requirements, there is no national requirement to do so.” EPA, Final Comprehensive State Groundwater Protection Guidance at 1-27 (December 1992).¹³

These statements demonstrate that EPA’s stance on CWA permitting requirements for discharges into groundwater has been inconsistent at best. It is therefore imperative that EPA clarify its position.

EPA must clarify that discharges into groundwater are not subject to NPDES permitting requirements.

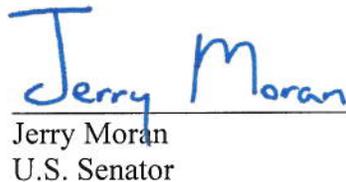
Thank you for considering these comments and supporting documents as you consider this matter.

Sincerely,

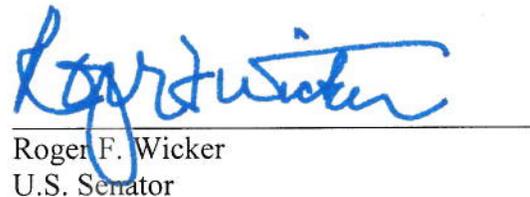

John Barrasso, M.D.
Chairman


Shelley Moore Capito
U.S. Senator


Joni K. Ernst
U.S. Senator


Jerry Moran
U.S. Senator

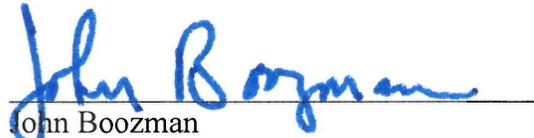

Deb Fischer
U.S. Senator


Roger F. Wicker
U.S. Senator

¹³ See Questions for the record responses of Amanda Waters before the EPW Committee (April 18, 2018) (identifying these and other past EPA statements).



Dan Sullivan
U.S. Senator



John Boozman
U.S. Senator



James M. Inhofe
U.S. Senator



For Immediate Release:
April 18, 2018

Contact: Mike Danylak ~202.224.1049
Mike_Danylak@EPW.Senate.Gov

Barrasso Opening Remarks at Hearing on State & Federal Governments' Roles in Protecting Groundwater

"Everyday activities, including farming, ranching, or having a septic tank in your backyard could require a federal discharge permit. This is not what Congress intended when it passed the Clean Water Act."



Click [here](#) to watch Chairman Barrasso's remarks.

WASHINGTON, D.C. — Today, U.S. Senator John Barrasso (R-WY), chairman of the Senate Committee on Environment and Public Works (EPW), delivered the following remarks at a hearing on the "Appropriate Role of States and the Federal Government in Protecting Groundwater."

The hearing featured testimony from Amanda Waters, general counsel at the National Association of Clean Water Agencies; Martha Clark Mettler, assistant commissioner at the Indiana Department of Environmental Management's Office of Water Quality; Joe Guild, treasurer at the National Cattlemen's Beef Association; Frank Holleman III, senior attorney at the Southern Environmental Law Center; and Anthony Brown, chief executive officer and principal hydrologist at aquilogic.

For more information on their testimonies click [here](#).

Senator Barrasso's remarks:

"Today, we are here to discuss a timely and important issue.

"What is the best way to protect groundwater, and what is the appropriate role of the federal government?"

"This issue has come to a forefront recently before all three branches of government.

"As we will hear from our witnesses today, a number of federal courts have generated confusing and conflicting opinions on the issue.

"In February, EPA recognized this confusion and asked for members of the public to file comments with the agency by May 21 of this year.

"And finally, last month, Congress weighed in.

"Congress directed EPA to resolve this issue as part of the omnibus spending bill.

"The bill's report specified releases through groundwater should not be regulated as point sources under the Clean Water Act.

"As chairman of the Senate Committee with jurisdiction over the Clean Water Act, I want our members to hear from the experts and determine what additional actions are needed.

"In 1971, the predecessor to this committee –the Committee on Public Works – rejected attempts to set federal standards for groundwater.

"Now, 37 years later, states, cities, farmers, water utilities, and private citizens have grave concerns that Congress's intent has been turned on its head by recent court decisions.

"Those decisions place Washington in charge of permitting when groundwater connects a source of pollution with a 'Water of the United States.'

"This is a disturbing development.

"A broad group of municipalities and water utilities have opposed this idea.

"Including: the city of San Francisco, the city of New York, and the Narragansett Bay Commission in Rhode Island.

"They voiced their opposition in a brief filed in federal court last year.

“Under the misguided theory, everyday activities including farming, ranching, or having a septic tank in your backyard could require a federal discharge permit.

“This is not what Congress intended when it passed the Clean Water Act.

“Eighteen states also recently filed a brief in opposition to this expanded and unreasonable interpretation.

“My home state of Wyoming joined that brief.

“The states explained the alarming consequences of a recent federal court’s ruling in California.

“If the court’s ruling stands, many more individuals and companies will need to apply for federal permits.

“In the brief, the state of Arizona pointed out the number of activities that would require federal permits could jump more than 200,000 percent.

“For example, up to 282,897 septic systems in that state could become federally regulated.

“Making matters worse, the additional permitting would come with significant added costs but no additional environmental benefit.

“States already have comprehensive groundwater protection laws.

“In addition, the Safe Drinking Water Act and the Resource Conservation and Recovery Act already protect groundwater at the federal level.”

“The additional permitting would sow great confusion and result in tremendous cost.

“I believe it is a harmful expansion of Washington’s authority.”

###

<http://epw.senate.gov>

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No. 15-17447

**In the United States Court of Appeals
for the Ninth Circuit**

HAWAII WILDLIFE FUND, A HAWAII NON-PROFIT CORPORATION; SIERRA CLUB-MAUI GROUP, A NON-PROFIT CORPORATION; SURFRIDER FOUNDATION, A NON-PROFIT CORPORATION; WEST MAUI PRESERVATION ASSOCIATION, A HAWAII NON-PROFIT CORPORATION,

Plaintiffs-Appellees,

v.

COUNTY OF MAUI,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Hawaii
Case No. 1:12-cv-00198-SOM-BMK

**BRIEF OF AMICI CURIAE STATES OF ARIZONA, ALABAMA,
ALASKA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA,
MISSOURI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA,
SOUTH CAROLINA, TEXAS, UTAH, WEST VIRGINIA, AND
WYOMING IN SUPPORT OF PETITION FOR REHEARING EN
BANC**

Mark Brnovich
Attorney General
Nicholas C. Dranias
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-5025

March 12, 2018

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STATEMENT OF AMICI CURIAE

The States of Arizona, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming file this brief under Circuit Rule 29-2(a) to spotlight the effect of the February 1, 2018 panel decision and speak in furtherance of their interests in (and sovereignty over) intrastate water management, in particular when the actions of state political subdivisions are at issue. The panel decision, which threatens to deny state and local governments their traditional primary authority to regulate and manage intrastate land and water uses, is bad for the Amici States, wrong for the environment, and contrary to the principles of our “compound republic.” *Quoting* Federalist No. 51, reprinted in 1 Debate on the Constitution 323 (B. Bailyn ed. 1993) (J. Madison).

The Amici States have a significant interest in en banc rehearing because of their sovereign status and long history of responsible governance over intrastate lands and waters, including groundwaters. Arizona’s efforts in this regard include its Aquifer Protection Permit and Aquifer Water Quality Standards programs, which protect

groundwaters and aquifers. *See, e.g.*, A.R.S. §§ 49-203(A)(4), 223, 224(B). And other Amici States have their own permitting and water quality standards programs.¹

SUMMARY OF ARGUMENT

The petition for rehearing en banc should be granted because the panel decision wrongly extends Clean Water Act (“CWA”) jurisdiction to intrastate “point sources” that are hydrologically connected only through intrastate nonpoint sources, such as groundwaters, to navigable waters. The panel’s decision usurps from state and local governments their traditional regulatory and management authority in

¹ For example, pursuant to the Nevada Water Pollution Control Law, the Nevada Division of Environmental Protection issues discharge permits that define the quality of a permitted discharge deemed necessary to protect the waters of the State. *See* NRS 445A.300-700. Nevada’s definition of waters of the State is broad and includes “all waters situated wholly or partly within or bordering upon [the] State, including but not limited to: (1) [a]ll streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and (2) [a]ll bodies or accumulations of water, surface and underground, natural or artificial.” NRS 445A.415. Further, NRS 445A.465 specifically prohibits the discharge of a pollutant without a permit. The Nevada Division of Environmental Protection has a long history of successfully overseeing this program. Accordingly, the Nevada Water Pollution Control Law would address the types of discharges contemplated while being protective of all waters of the State.

the sphere of intrastate land and water uses, and thus presents an issue of exceptional importance.

CWA point source jurisdiction is limited to intrastate point sources that themselves convey a pollutant into navigable waters because the governing statutory definition of “discharge of any pollutant” omits any reference to nonpoint sources, such as groundwaters, as a conveyance of a pollutant. Properly construed under the canon “*expressio unius est exclusio alterius*,” this omission precludes CWA point source jurisdiction when pollutants are conveyed to navigable waters solely by groundwaters or other nonpoint sources.

In reaching a contrary conclusion, the panel decision circumvents Supreme Court precedent, conflicts with opinions from other circuits, and undermines a rule of national application on a question of exceptional importance in which there is an overriding need for uniformity.

ARGUMENT

The mistaken expansion of CWA point source jurisdiction embraced by the panel decision is understandable from a certain perspective—everyone wants a clean, safe and healthy environment.

But the federal government need not usurp state authority to achieve that outcome, and Congress intended no such complete occupation of the field. State and local governments have the plenary power to protect public health, safety, and welfare; this includes protecting intrastate groundwaters from point source discharges. As compared to any federal agency, state and local governments are closer to the problem sources and more responsive to the people. The CWA even authorizes states to form interstate compacts to furnish solutions to interstate problems. 33 U.S.C. § 1253(b). As discussed below, both the environment and the rule of law are best protected by respecting the statutory text, the congressional intent, and the principles of cooperative federalism embraced by the CWA.

I. THE PANEL DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE IT CLASHES WITH OTHER CIRCUITS AND WOULD SWEEP AWAY TRADITIONAL STATE AND LOCAL AUTHORITY

“It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.”

Village of Oconomowoc Lake v. Dayton Hudson Corporation, 24 F.3d 962, 965 (7th Cir. 1994). Courts should avoid adopting a similar

approach to CWA point source jurisdiction. Nevertheless, the panel held that CWA point source jurisdiction extends to a “point source” whenever a pollutant added to navigable waters in a more than de minimis amount is “fairly traceable” to a point source, regardless of how the pollutant traveled from the point source. Dkt. 65 18-19, 25.² The panel specifically ruled that a county-operated injection well, which was used for water reclamation and waste management, was required to secure federal National Pollutant Discharge Elimination System (“NPDES”) permitting because pollutants traceable to the well reached the ocean by seeping through intermediating groundwaters. In other words, under the panel’s decision, the jurisdictional element for liability under the CWA is satisfied whenever there is an indirect hydrological connection between a point source and navigable waters, regardless of intervening nonpoint sources, even if the intervening medium is groundwaters.³

² For the sake of brevity, reference to “navigable waters” is used collectively to include both “navigable waters” and “waters of the contiguous zone or ocean.” *See* 33 U.S.C. §1362(12)(A), (B).

³ “It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil,” and “[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river,” “passive migration of pollutants” through

But neither admiralty nor CWA point source jurisdiction extends to every bucket of water (or well) that is hydrologically connected through inadvertent seepage to navigable waters, especially if that connection is through groundwaters. Contrary to the panel decision, other circuits have held that a point source must *itself* convey a pollutant into navigable waters to trigger CWA point source jurisdiction—*without* the pollutant travelling through nonpoint sources, such as groundwaters.⁴ The Seventh Circuit, for example, has observed that, even if groundwaters were thought within the scope of federal

groundwater is not a discharge from a point source. *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017).

⁴ *Village of Oconomowoc Lake*, 24 F.3d at 965 (CWA does not assert “authority over groundwaters, just because these may be hydrologically connected with surface waters”); *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (“a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater” was outside the scope of the Oil Pollution Act in order “to respect Congress’s decision to leave the regulation of groundwater to the States”); *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) (“Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow ‘hydrologically connected’ to navigable surface waters”); *see generally Catskill Mountains v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) (point source “refers only to the proximate source from which the pollutant is directly introduced to the destination water body”); *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165, 175-76 (D.C. Cir. 1982) (affirming reasonableness of EPA interpretation that “the point source must *introduce* the pollutant into navigable water”).

regulatory authority (an unsettled question), “the Clean Water Act does not attempt to assert national power to the fullest.” *Village of Oconomowoc Lake*, 24 F.3d at 965. The circuit reasoned that Congress repeatedly refused to pass proposals to add groundwaters “to the scope of the Clean Water Act.” *Id.* (citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir.1977)). The Seventh Circuit further explained that there was a clear reason for Congress’s refusal: *impracticality*. As stated by the Senate Committee on Public Works in 1972, Congress rejected proposals to add jurisdiction over groundwaters “[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State.” *Id.* at 965.

Congress was right. The panel decision threatens to create an unworkable regulatory environment by extending an onerous federal regulatory structure over what has been a traditional area of state responsibility. Whether and how pollutants seep through groundwaters into navigable waters from a point source is exceedingly difficult to observe and measure, much less predict, due to numerous factors including difficulty of access, temperature changes, chemical interactions, movement of the earth, tides, transpiration, evaporation,

groundwater withdrawals, vegetative conditions, atmospheric conditions, and surrounding surface and below-ground land uses. *See* T.C. Winter, et al, Ground Water and Surface Water: A Single Resource, U.S. Geological Survey Circular 1139 (1998). And yet, under the panel’s reading of the CWA, unforeseeable criminal and civil liability could arise whenever any point source is shown *in hindsight* to have caused the addition of some pollution to any navigable waters through *even the most unpredictable, improbable and multisteped causal chain*. *See, e.g.*, 33 U.S.C. §§ 1319(c), (d), 1365(a).

The civil and criminal exposure threatened by the panel decision would haunt far more than traditional waste management facilities. Section 1362(6) defines “pollutant” broadly to include much more than traditional wastes.⁵ Point sources that require NPDES permitting in Arizona alone could possibly jump more than *200,000%*—from the current ~150 permitted facilities to most (if not all) of the State’s 35,382

⁵ Even potable water can be considered a pollutant due to the residuals of the disinfection process. *See, e.g., W.R. Grace & Co. v. United States EPA*, 261 F.3d 330, 333 (3d Cir. 2001) (describing disinfection process for potable water as creating chloramines).

Class V Wells and potentially even an estimated 282,897 septic systems.⁶

If anything, a *multi-thousand percent increase* in the number of alleged mandatory NPDES permittees is a conservative estimate of the regulatory impact of the panel decision. The regulatory effort compelled by the panel decision would need to range to the entire network of ever changing, externally influenced underground capillaries and seeps that ultimately feed “navigable waters.” *See* 33 U.S.C. § 1342(c)(3). It is hard to imagine *any* land or water use with any *potential* for runoff, spillage, or leakage (much less *any* water storage, transportation, recycling, or waste management activity) that would not have this *possible* or *eventual* hydrological connection to navigable waters, particularly if viewed in hindsight. Every fluid or semi-fluid discharge that is capable of seepage, runoff, spillage, leakage, or evaporation is likely hydrologically connected to navigable waters indirectly through

⁶ Compare “FY 2017 Non-Tribal Permits Detailed Percent Current Status,” https://www.epa.gov/sites/production/files/2018-01/documents/final_fy17_eoy_non-tribal_backlog_report_card.pdf, with “National Underground Injection Control Inventory-Federal Fiscal Year 2016,” https://www.epa.gov/sites/production/files/2017-06/documents/state_fy_16_inventory_format_508.pdf, and “Septic Stats: Arizona,” http://www.nesc.wvu.edu/septic_idb/arizona.htm (all last visited 3.1.2018).

nonpoint sources, such as groundwaters. And almost every land or water use is capable of generating such discharges. As quipped in *Village of Oconomowoc Lake*, even a bucket of water can be hydrologically connected to navigable waters. 24 F.3d at 965.

