Daniel F. Mulvihill
MARTEN LAW LLP
45 Rockefeller Plaza, Suite 2000
New York, NY 10111
Tel.: (347) 218-8148
dmulvihill@martenlaw.com

Jeffrey B. Kray*
MARTEN LAW LLP
920 Fifth Ave, Suite 2700
Seattle, WA 98104
Tel.: (206) 292-2608
jkray@martenlaw.com

Victor Xu*
MARTEN LAW LLP
1050 SW Sixth Ave, Suite 2150
Portland, OR 97204
Tel.: (503) 241-2641
vxu@martenlaw.com

* *Admitted Pro Hac Vice*

Attorneys for Amicus Curiae the National Association of Clean Water Agencies

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al., Plaintiffs, v. E. I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants.	Civil Action No. 2:19-cv-14758-RMB-JBC Civil Action No. 1:19-cv-14765-RMB-JBC Civil Action No. 1:19-cv-14766-RMB-JBC Civil Action No. 3:19-cv-14767-RMB-JBC

AMICUS BRIEF OF NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN OPPOSITION TO PLAINTIFFS' MOTION TO APPROVE JUDICIAL CONSENT ORDERS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Per- and polyfluoroalkyl substances ("PFAS") contamination is among the most challenging and complex environmental issues of our time. PFAS did not earn the moniker "forever chemicals" by chance; manufacturers including 3M Company and DuPont[1] (together, "Settling Defendants") specifically designed them to resist breaking down, causing them to be persistent in both human bodies and the environment, particularly water. As the U.S. District Court for the District of South Carolina noted years ago: "[W]hile [Defendant] 3M assured the public and the government that its PFOS was not a threat to human health or the environment . . . 3M's Manager of Corporate Toxicology . . . reported internally that 3M needed to replace 'PFOS-based chemistry as these compounds [are] **VERY** persistent and thus insidiously toxic.'"[2]

Clean water agencies are cornerstone institutions in their communities. They provide the vital public services of protecting human health and the environment by managing and treating billions of gallons of wastewater and stormwater, as well as

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[1] Any reference to "DuPont" will refer to: EIDP, Inc. (f/k/a E. I. du Pont de Nemours and Company), Corteva, Inc., DuPont de Nemours Inc., DuPont Specialty Products USA, LLC, The Chemours Company, and The Chemours Company FC, LLC.

[2] *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG, 2022 LX 36295, at *29 (D.S.C. Sep. 16, 2022) (emphasis in original) (citation omitted).

the millions of tons of biosolids generated as a byproduct of the wastewater treatment process, every day. Amicus curiae the National Association of Clean Water Agencies ("NACWA") represents over 360 clean water agencies nationwide, including 16 in the State of New Jersey.

NACWA's members work diligently to keep utility rates affordable in the face of significant challenges ranging from rising construction costs and aging infrastructure to cybersecurity threats and climate mitigation needs. Added to that list now are PFAS—a class of chemicals manufactured by the Settling Defendants that have been used in thousands of everyday consumer products for decades, earning billions of dollars in corporate profits.

While NACWA's members and the public were not made aware of the threats posed by these chemicals in the past, utilities are now facing the fallout of the Settling Defendants' actions. Because conventional wastewater treatment plants were not designed to remove or destroy such chemicals, the water quality standards currently being developed at both the state and federal levels will undoubtedly require clean water agencies to make significant up-front capital expenditures,[3] and

[3] Notably, treatment technology to remove PFAS from the large volumes of wastewater handled by clean water agencies does not currently exist.

then shoulder long-term operations and maintenance expenses that could more than double the cost of providing clean water services.[4]

Because the proposed Judicial Consent Orders ("JCOs") will compensate for, at best, a miniscule fraction of PFAS-driven expenses, if finalized the JCOs will ultimately lead to the public bearing these costs through increased water and sewer rates. This will have significant adverse economic and affordability impacts on clean water utility customers and the public at large. Critically for NACWA's members, it is clean water utilities—not the New Jersey Department of Environmental Protection ("NJDEP") or the other Plaintiffs in the litigation (together, "State" or "New Jersey")—that will have to place monthly bills in the mailboxes of customers they know cannot afford to pay them to cover PFAS-driven costs. Affordability is not a buzzword for the local utilities performing essential services on the ground in communities nationwide; utilities must work to mitigate the hardships faced by households resulting from higher water and wastewater bills in a way state regulators do not, and rising costs in one area of utility operations necessarily have cascading effects on a utility's ability to make other needed investments.[5]

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[4] [*See* Aspatore Decl. ¶¶ 4–5, Ex. C.]

