



May 21, 2018

Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Sir or Madam:

The National Association of Clean Water Agencies (NACWA), the WaterReuse Association, the National League of Cities (NLC), National Association of Counties (NACo), the California Association of Sanitation Agencies (CASA), and the Central Valley Clean Water Association (CVCWA) appreciate the opportunity to file comments on the U.S Environmental Protection Agency’s (EPA or Agency) consideration of its previous statements regarding whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a Direct Hydrologic Connection (DHC) to jurisdictional surface waters may be subject to regulation under the Clean Water Act (CWA) (hereinafter referred to as the DHC theory). EPA published its notice requesting comments in the Federal Register on February 20, 2018: “Clean Water Act Coverage of ‘Discharges of Pollutants’ via a DHC to Surface Water.” 83 Fed. Reg. 7126 (Feb. 20, 2018). We submit these comments in response to EPA’s request.

As detailed in our comments below, our respective members have serious concerns with this DHC theory. We have a vested interest in this issue, as reflected in the ongoing CWA citizen suit litigation against our members based on this DHC theory and the potential for related future liability and permitting obligations. Critically, this DHC theory is contrary to the text, structure and legislative history of the CWA. EPA should take immediate action to provide certainty to our members and then conduct rulemaking to provide an opportunity for the public to weigh-in and to establish long-term clarity and certainty.

It is important to make clear that from our perspective the issue is not *whether* releases of pollutants into groundwater with a connection to surface waters should be addressed, the issue is *how* they should be addressed. Put another way, it is not our position that releases of pollutants into groundwater should be allowed to contaminate natural resources. Our organizations and members are committed to protection of public health and the environment regardless of specific statutory language. Even so, this does not mean the CWA and a National Pollutant Discharge Elimination System (NPDES) permit is the appropriate solution.

The federal NPDES permitting program is not the appropriate tool. In addition to the lack of any legal basis in the CWA to impose the NPDES program in such circumstances, this DHC theory adds

a duplicative and conflicting overlay of regulations on top of other federal and state programs that are more appropriately designed to address these circumstances. If the EPA and state regulators administer and enforce these other laws and regulations appropriately, there will not be a “loophole” in the protection of public health, the environment, and water quality. The DHC theory will also create disincentives for important public infrastructure projects that are environmentally beneficial and protective of public health.

Our members are focused on providing services and maintaining public infrastructure that is essential to protecting public health, the environment, and water quality. However, our members need regulatory certainty to allow for the effective and sustainable planning and investment of finite public resources. It is critical that EPA act to reject the DHC theory as outside the scope of the CWA and to provide certainty moving forward.

Our Respective Members Have an Interest in the Correct Interpretation of the CWA

The undersigned entities have a direct interest in the rejection of this DHC theory and associated EPA statements. Our members have been targets of CWA citizen suits based on this DHC theory. *See, e.g., Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018); *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 WL 2960506 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017). The undersigned entities all participated as *amici* in *26 Crown*; several participated as *amici* in *Cnty. of Maui* and in other litigation where the DHC theory is at issue. *E.g., Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). Each undersigned entity is described below in more detail.

- 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 CWA.
- The WaterReuse Association is a not-for-profit trade association representing over 500 municipal water utilities, businesses, and institutions that undertake or support water reuse.
- NLC is the country's largest and oldest organization serving municipal governments and represents more than 19,000 U.S. cities and towns, representing over 80 million Americans. Many of NLC's members provide water, stormwater, wastewater and other public services.
- NACo is the only national association that represents county governments in the United States. NACo serves as an advocate for county government and works to ensure that counties have the resources, skills and support needed to successfully lead their communities. NACo's members provide water, wastewater and flood control services to residents of the nation's 3,069 counties.

- CASA is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of more than 110 local public agencies throughout California, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy, and biosolids management services to millions of California residents, businesses, industries, and institutions.
- CVCWA is a non-profit association of public agencies located within the Central Valley region of California that provide wastewater collection, treatment, and water recycling services to millions of Central Valley residents and businesses. CVCWA is currently comprised of over 50 public wastewater collection and treatment member agencies, representing over 7 million people in California's Central Valley. CVCWA's members are public and private organizations charged with the responsibility for collecting, treating, recycling, and disposing of wastewater in a safe, responsible, and economical manner.