In short, extending CWA liability to any point source that is connected by groundwaters, or other nonpoint sources, to navigable waters threatens to force Arizona (and other Amici States that have accepted primacy) to undertake a massive expansion of NPDES permitting in areas the CWA was never intended to reach, as the far more reasonable approach of other circuits has confirmed.

II. THE PANEL REACHED ITS SWEEPING OUTCOME BY DISREGARDING A TRADITIONAL CANON OF CONSTRUCTION AND THE COOPERATIVE FEDERALISM EMBODIED IN THE CWA

En banc rehearing would allow for correction of the panel's error through a straightforward application of a basic canon of statutory interpretation with due consideration for principles of cooperative federalism.

A. The Panel Disregarded The Interpretative Canon "Expressio Unius Est Exclusio Alterius"

Under the interpretative canon "expressio unius exclusio alterius," the omission of a relevant term from a statutory provision is presumed

to exclude intentionally what has been omitted. *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004); *U.S. v. Vonn*, 535 U.S. 55, 64 (2002). This canon compels the conclusion that CWA point source jurisdiction cannot be triggered, such that a NPDES permit becomes necessary, unless a point source is *the* conveyance that adds pollution to navigable waters—to the exclusion of nonpoint sources, such as groundwaters.

The jurisdictional reach of the CWA is established by the meaning of “discharge of any pollutant” in the Act’s declaration that “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). The definition of “discharge of a pollutant” (and “discharge of pollutants”) is “any addition of any pollutant to navigable waters [or waters of the contiguous zone or the ocean] from any point source [other than a vessel or other floating craft].” *Id.* § 1362(12)(A), (B). However, the reference in this definition to “any point source” is emphatically *not* a reference to a mere source for a pollutant. A “point source” is expressly defined as *more* than a source; it is defined as a type of “conveyance” that is “discernible, confined, and discrete.” 33 U.S.C. § 1362(14). A conveyance is a “means or way of conveying,” it is *not*

merely a “source.”⁷ Thus, in the definition of “discharge of a pollutant,” Congress chose to reference “any point source” as the *only* designated “means or way of conveying” a pollutant into navigable waters.

Congress’s stark omission of any reference to nonpoint sources, such as groundwaters, as a “means or way of conveying” a pollutant in 33 U.S.C. § 1362(12) should not be ignored. Congress repeatedly rejected amendments that would have extended the CWA to groundwater. S. Rep. No. 92-414, at 3735-3739 (1971). Furthermore, whether the conveyance of a pollutant is a point or nonpoint source is highly relevant to the CWA. Numerous provisions of the CWA distinguish between point and nonpoint sources. *See, e.g.*, 33 U.S.C. §§ 1251, 1255, 1270, 1281, 1285, 1311, 1314, 1319, 1324, 1330, 1346. Congress was clearly aware that a nonpoint source, such as groundwaters, could be a relevant conveyance of pollution to navigable waters. Yet, Congress made no mention of any nonpoint source in the

⁷ *Conveyance*, Webster’s New International Dictionary of the English Language Unabridged (3rd ed. 1993) (“1: the action of conveying . . . b: carrying, transporting, transportation. . . 2: a means or way of conveying . . . c: a channel or passage for conduction or transmission . . . d: a means of carrying or transporting something”); *see also conveyance*, Webster’s New International Dictionary of the English Language Unabridged (2nd ed. 1950).

definition of “discharge of a pollutant,” which controls the reach of CWA point source jurisdiction. *Compare* 33 U.S.C. § 1311(a) *with* § 1362(12)(A), (B). This omission should be read as intentional.

Given the omission of any reference to any nonpoint source in the governing definitions, a straightforward application of the “*expressio unius exclusio alterius*” canon confirms that CWA point source jurisdiction (and NPDES permitting) applies only to point sources that themselves convey pollution into navigable waters, to the exclusion of any nonpoint source, such as groundwaters. *See Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.’ This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*.”).

To sustain CWA point source jurisdiction, a “point source” must be *the* “conveyance” of the pollutant into navigable waters, not merely the source, because *it is the only conveyance mentioned*. This natural interpretation, which has been adopted by other circuits as discussed above, defeats the claim that CWA point source jurisdiction can be

sustained by a mere indirect hydrological connection between a point source and navigable waters through nonpoint sources, such as groundwaters. *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87–88 (2006) (“The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions.”).

B. The Panel Disregarded The Cooperative Federalism Principles Embodied In The CWA

The CWA is a quintessential example of “cooperative federalism.” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2nd Cir. 2017) (“Act largely preserves states’ traditional authority over water allocation and use”). The CWA emphasizes that Congress had the intention to accommodate the traditional and “primary” role of state and local government in the field of environmental regulation. 33 U.S.C. §1251(b). The CWA also repeatedly emphasizes that federal agencies are to act in “cooperation” with the States. 33 U.S.C. §§ 1251(g), 1252(a).

When it comes to state authority to “allocate quantities of water,” such as in the Arizona Recharge Program, the CWA includes a

powerfully deferential savings clause to bar federal regulation from interfering with state primacy. 33 U.S.C. § 1251(g).⁸ And this savings clause is reinforced by 33 U.S.C. §1370, which states: “except as expressly provided in this chapter, nothing in this chapter shall . . . 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.”

The panel decision’s indirect hydrological connection theory of CWA point source jurisdiction is inconsistent with these manifestations of cooperative federalism in the CWA, which even the EPA recognizes. *Definition of “Waters of the United States”—Recodification of Pre-Existing Rules*, 82 FR 34899, 34900 (July 27, 2017) (identifying policy goals of CWA as “(a) To restore and maintain the nation's waters; and (b) to preserve the States’ primary responsibility and right to prevent, reduce, and eliminate pollution”). It disregards the traditional

⁸ As part of its Recharge Program, Arizona currently oversees and regulates a vast array of groundwater storage facilities, many, if not most, of which are not currently regarded as subject to NPDES permitting. *Underground Water Storage, Savings and Replenishment*, available at <https://new.azwater.gov/recharge> (last visited 2.26.2018). Planning is underway for many more such facilities on the assumption that NPDES permitting is not necessary. *USF Permit Application Online Noticing*, available at <https://new.azwater.gov/recharge/permitted-facilities> (last visited 2.26.2018).

management and regulatory authority of states over local land and water uses. *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (management and regulation of local lands and waters “is perhaps the quintessential state activity”). And, by threatening a nearly limitless expansion of preemptive federal jurisdiction, the panel decision wrongly circumvents the Supreme Court’s efforts to moderate similarly limitless interpretations of “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715, 779, 786 (2006) (Scalia, J., concurring; Kennedy, J., plurality), and *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001).⁹ For these reasons, the panel’s indirect hydrological connection theory of CWA point source jurisdiction, which lacks any clear and manifest textual support in the Act, should be rejected in

⁹ The doctrine of constitutional avoidance requires courts to construe statutes, “if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.” *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). A mere indirect hydrological connection between a point source and navigable waters might not be a sufficient “jurisdictional element” for Commerce Clause authority under *U.S. v. Morrison*, 529 U.S. 598 (2000), and *U.S. v. Lopez*, 514 U.S. 549 (1995). The panel’s theory is also constitutionally questionable because it may effectively authorize federal permitting to supersede nearly all state authority over intrastate land and water uses. *SWANCC*, 531 U.S. at 172-74 (“significant constitutional questions” are raised by “permitting federal encroachment upon a traditional state power”); *see also Bond v. U.S.*, 564 U.S. 211, 222 (2011) (observing our system of dual sovereignty denies “any one government complete jurisdiction over all the concerns of public life”).

favor of the interpretation that a point source must *itself* be the conveyance of pollutants into navigable waters.¹⁰

CONCLUSION

For the forgoing reasons, the undersigned Amici States request that the petition for en banc rehearing be granted.

March 12, 2018

Respectfully Submitted,

/s/ Nicholas C. Dranias

Mark Brnovich

Attorney General

Nicholas C. Dranias

Assistant Attorney General

OFFICE OF THE ARIZONA

ATTORNEY GENERAL

2005 N. Central Avenue

Phoenix, Arizona 85004

(602) 542-5025

Counsel for Amicus

State of Arizona

¹⁰ A federal statute should not be construed to preempt state laws or traditional sovereign interests unless such intent is evidenced by a clear and manifest statement from Congress. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gonzales v. Oregon*, 546 U.S. 243, 255, 270-72 (2006). This doctrine is applicable with special force in the context of cooperative federalism. *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

ALSO SUPPORTED BY:

STEVE MARSHALL
ATTORNEY GENERAL OF ALABAMA
P.O. Box 300152
Montgomery, AL 36130-0152

JAHNA LINDEMUTH
ATTORNEY GENERAL OF ALASKA
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501

LESLIE RUTLEDGE
ATTORNEY GENERAL OF ARKANSAS
323 Center Street, Suite 200
Little Rock, AR 72201

CHRISTOPHER M. CARR
ATTORNEY GENERAL OF GEORGIA
40 Capitol Square, Southwest
Atlanta, GA 30334

CURTIS T. HILL. JR.
ATTORNEY GENERAL OF INDIANA
302 West Washington Street, 5th Floor
Indianapolis, IN 46204

DEREK SCHMIDT
ATTORNEY GENERAL OF KANSAS
120 Southwest 10th Avenue, 2nd Floor
Topeka, KS 66612

JEFF LANDRY
ATTORNEY GENERAL OF LOUISIANA
P.O. Box 94005
Baton Rouge, LA 70804

JOSH HAWLEY
ATTORNEY GENERAL OF MISSOURI
207 West High Street, P.O. Box 899
Jefferson City, MO 65102

TIM FOX
ATTORNEY GENERAL OF MONTANA
215 North Sanders, P.O. Box 201401
Helena, MT 59620

DOUG PETERSON
ATTORNEY GENERAL OF NEBRASKA
P.O. Box 98920
Lincoln, NE 68509

ADAM PAUL LAXALT
ATTORNEY GENERAL OF NEVADA
100 North Carson Street
Carson City, NV 89701

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
313 Northeast 21st Street
Oklahoma City, OK 73105

ALAN WILSON
ATTORNEY GENERAL OF SOUTH CAROLINA
P.O. Box 11549
Columbia, SC 29211

KEN PAXTON
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, TX 78711

SEAN D. REYES
ATTORNEY GENERAL OF UTAH
P.O. Box 142320
Salt Lake City, UT 84114

PATRICK MORRISEY
ATTORNEY GENERAL OF WEST VIRGINIA
State Capitol Complex, Bldg. 1, Room E-26
Charleston, WV 25305

PETER K. MICHAEL
ATTORNEY GENERAL OF WYOMING
2320 Capitol Avenue
Cheyenne, WY 82002

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(b) as modified by Fed. R. App. P. 29-2(c)(2).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii) and (f), this brief is 3464 words.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

/s/ Nicholas C. Dranias

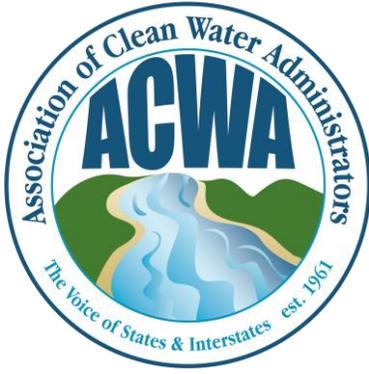
Nicholas C. Dranias
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-5025

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Nicholas C. Dranias

Nicholas C. Dranias
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-5025



ASSOCIATION OF CLEAN WATER ADMINISTRATORS

1634 I Street, NW, Suite 750
WASHINGTON, DC 20006
TEL: 202-756-0605
FAX: 202-793-2600
WWW.ACWA-US.ORG

April 18, 2018

Testimony of

Martha Clark Mettler

Assistant Commissioner, Office of Water Quality,
Indiana Department of Environmental Management

On behalf of the
Association of Clean Water Administrators

U.S. Senate
Committee on Environment
and Public Works

Regarding

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

Introduction

Chairman Barasso, Ranking Member Carper, and members of the Committee, my name is Martha Clark Mettler and it is my pleasure to appear before you today to provide the Association of Clean Water Administrators' ("ACWA") perspectives on the appropriate role of states and the federal government in protecting groundwater. I am here today representing the members of ACWA as a long-time member and past president.

I am currently the Assistant Commissioner of the Office of Water Quality at the Indiana Department of Environmental Management ("IDEM"). IDEM is responsible for the daily implementation of the Clean Water Act ("CWA") water quality programs in Indiana. I have been with IDEM since 1995 and have served as Assistant Commissioner since 2015.

ACWA is the national, non-partisan professional organization representing the State, Interstate, and Territorial water quality control officials responsible for the implementation of surface water protection programs throughout the nation. ACWA members are on the front lines of CWA monitoring, permitting, inspection, compliance, and enforcement across the country and are dedicated to Congress' goal of restoring and maintaining the chemical, biological, and physical integrity of our nation's waters.

As the primary entities responsible for carrying out the CWA, states are uniquely positioned to provide input on the appropriate role of states and the federal government in regulating discharges of pollutants to groundwater, specifically those discharges that may lead to surface waters via direct hydrologic connection. Discharges to groundwater are often site-specific and complex and

defining a “direct” hydrologic connection can be challenging. Due to this complexity, as well as varying state legal frameworks, there is great diversity of state approaches on the appropriate manner of regulating discharges of pollutants to groundwater. However, states are consistent in their desire to retain their current flexibilities to regulate these discharges using their discretion to determine which laws and regulatory schemes apply, including the federal Safe Drinking Water Act (“SDWA”) Underground Injection Control (“UIC”) Program, the federal Resource Conservation and Recovery Act (“RCRA”), state laws, as well as the CWA.

ACWA members are currently reviewing relevant case law, federal law, and their own state laws to submit comments responsive to EPA’s recent request on the issue. My statement today does not supersede or alter the perspective or input of any individual state, including Indiana. I encourage the Committee to review individual state comments sent to the docket in response to EPA’s request for comment on this issue so that you and the members of the Committee fully understand the diversity among the states.

Cooperative Federalism – State Input

ACWA appreciates EPA and this Committee seeking comment and testimony from stakeholders, especially the states. Because of states’ role under the CWA as co-regulators, states encourage EPA to maintain regular contact, through forums, calls, and other communication, with ACWA and its members throughout the life of this effort. State regulators have significant experience dealing with this issue as well as technical expertise and particular knowledge of their own waters and regulatory structures. In the spirit of cooperative federalism, we look forward to working with EPA, as well as Congress, on this important issue.

State Flexibility

States are currently equipped with legal frameworks to regulate discharges of pollutants to groundwater, including discharges that may lead to surface waters via direct hydrologic connection. However, there is significant diversity in the approaches states employ to regulate these discharges.

- Some states, like New York, Wisconsin, Wyoming, and Oklahoma, include groundwater under their definitions of “Waters of the State”, allowing for the regulation of direct discharges of pollutants to groundwater through state programs;
- Some states, like Tennessee, Connecticut, South Dakota, West Virginia, and Nevada, utilize the federal Safe Drinking Water Act (“SDWA”) Underground Injection Control (“UIC”) Program to regulate certain discharges of pollutants to groundwater;
- Some states, like Maine and Kentucky, employ the Resource Recovery and Conservation Act to address groundwater pollution; and
- Some states, like Colorado and Alaska, use federal NPDES permitting authority to regulate discharges of pollutants into groundwater that may lead to surface waters via direct hydrologic connection.