[5] NACWA has long advocated for federal funding and programs to help alleviate the affordability challenges posed by the increasing costs of providing water and wastewater services. [*See, e.g.*, Aspatore Decl. ¶¶ 6, 8, Ex. D, Ex. H.] NACWA

Nor is the State subject to the potential legal liability handling PFAS-laden materials leads to under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the New Jersey Spill Act. NACWA's members, on the other hand, have been exposed by Settling Defendants' actions to significant liability risk by virtue of performing vital, statutorily required wastewater services. PFAS enter clean water utilities from domestic, commercial, and industrial sources—most of which utilities have no legal authority to regulate—and treating these inputs and managing their byproducts make utilities (and thus the public) potentially legally responsible for their cleanup costs under CERCLA and the Spill Act. By seeking to deny utilities the right to assert contribution and cost recovery claims against the Settling Defendants without adequately addressing these liabilities, the proposed settlements will sharply undermine the "polluter pays"[6] goals underpinning both statutes.

NJDEP likewise does not have to contend with the potentially massive consequences PFAS are likely to have on biosolids[7] management in this country. It

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likewise works with utilities across the country to help put in place strong state and local customer assistance programs.

[6] NACWA has long championed a "polluter pays" approach to PFAS cleanups. [*See* Aspatore Decl. ¶¶ 6–7, Ex. D, Ex. E, Ex. F, Ex. G.]

[7] At the risk of being indelicate, it is important for the Court to understand at this point that unprocessed biosolids are, essentially, poop. As the saying goes,

is local utilities that every day must accept, treat, and manage biosolids in a manner protective of human health and the environment. PFAS may threaten the only three biosolids management options that are reasonably available to clean water utilities—land application, incineration, and landfilling. As a result of PFAS exposure, utilities across the country face questions about their biosolids management practices, creating what could easily become a biosolids management crisis. And any potential changes to current management practices will likely come with a high price tag.

It is beyond dispute that NJDEP and the other Plaintiffs play an essential role in protecting the environment and the health of New Jerseyans. With respect to PFAS, this will include the important work of developing and enforcing appropriate environmental standards and cleaning up PFAS pollution throughout the State. NACWA fully supports NJDEP's efforts to have PFAS manufacturers pay for those efforts.

However, the role of the State in this litigation with respect to PFAS pollution is fundamentally different from—and not representative of—the role of NACWA's members, who were not privy to the settlement negotiations. While both NJDEP and NACWA's members represent the interests of the public, it is utilities that bear the

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everybody poops. What the saying leaves out is that it is local clean water utilities that manage the environmental ramifications of that fact.

ultimate legal liabilities and costs associated with water and wastewater treatment and biosolids management caused by the presence of PFAS. And it is utilities that will have to charge their communities increasing rates that many may not be able to afford to pay for those liabilities if they are prevented from seeking appropriate redress in court by the proposed JCOs.

If approved, the JCOs will more likely than not set a persuasive precedent for future statewide settlements in other states and territories. On behalf of its members in New Jersey and those located elsewhere in the United States, NACWA therefore has a strong interest in ensuring that the JCOs are fundamentally fair and in the public interest.[8]

II. STATEMENT OF THE CASE

The impacts PFAS will potentially have on providing safe, affordable clean water services both in New Jersey and throughout the country are staggering. The fact that those who know the most about those potential impacts—the companies that created them—want to quickly resolve all liability before the full extent of the damages is known is both unsurprising and telling.

[8] Nothing in this amicus brief should be construed as waiving, on behalf of NACWA itself or any of its members or affiliates, any potential arguments or claims regarding the scope or language of the JCOs in any litigation or proceeding.

NACWA's members are fully aligned with the Plaintiffs' stated goal of holding polluters responsible for PFAS pollution. The proposed settlements, however, do not reflect or fairly compensate for the costs that clean water utilities and their public ratepayers will ultimately incur as a result of the Settling Defendants' manufacture, sale, and disposal of PFAS throughout the State. Those costs include not only the development, installation, and operation of new treatment technologies, but also the potential disruption to existing biosolids management practices and the significant potential legal liabilities imposed by CERCLA and the New Jersey Spill Act.

In addition, the overly broad release provisions in the proposed JCOs inappropriately purport to encompass the claims of any political subdivision of the State, including wastewater and stormwater claims. NACWA understands that it would be impractical[9] to expect the chemical manufacturers who have long produced and profited from PFAS to fully pay for their environmental remediation and treatment. But that does not mean that the Settling Defendants should be permitted to legally estop the clean water utilities that will be forced to bear a substantial portion of those costs from seeking appropriate redress on behalf of their communities through JCOs the utilities were not a party to.

[9] Although perhaps fair.

It is readily apparent that removing untold amounts of potential PFAS liability from the Settling Defendants in the manner proposed is in the Settling Defendants' interest. But the terms of the proposed JCOs are not nearly as favorable to the public, including the communities NACWA's member agencies serve. Chemical companies will not fairly compensate utilities and the public out of the goodness of their hearts; utilities must be permitted to maintain the ability to hold polluters accountable in court for the damages they have and continue to cause.