1. The DHC Theory is Contrary to the Text, Structure, and Legislative History of the CWA

This DHC theory is contrary to the text, structure, and legislative history of the CWA. The way EPA has framed the issue in the February 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. This reading of the CWA is contrary to the text, structure, and history of the statute.

Contrary to the DHC theory, the CWA forecloses mandating NPDES permits for the release of pollutants into groundwater that subsequently migrates through the subsurface, eventually entering surface waters. The CWA prohibits "the discharge of any pollutant" unless authorized by an NPDES permit, 33 U.S.C. §1311(a). The term "discharge of pollutants" is defined and limited to the addition of pollutants to navigable waters from a point source, 33 U.S.C. §1362(12); a "point source" is further defined as "any discernible, confined and discrete conveyance." 33 U.S.C. §1362(14). The Supreme Court has recognized the importance of the requirement for a discernible, confined, discrete conveyance. In *S. Florida Miccosukee Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Supreme Court emphasized the word "conveyance" in explaining that the statute "makes plain" that a point source "need[s] [to] convey the pollutant to 'navigable waters.'"

Thus, consistent with the language and intent of the CWA, when our members add pollutants into surface waters from point sources, including infrastructure that conveys and treats wastewater and stormwater, providing vital protection to public health and the environment, they operate pursuant to the CWA's NPDES permitting program. The NPDES program is designed to be an "end-of-pipe" program under which pollutants can be effectively controlled, monitored, and reported to permitting authorities.

The legislative history supports this interpretation of the CWA. *See* Senate Consideration of the Report of the Conference Committee, Oct. 4, 1972, Vol. 1, p. 178 (“The term ‘discharge’ is a word of art in the legislation. It refers to the actual discharge from a point source into the navigable waters....”). Notably, 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. *See 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.”)

A more complete discussion of the reasons why this DHC theory is inconsistent with the text, structure, and legislative history of the CWA is included in the briefs we filed as *amici* in *26 Crown, Cnty. of Maui*, and *Kinder Morgan*, which are attached as appendices A, B, and C, respectively, and we incorporate the points made in our briefs in these comments.

2. Essential Water Infrastructure Systems and Projects Could be Unintentionally Impacted

Application of the DHC theory will lead to a substantial expansion of the number and types of sources that are independently treated as “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 and 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 (or even individual leaks in such 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.

Regulatory agencies might provide assurances that they will not view this type of infrastructure as a target for permitting or enforcement, but this does not provide sufficient certainty that our members will not be targeted. Even if that assurance was ironclad, any releases into groundwater would be subject to citizen suit enforcement, including civil penalties, injunctive relief, and attorneys’ fees awards, potentially diverting limited public resources from projects and programs that do far more to improve water quality and protect human health. The reality is that a strict application of this DHC theory will expose—and is in fact already exposing—local governments and public water utilities throughout the country to unnecessary liability for facilities and infrastructure that EPA and state regulators had never previously considered subject to the NPDES program.

As noted above, our members have been targets of CWA citizen suits based on this DHC theory. For example, *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018), involved an

underground injection well permitted under the Safe Drinking Water Act (SDWA), which both the state and EPA had found did not require an NPDES permit. In spite of the existing regulation under the SDWA, historical regulatory position, and impracticality of imposing NPDES permit requirements on diffuse, subsurface sources, both the district court and the U.S. Court of Appeals for the Ninth Circuit found that the wells are subject to NPDES permitting requirements. In *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 WL 2960506 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017), the plaintiffs allege that an NPDES permit is required for all basement backups from which pollutants seep into groundwater and enter navigable waters. If the *26 Crown* plaintiffs succeed, the potential implications are extreme—taken to its logical conclusion, such an application of the DHC theory would require an NPDES permit for millions of basements across the country.

As outlined more fully below, the DHC theory also threatens to impact various types of environmentally beneficial infrastructure, much of which is specifically designed or intended to address other regulatory obligations. For example, green infrastructure may be used to help address urban runoff as part of a municipal separate storm sewer (MS4) NPDES permit compliance. Under the DHC theory, this green infrastructure designed as part of a permit compliance program, would potentially be subject to a separate NPDES permit. EPA must act to avoid this illogical and unworkable application of the NPDES permit program, and to ensure that local governments and public water utilities are not subjected to citizen suits for a myriad of infrastructure that was never intended to be subject to the NPDES permit program in this way.