Additionally, many states, including those listed, use variations and combinations of these regulatory controls.

It is critical that states retain maximum flexibility to regulate discharges to groundwater in ways that work for the states. Therefore, states prefer that EPA neither demand nor deny of the use of

NPDES for groundwater that may lead to surface water via direct hydrologic connection. States are in the best position to manage this issue for they are particularly situated to assess local environmental conditions, understand their own legal frameworks, have the expertise, and recognize how to appropriately implement the various federal and state laws that may cover a discharge of pollutants to groundwater, including discharges that may impact surface water. Therefore, ACWA supports the empowerment of states to utilize their own laws, federal laws, and CWA protections at their own discretion to manage discharges to groundwater.

Uncertainty Due to Court Decisions

We recognize that there are multiple federal courts currently addressing CWA citizen suits on this issue. The *Hawai'i Wildlife Fund v. County of Maui* decision in the Ninth Circuit established a specific test to determine when the CWA applies to discharges to groundwater. The Ninth Circuit explained that for a discharge of pollutants to groundwater to violate the CWA, (1) there must be a discharge of pollutants from a point source, (2) the pollutants must be “fairly traceable” from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into a navigable water, and (3) the pollutant levels reaching a navigable water are more than *de minimus*. In their decision in *Upstate Forever, et al., v. Kinder Morgan Energy Partners*, the Fourth Circuit ruled similarly to the Ninth Circuit in *Maui* stating, “We do not hold that the CWA covers discharges to ground water itself. Instead, we hold only that an alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA”. There are also cases pending in the Second (*26 Crown Associates v. Greater New Haven Regional Water Pollution Control Authority*), Fourth (*Sierra Club v. Dominion Energy*),

and Sixth (*Kentucky Waterways Alliance v. Kentucky Utilities* and *Tennessee Clean Water Network v. TVA*) Circuits on the issue. It is unclear how these courts will rule. However, there is a chance that circuit courts will end up split, causing national uncertainty. This would be problematic for states implementing the CWA. Therefore, states encourage EPA to clarify its previous statements on discharges to groundwater in order to explicitly empower states to continue to make decisions at their own discretion.

Congressional and Agency Action

The EPA request for comment, *Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water* [EPA-HQ-OW-2018-0063], is an excellent opportunity for the Agency to work with states in the spirit of cooperative federalism. Therefore, Congress should allow the process to progress before taking legislative action on this issue. At a minimum, this Committee should encourage EPA to clarify previous statements on discharges to groundwater in order to explicitly empower states to continue to make decisions at their own discretion.

Further, because of states’ role under the CWA as co-regulators, the fact that states are in the best position to assess local environmental conditions, understand their own legal frameworks, and implement the various federal and state laws that may cover a discharge of pollutants to groundwater, we urge this Committee to direct the Agency to coordinate with state programs and continue to monitor EPA’s efforts, especially as the Agency reviews public comments on this issue and determines what future actions to take.

Closing

Mr. Chairman, Ranking Member Carper and Members of the Committee, I thank you for this opportunity to share ACWA's perspectives on the appropriate role of states and the federal government in protecting groundwater. ACWA remains committed to the goals of the CWA and look forward to working with our partners at EPA as they move forward with efforts related to this issue. ACWA remains ready to answer any questions or concerns EPA or Congress may have and would be pleased to facilitate further dialogue with our state member agencies. I am happy to answer any questions that you may have.

Senate Committee on Environment and Public Works
Hearing entitled, “The Appropriate Role of States and the Federal Government in Protecting Groundwater”

April 18, 2018
Responses for the Record

Amanda Waters
General Counsel
National Association of Clean Water Agencies

Chairman Barrasso

1. Ms. Waters, both the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Fourth Circuit have issued recent decisions concerning the scope of the National Pollutant Discharge Elimination System (NPDES) program as it applies to situations where groundwater serves as a “conduit” between a point source and a surface water. Have the courts articulated a clear standard for when NPDES liability attaches?

No. Because the “direct hydrologic connection” and “conduit” theories are not grounded in the text, structure, or legislative history of the CWA, courts have created a variety of vague and inconsistent standards for subjecting releases to groundwater to NPDES regulation. The Ninth Circuit *rejected* EPA’s “direct hydrologic connection” test because it “reads two words into the CWA (‘direct’ and ‘hydrological’) that are not there.” *Hawai‘i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 n.3 (9th Cir. 2018). Ironically, the Ninth Circuit then invented yet another new standard, claiming that NPDES permitting requirements apply when pollutants are “fairly traceable” from a point source to a navigable water and the “pollutant levels reaching navigable water are more than de minimis.” Like EPA’s “direct hydrologic connection” standard, however, the Ninth Circuit’s “fairly traceable” and “*de minimis*” standard appears nowhere in the statute, leaving permitting authorities, regulated parties, and courts to guess as to what those words mean. For its part, the Fourth Circuit’s majority opinion adopted EPA’s “direct hydrologic connection” interpretation, but overlooked critical indications of congressional intent in the CWA’s text, structure, and legislative history. Even if these standards were grounded in the text of the CWA, they provide no direction to the regulated community, as either standard would require extensive and costly scientific study to determine whether a discharge falls within the definition.

2. Ms. Waters, Ranking Member Carper and Mr. Holleman asserted that the “direct hydrologic connection” or “conduit theory” interpretation they support has been the agency’s consistent interpretation since the Clean Water Act was enacted. What is your view on that assertion?

EPA’s “direct hydrologic connection” and “conduit theory” interpretations are contrary to EPA’s original interpretations and ongoing interpretations for the past 45 years. To demonstrate this, we have attached a list of EPA statements regarding discharges to

groundwater from 1973 to 2017, showing that any suggestion that EPA's "direct hydrologic connection" and "conduit theory" interpretations have been longstanding or consistent grossly distorts the record. In seeking comments on the "direct hydrologic connection" interpretation, EPA itself recently acknowledged that it has approached this issue in "different ways ... over the years." EPA, Region 10 Tribal Newsletter (Apr. 2018).

3. Ms. Waters, to your knowledge, has the term "direct hydrological connection" ever been defined in federal statute or regulation?

No. EPA has never defined "direct hydrologic connection" in any guidance or rule. In fact, when EPA was asked whether it could define "direct hydrologic connection" in 2001 (nearly 30 years after the CWA was enacted), the agency said it was "not sure how it should define this specifically in a national rule." EPA, CAFO Public Meeting, Denver, CO (Mar. 2001). Likewise, EPA recently said that "the connection between groundwater discharges and surface waters is too complex to determine a direct causal effect." EPA, Response to Comments on NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewers Systems in Massachusetts, at 219 (Apr. 4, 2016).

4. Ms. Waters, what role, if any, do you see Congress playing in helping to provide certainty for public wastewater and stormwater agencies?

EPA's "direct hydrologic interpretation" has created a massive amount of uncertainty and confusion among courts, states, and regulated parties, including public wastewater and stormwater agencies. Although we agree with the courts that have found that the plain language of the Clean Water Act makes clear that discharges to surface water via groundwater are not subject to NPDES permitting (*see, e.g., Ky. Waterways Alliance v. Ky. Utils.*, 2017 WL 6628917 (E.D. Ky. Dec. 28, 2017), Congress could, if necessary, amend the definition of "discharge of a pollutant" in 33 U.S.C § 1362(12) to confirm what these courts have found that the statute already expressly says, i.e., to exclude discharges to surface water via groundwater.

5. At the hearing, Mr. Holleman suggested that the "direct hydrologic connection" interpretation he supports is consistent with *Rapanos v. United States*, 547 U.S. 715 (2006). Is that true?

No. The kind of "indirect" conveyances discussed in the plurality opinion were "sewer systems," "pipes," and "storm drains"—discrete conveyances that the plurality noted likely qualified as "point sources" themselves. 547 U.S. at 743. The plurality's recognition that the CWA permitting program may apply to a discharge from one point source to another point source that ultimately discharges into navigable waters does not support the "direct hydrologic connection" theory, which claims that the conveyance of pollutants by groundwater (an indisputable nonpoint source) to navigable waters triggers NPDES permitting requirements. Indeed, that contention is fundamentally inconsistent with the plurality's admonition that the CWA should not be interpreted to "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 747.

6. Ms. Waters, given your knowledge of the NPDES permitting program, are there practical concerns with how that program would be applied on a permit-basis to situations such as groundwater seepage? Do you think the NPDES program is the appropriate tool to address this type of pollution?

The NPDES program is not designed to require NPDES permits for the addition of pollutants to surface water via groundwater. Discharges of pollutants covered by section 402 are subject to “effluent limitations,” which are specific, numeric limits on pollutants at the point of discharge. 33 U.S.C. § 1362(11). (The only exception under section 402 are discharges from municipal separate stormwater sewer systems, which are required to limit pollutants to the “maximum extent practicable” standard). As a result, the NPDES program requires identifiable discharge points for permitting. This approach only works for discernable, discrete and confined discharges to navigable waters, such as through a pipe. As EPA has explained: “[i]n contrast to ... nonpoint sources, point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters *can be controlled by effluent limitations.*” 41 Fed. Reg. 24,709, 24,710 (June 18, 1976) (emphasis added). Neither EPA nor Mr. Holleman has ever explained how a permitting authority would apply effluent limitations to diffuse subsurface releases of pollutants to surface water or how a source could monitor them.

7. Ms. Waters, can you give an example of the types of regulation at the federal and state level that apply to your members’ groundwater injection activities? Is groundwater protected in all the states in which your members operate?

The Safe Drinking Water Act (SDWA) regulates underground injection wells through the underground injection control program. The SDWA is designed to protect the quality of drinking water in the United States, and specifically mandates the regulation of underground injection of fluids through wells. In addition, as indicated in the attached chart, all 50 states have robust laws that protect groundwater conditions, which in turn protects surface water conditions.

8. Ms. Waters, much of Mr. Holleman’s testimony dealt with coal ash operations, which are regulated under the Resource Conservation and Recovery Act (RCRA). If the concerns are with coal ash, the RCRA program seems best suited to address those concerns. Do you agree? Would application of the conduit theory under the Clean Water Act’s NPDES program affect more than the utility industry?

As NACWA only works with municipal wastewater and stormwater utilities, I am not familiar enough with the practices of coal ash operations to answer the first question.

EPA’s “direct hydrological connection” theory is already affecting local governments and public water treatment agencies. Application of the theory will lead to a substantial expansion of the number and types of sources that are independently treated “point sources” and thus individually subject to the requirements of the CWA and the NPDES program. The result is the potential to trigger the regulation of an indeterminable array of diffuse and indistinct sources by blurring the distinction between whole systems that can

be coherently managed and regulated, on the one hand, and components of such systems that would be subject to separate and piecemeal regulation. These diffuse sources could include public water distribution and sewer collection systems, retention ponds, municipal green infrastructure projects designed specifically to infiltrate stormwater into the ground and groundwater, and water recycling projects where recycled water is injected or seeps into groundwater.

9. At the hearing, Mr. Holleman testified that a source could avoid Clean Water Act regulation by moving a discharge back a few feet from a surface water and in turn “avoid the protections of the Nation’s waters.” Do you have input on that assertion?

The hypothetical is unrealistic—no permitting authority would authorize the movement of a discharge pipe a few feet (or even further) simply to allow that pipe to discharge onto the ground and avoid NPDES regulation. Such a notion is also at odds with reality when considering engineering design and safety standards, and volume of effluent flows, at facilities.

Indeed, at the hearing, Mr. Holleman failed to identify any instance of this occurring during the entire 45-year history of the NPDES program. In any event, the question is not whether such a discharge would be regulated, but how it would be regulated. For example, even if the discharge was not subject to NPDES permitting requirements under the CWA, the discharge still would be regulated as an underground injection well under the SDWA, or under CWA nonpoint source programs, other federal programs, and state programs like those identified in the attached chart summarizing groundwater protection laws in all 50 states.

10. Ms. Waters, in your testimony, you mention green infrastructure and water recharge projects. Can you further explain what those types of projects are and how they benefit health and the environment?

EPA’s “direct hydrologic connection” theory would likely discourage the construction or operation of a number of public and private treatment and pollution control infrastructure projects specifically designed to protect and preserve water resources. Groundwater recharge systems use spreading basins, percolation ponds, infiltration basins, and injection wells to convey stormwater or recycled wastewater into subsurface aquifers. These systems provide a host of ecological benefits; they augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls.

The DHC theory could also put green infrastructure – intended to treat stormwater to further the water quality protection goals of the CWA – at risk of being regulated as point sources of pollutants subject to CWA jurisdiction. Specifically, every instance where stormwater runoff drains into green infrastructure – for the very purpose of preventing the pollutants carried in such runoff from entering surface waters – could be viewed as a discharge to groundwater that might have a “direct hydrological connection” to surface water. This type of approach is inconsistent with how States have categorized stormwater and the infiltration of stormwater. *See, e.g.*, Oyster Pond Embayment System TMDL at 4,

14 (Feb. 7, 2008) (Massachusetts assigned load allocations to stormwater runoff as nonpoint source pollution, knowing that “the vast majority of storm water percolates into the ground and aquifer and proceeds into the embayment systems *through groundwater migration.*”)

11. Do you think it is important for EPA to articulate a clear, binding nationwide position concerning when NPDES permitting requirements attach to particular discharges?

Yes. The way EPA has framed the issue in the February Federal Register notice (e.g., “review and revise” the DHC theory) makes it appear that EPA believes the statute gives EPA a choice. In other words, it appears the Agency believes that it could simply review and revise the DHC theory based on policy or technical reasons. NACWA does not believe that is correct.

EPA should disavow its “direct hydrologic connection” theory as contrary to the CWA’s plain language, structure and legislative history. EPA should promptly issue a memorandum (1) explaining that the agency no longer supports its statements on “direct hydrologic connection,” including the amicus brief submitted by the United States in the Ninth Circuit; and (2) confirming that an addition of pollutants to surface water via groundwater is not an “addition ... to navigable waters from a point source” under the CWA.

Notwithstanding that the CWA is unambiguous on this issue and releasing short-term guidance, EPA should conduct an expedited notice and comment rulemaking so our members, other regulated entities, environmental activist organizations, the States, and other federal agencies can comment and then EPA can take final action through rulemaking on its position and how the CWA should be implemented and enforced. In part, what is so frustrating about this issue is that the public has never been able to weigh-in nor has EPA been able to hear from public entities on how this issue impacts them and the impossibility of using the NPDES permitting program to address these types of factual circumstances.

Ranking Member Carper

12. You write in your testimony that, “Despite being aware that pollutants in groundwater may enter navigable waters, the Senate and House rejected proposals to extend the CWA’s reach.”¹ In support of this proposition, you quote legislative history from the Committee of Public Works (the predecessor of this committee) showing the Committee intentionally declined to provide “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.”²

- a. Your citation appears to be confusing the difference between regulating groundwater as a water of the United States (for which, in the words of the Committee report, there would thus be “Federally approved standards”), and merely acknowledging that

¹ Testimony of Amanda Waters at 2–3.

² *Id.* (quoting S. Rep. No. 92-414, at 73 (1971))

pollutants discharged from point sources can travel relatively direct paths through groundwater *into* a water of the United States. Did you understand that discrepancy when you cited this authority?