The State of New Jersey has legitimate claims against PFAS manufacturers that they have every right to vindicate through litigation and settlements. But so do NACWA's members. NACWA therefore respectfully asks that this Court deny approval of the JCOs, as they will improperly impair clean water utilities' rights to seek appropriate redress and, in doing so, have the potential to significantly disrupt the provision of safe, affordable clean water services throughout the State and, if undertaken elsewhere, the country.

III. ARGUMENT

A. The Proposed JCOs Improperly and Unfairly Increase the Burdens Placed on Local Governments and the Public for the Costs of Remediating PFAS Pollution in New Jersey

Polluters should pay for the pollution they have caused. NACWA, the federal government, and New Jersey are aligned on this principle.

Wastewater, stormwater, and drinking water agencies are "passive receivers" of PFAS in the sense that they do not manufacture, import, or use PFAS but nevertheless receive them from domestic, commercial, and industrial sources. [Aspatore Decl. ¶¶ 6–7, Ex. D, Ex. E, Ex. F, Ex. G.] Although these agencies are not responsible for introducing PFAS into the environment, they are responsible under both state and federal law for treating water to certain designated standards. [*Id.*] Failure to comply can result in citizen-suit exposure and civil enforcement, including potential penalties that "can mount up and reach enormous sums." *City & Cnty. of S.F. v. EPA*, 604 U.S. 334, 350–51 (2025); 33 U.S.C. §§ 1319(b)–(d), 1365 (Clean Water Act provisions); 42 U.S.C. §§ 300g-3, 300j-8 (Safe Drinking Water Act provisions).

As to wastewater and stormwater, EPA finalized recommended national aquatic life criteria for certain PFAS in 2024, and it is currently developing recommended national human health water quality criteria.[10] Likewise, New Jersey has reaffirmed that it intends to adopt Surface Water Quality Standards for PFAS.[11]

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[10] Draft National Recommended Ambient Water Quality Criteria for the Protection of Human Health for Perfluorooctanoic Acid, Perfluorooctane Sulfonic Acid, and Perfluorobutane Sulfonic Acid, 89 Fed. Reg. 105041 (Dec. 26, 2024); Final Recommended Aquatic Life Criteria and Benchmarks for Select PFAS, 89 Fed. Reg. 81077 (Oct. 7, 2024).

[11] NJDEP Commissioner Shawn LaTourette earlier stated that the agency "has and must continue to proactively evaluate and reduce potential sources [of] PFAS,

[Docket No. 746-4 at 7–8; Docket No. 746-5 at 6.] For public water systems, the U.S. Environmental Protection Agency has finalized drinking water requirements under the Safe Drinking Water Act. *See* PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (Apr. 26, 2024) (codified at 40 C.F.R. pts. 141–143).

PFAS therefore pose a costly problem for clean water agencies and public water systems. These agencies have not traditionally been designed nor built to address contaminants like PFAS, which due to their resistance to natural degradation and other unique properties require additional and novel treatment technology to remove. [Aspatore Decl. ¶¶ 4–5, Ex. C.] Across New Jersey, these utilities may need to *individually* spend billions of dollars to investigate, manage, and, as necessary, treat wastewater for PFAS. [*Id.*]

A full accounting of expected costs for wastewater treatment is not readily available, in part because the exact direction of CWA regulations relating to PFAS is uncertain. But take, for example, NACWA New Jersey public utility member the Passaic Valley Sewerage Commission ("PVSC"), which has obtained a preliminary

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including, but not limited to, evaluating the presence of PFAS in wastewater discharges and considering requirements for the reduction of PFAS in such discharges." N.J. Dep't of Environmental Protection, *Administrative Order No. 2023-01* (Jan. 17, 2023), https://tinyurl.com/yy8x3xsv.

$5 billion cost estimate for capital improvements to remove and destroy PFAS from wastewater influent and a $300 million annual operating costs estimate. [Aspatore Decl. ¶ 4, Ex. C.] To put those figures into context, PVSC's current annual budget is approximately $230 million. [*Id.*] Thus, the cost of treating PFAS will likely more than double PVSC's annual budget. [*Id.*] By contrast, the proposed JCOs would provide, at most, $750 million in total over the course of 25 years to address any wastewater and drinking water-related claims statewide. [*Id.*] As an example of what wastewater costs may look like statewide, a state agency in Minnesota estimated that technologies and expenses to remove and destroy PFAS from certain wastewater streams in the state would cost between $14 and $28 billion over 20 years.[12]

On the drinking water side, the cost to comply with the new Safe Drinking Water Act standards is an estimated annualized $2.7 to $3.5 billion nationwide. *See* Black & Veatch & Corona Environmental Consulting, *Estimating the National Cost to Remove PFAS from Drinking Water Using UCMR 5 Data* (July 11, 2024), https://tinyurl.com/43x74th6. That corresponds to $37.1 to $48.3 billion for capital costs in the next five years alone. *Id.* To put these national figures into local context,