Wastewater and Stormwater Conveyance Systems

Public clean water utilities provide services that are essential to protecting public health and the environment. Working closely with state and federal regulators, public utilities have collectively achieved an astonishing level of pollution reduction under the CWA, both at their own facilities and at thousands of industrial facilities regulated by utilities under the federal pretreatment program.

These public utilities own, operate, and manage the nation's most critical infrastructure systems for protecting public health and the environment, including publicly owned sewage treatment works (POTWs) that are subject to stringent NPDES permit requirements for discharges to surface waters. These permits include limits on the pollutants in those discharges to meet water quality standards in the receiving waters.

Clean water utilities also operate collection systems that convey wastewater to the POTWs, ranging in size from a few hundred miles to several thousands of miles of buried pipe throughout their communities. NPDES permits generally require utilities to properly operate and maintain these collection systems, and utilities implement a number of methods to locate and address issues, including collection system inspection using CCTV on a regular schedule and rehabilitation and repair of any leaks. Some states, such as California, also have separate requirements for collection systems that are specifically designed to ensure proper system maintenance and repair, but that are not part of the NPDES permit program.

Regardless of diligent and rigorous maintenance and repair, these facilities and systems—many of which may be more than 100 years old—can leak. Such leaks could fall within the scope of this DHC theory. While clean water utilities work to prevent any leak into the environment, leaks can and do happen because they are difficult to predict and locate, and impossible to eliminate altogether. Under the DHC theory, each leak would potentially be regulated as a distinct discharge under the CWA, which would be logistically challenging and create unnecessary duplication with existing rules and requirements. And—particularly in light of the potential for citizen suits—this could undermine the ability of utilities to plan and prioritize investments to maximize overall benefits to the environment.

Green Infrastructure

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.*”) (emphasis added).

Clean water utilities are increasingly relying on green infrastructure to retain, percolate and infiltrate stormwater into the ground to reduce discharges of municipal stormwater and combined sewer overflows to surface water, as well as to recharge depleted drinking water aquifers.

Use of green infrastructure can be better for water quality than traditional approaches to managing these sources of pollutants. Green infrastructure is recognized as one of the most effective solutions to the water quantity and quality problems associated with polluted stormwater runoff. EPA has determined that green infrastructure provides a “cost-effective, resilient approach to managing wet weather impacts that provides many community benefits.”¹

This DHC theory could subject these green infrastructure installations to CWA regulation, including a requirement to obtain NPDES permit authorization, serving as a strong disincentive to greater adoption.

Water Reuse Projects

The DHC theory could also affect beneficial water reuse projects. Water reuse is the process of treating wastewater to meet water quality standards for designated beneficial purposes such as

¹ U.S. Environmental Protection Agency, What Is Green Infrastructure?, <https://www.epa.gov/green-infrastructure/what-green-infrastructure> (last visited May 17, 2018).

industrial processes, irrigation, surface or ground water replenishment, watershed restoration, and agricultural or irrigation use.

Communities across the country are incorporating water reuse into their water management strategies as a proven method for ensuring a safe, reliable, locally controlled water supply—essential for livable communities with healthy environments, robust economies and a high quality of life. By 2027, the volume of recycled water produced in the United States is projected to increase 37% from 4.8 billion gallons per day to 6.6 billion gallons per day.²

If water reuse projects or recycled water uses are subject to CWA regulation, municipalities will face additional hurdles that may inhibit the implementation of water reuse projects.

The DHC theory could impede the implementation of these beneficial reuse projects by requiring NPDES permits in cases where the recycled water may be connected to jurisdictional surface waters via groundwater. Transport of recycled water to groundwater with a DHC to surface waters could occur in groundwater recharge or injection, seepage from recycled water storage ponds and recharge ponds, use of recycled water for irrigation, and more.

Even though water reuse projects are permitted according to state reuse regulations that account for environmental impacts, projects could face additional regulatory requirements under this federal theory of liability that would result in additional time and resource intensive burdens. Furthermore, the demand for recycled water by end users may also decrease as customers have expressed concern regarding the potential regulatory costs and legal exposure they may face if using or impounding recycled water. This DHC interpretation could cause a significant setback to water reuse policies and public support, which have gained important momentum in recent years.

EPA has never required NPDES permits for these types of activities; the Agency recognizes water reuse as “play[ing] a critical role in helping states, tribes, and communities meet their future drinking water needs.”³ Even if federal agencies do not target reuse projects, the uncertainty surrounding whether an NPDES permit may be needed and the potential for citizen suits could be a barrier to further implementation of reuse projects.