- i. There is no discrepancy. As noted in my testimony, EPA requested authority over groundwater, in part, because pollutants in groundwater can enter surface waters. Indeed, the Committee “recognize[d] the essential link between ground and surface waters,” S. Rep. No. 92-414, at 73 (1971), and members of Congress fully understood that pollution in groundwater could migrate to navigable waters “through seepage and other means,” 118 Cong. Rec. 10666 (1972) (floor statement of Rep. Aspin).
 - b. Did either the Ninth Circuit in the *Hawaii Wildlife Fund* case or the Fourth Circuit in the *Kinder Morgan* case hold that the groundwaters are jurisdictional waters under the CWA (thus establishing the prospect that EPA could, in the Committee’s terms, set “Federally approved standards for groundwaters”)?
 - i. No. The central question in both cases is whether releases to surface water via groundwater are subject to the CWA’s NPDES permitting program. As noted, the Ninth Circuit rejected EPA’s “direct hydrologic connection” interpretation, because it “reads two words into the CWA (‘direct’ and ‘hydrological’) that are not there.” *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 n.3 (9th Cir. 2018).
13. You write in your testimony that “EPA’s direct hydrologic connection theory is contrary to the text and structure of the CWA . . .” Your testimony also says that other statutes regulate pollutants that find their way into groundwater, citing SDWA, RCRA, and CERCLA.
- a. Are you saying that the existence of SDWA, RCRA, and CERCLA illuminate congressional intent in enacting the CWA’s discharge prohibition? If yes, why?
 - i. Yes. Almost twenty years ago, the Supreme Court held that “the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000). And here, Congress “has spoken subsequently and more specifically to the topic” of groundwater contamination and its impact on surface waters through SDWA, RCRA and CERCLA. The later enactment of these statutes, and the regulation of discharges to groundwater therein, reflect Congress’ clear intent not to include discharges to groundwater within the CWA NPDES permit program.
 - b. The modern Clean Water Act — and the statutory language at issue in *Hawaii Wildlife Fund* and *Kinder Morgan* — was enacted in 1972. The statutes you cite were all passed *after* the CWA: SDWA (1974); RCRA (1976); CERCLA (1980).

- a. Is it NACWA’s legal position that *any* entry of pollutants to groundwater terminates Clean Water Act liability, no matter how short or direct the hydrologic flow is to a jurisdictional water, and no matter how toxic the pollutant is? Please explain your answer.
 - i. As outlined in my testimony, other tools exist within the CWA, and there are other federal and state environmental laws, that are better designed and currently utilized to address the release of pollutants into groundwater.
- b. Is NACWA’s position limited to groundwater? For example, some streams have brief periods of subsurface flow. If a point source discharged into a foot-long stretch of subsurface flow, and the stream resurfaced as a surface water (containing the pollutants) one foot later, would that point source discharge be exempt from the Clean Water Act?
 - i. See my response to Question 9 above.

17. Suppose you had two pipelines carrying chemical waste over the Delaware River. Pipeline #1 ruptures directly above the river, and chemical waste starts pouring in. Pipeline #2 ruptures 100 feet from the water, and chemical waste pours onto the ground, burns through the soil, and runs downhill through a shallow subsurface connection into the Delaware River. Neither pipeline has a NPDES permit for the discharge.

- a. Based on the facts presented, in your opinion, should the owner of Pipeline #1 be subject to CWA liability for that discharge? Why or why not?
- b. Based on the facts presented, in your opinion, should the owner of Pipeline #2 be subject to CWA liability for that discharge? Why or why not?
- c. Do you believe it would lead to absurd results if courts or the EPA regulated only one of those discharges? Why or why not?
 - i. As to Questions 17(a) – (c), there are not enough facts and/or missing facts to be able to reasonably answer these questions. Further, NACWA only works with municipal wastewater and stormwater utilities, and I am therefore not familiar enough with regulation of pipelines or chemical waste to answer these questions. However, generally, Congress envisioned that these types of factual scenarios—spills or releases of oil and hazardous substances (e.g., chemical waste)—would be addressed via CWA section 311, not via section 301(a) and the NPDES program. Under section 311, a “discharge” is defined differently to mean “any spilling, leaking, pumping, pouring, emitting, emptying or dumping,” section 311(a)(2), and such a discharge is prohibited “into or upon the navigable waters of the United States [or] adjoining shorelines.” CWA section 311(b)(1).

Senator Merkley

18. In your testimony before the Senate Environment and Public Works Committee, you state that the question that should be asked is how releases to groundwater that reach surface water should be regulated. You represent hundreds of public water utilities, much like the Lahaina Wastewater Reclamation Facility that was the basis for the Ninth Circuit decision (*Hawai'i Wildlife Fund v. County of Maui*). Please explain you how think a facility discharging to groundwater, where that discharge impacts surface waters, should be regulated.
 1. As outlined in my testimony, these discharges are currently regulated under other federal and state statutes. Specifically, the discharges at issue in *Hawaii Wildlife Fund v. County of Maui*, are regulated as underground injection wells under the Safe Drinking Water Act.

19. You stressed the importance of cooperative federalism in your testimony and how states should have control over groundwater impacts to surface waters in their states. Yet in the *Hawai'i Wildlife Fund v. County of Maui* case, the state was not controlling those groundwater discharges and it created an excursion of water quality standards in surface waters. There are many other cases where these types of discharges adversely impacted surface waters. What cooperative federalism approach would you propose to ensure states are regulating these types of discharges consistently across the country that gives citizens an assurance that their waters kept clean and safe?
 1. As outlined in my testimony, a myriad of state and federal environmental laws already operates in concert to address discharges that reach surface water via groundwater. If these statutes or regulations are not sufficiently protective of public health and the environment, the remedy is to revise those statutes or regulations at the state or federal level rather than to overlay the NPDES permit program on top of these existing regulations.

EPA STATEMENTS ON DISCHARGES TO GROUNDWATER (1973-2017)

- **EPA Office of General Counsel Memorandum, 1973.**

In 1973, shortly after the CWA was enacted, EPA's Office of General Counsel issued a memorandum confirming that the term "discharge of a pollutant" is "defined so as to include *only* discharges into navigable waters," and that "[d]ischarges into ground waters are not included." *In re E.I. DuPont de Nemours & Co.*, Op. No. 6, 1975 WL 23850, at *3 (E.P.A.G.C. Apr. 8, 1975) (emphasis added).

- **United States Rule 12(b) Motion to Dismiss, 1984.**

About a decade later, the United States successfully argued in *Kelley ex rel. People of the State of Michigan* that discharges from a U.S. Coast Guard facility to groundwater allegedly hydrologically connected to nearby navigable waters were *not* regulated by the point source program. 618 F. Supp. 1103, 1105-07 (W.D. Mich. 1985). In moving to dismiss the case, the United States did not dispute a hydrologic connection, such that "chemicals [could] enter the groundwaters under the ... area *and be discharged into Grand Traverse Bay.*" United States Mem. in Supp. of Rule 12(b) Mot. & In The Alternative for Summ. J. at 3-4, *Kelley ex rel. People of the State of Michigan v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985) (No. G83-630) (emphasis added). Rather, the United States argued that "Michigan cannot make these claims under the Clean Water Act since the Act does not regulate pollutant discharges onto soil or into underlying groundwater." *Id.* at 5. According to the United States, "[t]he statutory language, the legislative history, the case law, and EPA's interpretation of the Act all support this conclusion." *Id.* at 22.

- **EPA, Final Comprehensive State Groundwater Protection Guidance, 1992.**

In 1992, EPA issued guidance explaining that "EPA and the States regulate facilities [under the CWA] that either discharge wastewaters *directly* to surface waters or discharge to municipal treatment systems." EPA, Final Comprehensive State Groundwater Protection Guidance at 1-27 (December 1992). In addition, "[w]hile a number of States have incorporated ground water discharges into their NPDES permits and pretreatment requirements," EPA confirmed that "*there is no national requirement to do so.*" *Id.* (emphasis added).

- **EPA, President Clinton's Clean Water Initiative, 1994.**

In 1994, EPA proposed a new Clean Water Initiative, including an "updated CWA" that addresses water quality issues "through a new, more targeted approach." In discussing this new approach, EPA said it was "presently unclear whether a discharge to the ground or to groundwater that rapidly moves into surface water through a 'direct hydrologic connection' between the point of discharge and the surface water is subject to NPDES regulation." To address this, EPA suggested that the "*CWA should be amended* so that ... a point source discharge to ground or to groundwater that has a direct hydrologic connection with surface waters is subject to regulation as a NPDES point source discharge." To mitigate the consequences of such an massive expansion of the NPDES program, however, EPA suggested

that this rule should only apply if: (1) “a reasonably foreseeable direct hydrologic connection to surface waters in the proximity of the release”; (2) “a greater than de minimis quantity of the pollutant must reasonably be able to reach the surface water”; and (3) “no other Federal statute directly addresses the activity causing the release.” EPA, President Clinton’s Clean Water Initiative at 104-105 (Feb. 1994).

- **EPA, Office of Wastewater Management, Case Study Questionnaire, 2000.**

In 2000, EPA issued a questionnaire to plants operating cooling water intake structures in connection with the development of regulations under Section 316(b) of the CWA, 33 U.S.C. § 1326(b). In the questionnaire, EPA noted that “NPDES permits are required to be held ... by any point source that discharges pollutants *directly* to waters of the United States.” For facilities that discharge all of their “effluent” to “groundwater injection wells,” the questionnaire directed the recipients to answer “no” to the question of whether “the facility presently ha[s] or ... [is] in the process of obtaining a ... NPDES ... permit.” EPA, Office of Wastewater Management, Case Study Questionnaire (January 2000). In the questionnaire, EPA did not suggest that the facility should determine whether impacted groundwater has a “direct hydrologic connection” to surface water.

- **EPA, Memorandum to EPA Administrator Browner, 2000.**

Later that same year, high-ranking EPA officials (including EPA’s Director of the Water Permits Division) issued a memorandum to EPA Administrator Browner concerning potential new regulations for Concentrated Animal Feeding Operations (“CAFOs”). As part these new regulations, the EPA officials indicated they were “exploring an *option* under which CAFOs would be required to determine whether they have a reasonable potential to discharge to groundwater with a direct hydrological connection to surface water.” At the time, the EPA officials explained that this “determination would likely require hiring an assessor.” If a “potential to discharge were established,” the officials suggested that the proposed regulations “might specify additional monitoring (which may require the operator to drill wells), record keeping and reporting requirements and compliance requirements (e.g., lining existing lagoon(s) to prevent leaching) to prevent or reduce discharges to groundwater.” In light of “the potentially high costs to small operators associated with such an option,” however, the EPA officials noted that EPA should give “careful consideration” to the “associated small business impacts” and “balance these against any identified environmental benefits.” In fact, the EPA officials recommended that EPA “streamlin[e] the[se] requirements for small businesses ... or *exempt[] them altogether.*”

- **EPA, Update -- Concentrated Animal Feeding Operations (CAFOs) Regulation, 2001.**

In a 2001 update on CAFO regulation, EPA noted that “[e]xisting regulations do not explicitly address environmental concerns such as ... discharges to surface water via groundwater with a direct hydrologic connection.” EPA, Concentrated Animal Feeding Operations Regulation – Update (Aug. 13, 2001).

- **EPA, Effectiveness of Effluent Guidelines Program for Reducing Pollutant Discharges Uncertain, 2004.**

In 2004, EPA published a report regarding effluent guidelines for reducing pollutant discharges. In that report, EPA indicated that the “National [NPDES] regulations apply to ... [e]xisting facilities that discharge *directly* to surface waters,” but did not provide any indication that those regulations also apply to releases to groundwater with a “direct hydrological connection” to surface water. EPA, Effectiveness of Effluent Guidelines Program for Reducing Pollutant Discharges Uncertain at Chapter 1, page 2 (August 24, 2014) (emphasis added).

- **EPA, Response to Comments on Draft NPDES Permit, Holyoke Gas & Electric Department, Cabot Street Station, 2005.**

In 2005, EPA responded to comments on a draft NPDES permit for Holyoke Gas & Electric Department’s Cabot Street Station, which sits on the banks of the Holyoke Canal System (a tributary of the Connecticut River). In discussing the facility’s options to avoid NPDES permitting requirements, EPA explained that direct surface water discharges “could be re-directed to a non-surface water discharge location, such as ground injection.” EPA, Holyoke Gas & Electric Department Cabot Street Station Response to Comments on Draft National Pollutant Discharge Elimination System (NPDES) Permit No. MA0001520, at 20. Under these circumstances, EPA said that “NPDES ... permit requirements would not apply, because there would be no *direct* discharge to a surface water of the United States.” *Id.*

- **EPA, Fact Sheet, Draft NPDES Permit, Public Service of New Hampshire, Merrimack Station, 2011.**

In 2011, EPA issued a fact sheet related to a draft NPDES permit for the Public Service of New Hampshire’s Merrimack Station, which sits next to the Merrimack River in Bow, New Hampshire. Although the previous NPDES permit included discharges from roof drains, EPA eliminated those discharges from the permit because “the roof drains convey rain water from [station’s] roof and drain it into the ground.” As a result, EPA concluded, the “roof drains do not constitute a point source with a *direct* discharge to the Merrimack River.”

- **EPA, Response to Public Comments, EPA NPDES Pesticide General Permit, 2011.**

Also in 2011, in response to a comment on a final NPDES pesticide general permit stating that the permit should “ensure that discharges do not affect groundwater,” EPA confirmed that the “NPDES program ... is for the control of discharges to waters of the United States” and that “discharges to groundwater are not regulated under the NPDES program.” EPA, Response to Public Comments, EPA NPDES Pesticide General Permit (Oct. 31, 2011) at xxii. In confirming that the NPDES program does not regulate “discharges to groundwater,” EPA provided no indication that a source must consider whether that groundwater has a “direct” hydrological-connection to surface water.

- **EPA, Fact Sheet, Draft General Permits for Stormwater Discharges Systems from Small Municipal Separate Sewer Systems in Massachusetts, 2014.**

In 2014, EPA issued a fact sheet regarding the reissuance of three NPDES permits for the discharge of stormwater from municipal storm sewer systems to waters in Massachusetts. In addressing stormwater “discharges to the subsurface,” EPA stated that “NPDES permits are applicable for point source discharges to waters of the U.S” and that “discharges to groundwater are not addressed in the NPDES program and as such are not addressed by this permit.” EPA, Fact Sheet, Draft General Permits for Stormwater Discharges Systems from Small Municipal Separate Sewer Systems in Massachusetts at 18 (Sept. 30, 2014).

- **EPA, Response to Comments on NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewers Systems in Massachusetts, 2016.**

In 2016, in response to comments on NPDES General Permits in Massachusetts, EPA said that “[i]n general the connection between groundwater discharges and surface waters is too complex to determine a direct causal effect.” EPA, Response to Comments on NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewers Systems in Massachusetts at 219 (April 4, 2016).

- **EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, 2017.**

In 2017, in response to public comments on draft NPDES permits authorizing remediation activity discharges in Massachusetts and New Hampshire, EPA again made clear that “discharges to groundwater are not regulated by the NPDES program,” but “may be regulated under other discharge permit authorities.” EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, at 7 (March 9, 2017). As EPA explained: “*if* a discharge to groundwater requires a permit, the [NPDES] is not the permit program authority under which such discharges can be covered.” Rather, “such discharges are generally regulated under the [Underground Injection Control] Program” under the Safe Drinking Water Act, or “similar programs ... such as State groundwater discharge programs.”

