ASSOCIATION OF CLEAN WATER ADMINISTRATORS

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April 18, 2018

Testimony of

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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.