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[12] *See* Minn. Pollution Control Agency, *Evaluation of Current Alternatives and Estimated Cost Curves for PFAS Removal and Destruction from Municipal Wastewater, Biosolids, Landfill Leachate, and Compost Contact Water* (2023), https://www.pca.state.mn.us/sites/default/files/c-pfc1-26.pdf.

take the example of NACWA corporate affiliate Veolia Water New Jersey, Inc., which operates water treatment plants that together serve 1.7 million New Jerseyans. Veolia estimates that it will incur hundreds of millions of dollars in PFAS-related capital and operational costs, including $600 million in capital expenditures over six years for just *one* of its water treatment plants.[13] [Aspatore Decl. ¶ 4, Ex. C.]

As previously explained, potential costs to publicly owned treatment works are not limited to effluent controls; they extend to investigations, monitoring, pretreatment programs, and, critically, managing biosolids generated at treatment plants. Managing biosolids is one area that has drawn significant regulatory attention by states. Some states have begun to limit PFAS content in biosolids, and many more are considering it.[14] These regulations translate to new capital and operational costs and significant implementation challenges, as the only biosolids management options that are reasonably available to clean water utilities are land application as a

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[13] To avoid doubt, Veolia and NACWA's other utility and affiliate members do not concede that the JCOs validly release any of their claims.

[14] *See, e.g.*, Mich. Dep't of Envt., Great Lakes & Energy, *Interim Strategy Requirements: Land Application of Biosolids Containing PFAS* (2024), https://www.michigan.gov/egle/about/organization/water-resources/biosolids/pfas-related/interim-strategy (implementing numeric limits on PFAS biosolids); H.B. 1674, 89th Leg., Reg. Sess. (Tex. 2024) (proposing numeric limitations on several PFAS in biosolids).

beneficial soil amendment, landfilling, and incineration—all of which may be impacted by PFAS.

Maine, which has gone so far as banning the land application of biosolids entirely due to PFAS concerns, provides a telling example and cautionary tale of the hurdles NACWA's members face with respect to biosolids management in response to PFAS. *See* Me. Rev. Stat. Ann. tit. 38, § 1306(7)(A)(2). Maine's ban has led to significant stress on in-state landfills, which are rapidly reaching capacity in part due to diverted biosolids that can no longer be beneficially land applied.[15] Depending on the future of federal or state biosolids regulations, New Jersey utilities may face similar challenges—as of 2021, 45 percent of sewage sludge was beneficially land applied in-state.[16] More generally, a 2020 study that surveyed 29 facilities that manage biosolids found that the facilities had on average already experienced a 37 percent increase in biosolids management costs in response to new PFAS

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[15] *See* Kate Cough, *Trash Talk: Towns' Garbage in Maine Landfills Is Up Nearly 50 Percent*, MAINE MONITOR (Jan. 14, 2024), https://themainemonitor.org/municipal-solid-waste-buried-in-landfills-up-nearly-50-percent/; Sydney Cromwell, *Maine Was First to Ban Spreading PFAS-Contaminated Sludge on Farmland. Now Sludge is Filling up Landfills*, INSIDE CLIMATE NEWS (Nov. 24, 2025), https://insideclimatenews.org/news/24112025/maine-landfill-pfas-contamination/.

[16] In addition, 19 percent of domestic sludge was incinerated, 7 percent was disposed of out-of-state, and 29 percent was beneficially reused in some capacity out-of-state. *See* N.J. Dep't of Envtl. Protection, *NJ Sludge Management Methods* (2021), https://dep.nj.gov/wp-content/uploads/dwq/sludgeproductiondata2021.pdf.

regulations.[17] Another study more recently concluded that municipal spending on biosolids management will grow from $2.5 billion in 2025 to more than $4.8 billion annually by 2035.[18] The potential impacts PFAS may have on biosolids management options throughout the country are almost inconceivable.

Utilities also initiate source control measures through operation of Clean Water Act Pretreatment Programs, which NJDEP has delegated to 17 clean water utilities, or Delegated Local Agencies. The National Pretreatment Program is designed to protect public wastewater infrastructure and reduce conventional and toxic pollutant levels discharged by industries and other nondomestic wastewater sources into municipal sewer systems and the environment. But operating an effective pretreatment program demands substantial funding for inspection, monitoring, personnel, technical, and enforcement costs: costs that are sure to increase as PFAS-related efforts are undertaken.

On top of these significant compliance costs, clean water agencies and public water systems face wide-ranging potential legal liabilities due to PFAS. Under

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[17] CDM Smith, *Cost Analysis of the Impacts on Municipal Utilities and Biosolids Management to Address PFAS Contamination* (2020), https://www.cdmsmith.com/-/media/white-papers/pfas-on-biosolids.pdf.

