TESTIMONY OF

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ON BEHALF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES (NACWA)

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The Next Fifty Years of the Clean Water Act: Examining the Law and Infrastructure Project Completion

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Good morning and thank you Chairmen Graves and Rouzer, Ranking Members Larsen and Napolitano, and all members of the Subcommittee for the invitation to testify before you today on behalf of the National Association of Clean Water Agencies, or NACWA, on the need for critical reforms as we look to the next fifty years of the Clean Water Act.

My name is Mickey Conway, and I am the Chief Executive Officer of Metro Water Recovery. Metro is the largest resource recovery and clean water provider in the Rocky Mountain West, serving more than 2.2 million people throughout the Denver-Metro region. We work with 61 local governments, including cities, counties, and water and sanitation districts across our 805-square mile service area to provide clean water services, generate renewable energy, and promote sustainable agriculture.

I also serve on NACWA's Board of Directors and NACWA's Executive Committee, and I am honored to be here today to represent NACWA and its over 350 public clean water utility

members that, like Metro, are anchor institutions protecting public health and the environment in the communities they serve nationwide.

Clean water utilities today face an unprecedented number of challenges. Replacing aging infrastructure, increasing system resiliency in the face of climate change, addressing emerging contaminants including per- and polyfluoroalkyl substances, or PFAS, developing and maintaining a strong workforce, and protecting against increasing threats to cyber-security are just a few of the critical issues utilities must manage every day.

And while tackling these challenges is of vital importance to the long-term health and vitality of the communities we serve, it is every bit as pressing that we do so in a way that keeps rates affordable for everyone. NACWA members are stewards not only of the environment, but also of public funds; we must plan for the future while not overburdening our ratepayers today, particularly those in small, rural, and disadvantaged communities.

It is for these reasons that I am testifying before the Committee this morning. There are three key Clean Water Act reforms in particular I will discuss that could help alleviate some of the burdens utilities face by providing the regulatory certainty necessary for long-term strategic planning while also stemming the unnecessary flow of increasingly scarce public dollars to costly and unwarranted litigation.

Public clean water agencies are proud of the water quality advancements they have made in the first 50 years of the Clean Water Act's implementation. If adopted, these reforms would give utilities the ability to do even more by helping to ensure that, over the next 50

years, the Clean Water Act continues to protect those we are tasked to protect – our local community residents.

Metro – like all NACWA members – operates pursuant to Clean Water Act National Pollutant Discharge Elimination System, or NPDES, permits. These permits outline the requirements the discharges from our facilities must meet to ensure the protection of water quality. They are not only a critical tool in protecting the environment, but they allow utilities to plan and make the infrastructure investments necessary to meet the permit terms and, thereby, provide the greatest benefit to local communities.

Due to the volume of wastewater and stormwater public clean water agencies manage and treat, infrastructure improvements needed to meet increasingly stringent Clean Water Act requirements often entail long-term financial and technical planning, as well as large-scale – and frequently disruptive – construction projects. It is therefore critical that requirements in utility NPDES permits be developed transparently, that a utility's Clean Water Act obligations be clearly outlined in those permits, and that a utility be able to rely on those permits for the entire length of their term. I guarantee you that any public servant in front of the Committee would say the same thing – you better have a solid plan in place <u>before</u> you start digging up city streets.

Clean Water Act Section 402(k) – the NPDES "permit shield" provision – provides key protections to clean water utilities in this regard. Under that provision, Congress deemed compliance with an NPDES permit to be compliance with the Clean Water Act itself.

Pursuant to EPA's longstanding "permit shield" policy interpreting Section 402(k), if a permittee provides all the information it is supposed to during the permit application process, it is the NPDES permit writer's job to include all the limits necessary to meet the requirements of the Clean Water Act in the permit. If a permit holder complies with those limits, all of the pollutants discharged from the facility that were within the reasonable contemplation of the permit writer – regardless of whether or not they are expressly identified or limited in the permit – are considered lawfully permitted discharges for purposes of Clean Water Act compliance.

Importantly, before an NPDES permit is finalized, EPA can object to it if it does not include any necessary limits. Likewise, environmental organizations and citizens can bring lawsuits against permits they do not think are stringent enough within a specified statutory timeframe. But once a permit is "final," under the Section 402(k) "permit shield," a permit holder can rely on it as the touchstone for Clean Water Act compliance during its term.

The U.S. Supreme Court has held that the purpose of the "permit shield" is to "insulate permit holders from changes in various regulations during the period of a permit and to relieve permit holders of having to litigate the question of whether their permits are sufficiently strict. In short, Section 402(k) serves the purpose of giving permits finality."

But this finality, which is especially important in the context of restoring and maintaining the nation's critical wastewater and stormwater infrastructure, is being threatened in two fundamental ways.