State	Standard	Enforcement Authorities	Other Relevant State Authority
Alabama	<p>"Every person, prior to discharging any new or increased pollution into any waters of this state, shall apply to the commission in writing for a permit and must obtain such permit before discharging such pollution." Ala. Code § 22-22-9(1)(3).</p>	<p>Available enforcement includes administrative orders, injunctive relief, authority to initiate civil actions, and civil and criminal penalties. Ala. Code §§ 22-22-9(1)-(n), 22-22A-5(17)-(19), 22-22-14.</p>	<p>"Discharge" is defined as "The addition, introduction, leaking, spilling or emitting of any sewage, industrial waste, pollutant or other wastes into waters of the state." Ala. Code § 22-22-1.</p> <p>"Waters" is defined to mean "All waters of any river, stream, watercourse, pond, lake, coastal, ground or surface water, wholly or partially within the state, natural or artificial. This does not include waters which are entirely confined and retained completely upon the property of a single individual, partnership or corporation unless such waters are used in interstate commerce." Ala. Code § 22-22-1.</p> <p>All pollution is declared to be a public nuisance. Ala. Code § 22-22-9.</p>
Alaska	<p>"A person may not pollute or add to the pollution of the air, land, subsurface land, or water of the state." Alaska Stat. Ann. § 46.03.710.</p>	<p>Enforcement of this section is permitted through administrative penalties, injunctions, and compliance orders. Alaska Stat. Ann. § 46.03.761, 46.03.850, 46.03.765.</p>	<p>"Pollution" is defined to mean "the contamination or altering of waters, land, or subsurface land of the state in a manner which creates a nuisance or makes waters, land, or subsurface land unclean, or noxious, or impure, or unfit so that they are actually or potentially harmful or detrimental or injurious to public health, safety, or welfare, to domestic, commercial, industrial, or recreational use, or to livestock, wild animals, bird, fish, or other aquatic life." Alaska Stat. Ann. § 46.03.900.</p> <p>"Waters" is defined to include "lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea, and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state." Alaska Stat. Ann. § 46.03.900.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Arizona	<p>"It is unlawful to . . . Discharge without a permit or appropriate authority under this chapter . . . Fail to . . . report discharges as required by a permit . . . Violate a discharge limitation specified in a permit . . . [or] Violate a water quality standard." Ariz. Rev. Stat. Ann. § 49-263.</p> <p>". . . any person who discharges or who owns or operates a facility that discharges shall obtain an aquifer protection permit from the director." (i.e., the Arizona Aquifer Protection Permit program). Ariz. Rev. Stat. Ann. § 49-241.</p> <p>"water quality standards for all navigable waters and for all waters in all aquifers to preserve and protect the quality of those waters for all present and reasonably foreseeable future uses" and in setting these standards the state considers "[t]he provisions and requirements of the clean water act and safe drinking water act and the regulations adopted pursuant to those acts; and [t]he degree to which standards for one category of waters could cause violations of standards for other, hydrologically connected, water categories." Ariz. Rev. Stat. Ann. § 49-221(A), (C).</p>	<p>Enforcement is available through compliance orders, preliminary and permanent injunctions, and civil penalties of up to \$25,000 per day per violation. Ariz. Rev. Stat. Ann. §§ 49-261, 262.</p> <p>The statute also provides for misdemeanor and felony prosecutions and citizen suits. Ariz. Rev. Stat. Ann. §§ 49-263, 264.</p>	<p>"Discharge' means the direct or indirect addition of any pollutant to the waters of the state from a facility. For purposes of the aquifer protection permit program prescribed by article 3 of this chapter, discharge means the addition of a pollutant from a facility either directly to an aquifer or to the land surface or the vadose zone in such a manner that there is a reasonable probability that the pollutant will reach an aquifer." Ariz. Rev. Stat. Ann. § 49-201.</p> <p>"Waters of the state' means all waters within the jurisdiction of this state including all perennial or intermittent streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, aquifers, springs, irrigation systems, drainage systems and other bodies or accumulations of surface, underground, natural, artificial, public or private water situated wholly or partly in or bordering on the state." Ariz. Rev. Stat. Ann. § 49-201.</p>
Arkansas	<p>"It shall be unlawful for any person to . . . Cause pollution, as defined in § 8-4-102, of any of the waters of this state." Ark. Code Ann. § 8-4-217.</p>	<p>Arkansas Department of Environmental Quality may issue administrative enforcement orders and impose civil penalties of up to \$10,000 per day per violation. Ark. Code Ann. §§ 8-4-103, 208. The statute also provides for criminal prosecutions of misdemeanor and felony violations of the chapter or related permit. Id.</p>	<p>"Pollution' means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, or such discharge of any liquid, gaseous, or solid substance in any waters of the state as will, or is likely to, render the waters harmful, detrimental, or injurious to public health, safety, or welfare; to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses; or to livestock, wild animals, birds, fish, or other aquatic life." Ark. Code Ann. § 8-4-102(6).</p> <p>"Waters of the state' means all streams, lakes, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state." Ark. Code Ann. § 8-4-102(10).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
California	<p>A "report of discharge" is required for any "person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system." Cal. Water Code § 13260(1)(a).</p> <p>"A person who . . . has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action . . ." Cal. Water Code § 13304(a).</p>	<p>Enforcement is available by order, injunction, or remedial action with cost recovery. Cal. Water Code § 13304(a).</p> <p>Other sections of the law provide for civil penalties, injunctions, misdemeanor prosecutions, and administrative orders. Cal. Water Code §§ 13261, 13265, 13268, 13301, 13304, 13305, 13308, 13323, 13331, 13399.</p> <p>The state may order the person to "cleanup the waste or abate the effects of the waste, or in the case of threatened pollution or nuisance, take another necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts" Cal. Water Code § 13304(a).</p>	<p>"Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code § 13050(e).</p>
Colorado	<p>"No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the Division for such discharge . . ." 5 Colo. Code Regs. § 1002-61:61.3.</p>	<p>The Department of Public Health and Environment may enforce the prohibitions in this title through cease and desist orders, clean-up orders, restraining orders, injunctions, and criminal and civil penalties. Colo. Rev. Stat. Ann. §§ 25-8-605, 606, 607, 608, 609.</p> <p>Civil penalties may range as high as \$10,000 per day per violation, and criminal penalties may be as high as \$25,000. §§ 25-8-608, 609.</p>	<p>"Discharge of pollutants" means the introduction or addition of a pollutant into state waters." Colo. Rev. Stat. Ann. § 25-8-103.</p> <p>"State waters" means any and all surface and subsurface waters which are contained in or flow in or through this state . . ." Colo. Rev. Stat. Ann. § 25-8-103.</p>
Connecticut	<p>"No person or municipality shall initiate, create, originate or maintain any discharge of water, substance or material into the waters of the state without a permit for such discharge issued by the commissioner." Conn. Gen. Stat. Ann. § 22a-430.</p> <p>"No person or municipality shall cause pollution of any of the waters of the state or maintain a discharge of any treated or untreated wastes in violation of any provision of this chapter." Conn. Gen. Stat. Ann. § 22a-427.</p>	<p>Enforcement includes administrative orders for sources "which reasonably can be expected to create a source of pollution to the waters of the state," injunctive relief, civil penalties up to \$25,000 for each violation, each day constituting a separate violation, and criminal penalties. Conn. Gen. Stat. Ann. §§ 22a-432, 435, 438.</p> <p>Orders may also be issued against landowners if different from the discharger. Conn. Gen. Stat. Ann. § 22a-433.</p>	<p>Discharge "means the emission of any water, substance or material into the waters of the state, whether or not such substance causes pollution." Conn. Gen. Stat. Ann. § 22a-423.</p> <p>Waters "means all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways, wells, springs, lakes, ponds, marshes, drainage systems and all other surface or underground streams, bodies or accumulations of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof." Conn. Gen. Stat. Ann. § 22a-423.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Delaware	"No person shall, without first having obtained a permit from the Secretary, undertake any activity . . . which may cause or contribute to discharge of a pollutant into any surface or ground water . . ." Del Code Ann. tit. 7, § 6003(a).	Enforcement of this chapter is permitted through temporary restraining orders, permanent injunctions, or monetary penalties, up to \$10,000 per day for each completed violation. Penalties may be tripled for chronic violators. Del Code Ann. tit. 7, § 6005.	<p>"Discharge Of A Pollutant' means any addition of any pollutant, or combination of pollutants, to state waters or the contiguous zone, or the ocean, from any source or activity . . ." Code Del. Regs. 7 7000 7201.</p> <p>"State Waters' Or 'Waters Of The State' means all water, on the surface and under the ground, wholly or partially within, or bordering the State, or within its jurisdiction." Code Del. Regs. 7 7000 7201.</p>
District of Columbia	"Except as provided in § 8-103.06, no person shall discharge a pollutant to the waters of the District." D.C. Code Ann. § 8-103.02.	Available enforcement mechanisms include administrative orders, civil penalties, injunctive relief, and criminal prosecution for willful or negligent violations. D.C. Code Ann. §§ 8-103.16, 103.17, 103.18. District of Columbia Code also provides for a private right of action against any person in violation of the Water Pollution Control subchapter. D.C. Code Ann. § 8-103.19.	<p>"Discharge' means the spilling, leaking, releasing, pumping, pouring, emitting, emptying, or dumping of any pollutant or hazardous substance, including a discharge from a storm sewer, into or so that it may enter District of Columbia waters." D.C. Code Ann. § 8-103.01(6).</p> <p>"Waters of the District' or 'District waters' means flowing and still bodies of water, whether artificial or natural, whether underground or on land, so long as in the District of Columbia, but excludes water on private property prevented from reaching underground or land watercourses, and also excludes water in closed collection or distribution systems." D.C. Code Ann. § 8-103.01(25).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Florida	<p>“It shall be a violation of this chapter, and it shall be prohibited for any person . . . [t]o cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property . . . or [t]o fail to obtain any permit required by this chapter or by rule or regulation” Fla. Stat. Ann. § 403.161(1).</p> <p>“Without the written authorization of the department, a person may not discharge any waste into the waters of the state which, by itself or in combination with the wastes of other sources, reduces the quality of the receiving waters below the classification established for such waters.” Fla. Stat. Ann. § 403.088(1).</p> <p>“[n]o installation shall directly or indirectly discharge into groundwater any contaminant that causes a violation of the water quality standards or minimum criteria in the receiving groundwater as established in this Chapter....” F.A.C.§ 62-520.310(7).</p> <p>“discharge to groundwater shall not impair the designated use of contiguous surface waters.” F.A.C.§ 62-520.310(2).</p> <p>FDEP’s practice is to “incorporate groundwater discharge considerations into other [FDEP] permits, as appropriate, and not to require a separate permit for discharges to groundwater.” F.A.C.§ 62-520.310(12).</p>	<p>Violators are subject to enforcement orders, injunctive relief, and criminal penalties. Fla. Stat. Ann. §§ 403.061, 403.131, 161. Private citizens may also initiate civil actions against violators or compel the government to enforce its laws, rules, or regulations relating to the protection of water and other natural resources. Fla. Stat. Ann. § 403.412.</p>	<p>“‘Pollution’ is the presence in the . . . waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law.” Fla. Stat. Ann. § 403.031 (7).</p> <p>“‘Waters’ include, but are not limited to, rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water. Underground waters include, but are not limited to, all underground waters passing through pores of rock or soils or flowing through in channels, whether manmade or natural” Fla. Stat. Ann. § 403.031 (13).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Georgia	<p>“Any person who owns or operates a facility of any type or who desires to erect, modify, alter, or commence operation of a facility of any type which results or will result in the discharge of pollutants from a point source into the waters of the state shall obtain from the director a permit to make such discharge.” Ga. Code Ann. § 12-5-30(a).</p> <p>“Any person desiring to erect or modify facilities or commence or alter an operation of any type which will result in the discharge of pollutants from a nonpoint source into the waters of the state, which will render or is likely to render such waters harmful to the public health, safety, or welfare, or harmful or substantially less useful for domestic, municipal, industrial, agricultural, recreational, or other lawful uses, or for animals, birds, or aquatic life, shall obtain a permit from the director to make such discharge.” Ga. Code Ann. § 12-5-30(b).</p>	Enforcement of these prohibitions may be accomplished through enforcement orders, civil actions for permanent or temporary injunctions, civil actions for damages, and civil and criminal penalties. Ga. Code Ann. §§ 12-5-23, 48, 51, 52, 53.	“‘Waters’ or ‘waters of the state’ means any and all rivers, streams, creeks, branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and all other bodies of surface or subsurface water, natural or artificial, lying within or forming a part of the boundaries of the state which are not entirely confined and retained completely upon the property of a single individual, partnership, or corporation.” Ga. Code Ann. § 12-5-22.
Hawaii	“No person, including any public body, shall discharge any water pollutant into state waters, or cause or allow any water pollutant to enter state waters except in compliance with this chapter, rules adopted pursuant to this chapter, or a permit or variance issued by the director.” Haw. Rev. Stat. Ann. § 342D-50.	The director of the Department of Health may enforce the title through administrative orders, injunctive relief in an environmental court, civil penalties of up to \$25,000 per day per violation, and criminal penalties or imprisonment for negligent or knowing violations. Haw. Rev. Stat. Ann. §§ 342D-9, 342D-30, 342D-31, 342D-32, 342D-11.	<p>“‘State waters’ means all waters, fresh, brackish, or salt, around and within the State, including, but not limited to, coastal waters, streams, rivers, drainage ditches, ponds, reservoirs, canals, ground waters, and lakes; provided that drainage ditches, ponds, and reservoirs required as a part of a water pollution control system are excluded.” Haw. Rev. Stat. Ann. § 342D-1.</p> <p>“Water pollution” means . . . [s]uch contamination or other alteration of the physical, chemical, or biological properties of any state waters . . . or is likely to create a nuisance or render such waters unreasonably harmful, detrimental, or injurious to public health, safety, or welfare, including harm, detriment, or injury to public water supplies, fish and aquatic life and wildlife, recreational purposes and agricultural and industrial research and scientific uses of such waters or as will or is likely to violate any water quality standards, effluent standards, treatment and pretreatment standards, or standards of performance for new sources adopted by the department.” Haw. Rev. Stat. Ann. § 342D-1.</p> <p>Hawaii also administers a nonpoint source pollution management and control program to enforce and carry out all laws, rules, and programs relating to nonpoint source pollution in the state. Haw. Rev. Stat. Ann. § 342E-2.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Idaho	<p>Unless prior agency approval has been obtained, “[n]o person shall conduct a new or substantially modify an existing nonpoint source activity that can reasonably be expected to lower the water quality of an outstanding resource water, except for short-term or temporary nonpoint source activities which do not alter the essential character or special uses of a segment, issuance of water rights permits or licenses, allocation of water rights, or operation of water diversions or impoundments.” Idaho Code Ann. §§ 39-3618, 39-3620.</p> <p>The Idaho Department of Environmental Quality has also promulgated rules to establish and protect ground water quality standards, which provide that “[n]o person shall cause or allow the release, spilling, leaking, emission, discharge, escape, leaching, or disposal of a contaminant into the environment in a manner that . . . [c]auses a ground water quality standard to be exceeded . . . [i]njures a beneficial use of ground water; or . . . [i]s not in accordance with a permit, consent order or applicable best management practice, best available method or best practical method.” Idaho Admin. Code r. 58.01.11.400.</p>	<p>The director of the department may issue compliance orders, initiate administrative or civil enforcement actions against violators, issue monetary penalties up to \$10,000 per violation or \$1,000 for each day the violation continues (whichever is greater). Idaho Code Ann. §§ 39-108, 39-116; Idaho Admin. Code r. 58.01.11.400. The statute also provides for criminal prosecutions. Idaho Code Ann. § 39-109.</p>	<p>“All state agencies shall incorporate the adopted ground water quality protection plan in the administration of their programs and shall have such additional authority to promulgate rules to protect ground water quality as necessary to administer such programs which shall be in conformity with the ground water quality protection plan.” Idaho Code Ann. § 39-126.</p> <p>“‘Waters’ means all accumulations of water, surface and underground, natural and artificial, public and private or parts thereof which are wholly or partially within, flow through or border upon this state except for private waters as defined in section 42-212, Idaho Code.” Idaho Code Ann. § 39-103(18).</p>
Illinois	<p>"No person shall . . . Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act." 415 Ill. Comp. Stat. Ann. 5/12.</p>	<p>The prohibitions in the Illinois code are enforced through administrative citations and orders, injunctive relief, civil penalties (\$50,000 for each violation and \$10,000 for each day the violation continues), and criminal penalties. 415 Ill. Comp. Stat. Ann. 5/31.1, 5/33, 5/42-5/45.</p>	<p>"The Agency shall establish a Statewide groundwater monitoring network. Such network shall include a sufficient number of testing wells to assess the current levels of contamination in the groundwaters of the State and to detect any future degradation of groundwater resources." 415 Ill. Comp. Stat. Ann. 5/13.1.</p> <p>"‘Waters’ means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon the State of Illinois, except that sewers and treatment works are not included except as specially mentioned" Ill. Admin. Code tit. 35, § 301.440.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Indiana	<p>“[A] person may not: (1) throw, run, drain, or otherwise dispose; or (2) cause, permit, or suffer to be thrown, run, drained, allowed to seep, or otherwise disposed [] into any of the streams or waters of Indiana any organic or inorganic matter that causes or contributes to a polluted condition of any of the streams or waters of Indiana, as determined by a rule of the board . . .” Ind. Code Ann. § 13-18-4-5.</p>	<p>The Department of Environmental Management may enforce the statute through administrative compliance orders and civil actions seeking injunctive relief. Ind. Code Ann. §§ 13-18-4-6, § 13-14-2-6, 13-14-2-7, 13-30-4-1. Civil penalties of up to \$25,000 per day of any violation are authorized, as well as criminal penalties. Ind. Code Ann. §§ 13-30-4-1, 13-30-10-1.5.</p>	<p>“‘Waters’, for purposes of water pollution control laws and environmental management laws, means: (1) the accumulations of water, surface and underground, natural and artificial, public and private; or (2) a part of the accumulations of water[,] that are wholly or partially within, flow through, or border upon Indiana.” Ind. Code Ann. § 13-11-2-265.</p>
Iowa	<p>“A pollutant shall not be disposed of by dumping, depositing, or discharging such pollutant into any water of the state, except that this section shall not be construed to prohibit the discharge of adequately treated sewage, industrial waste, or other waste in accordance with rules adopted by the commission.” Iowa Code Ann. § 455B.186.</p>	<p>Enforcement mechanisms include cease and desist orders, civil penalties up to \$5,000 per day for each violation, a range of criminal penalties, and temporary and permanent injunctions. Iowa Code Ann. §§ 455B.175, 455B.191.</p>	<p>Iowa’s Groundwater Protection Act supplements Iowa’s water quality laws to further promote its goal of “prevent[ing] contamination of groundwater from point and nonpoint sources of contamination to the maximum extent practical . . .” Iowa Code Ann. § 455E.4.</p> <p>“‘Water of the state’ means any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water, surface or underground, natural or artificial, public or private, which are contained within, flow through or border upon the state or any portion thereof.” Iowa Code Ann. § 455B.171(39).</p>
Kansas	<p>“No person, company, corporation, institution or municipality shall place or permit to be placed or discharge or permit to flow into any of the waters of the state any sewage . . .” Kan. Stat. Ann. § 65-164.</p>	<p>Enforcement of the statute is permitted through cease and desist orders, civil penalties, and criminal penalties. Kan. Stat. Ann. §§ 65-164 (d), 65-170d, 65-167.</p>	<p>“‘[S]ewage’ means any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry.” Kan. Stat. Ann. § 65-164.</p> <p>“‘Waters of the state’ means all streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state . . .” Kan. Stat. Ann. § 65-161(a).</p> <p>“‘[D]ischarge’ means when used without qualification, the causing or permitting of sewage to enter, either directly or indirectly, into waters of the state . . .” Kan. Stat. Ann. § 65-161(b).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Kentucky	<p>“No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.” Ky. Rev. Stat. Ann. § 224.70-110.</p>	<p>Enforcement mechanisms include civil penalties, up to \$25,000 per day as long as violation continues, Civil actions for injunctive relief and to recover penalties or damages for injury to fish or wildlife, criminal penalties and/or imprisonment. Ky. Rev. Stat. Ann. §§ 224.99-010 , 224.99-020, 224.1-070.</p>	<p>“‘Pollutant’ means and includes dredged spoil, solid waste, incinerator residue, sewage, sewage sludge, garbage, chemical, biological or radioactive materials, heat, wrecked or discarded equipment, rock, sand, soil, industrial, municipal or agricultural waste, and any substance resulting from the development, processing, or recovery of any natural resource which may be discharged into water.” Ky. Rev. Stat. Ann. § 224.1-010(34).</p> <p>“‘Water pollution’ means the alteration of the physical, thermal, chemical, biological, or radioactive properties of the waters of the Commonwealth in such a manner, condition, or quantity that will be detrimental to the public health or welfare, to animal or aquatic life or marine life, to the use of such waters as present or future sources of public water supply or to the use of such waters for recreational, commercial, industrial, agricultural, or other legitimate purposes.” Ky. Rev. Stat. Ann. § 224.1-010(33).</p> <p>“Water” or “waters of the Commonwealth” are defined to mean and include “any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes, and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction.” Ky. Rev. Stat. Ann. § 224.1-010 (32).</p>
Louisiana	<p>“No person shall conduct any activity which results in the discharge of any substance into the waters of the state without the appropriate permit, variance, or license required under the regulations of the department adopted pursuant to this Chapter.” La. Stat. Ann. § 30:2075.</p> <p>“No person shall discharge or allow to be discharged into any waters of the state: (a) Any waste or any other substance of any kind that will tend to cause water pollution in violation of any rule, order, or regulation; or (b) Any substance, the discharge of which violates any term, condition, or limit imposed by a permit.” La. Stat. Ann. § 30:2076.</p>	<p>Available enforcement includes compliance orders, civil actions for permanent or temporary injunctions and/or damages against violators, civil penalties of up to \$32,500 for each day of a violation, and criminal penalties. La. Stat. Ann. §§ 30:2025, 30:2050.2, 30:2076.1.</p>	<p>“‘Discharge’ means the placing, releasing, spilling, percolating, draining, pumping, leaking, seeping, emitting, or other escaping of pollutants into the air, waters, subsurface water, or ground as the result of a prior act or omission; or the placing of pollutants into pits, drums, barrels, or similar containers under conditions and circumstances that leaking, seeping, draining, or escaping of the pollutants can be reasonably anticipated.” La. Stat. Ann. § 30:2004(10).</p> <p>“‘Waters of the state’ means both the surface and underground waters within the state of Louisiana including all rivers, streams, lakes, groundwaters, and all other water courses and waters within the confines of the state, and all bordering waters and the Gulf of Mexico. . . .” La. Stat. Ann. § 30:2073(7).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Maine	<p>“No person may directly or indirectly discharge or cause to be discharged any pollutant without first obtaining a license therefor from the department.” Me. Rev. Stat. tit. 38, § 413.</p>	<p>Enforcement of these provisions is permitted through administrative orders and consent agreements, civil actions, civil penalties amounting to not more than \$10,000 per day for each violation, or \$25,000 if the violation relates to hazardous waste, criminal penalties between \$2,500 and \$25,000 for each day of the violation, and debarment from department contracts for repeated violations. Me. Rev. Stat. tit. 38, § 347-A, 348, 349, 349-B.</p>	<p>“‘Discharge’ means any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant to water of the State. Me. Rev. Stat. tit. 38, § 361-A(1).</p> <p>“‘Waters of the State’ means any and all surface and subsurface waters that are contained within, flow through, or under or border upon this State or any portion of the State . . .” Me. Rev. Stat. tit. 38, § 361-A(7).</p>
Maryland	<p>“[A] person may not discharge any pollutant into the waters of this State.” Md. Code Ann., Envir. § 9-322.</p>	<p>Enforcement of these provisions is by administrative corrective action orders, injunctions, civil penalties not exceeding \$10,000 per day (judicially) or \$1,000 per day (administratively), or criminal prosecution. Md. Code Ann., Envir. §§ 9-334, 9-335, 9-338, 9-339, 9-342, 9-343.</p>	<p>“Discharge” is defined to mean “the addition, introduction, leaking, spilling, or emitting of a pollutant into the waters of this State” or “the placing of a pollutant in a location where the pollutant is likely to pollute.” § 9-101(b).</p> <p>“Waters of this State” includes, in relevant part, “[b]oth surface and underground waters within the boundaries of this State subject to its jurisdiction. . . .” § 9-101(l)(1).</p>
Massachusetts	<p>“Any person who, directly or indirectly, throws, drains, runs, discharges or allows the discharge of any pollutant into waters of the commonwealth, except in conformity with a permit” shall be subject to the enforcement provisions. Mass. Gen. Laws Ann. ch. 21, § 42.</p> <p>“[n]o person shall engage in any other activity that may reasonably be expected to result, directly or indirectly, in discharge of pollutants into waters of the commonwealth.” Mass. Gen. Laws Ann. ch. 21, § 43(2).</p>	<p>Violations of the standards shall punished by a fine, imprisonment, or shall be subject to a civil penalty not to exceed \$25,000 per day of such violation. Enforcement mechanisms, in addition to civil penalties, include orders and injunctive relief. Mass. Gen. Laws Ann. ch. 21, §§ 44, 46.</p>	<p>“‘Waters’ and ‘waters of the commonwealth,’ all waters within the jurisdiction of the commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, coastal waters and groundwaters.” Mass. Gen. Laws Ann. ch. 21, § 26A.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Michigan	<p>"A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following: (a) To the public health, safety, or welfare . . . domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such water . . . [t]o the value or utility of riparian lands . . ."</p> <p>Mich. Comp. Laws Ann. § 324.3109(1).</p> <p>"A person shall not discharge without an authorization" under Part 22 Rules (Groundwater Quality), which establishes specific criteria for the "discharge," which is defined to mean "any direct or indirect discharge . . . into the groundwater or on the ground." R §§ 323.2204, 323.2201(i).</p>	<p>Enforcement of these provisions is permitted through abatement orders, civil actions, civil fines of up to \$25,000 per day per violation, criminal penalties and imprisonment.</p> <p>Mich. Comp. Laws Ann. §§ 324.1601, 324.3112, 324.3115.</p>	<p>"Waters of the state" means groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state." Mich. Comp. Laws Ann. § 324.3101(aa).</p>