[18] *See* Bluefield Research, *U.S. Municipal Utilities Face US$4.8 Billion Biosolids Management Bill as Disposal Costs and Capacity Pressures Mount* (Nov. 13, 2025), https://www.bluefieldresearch.com/ns/u-s-municipal-utilities-face-us4-8-billion-biosolids-management-bill-as-disposal-costs-and-capacity-pressures-mount/.

CERCLA, clean water utilities could be subject to significant liability by virtue of their handling of PFAS-laden influent.[19] *See* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (May 8, 2024) (codified at 40 C.F.R. § 302.4). Despite being passive receivers, municipalities have been sued under the Resource Conservation and Recovery Act and the Clean Water Act for PFAS contamination in wastewater, biosolids, and drinking water, acceding to consent decrees that impose costly investigation, monitoring, enforcement, and capital-improvement obligations. *See, e.g.*, Final Consent Decree, *Coosa River Basin Initiative v. City of Calhoun*, Civil Action No. 4:24-cv-00068-WMR (N.D. Ga. Oct. 24, 2024). In addition, public water systems, including those in New Jersey, have been sued by customers in class actions for the costs of obtaining alternative water supplies, installing filtration, and seeking medical advice due to PFAS contamination. *See* Third Am. Compl., *Vera v. Middlesex Water Co. & 3M Co.*, No. MID-L-6306-21 (N.J. Super. Ct. Apr. 16, 2025) (settled for $4.9 million).

[19] Because the JCOs' releases are not limited to any specific sites, any clean water agency that is sued under CERCLA or the Spill Act would be impeded from seeking contribution from the Settling Defendants as persons arranging for the disposal of hazardous substances and as persons "in any way responsible for any hazardous substance." N.J.S.A. 58:10-23.11g(c)(1).

NACWA appreciates the efforts states like New Jersey have made to financially assist clean water agencies and water providers in addressing PFAS through initiatives like the New Jersey Water Bank, which provides loans for water infrastructure projects at below-market interest rates.[20] Needless to say, however, the costs of PFAS removal and treatment dwarf any available funding, and loans generally must be paid back. So, who should pay: the polluters, or ratepayers?

For NACWA, the answer is clear: the polluters. A foundational principle of environmental law is that "the polluter should be charged with the cost of whatever pollution prevention and control measures are determined by the public authorities, whether preventive measures, restoration, or a combination of both." Organization for Economic Cooperation and Development, *The Polluter Pays Principle* (1975), https://tinyurl.com/3t6kzcwr. The polluter-pays principle has likewise been a fundamental precept for NACWA's advocacy. [Aspatore Decl. ¶¶ 6–7, Ex. D, Ex. E, Ex. F, Ex. G.] As a matter of basic fairness, those who cause pollution—and,

[20] The Water Bank describes its mission as follows: "The New Jersey Infrastructure Bank is an independent State Financing Authority responsible for providing and administering low interest rate loans to qualified municipalities, counties, regional authorities, and water purveyors in New Jersey for the purpose of financing water quality infrastructure projects that enhance ground and surface water resources, ensure the safety of drinking water supplies, protect the public health and make possible responsible and sustainable economic development." N.J. Water Bank, https://www.njib.gov/njeit.

indeed, have been exceptionally enriched as a result—should bear responsibility for remediating the pollution. Having caused PFAS pollution in New Jersey's natural resources and reaped the financial rewards, the Settling Defendants must participate fully and directly in paying for water utilities' present and future PFAS compliance costs.

The federal government's position is in accord. In discussing PFAS, EPA Administrator Lee Zeldin has called for "a clear liability framework that operates on polluter pays and protects passive receivers" and emphasized that "the need for a polluter pays model has guided a lot of the work to be done at EPA in the future." EPA, *Administrator Zeldin Announces Major EPA Actions to Combat PFAS Contamination* (Apr. 28, 2025), https://www.epa.gov/newsreleases/administrator-zeldin-announces-major-epa-actions-combat-pfas-contamination. Administrator Zeldin echoed this sentiment in discussing how EPA would approach securing funding for the PFAS maximum contaminant levels: "[h]olding [p]olluters [a]ccountable." EPA, *EPA Announces It Will Keep Maximum Contaminant Levels for PFOA, PFOS* (May 14, 2025), https://www.epa.gov/newsreleases/epa-announces-it-will-keep-maximum-contaminant-levels-pfoa-pfos.

New Jersey has expressed similar sentiments. In announcing the DuPont JCO, NJDEP Commissioner LaTourette said: "Polluters who place profit above public well-being by releasing poisonous PFAS and other contamination in our State can

expect to be held responsible to clean up their mess and *fully compensate* the State and its citizens for the precious natural resources they've damaged or destroyed." NJDEP, *DuPont/Chemours PFAS Settlement*, https://dep.nj.gov/dupont/ (emphasis added).