3. Practical Challenges and Policy Concerns with the DHC Theory

There are considerable practical and policy reasons to avoid extending the CWA prohibition to pollutants entering groundwater.

² Bluefield Research, U.S. Municipal Water Reuse: Opportunities, Outlook, & Competitive Landscape 2017–2027 (2017).

³ U.S. Environmental Protection Agencies, 2017 Potable Reuse Compendium (2017).

Technical Challenges to Implementation

By EPA's own admission, this theory would require a fact-specific determination for any potential source of pollutants to know whether there is a DHC and therefore the potential for the need to seek to obtain NPDES permit authorization. Indeed, this very reason is why current regulation of discharges to groundwater under other federal and state environmental statutes regulates the discharges to groundwater themselves, rather than some possibly connected surface water.

The DHC determination would depend on topography, hydrology, and geology as well as climate, distance to a surface water, and travel time, among other factors that EPA has never identified through rulemaking. EPA has provided no clarity on how long and how far pollutants can travel for a connection to be considered "direct."

Complicating things further is the fact some courts have created their own standard, different from this DHC theory. See, e.g., *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) ("[G]roundwater is subject to the CWA provided an *impact* on federal waters.") (emphasis added); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-1133, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015) (explaining that a "[d]efendant may be required to seek an NPDES permit even if groundwater is *somehow* hydrologically connected ... to surface waters") (emphasis added); *Tenn. Clean Water Network v. TVA*, No. 3:15-cv-424, 2017 WL 3476069, at *44 (M.D. Tenn. Aug. 4, 2017) (holding that discharges to groundwater subject to CWA regulation "if the hydrologic connection between the source of the pollutants and navigable waters is *direct, immediate, and can generally be traced*") (emphasis added). The Ninth Circuit's *Cnty. of Maui* decision rejected the DHC theory, finding it inconsistent with the text of the CWA, but then suggested another new test, asserting the CWA applies 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*." *Cnty. of Maui*, 881 F. 3d at 765.

The practical challenges of applying the CWA to this general fact pattern is further illustrated by the Ninth Circuit's inability to provide any guidance. As the court stated: "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." 881 F. 3d at 765. The CWA is a strict liability statute. Our members cannot wait "for another day" to know whether millions of dollars of investment should be made, and whether complicated and resource intensive regulatory compliance-related actions must be taken based on the DHC theory or some other test created by the courts. EPA, as the implementing Agency of the CWA, must step up and clearly articulate the meaning of the CWA.

Practically, the costs to determine whether groundwater beneath a source has a DHC to a 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, the thousands of miles of sewer collection system owned and operated by even a single clean water utility, as

well as virtually every city and county in the country. EPA has never considered these costs or their impact on the public.

Regulatory Challenges to Implementation

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 have been crafted to address the “end-of-pipe” discharges. To permit diffuse discharges of pollutants from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow, EPA would need to develop (and delegated states would have to implement) an entirely new regulatory program that attempts to regulate indistinct, not “end of pipe” sources, through a point source permitting system. EPA would need to establish a regulatory scheme for determining how and where to monitor the “discharges” to groundwater, how to determine compliance with effluent limits, how to apply a mixing zone, and how to consider dilution and attenuation within the soil and groundwater in determining the appropriate discharge limits. This scenario is the very definition of a “round peg in a square hole;” a traditional point source permitting scheme simply does not make sense.

Determinations necessary to issue a permit—such as whether “reasonable potential” exists—would often be impossible in the context of groundwater. Yet, if a permit cannot be obtained, the addition of pollutants may not occur (or must cease, in the case of an existing discharge), or a discharger would be subject to federal enforcement and citizen suit challenges. As noted above, 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.

The DHC Theory is Duplicative and Unnecessary

Contrary to assertions that have been made by third parties, there will not be a “loophole” in the protection of public health, the environment, and water quality if the EPA and state regulators administer and enforce the CWA and other laws appropriately. There are other authorities—including provisions of the CWA other than the NPDES program, as well as other federal and state laws—that are better designed to address pollution resulting from discharges to groundwater.