Firstly, outside parties are increasingly challenging the scope of the "permit shield" as applied to pollutants not expressly listed in an NPDES permit. This is particularly problematic in the context of emerging contaminants that EPA has not yet developed permitting requirements for, such as PFAS. Codification of EPA's "permit shield" policy would help protect communities across the country from being forced to spend precious public dollars defending against such lawsuits, distracting the utility from meeting the requirements already contained in the permit as well as from finding solutions to actually begin the process to address, in this example, PFAS contamination. It is important to underscore that utility leaders and workers are public servants and dedicated environmental stewards, and they need certainty to ensure these goals can be met.

By way of example, one public utility in Georgia is being sued for allegedly "unlawfully discharging" PFAS it passively receives from upstream carpet manufacturing processes because its NPDES permit does not include PFAS limits and its treatment facility was (unsurprisingly) not designed to remove these indestructible manmade chemicals.

Clean water utilities have already begun to work with EPA and state partners to develop the requirements and treatment processes necessary to protect our nation's waterbodies from PFAS pollution. The notion that, in the meantime, thousands of utilities all over the country could be held to be categorically out of compliance with the Clean Water Act because such requirements and treatment processes do not yet exist and have therefore not been written into NPDES permits is unacceptable.

EPA and state regulators must be permitted to address PFAS through the Clean Water Act's well-established, science-based effluent limitations development processes. And utilities, in turn, must not be faced with the imposition of ad hoc, activist-driven permitting requirements through litigation.

The second threat to the scope of Section 402(k) is related to the first. A growing number of suits are being brought over the boilerplate language often included in NPDES permits stating that discharges shall not "cause or contribute to the violation of water quality standards." A statutory requirement that permit writers use only clear permitting terms, not vague and unclear boilerplate language that invites uncertainty and litigation, could save communities across the country from being placed in untenable positions.

As I mentioned earlier, under EPA's own regulations and guidance, it is a permit writer's job to include all necessary limits in a permit to ensure that authorized discharges are protective of water quality standards. But both outside parties and EPA itself are increasingly trying to enforce this boilerplate language well into a permit's term as if it were a separate, all-encompassing "effluent limitation."

This position eviscerates the "permit finality" the Supreme Court has held an NPDES permit is supposed to provide, as it effectively allows permit writers to establish post-hoc requirements they failed to include when they issued the permit at any time under the guise of "enforcing" this generic fiat. It likewise provides outside parties with an avenue to second-guess permitting decisions and read new limits into a permit well after the statutory timeframe provided for permit objections.

The U.S. Supreme Court has stated that due process demands that "regulated parties should know what is required of them." Public clean water agencies are regulated parties that have and continue to spend billions of dollars to maintain and upgrade our nation's critical wastewater and stormwater infrastructure. It is especially important for these utilities to have clear Clean Water Act requirements that they can strategically plan to meet in the manner that best protects the health and environment of the communities they operate in. The City of San Francisco – a NACWA member – is in fact currently engaged in litigation aimed at forcing EPA to remove this boilerplate language from one of its NPDES permits considering the unacceptable amounts of risk and uncertainty it poses. Congress can provide such relief to utilities nationwide through these reforms, and I strongly encourage it to do so.

And finally, even if NPDES permits clearly identify a permittee's obligations and provide permit holders with sufficient regulatory certainty, the objectives of the Clean Water Act will not be met if the water quality standards upon which the limits in those permits are based were not developed in a transparent, science-based process.

Requiring EPA to undergo notice and comment rulemaking when developing recommended water quality criteria and subjecting the final criteria to a limited judicial review process under Clean Water Act Section 509(b) would help ensure that the onus placed on public agencies are necessary and do not unduly burden communities while providing little corresponding environmental benefit.

EPA develops recommended water quality criteria which states must consider adopting under Clean Water Act Section 304(a). While states can adopt different criteria if approved by

EPA most states simply do not have the resources to do so. The criteria developed by EPA under Section 304(a) are therefore typically adopted into state water quality standards and translated into all NPDES permits through enforceable permit limits.

While it is true that EPA typically takes comment on its proposed criteria and subjects them to limited review from its Science Advisory Board, because the Agency takes the position that the criteria are just "guidance," it does not fully follow the regulatory requirements of the Administrative Procedure Act or the Office of Management and Budget, including those related to fully considering and responding to public comments. Nor can impacted parties legally challenge any final criteria, as EPA does not treat the criteria as "final agency action," even though, for the majority of NPDES permit holders nationwide, they will ultimately dictate permitting obligations.

As utilities face complex and costly infrastructure challenges over the next 50 years, it is critical that the limits imposed in NPDES permits be based on the best available science and a complete record, not political whim or expedience. The reforms under consideration could help ensure this happens.

This concludes my testimony. Thank you for giving me the opportunity to speak here today. NACWA appreciates the ongoing engagement by the Committee with the public clean water sector on these critical issues, and I would be happy to answer any questions the Committee may have.