NACWA submits that the JCOs are inconsistent with the polluter-pays principle, as they do not even approach fully compensating New Jersey's public utilities for the harm caused in the State by PFAS. Substantive fairness requires that the terms of a proposed JCO "be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990). Simply put, the $795 million the Settling Defendants will pay toward abatement projects is inadequate relative to the full scope of their PFAS liabilities to the State and its citizens, including local government entities.

New Jersey recognizes that the magnitude of statewide PFAS cleanup costs is "currently unknown," and the State did not even attempt to estimate a statewide cost for PFAS harms other than those impacting drinking water systems. [Docket No. 746-1 at 43–48.] New Jersey thus did not estimate any costs concerning wastewater or stormwater management. But, respectfully, if there was insufficient information

for New Jersey to estimate the scope of potential PFAS costs in evolving regulatory areas like wastewater and stormwater, then the solution was to narrow the release, not forge ahead despite known unknowns. *See infra* Section III.B.2; *see also In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003) ("Substantive fairness requires that the terms of the consent decree are based on 'comparative fault' and apportion liability 'according to rational estimates of the harm each party has caused.'" (citation omitted)); *United States v. Charles George Trucking*, 34 F.3d 1081, 1087 (1st Cir. 1994) ("[T]he proper way to gauge the adequacy of settlement amounts to be paid by settling PRPs is to compare the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them . . . .").

In support of the JCOs, New Jersey points to litigation and insolvency risks, concluding that a "bird in hand" is better than two in the bush. [Docket No. 746-1 at 42.] But experience shows the dangers associated with this approach. In 2018, 3M paid the State of Minnesota $850 million to resolve claims related to 3M's release of PFAS into state waters. *See* Agreement and Order ¶ 13, *Minnesota v. 3M Co.*, No. 27-CV-10-28862 (D. Minn. Feb. 20, 2018). Those funds are now expected to run out by 2027, less than one decade into the agreement, and utilities in Minnesota remain under a "cloud of uncertainty" about whether 3M will finance the necessary additional costly PFAS-related upgrades and operational expenses. Eva Herscowitz,

As 3M Settlement Money Dwindles, East Metro Cities Still Have Millions in Water Treatment Costs, MINN. STAR-TRIB. (Mar. 29, 2025), https://www.startribune.com/3m-settlement-minnesota-pfaswater/601287204. As Minnesota's representatives have noted, if 3M fails to pay for those costs, "[t]he only option would be to increase water rates." *Id.*

Indeed, if the JCOs are approved here, there is a serious risk that "polluter pays" will become "public pays." While NACWA public utility members and affiliates intend to pursue every available avenue for funding water quality infrastructure, water providers may have no choice but to seek to raise rates if the Settling Defendants are released from liability statewide. Indeed, water providers across New Jersey have already had to raise rates to address PFAS. *See, e.g.*, *In re Middlesex Water Co.*, 2024 WL 773621, at *2, *8 (N.J. Bd. Regul. Comm'rs Feb. 14, 2024). Relative to the all-encompassing scope of the release, *see infra* Section III.B, the amount New Jersey will receive is insufficient to sustain the JCOs as substantively fair.

B. The Releases Are Overbroad

The inadequacy of the Settling Defendants' payments under the JCOs corresponds with breathtakingly broad releases that should be narrowed in two ways. First, the JCOs should not release the claims of all political subdivisions of the State. Second, the releases should, at most, be limited to only those claims for drinking

water contamination for which the Settling Defendants have already been released to an extent as part of their class action settlements with public water systems.[21] The JCOs should not release or impair potential claims for PFAS related to wastewater, stormwater, or other issues, or for drinking water utilities that were not included in or opted out of the class action settlements.

1. The State of New Jersey lacks clear authority to release the claims of all its political subdivisions.

The releases in the JCOs notably purport to encompass the claims of all New Jersey's political subdivisions. 3M JCO ¶ 54; DuPont JCO ¶ 50. The JCOs include warranties that the New Jersey Attorney General, as the State's "chief legal officer," has authority to release political subdivisions' claims. 3M JCO ¶¶ 9, 55; DuPont JCO ¶¶ 49, 50. The JCOs also cite the New Jersey Spill Act and CERCLA. 3M JCO ¶¶ 1, 68, 71; DuPont JCO ¶¶ 1, 67, 72. Anticipating challenges to this aspect of the release, the State likewise seeks to invoke its authority in *parens patriae* and as "trustee of New Jersey's natural resources." [Docket No. 746-1 at 61.]