Minnesota	<p>"[I]t is the duty of every person to notify the agency immediately of the discharge, accidental or otherwise, of any substance or material under its control which, if not recovered, may cause pollution of waters of the state" Minn. Stat. Ann. § 115.061.</p> <p>"No sewage, industrial waste, or other wastes shall be discharged from either a point or a nonpoint source into the waters of the state in such quantity or in such manner alone or in combination with other substances as to cause pollution as defined by law." Minn. R. 7050.0210.</p>	<p>Minnesota's Water Pollution Control Act may be enforced through civil actions, civil penalties, criminal penalties, and administrative orders. Minn. Stat. Ann. § 115.071.</p>	<p>"Discharge" means "the addition of any pollutant to the waters of the state or to any disposal system." Minn. Stat. Ann. § 115.01.(4).</p> <p>"Waters of the state" is defined to mean "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state . . ."</p> <p>Minn. Stat. Ann. § 115.01(22).</p>
Mississippi	<p>"[I]t is unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state. It is also unlawful to discharge any wastes into any waters of the state which reduce the quality of those waters below the water quality standards established by the commission; or to violate any applicable pretreatment standards or limitations, technology-based effluent limitations, toxic standards or any other limitations established by the commission. Any such action is declared to be a public nuisance." Miss. Code. Ann. § 49-17-29(2)(a).</p>	<p>Available enforcement includes administrative orders, civil actions, civil penalties, and misdemeanor prosecution.</p> <p>Miss. Code. Ann. §§ 49-17-31, 49-17-43.</p>	<p>"Waters of the state" is defined to mean "all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the state . . ."</p> <p>Miss. Code. Ann. § 49-17-5(1)(f).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Missouri	<p>“It is unlawful for any person . . . [t]o cause pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state; [or] discharge any water contaminants into any waters of the state which reduce the quality of such waters below the water quality standards” Mo. Ann. Stat. § 644.051.</p>	<p>Enforcement includes administrative orders, civil actions, administrative penalties and civil penalties. Mo. Ann. Stat. §§ 644.079, 644.076.</p>	<p>“Pollution” is defined to mean “such contamination or other alteration of the physical, chemical or biological properties of any waters of the state . . . or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is reasonably certain to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life” Mo. Ann. Stat. § 644.016(17).</p> <p>“Discharge” is defined to mean “the causing or permitting of one or more water contaminants to enter the waters of the state.” Mo. Ann. Stat. § 644.016(6).</p> <p>“Waters of the state” means “all waters within the jurisdiction of this state, including all rivers, streams, lakes and other bodies of surface and subsurface water lying within or forming a part of the boundaries of the state” Mo. Ann. Stat. § 644.016(27).</p>
Montana	<p>It is unlawful to “cause pollution . . . of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters.” Mont. Code Ann. § 75-5-605.</p>	<p>The department may enforce these provisions through administrative orders for abatement, compliance, or cleanup, administrative penalties, civil actions for injunctive relief, civil penalties, criminal penalties and/or imprisonment. Mont. Code Ann. §§ 75-5-611 to 75-5-614, 75-5-631, 75-5-632.</p>	<p>“Pollution” means “contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards,” or “the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.” Mont. Code Ann. § 75-5-103 (30)(a).</p> <p>“State waters” is defined to mean “a body of water, irrigation system, or drainage system, either surface or underground.” Mont. Code Ann. § 75-5-103(34)(a).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Nebraska	<p>“It shall be unlawful for any person” to “cause pollution of any air, waters, or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, waters, or land of the state” or “discharge or emit any wastes into any air, waters, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established therefor by the council. Any such action is hereby declared to be a public nuisance.” Neb. Rev. Stat. Ann. § 81-1506.</p>	<p>Enforcement is permitted through administrative corrective action orders, injunctions, civil penalties, felony and misdemeanor prosecution. Neb. Rev. Stat. Ann. §§ 81-1508, 81-1508.01, 81-1508.02.</p>	<p>“Water pollution shall mean the manmade or man-induced alteration of the chemical, physical, biological, or radiological integrity of water . . .” Neb. Rev. Stat. Ann. § 81-1502(20).</p> <p>“Waters of the state shall mean all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial . . .” Neb. Rev. Stat. Ann. § 81-1502(21).</p> <p>Nebraska also manages groundwater through the “Nebraska Ground Water Management and Protection Act.” Neb. Rev. Stat. Ann. § 46-701 et seq.</p>
Nevada	<p>“[A] person shall not discharge a pollutant from a point source into any waters of the State without obtaining a permit from the Department.” Nev. Admin. Code 445A.228.</p> <p>The Nevada Department of Conservation and Natural Resources possesses the authority to prescribe pollution controls for “diffuse sources”, or delegate such authority to local municipalities. Nev. Rev. Stat. Ann. § 445A.570; Nev. Admin. Code 445A.314.</p>	<p>Persons who violate the statute or regulations are subject to administrative compliance orders, civil actions for injunctive relief, civil penalties, and criminal penalties. Nev. Rev. Stat. Ann. §§ 445A.675, 445A.690, 445A.695 445A.700.</p> <p>If the violation relates to a rule or regulation concerning diffuse sources, no civil or criminal penalties may be imposed for failing to obey an administrative order. Nev. Rev. Stat. Ann. § 445A.680.</p>	<p>“‘Diffuse source’ means any source of water pollution which is diffused to the extent that it is not readily discernible and cannot be confined to a discrete conveyance. This term is intended to be equivalent to the term “nonpoint source” as used in federal statutes and regulations.” Nev. Rev. Stat. Ann. § 445A.335.</p> <p>“‘Discharge’ means any addition of a pollutant or pollutants to water.” Nev. Rev. Stat. Ann. § 445A.345.</p> <p>“Waters of the State” is defined to mean “all waters situated wholly or partly within or bordering upon this State, including but not limited to . . . [a]ll streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and [] [a]ll bodies or accumulations of water, surface and underground, natural or artificial.” Nev. Rev. Stat. Ann. § 445A.415.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
New Hampshire	<p>“It shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to the surface water or groundwater of the state without first obtaining a written permit from the department of environmental services.” N.H. Rev. Stat. Ann. § 485-A:13.</p> <p>“After adoption of a given classification for a stream, lake, pond, tidal water or section of such water . . . it shall be unlawful for any person or persons to dispose of any sewage, industrial, or other wastes, either alone or in conjunction with any other person or persons, in such a manner as will lower the quality of the waters . . . below the minimum requirements of the adopted classification.” N.H. Rev. Stat. Ann. § 485-A:12.</p>	<p>Available enforcement includes administrative cease and desist orders, civil actions for injunctive relief, administrative penalties, civil penalties, and criminal penalties or imprisonment. N.H. Rev. Stat. Ann. §§ 485-A:22, 485-A:22-a.</p>	<p>“Waste” means “industrial waste and other wastes.” N.H. Rev. Stat. Ann. § 485-A:2. XVI.</p> <p>“Other wastes” is defined to mean “garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, ashes, offal, oil, tar, chemicals and other substances other than sewage or industrial wastes, and any other substance harmful to human, animal, fish or aquatic life.” N.H. Rev. Stat. Ann. § 485-A:2.VIII.</p> <p>“Sewage” means “the water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present.” N.H. Rev. Stat. Ann. § 485-A:2. X.</p>
New Jersey	<p>“It shall be unlawful for any person to discharge any pollutant, except as provided pursuant to [this section], or when the discharge conforms with a valid [state or federal discharge permit, e.g. a NPDES permit].” N.J. Stat. Ann. § 58:10A-6.</p>	<p>The commissioner of the New Jersey Department of Environmental Protection may enforce the state’s water pollution statute through compliance orders, administrative penalties, civil action for injunctive relief, civil penalties, and criminal fines. N.J. Stat. Ann. §§ 58:10A-10, 58:10A-24.6.</p>	<p>“Discharge” means an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a pollutant into the waters of the State, onto land or into wells from which it might flow or drain into said waters or into waters or onto lands outside the jurisdiction of the State, which pollutant enters the waters of the State.” N.J. Stat. Ann. § 58:10A-3(e).</p> <p>“Waters of the State” is defined to mean “the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this State.” N.J. Stat. Ann. § 58:10A-3(t).</p> <p>The state also has a program to designate areawide waste treatment management planning areas that would include the establishment of regulations to, among other things, provide control mechanisms for nonpoint source pollution. N.J. Stat. Ann. § 58:11A-4.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
New Mexico	<p>Under the state’s water quality control commission’s authority to promulgate rules to prevent or abate water pollution and develop water quality standards for surface and ground waters, New Mexico code provides that “[a]ny person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge . . . shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water.” N.M. Stat. Ann. § 74-6-4 ; N.M. Admin. Code 20.6.2.1201.</p> <p>The regulations further provide that, “[u]nless otherwise provided by this Part, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary.” N.M. Admin. Code 20.6.2.3104.</p>	<p>Enforcement is available through administrative compliance orders and penalties, civil penalties, and criminal penalties for knowing violations. N.M. Stat. Ann. §§ 74-6-10, 74-6-10.1,74-6-10.2.</p>	<p>“Water contaminant” is defined to mean “any substance that could alter, if discharged or spilled, the physical, chemical, biological or radiological qualities of water.” N.M. Stat. Ann. § 74-6-2(B).</p> <p>“Water” is defines to mean “all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water.” N.M. Stat. Ann. § 74-6-2(H).</p>
New York	<p>“It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department . . .” N.Y. Env’tl. Conserv. Law § 17-0501.</p>	<p>Available enforcement mechanisms include administrative compliance orders, civil actions for injunctive relief or the recovery of penalties, civil penalties, criminal fines and/or imprisonment. N.Y. Env’tl. Conserv. Law §§ 71-1707, 71-1711, 71-2727, 71-1929, 71-1931, 71-1933.</p>	<p>“Waters” or “waters of the state” are defined to include “lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water . . . which are wholly or partially within or bordering the state or within its jurisdiction.” N.Y. Env’tl. Conserv. Law § 17-0105(2).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
North Carolina	Unless a person has received a permit and complied with all conditions set forth in the permit, "no person shall . . . [c]ause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument . . ." N.C. Gen. Stat. Ann. § 143-215.1(a)(6).	<p>The North Carolina Environmental Management Commission may issue special orders "to any person whom it finds responsible for causing or contributing to any pollution of the waters of the State within the area for which standards have been established." N.C. Gen. Stat. Ann. § 143-215.2.</p> <p>The Commission may also enforce state water pollution laws through injunctive relief and civil and criminal penalties. N.C. Gen. Stat. Ann. §§ 143-215.6A, 143-215.6B, 143-215.6C.</p>	<p>The term "water pollution" is defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of the waters of the State, including, but specifically not limited to, alterations resulting from the concentration or increase of natural pollutants caused by man-related activities." N.C. Gen. Stat. Ann. § 143-213(19).</p> <p>Reference to "discharge" or "discharge of waste" is interpreted to include "discharge, spillage, leakage, pumping, placement, emptying, or dumping into waters of the State . . ." N.C. Gen. Stat. Ann. § 143-213(9).</p> <p>"Waters" means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction." N.C. Gen. Stat. Ann. § 143-212(6).</p>
North Dakota	"It shall be unlawful for any person" to "cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state," and "[t]o discharge any wastes into any waters of the state or to otherwise cause pollution, which reduces the quality of such waters below the water quality standards established therefor by the department." N.D. Cent. Code Ann. § 61-28-06.	The Department of Health may enforce the state's water pollution laws through orders for compliance or abatement, injunctive relief against threatened or continuing violations, civil and criminal penalties, and/or imprisonment. N.D. Cent. Code Ann. §§ 61-28-04, 61-28-07, 61-28-08.	<p>"Pollution" is defined to mean "the manmade or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state." N.D. Cent. Code Ann. § 61-28-02(7).</p> <p>"Waters of the state" means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state . . ." N.D. Cent. Code Ann. § 61-28-02(15).</p>
Ohio	Unless holding a valid permit, "[n]o person shall cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state," and "[s]uch an action . . . is hereby declared to be a public nuisance." Ohio Rev. Code Ann. § 6111.04.	Enforcement mechanisms include administrative orders, injunctions, civil penalties of up to \$10,000 per day, criminal penalties, and/or imprisonment. Ohio Rev. Code Ann. §§ 6111.06, 6111.07, 6111.08, 6111.99.	<p>"Pollution" means the placing of any sewage, sludge, sludge materials, industrial waste, or other wastes in any waters of the state." Ohio Rev. Code Ann. § 6111.01(A).</p> <p>"Waters of the state" is defined to mean "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state . . ." Ohio Rev. Code Ann. § 6111.01(H).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Oklahoma	<p>“It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.” Okla. Stat. Ann. tit. 27A, § 2-6-105.</p>	<p>Available enforcement includes cease and desist orders, civil penalties, injunctive relief, criminal penalties and/or imprisonment in county jail. Okla. Stat. Ann. tit. 27A, §§ 2-6-105, 2-6-901.</p>	<p>“‘Pollution’ means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property.” Okla. Stat. Ann. tit. 27A, § 2-1-102(12).</p> <p>“Waters of the state” is defined to mean “all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof” Okla. Stat. Ann. tit. 27A, § 2-1-102(15).</p>
Oregon	<p>“[N]o person shall . . . [c]ause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means” or “[d]ischarge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.” Or. Rev. Stat. Ann. § 468B.025(1); see § 468B.050. Violations of this section are considered a public nuisance. Or. Rev. Stat. Ann. § 468B.025(3).</p>	<p>Enforcement of the Oregon’s water pollution control laws is permitted through compliance and abatement orders, civil action, and civil penalties of up to \$25,000 per day for each violation. Or. Rev. Stat. Ann. §§ 468B.032, 468.090, 468.100, 468.140.</p>	<p>“Pollution” or “water pollution” are defined to mean “such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to . . . render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses” Or. Rev. Stat. Ann. § 468B.005(5).</p> <p>“Water” or “the waters of the state” is defined to include “lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters . . . wholly or partially within or bordering the state or within its jurisdiction.” Or. Rev. Stat. Ann. § 468B.005(10).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Pennsylvania	<p>“It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.” 35 Pa. Stat. Ann. § 691.401.</p> <p>“The waters of this Commonwealth may not contain toxic substances attributable to point or nonpoint source waste discharges in concentrations or amounts that are inimical to the water uses to be protected.” 25 Pa. Code § 93.8a(a).</p>	Enforcement mechanisms include abatement orders, injunctions, civil penalties up to \$10,000 for each separate offense (each day constituting a new offense), criminal penalties, and imprisonment. 35 Pa. Stat. Ann. §§ 691.601, 691.610, § 691.605, 691.602.	<p>“Pollution” is defined to mean “contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life” 35 Pa. Stat. Ann. § 691.1.</p> <p>““Waters of the Commonwealth’ shall be construed to include any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.” 35 Pa. Stat. Ann. § 691.1.</p>
Rhode Island	<p>“It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.” 46 R.I. Gen. Laws Ann. § 46-12-5(b)</p> <p>“It shall be unlawful for any person to place any pollutant in a location where it is likely to enter the waters or to place or cause to be placed any solid waste materials, junk, or debris of any kind whatsoever, organic or non organic, in any waters.” 46 R.I. Gen. Laws Ann. § 46-12-5(a).</p>	Enforcement of the Rhode Island water pollution laws may be achieved through compliance orders, injunctive relief, civil penalties of up to \$25,000 per day, criminal penalties, and/or imprisonment. 46 R.I. Gen. Laws Ann. §§ 46-12-9, 46-12-13, 46-12-14, 46-12-16.	<p>“Pollutant” is defined to mean “any material or effluent which may alter the chemical, physical, biological, or radiological characteristics and/or integrity of water, including but not limited to, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, [or] biological materials” 46 R.I. Gen. Laws Ann. § 46-12-1(15).</p> <p>““Waters’ includes all surface waters including all waters of the territorial sea, tidewaters, all inland waters of any river, stream, brook, pond, or lake, and wetlands, as well as all groundwaters.” 46 R.I. Gen. Laws Ann. § 46-12-1 (23).</p>
South Carolina	“It is unlawful for a person, directly or indirectly, to throw, drain, run, allow to seep, or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes, and other wastes, except in compliance with a permit issued by the department.” S.C. Code Ann. § 48-1-90(A)(1).	Enforcement mechanisms include administrative orders for compliance or abatement, civil actions for injunctive relief or damages where appropriate, civil penalties, criminal penalties up to \$25,000 per day for each violation, and/or up to two years imprisonment. S.C. Code Ann. §§ 48-1-50, 48-1-220, 48-1-320.	<p>““Environment’ means the waters, ambient air, soil and/or land” S.C. Code Ann. § 48-1-10 (20).</p> <p>“Waters” is defined to mean “lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction.” S.C. Code Ann. § 48-1-10(2).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
South Dakota	<p>“No person may discharge any wastes into any waters of the state which reduce the quality of such waters below the water quality level existing on March 27, 1973” and “[n]o person may cause pollution of any waters of the state, or place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state.” S.D. Codified Laws §§ 34A-2-22, 34A-2-21.</p>	<p>Enforcement mechanisms include emergency abatement orders, civil actions for injunctive relief and recovery of penalties, civil penalties, and criminal fines and/or prosecution. S.D. Codified Laws §§ 34A-2-53, 34A-2-68, 34A-2-73 to 34A-2-75.</p> <p>Violations may also be abated as a public nuisance. S.D. Codified Laws §§ 34A-2-22, 34A-2-21.</p>	<p>“Waters of the state,” is defined to mean “all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground . . . within or bordering upon the state . . .” S.D. Codified Laws § 34A-2-2(12).</p> <p>“Pollutant,” is defined to mean “any dredged spoil, solid waste, incinerator residue, sewage, sewage sludge, garbage, trash, munitions, chemical waste, biological material, radioactive material, heat, wrecked or discarded equipment, rock, sand, cellar dirt or any industrial, municipal or agricultural waste discharged into waters of the state.” S.D. Codified Laws § 34A-2-2(5).</p>
Tennessee	<p>“It is unlawful for any person . . . to carry out any of the following activities, except in accordance with the conditions of a valid permit: [] The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state . . . [] The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters [or] . . . the underground placement of fluids and other substances that do or may affect the waters of the state.” Tenn. Code Ann. § 69-3-108(b).</p>	<p>The state’s Department of Environment and Conservation may enforce provisions of the statute through orders for corrective action, emergency orders (without prior notice), civil penalties up to \$10,000 per day for each day the violation continues, criminal penalties and prosecution. Tenn. Code Ann. §§ 69-3-109, 69-3-112, 69-3-113, 69-3-115, 69-3-116.</p>	<p>“Pollutant” means “sewage, industrial wastes, or other wastes.” Tenn. Code Ann. § 69-3-103(27).</p> <p>“Industrial wastes” are “any liquid, solid, or gaseous substance, or combination thereof, or form of energy including heat, resulting from any process of industry, manufacture, trade, or business . . .” Tenn. Code Ann. § 69-3-103 ((15))</p> <p>“Other wastes” is defined to mean “any and all other substances or forms of energy, with the exception of sewage and industrial wastes, including, but not limited to, decayed wood, sand, garbage, silt, municipal refuse, sawdust, shavings, bark, lime, ashes, offal, oil, hazardous materials, tar, sludge, or other petroleum byproduct . . .” Tenn. Code Ann. § 69-3-103 (23).</p> <p>“Sewage” means “water-carried waste or discharges from human beings or animals, from residences, public or private buildings, or industrial establishments . . .” Tenn. Code Ann. § 69-3-103(34).</p> <p>“Waters” is defined to mean “any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters.” Tenn. Code Ann. § 69-3-103(44).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Texas	<p>“[N]o person may: (1) discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state; (2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state . . .” Tex. Water Code Ann. § 26.121(a).</p>	<p>The Texas Natural Resource Conservation Commission or its executive director may enforce state water code provisions through the initiation of civil actions for injunctive relief, issuance of compliance orders, administrative and civil penalties (both) up to \$25,000 per day for each violation, attorney’s fees if the state prevails, criminal penalties for unauthorized, intentional, or knowing discharges, and/or confinement. Tex. Water Code Ann. §§ 7.001, 7.002, 7.032, 7.051, 7.052, 7.101, 7.102, 7.105, 7.108, 7.152, 7.187.</p>	<p>“Waste” is defined to mean “sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste, as defined in this section.” Tex. Water Code Ann. § 26.001(6)</p> <p>“Pollution” is defined to mean “the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.” Tex. Water Code Ann. § 26.001(14).</p> <p>“Water” or “water in the state” is defined to mean “groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.” Tex. Water Code Ann. § 26.001(5).</p>
Utah	<p>“[I]t is unlawful for any person to discharge a pollutant into waters of the state or to cause pollution which constitutes a menace to public health and welfare, or is harmful to wildlife, fish or aquatic life, or impairs domestic, agricultural, industrial, recreational, or other beneficial uses of water, or to place or cause to be placed any wastes in a location where there is probable cause to believe it will cause pollution.” Utah Code Ann. § 19-5-107(1)(a).</p> <p>“[A]ny violation of this subsection is a public nuisance.” Utah Code Ann. § 19-5-107(1)(b).</p>	<p>Available enforcement includes cease and desist orders, civil actions for injunctive relief, civil penalties up to \$10,000 per day of violation, and criminal prosecution and penalties. Utah Code Ann. §§ 19-5-111, 19-5-115.</p>	<p>“Pollution’ means any man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of any waters of the state . . .” Utah Code Ann. § 19-5-102(13).</p> <p>“Discharge’ means the addition of any pollutant to any waters of the state.” Utah Code Ann. § 19-5-102(7).</p> <p>“Waters of the state” is defined to mean “all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground . . . which are contained within, flow through, or border upon this state or any portion of the state . . .” Utah Code Ann. § 19-5-102(23).</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
Vermont	<p>“No person shall discharge any waste, substance, or material into waters of the State, nor shall any person discharge any waste, substance, or material into an injection well or discharge into a publicly owned treatment works any waste which interferes with, passes through without treatment, or is otherwise incompatible with those works or would have a substantial adverse effect on those works or on water quality, without first obtaining a permit for that discharge from the Secretary.” Vt. Stat. Ann. tit. 10, § 1259.</p>	<p>Enforcement of Vermont’s water pollution laws is permitted through administrative orders and penalties, civil actions for injunctive relief, civil penalties of not more than \$100,000 for each continuing violation, and criminal penalties or imprisonment. Vt. Stat. Ann. tit. 10, §§ 1274, 1275, 8001-8018.</p>	<p>“Discharge’ means the placing, depositing, or emission of any wastes, directly or indirectly, into an injection well or into the waters of the State.” Vt. Stat. Ann. tit. 10, § 1251(3).</p> <p>“Waters’ includes all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs, and all bodies of surface waters, artificial or natural, which are contained within, flow through, or border upon the State or any portion of it.” Vt. Stat. Ann. tit. 10, § 1251(13).</p> <p>“Waste” is defined to mean “effluent, sewage or any substance or material, liquid, gaseous, solid or radioactive, including heated liquids, whether or not harmful or deleterious to waters . . .” Vt. Stat. Ann. tit. 10, § 1251(12).</p>
Virginia	<p>Except in compliance with a certificate or permit . . . it shall be unlawful for any person to . . . [d]ischarge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances . . .” Va. Code Ann. § 62.1-44.5(A).</p> <p>“Except as otherwise permitted by law, it shall be unlawful for any person to dump, place or put, or cause to be dumped, placed or put into, upon the banks of or into the channels of any state waters any object or substance, noxious or otherwise, which may reasonably be expected to endanger, obstruct, impede, contaminate or substantially impair the lawful use or enjoyment of such waters and their environs by others.” Va. Code Ann. § 62.1-194.1.</p>	<p>Enforcement of these provisions is by special order, civil actions for injunctive relief, civil and criminal penalties, and criminal prosecution. Va. Code Ann. § 62.1-44.32, 62.1-44.15:1.1, 62.1-44.15.</p>	<p>“Other wastes’ means decayed wood, sawdust, shavings, bark, lime, garbage, refuse, ashes, offal, tar, oil, chemicals, and all other substances except industrial wastes and sewage which may cause pollution in any state waters.” Va. Code Ann. § 62.1-44.3.</p> <p>“Pollution” is defined to mean “such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life . . .” Va. Code Ann. § 62.1-44.3.</p> <p>“State waters’ means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.” Va. Code Ann. § 62.1-44.3.</p>
Washington	<p>“It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters . . .” Wash. Rev. Code 90.48.080.</p> <p>For the “disposal of solid or liquid waste material into the waters of the state,” the person “shall procure a permit from . . . the [Department of Ecology].” Wash. Rev. Code 90.48.160</p>	<p>The Department of Ecology is authorized “to bring any appropriate action at law or in equity, including action for injunctive relief” to enforce the Code, including “with the assistance of the attorney general.” Wash. Rev. Code 90.48.037.</p> <p>The Department of Ecology may also issue an order to abate “polluting content of waste discharged or to be discharged into any waters of the state.” Wash. Rev. Code 90.48.120.</p>	<p>“[W]aters of the state’ shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.” Wash. Rev. Code 90.48.020.</p>