In addition to the NPDES program, which, as demonstrated above, is not applicable or suited to discharges to groundwater, the CWA provides for total maximum daily loads (TMDLs), grants, planning, and nonpoint source management programs under CWA Section 319. All of these programs can be effectively used to address nonpoint source pollution.

Other federal environmental laws address, either directly or indirectly, the potential for contamination that has been asserted as a policy rationale for the DHC theory. For instance, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, regulates disposal of solid waste and is the appropriate federal framework for addressing many of the sources of contamination that have been challenged using the DHC theory. *See, e.g., Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753 (E.D. Va. 2017); *Tennessee Clean Water Network v. Tennessee Valley Authority*, appeal pending, No. 17-6155 (6th Cir.). The SDWA, 42 U.S.C. § 300 *et seq.*, establishes a program for regulating underground injection wells, for the precise

purpose of protecting groundwater resources from contamination. Finally, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, addresses hazardous wastes.

Most importantly, the CWA, a cooperative federalism statute, supports States' decisions to adopt more stringent requirements to protect their own water resources, *see* 33 U.S.C. §1370 (preserves states' ability to adopt any requirement to control pollution). All 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater (see Attachment A). Since the release of pollutants into groundwater is already prohibited and/or regulated in *every state*, there is no practical reason for this DHC theory—it is not necessary to stretch the CWA beyond what Congress intended.

4. EPA Should Immediately Reject the DHC Theory and Conduct Rulemaking to Make its Position Clear

Our members are currently being harmed by the application of the DHC theory. The DHC theory and the associated EPA statements are being used by third parties in CWA citizen suits against our members. As discussed above, the DHC theory has no basis in the statute, it is duplicative and potentially conflicts with other federal and state authority, and it will have practical and significant consequences. Given these serious implications and the ongoing uncertainty, EPA should take the following actions:

- Immediately issue guidance (in some form) to the public that makes it clear that the DHC theory is no longer EPA's position. The guidance should make it clear that the DHC theory was based on an incomplete analysis of the relevant statutory text, structure and legislative history and, in fact, the text, structure, policies, and legislative history, all provide clear evidence to the contrary. *See, e.g., Ky. Waterways Alliance v. Ky. Utils. Co.*, 2017 WL 6628917 (E.D. Ky. Dec. 28, 2017), appeal docketed (6th Cir. Feb. 1, 2018). The short-term guidance should also make clear that the *amicus* brief filed by the United States in *Cnty. of Maui* no longer reflects the EPA's position.
- The short-term guidance should make it clear how the EPA will implement and enforce the CWA until it completes notice and comment rulemaking. The short-term guidance should make it clear that the addition of pollutants into navigable waters via groundwater is nonpoint source pollution and not a prohibited "discharge of a pollutant" under CWA section 301(a).
- Notwithstanding that the CWA is unambiguous on this issue, following the release of short-term guidance, EPA should conduct an expedited notice and comment rulemaking so that 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 factual circumstances.

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. The undersigned organizations have a vested interest in protecting the Nation's water quality. It is a part of our core mission and we are dedicated to ensuring our activities are protective of human health and the environment.

We fully support a strong regulatory framework to protect water resources. But such regulations must be grounded in statute and consistent with congressional intent under the CWA. The DHC interpretation fails to meet this standard and threatens to hamper public clean water agencies in carrying out their critical public missions. Regulatory certainty is necessary to allow utilities to plan prudently for the expenditure and investment of public funds to protect public health and the environment, while operating responsibly under the law.

While the factual circumstances in certain cases may suggest a need to strengthen the regulation of discharges to groundwater, the CWA NPDES permitting program does not contemplate, and cannot logically accommodate, the regulation of sources through a DHC theory. Moreover, using the ill-suited NPDES permitting program to regulate discharges that are better addressed by other federal regulatory programs or state law will impede our and EPA's shared water quality goals. The DHC theory is duplicative, unnecessary, may cause more harm than good, and could have a ripple effect of hindering programs, projects, and investments that may have greater environmental benefits.

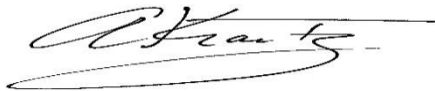
We appreciate the opportunity to submit these comments. Please feel free to call (202-530-2758) or e-mail [Amanda Waters](mailto:awaters@nacwa.org) (awaters@nacwa.org), General Counsel, NACWA, if have any questions, or if you would like additional information concerning the issues raised in these comments.



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