The State lacks clear authority to release the claims of its political subdivisions in the manner it proposes. No case in New Jersey establishes such authority under

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[21] *See* 3M Settlement Agreement ¶ 11.1 (Docket No. 3370-3), *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-02873-RMG (D.S.C. July 3, 2023); DuPont Settlement Agreement ¶ 12.1 (Docket No. 3393-2), *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-02873-RMG (D.S.C. July 10, 2023).

the *parens patriae* doctrine. On the contrary, the cases describing *parens patriae* standing sow doubt. "Parens patriae refers to 'the state in its capacity as provider of protection to those unable to care for themselves.'" *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006) (citation omitted). But *parens patriae* authority does not subsume the claims of those who are able to protect themselves. *See Sashihara v. Nobel Learning Cmtys., Inc.*, 219 A.3d 1070, 1075 (N.J. Super. Ct. App. Div. 2019) (State could not invoke *parens patriae* authority as to minor whose parents could protect her). Here, New Jersey's political subdivisions are more than capable of protecting themselves by independently litigating against the Settling Defendants; in fact, several have indicated this ability through opposition to having their claims released.

In support of the release of political subdivisions' claims, the State also seeks to invoke its role as trustee of statewide natural resources. N.J.S.A. 58:10-23.11a. ("[T]he State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction."). "The public trust doctrine was passed down to the common law of England, where the king—the sovereign—possessed title to tidally flowed lands for the benefit of all people." *City of Long Branch v. Jui Yung Liu*, 4 A.3d 542, 548 (N.J. 2010). While "the public trust doctrine has adapted to the 'changing conditions and needs of the public it was created to benefit,'" *id.* at 549, New Jersey courts have never interpreted the doctrine as broadly as the State seeks to do here.

For example, in *Hackensack Riverkeeper, Inc. v. N.J. Dep't of Envtl. Prot.*, 128 A.3d 749 (N.J. Super. Ct. App. Div. 2015), NJDEP invoked the public trust doctrine to justify rules giving the agency greater authority over public access to beaches and tidal waterways and reducing the control of municipalities in the process. The court rejected the notion that the public trust doctrine overwhelmed statutes empowering municipalities to regulate municipally owned beaches and, more generally, to manage any municipally owned property. *Id.* at 758 (citing N.J.S.A. 40:61-22.20(a) and N.J.S.A. 40:48-1).

Likewise, here, interpreting the public trust doctrine to allow the State to unilaterally release the claims of political subdivisions would undermine the statutes enumerating the powers of political subdivisions. For one, municipalities in New Jersey have the power to sue and be sued. *See, e.g.*, N.J.S.A. 40:43-1 (municipalities "may sue and be sued"); N.J.S.A. 40:14B-20 ("Every municipal authority shall be a public body politic and corporate . . . and have the following powers: . . . To sue and be sued."). The State legislature has also empowered municipalities, among other things, "[t]o produce, develop, purchase, accumulate, distribute and sell water and water services, facilities and products"; oversee on-site wastewater systems; and finance the "planning, designing, acquiring, constructing, reconstructing, improving, equipping, furnishing, and operating . . . of any part of a solid waste system, sewage treatment system, wastewater treatment or collection system." N.J.S.A. 40:14B-20.

Reading common law principles like the public trust doctrine or *parens patriae* authority to override these statutes would risk negating the State legislature's judgments.

Nor do the New Jersey Spill Act or CERCLA provide the State authority to release the claims of all its subdivisions. Although these acts empower the State and the federal government to protect a potentially responsible party from contribution claims upon entry of a JCO, *see* N.J.S.A. 58:10-23.11f(a)(2)(b); 42 U.S.C. § 9613(f)(2), they do not by their plain terms encompass other claims under other statutes and causes of action. *See Allied Corp. v. Frola*, Civil Action No. 87-462, 1993 U.S. Dist. LEXIS 13343, at *36–37 (D.N.J. Sep. 21, 1993) ("[I]t would strain the meaning of 'contribution bar' beyond common sense and congressional intent to find that section 113(f)(2) precludes state tort claims.").

New Jersey cites distinguishable authorities in other jurisdictions that approved of states' releases of political subdivisions' claims. In *State v. City of Dover*, 891 A.2d 524 (N.H. 2006), the court held that the New Hampshire attorney general's ongoing suit for MTBE contamination barred cities' similar suits. But the court's analysis erroneously conflates the standard for determining a state's Article III standing to bring a federal suit in *parens patriae*—a jurisdictional question—with the substantive power of a state to preclude its subdivisions' independent lawsuits. *In re Certified Question from the U.S. Dist. Court for the E. Dist. of Mich. v. Philip*