State	Standard	Enforcement Authorities	Other Relevant State Authority
West Virginia	<p>“It is unlawful for any person, unless the person holds a permit therefor from the department, which is in full force and effect, to . . . [a]llow sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state,” “[m]ake, cause or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet, for the discharge of sewage, industrial wastes or other wastes, or the effluent therefrom, into the waters of this state,” [or] “[a]cquire, construct, install, modify or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated sewage, industrial wastes or other wastes, or the effluent therefrom, into the waters of this state . . .” W. Va. Code Ann. § 22-11-8.</p>	<p>The state water pollution control act may be enforced through administrative orders for compliance or abatement, injunctive relief, administrative penalties, civil penalties, and criminal fines. W. Va. Code Ann. § 22-11-12, 22-11-16, 22-11-15, 22-11-22, 22-11-24.</p>	<p>“Water resources”, “water” or “waters” are defined to mean “any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction, and includes, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds (except farm ponds, industrial settling basins and ponds and water treatment facilities), impounding reservoirs, springs, wells, watercourses and wetlands . . .” W. Va. Code Ann. § 22-11-3(23).</p>
Wisconsin	<p>Wisconsin’s Department of Natural Resources is authorized to “issue general orders, and adopt rules applicable throughout the state for the construction, installation, use and operation of practicable and available systems, methods and means for preventing and abating pollution of the waters of the state.” Wis. Stat. Ann. § 281.19 (1).</p> <p>The Department may also “[o]rder or cause the abatement of pollution which the department . . . has determined to be significant and caused by a nonpoint source . . .” Wis. Stat. Ann. § 281.20(1)(a).</p>	<p>Enforcement of the department’s orders are permitted through emergency orders, civil penalties, and civil action by the state attorney general. Wis. Stat. Ann. §§ 281.19, 281.20, 281.98.</p>	<p>“Pollution’ includes contaminating or rendering unclean or impure the waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.” Wis. Stat. Ann. § 281.01(10).</p> <p>“‘Waters of the state’ includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.” Wis. Stat. Ann. § 281.01(18).</p>
Wyoming	<p>“No person, except when authorized by a permit issued pursuant to the provisions of this act, shall . . . Cause, threaten or allow the discharge of any pollution or wastes into the waters of the state,” or “[a]lter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state . . .” Wyo. Stat. Ann. § 35-11-301.</p>	<p>Enforcement mechanisms include administrative cease and desist orders, civil penalties, criminal penalties or imprisonment, and injunctive relief. Wyo. Stat. Ann. §§ 35-11-701, 35-11-901, 35-11-903.</p> <p>Citizen suits are also permitted. Wyo. Stat. Ann. § 35-11-904.</p>	<p>“Pollution’ means contamination or other alteration of the physical, chemical or biological properties of any waters of the state . . .” Wyo. Stat. Ann. § 35-11-103(i).</p> <p>“Waters of the state” is defined to mean “all surface and groundwater, including waters associated with wetlands, within Wyoming.” Wyo. Stat. Ann. § 35-11-103(vi).</p>

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

April 18, 2018

Written Testimony of:

Amanda Waters
General Counsel
National Association of Clean Water Agencies

Before the:

U.S. Senate Committee on Environment and Public Works

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.

Testimony

on behalf of the

**National Cattlemen's Beef Association
&
Public Lands Council**

with regards to

“The Appropriate Role of the States and Federal Government in Regulating Groundwater”

submitted to the

United States Senate
Committee on Environment and Public Works
John Barrasso, Chairman

submitted by

Joe Guild
Treasurer
National Cattlemen's Beef Association
Member
Public Lands Council

April 18, 2018
Washington, D.C.



**National Cattlemen's
Beef Association**



Good morning, my name is Joe Guild. I am a rancher from Washoe County, Nevada, where I live with my wife, Catherine. I co-operate a cow-calf ranch for a family trust located on private and US Forest Service land in Douglas County, Nevada and Alpine County, California, in addition to running a small herd of my own cattle. Additionally, I'm a member of the management team for a large cattle, sheep, and dairy alfalfa ranch in Eastern Nevada that operates on private and public lands. I'm a past president of the Nevada Cattlemen's Association, member of the Public Lands Council, and current Treasurer of the National Cattlemen's Beef Association. Today, I represent nearly 25,000 of America's cattle producers who will be detrimentally impacted by federal regulation of groundwater under the Clean Water Act. Thank you, Chairman Barrasso and Ranking Member Carper, for allowing me to speak on this critical issue today.

One of the most complex environmental issues facing our country in recent history has been the Environmental Protection Agency's (EPA) attempted definition of Waters of the United States, known simply as WOTUS. NCBA has worked hard, and continues working to ensure that the definition of WOTUS is not expanded to include water that Congress never intended to regulate. However, if the EPA finds authority to regulate discharges to surface water via groundwater, any progress made on this front will be lost. The regulation of groundwater has the potential to impact even more cattle operations than the damaging 2015 WOTUS definition.

The Carson River runs through a portion of the range on the smaller ranch that I manage. The water is used to irrigate hay fields and mountain and valley pastures. A tributary runs through one of the valleys on the mountain range. To prevent degradation of the streambed, we move the cattle away from the stream as often as possible. I don't have an NPDES permit for this operation because, quite frankly, I don't need one. My cattle are not point sources, and thus do not meet the Clean Water Act's discharge standard. Through USDA-NRCS, I've implemented voluntary conservation practices on my operations, including the strategic placement of wells and underground pipelines to move water throughout the operation. Such voluntary practices increase efficiency and maintain natural resource quality, both on my operation and downstream. However, the expansion of the Clean Water Act to regulate discharges into groundwater would change all of this. Not only would such an expansion directly contradict the intent of the law, but take authority from those who can best manage groundwater quality.

Currently, a range of thought exists when it comes to the appropriate regulation of groundwater at the federal and state level. Among those who believe federal groundwater regulation to be necessary, two schools of thought exist. The conduit theory argues that groundwater is a point source, while the direct hydrologic connection theory claims that groundwater is a conveyance. Under the plain language of the Clean Water Act, groundwater is neither. Groundwater is sufficiently managed through state programs and the Safe Drinking Water Act. Regulation under the Clean Water Act would only lead to unnecessary, duplicative permitting and enforcement, usurping current state authority.

States are uniquely positioned to manage and prevent the discharge of pollutants into groundwater.

The Clean Water Act begins by stating that it is the “policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.” This important statement indicates the key role that states play in protecting the quality of our nation’s water. Unfortunately, the EPA’s direct hydrologic connection theory completely obliterates this federal-state partnership through a *de facto* declaration that all waters are federal.

When Congress enacted the Clean Water Act in 1972, then amended the Act in 1987, one theme remained constant; the Clean Water Act is intended to regulate discharges to jurisdictional surface waters from point sources. The Act specifically defines a point source as a discernable, confined, and discrete conveyance that discharges pollutants to a jurisdictional surface water. By limiting Clean Water Act jurisdiction to point sources, Congress ensured that responsibility would remain with the states to regulate groundwater quality. This wasn’t an accident – Congress understood that groundwater regulation could not be a one-size-fits all approach.

Only states have the flexibility to regulate groundwater discharges in a way that is most beneficial to the environment. The state of Nevada has a robust environmental regulatory regime, much of which is dedicated to maintaining groundwater quality. In western states like Nevada, water quality is directly tied into a question of water quantity. Questions of water quantity are

often tied directly to questions of water quality, and states cannot effectively manage water rights if they have no control over the regulation of groundwater quality.

In Nevada, we have a number of different subsurface water systems that are unique to our region. Certainly, underground flow of glacial water, which is a unique piece in Nevada's water quality regulatory framework, should not be regulated in Mississippi, New Jersey, or Florida. One of the things I love most about our country is its geographic and topographic variety – every state provides a new adventure. But those new adventures present new challenges to overcome, and states are the only parties that can address soil and water quality in a holistic manner to ensure that our agricultural operations stay in business for many generations to come.

Groundwater is not a point source, and regulating it as such blurs the line between point and non-point source standards that are key to the integrity of the Clean Water Act.

The theory that groundwater may be regulated as a point source defeats the Act's bifurcated approach by blurring the line between sources and non-point sources. Bringing non-point sources into the realm of Clean Water Act regulation will exponentially expand EPA's permitting and enforcement authority, while providing little environmental benefit.

To determine if federally regulating groundwater as a point source under the Clean Water Act really provides a significant benefit, Congress and the EPA must consider what environmental benefit will be gained, and if that benefit outweighs a significant increase in operation costs. In the cattle industry, Concentrated Animal Feeding Operations (CAFOs) are defined as point sources under the Clean Water Act, and are therefore required to have an NPDES permit if there is a discharge from their operation into a jurisdictional surface water. Under the NPDES permit, CAFOs are required to implement manure management practices that prevent their operation from discharging. A CAFO does not receive an NPDES permit until it meets set requirements for nutrient management.

So who will this additional permitting requirement effect in the cattle industry? Me, the pasture-based cow-calf rancher, and the other ranchers like me across the country. We work hard to maintain the soil and water quality on our operations through the implementation of voluntary USDA-NRCS programs. Due to the unpredictable, diffuse flow of groundwater that varies depending on the hydrological and geological features in each region, it is difficult to calculate

what amount of nutrients could be coming from my ranching operation and flowing through groundwater to distant or adjacent surface water. That all said, it would be devastating to the farming community for the government to require farmers and ranchers to get NPDES permits for groundwater flow.

To put it in perspective, the number of cattle that graze today on pasture in the United States is less than the number of buffalo that grazed America's prairies prior to westward expansion. Waste from non-point, pasture-based agriculture is simply not a regulatable source of surface water pollutant. By regulating groundwater, the EPA accomplishes nothing other than a significant expansion of Clean Water Act authority to manage operations that, frankly, do not need to be federally managed. Presently, discharges to groundwater are managed at the state level, and should remain so.

Groundwater is not a conveyance as defined by the Clean Water Act.

While it is clear that groundwater should not be regulated as a point source, additional confusion remains as to whether groundwater can be classified as a "conveyance" under the Clean Water Act. While the Act provides no definition for conveyance, the general definitions section of the Act clarifies that conveyances must be "discernable, confined, and discrete." All prior case law in this area finds that a point source may be separated from a jurisdictional surface water, and that point source can still be subject to permitting and enforcement if a conveyance exists which connects it to the surface water. However, in all cases, the conveyances considered met the qualifications provided by the Clean Water Act. In fact, these conveyances were specifically engineered to convey pollutants from one point to another. Naturally flowing and diffuse groundwater is nothing like conveyances that were designed, built, and maintained with the sole purpose of moving effluent from one point to another.

Interpretation of the Clean Water Act to regulate groundwater as a conveyance presents a significant risk to any diversified producer. Earlier, I mentioned that I assist in managing a large operation to produce alfalfa for beef cattle, dairy cattle, and sheep. On this operation, we fertilize crops and consult with experts to ensure that nutrients are not over applied. But scientific data tells us that, even with the best precision application practices – even when we do everything possible to ensure that the application of nutrients to a crop is exact, there will always be some amount of nutrient that pass the root zone. If we do our job right, that amount will be filtered out

by soil in the groundwater system, and has little to no environmental or public health impact. However, under the direct hydrologic connection, because a risk exists of discharging to surface water, even though that risk is minimal, operations will be required to get an NPDES permit.

If Congress allows the expanded interpretation of “conveyance” to include groundwater, all sectors of the cattle industry will face additional federal regulation and scrutiny, with little to no environmental benefit. Without an incentive, farmers and ranchers will stop working voluntarily with state and federal conservation programs to protect water quality. As producers sell off their cattle out of frustration with further regulation, the industry will face further consolidation because smaller producers are unable to comply with overly burdensome permitting requirements.

Thank you for taking the time to hear my concerns, and for listening to livestock producers around the country. The key to environmental sustainability is working together with states and stakeholders, not fighting us. Thank you for your time, and I look forward to answering your questions.