Morris, 638 N.W.2d 409 (Mich. 2002), concerning tobacco, *People ex rel. Devine v. Time Consumer Mktg.*, 782 N.E.2d 761, 768 (Ill. App. 2002), concerning consumer-protection claims, and *Commonwealth ex rel. Krasner v. Attorney General of Commonwealth*, 309 A.3d 265 (Pa. Commw. Ct. 2024),[22] concerning opioids, all involved diffuse harms that broadly affected residents across each state. In these circumstances, the suits of municipalities, who at least arguably could claim no special harms, could plausibly be held to yield to statewide litigation efforts. In contrast, while "PFAS contamination is prevalent in the environment throughout New Jersey," as the State asserts [Docket No. 746-1 at 63], PFAS pollutes specific waters used and managed by specific political subdivisions in New Jersey, some of which are undoubtedly specially harmed locally by PFAS contamination compared to others that may not be appreciably impacted at all. But instead of accommodating specially harmed political subdivisions—by, for example, giving each municipality the option to participate in the state-brokered settlement, as in *Commonwealth ex rel.*

[22] *Commonwealth ex rel. Krasner* involved the Pennsylvania attorney general's participation in nationwide opioid settlements, which were held to bar district attorneys' opioid suits within their counties. But the question of the attorney general's authority was largely academic, as the district attorneys' counties were *also* participating in the settlements, so "there [was] nothing left for them to obtain" even if their suits could continue. 398 A.3d at 278.

Krasner, 309 A.3d at 269—New Jersey swept into the JCOs' releases the claims of every subdivision without their input, absent clear authority to do so.

Finally, even if the Court looks past the aforementioned distinctions between the cases the State cites and those at issue here, there is a jurisdictional split on states' authority to release the claims of political subdivisions. For example, a court in Florida recently concluded that the Florida attorney general lacked authority to release the claims of in-state hospitals through statewide opioid settlements, rejecting many of the same arguments New Jersey asserts in support of the JCOs here:

> In essence, the Attorney General asserts the unilateral *substantive* authority to dispose of Appellants' claims on behalf of the people of Florida, notwithstanding the enactment of law assigning that authority to Appellants. But the Attorney General is the "chief state legal officer" of the state, *not the client*. As the state's chief legal officer, the Attorney General has limited common-law authority as *parens patriae* to litigate claims common to the state at large—and, of course, claims authorized by general law, and limited by that law—but not to control claims of Appellants who assert unique and individual actual damages. The Attorney General has no more authority to litigate such claims than the claims of a private hospital asserting its own individual damages.

Halifax Hosp. Med. Ctr. v. Office of the AG, 393 So. 3d 1253, 1258 (Fla. Dist. Ct. App. 2024) (emphases in original) (citations omitted).

And in Missouri, following the 1998 Tobacco Master Settlement Agreement, municipalities like the City of St. Louis disputed whether the agreement, to which

the State of Missouri was a party, could release municipalities' tobacco-related claims. The Missouri Supreme Court wrote:

> To say that the attorney general is empowered to enter settlements for the citizens of Missouri generally, including those who reside in the City of St. Louis, does not, however, answer the question of whether he has the power to compromise or extinguish a claim that is held by the City. The City of St. Louis has the power to litigate claims in its own right where its own financial interests have been affected, and we can find no statutory or constitutional provision that allows the attorney general to control or compromise the City's claims.

State ex rel. Nixon v. Am. Tobacco Co., 34 S.W.3d 122, 128 (Mo. 2000); *see also City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999) (allowing City's suit to proceed).

As in Florida and Missouri, the New Jersey legislature has granted the State's political subdivisions the authority to control their own litigation. New Jersey has not established how it could—much less should—nevertheless unilaterally release the claims of all its political subdivisions through the JCOs.

2. The releases could compromise the ability of clean water agencies to effectively respond to PFAS.

As a corollary to Section III.A, *supra*, NACWA submits that New Jersey should not settle out PFAS liability in areas like wastewater, stormwater, and real property before the State understands the magnitude of costs of complying with future regulations in each relevant area. As explained, applying water-quality based limitations at even *one* wastewater treatment plant could necessitate extraordinary

capital expenditures dwarfing the total abatement funding New Jersey would obtain through the JCOs. [Aspatore Decl. ¶ 4, Ex. C (preliminary estimates of PVSC); *see supra* Section III.A.]

Given regulatory uncertainty, the 3M and DuPont class action settlements with public water systems, which New Jersey cites in support of the JCOs [Docket No. 746-1 at 44–45, 51], reasonably did not release wastewater- or stormwater-related PFAS claims. *See* 3M Settlement Agreement ¶ 11.1.2.2 (Docket No. 3370-3), *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-02873-RMG (D.S.C. July 3, 2023) (preserving class members' claims "related to the discharge, remediation, testing, monitoring, treatment, or processing of stormwater or wastewater to remove or remediate PFAS at its permitted stormwater system or permitted wastewater facility"); DuPont Settlement Agreement ¶ 12.1.2 (Docket No. 3393-2), *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-02873-RMG (D.S.C. July 10, 2023) (preserving class members' claims "where a Settlement Class Member also owns real property or owns or operates a facility that is separate from and not related to a Public Water System and does not provide Drinking Water (e.g., a separate wastewater or stormwater system or airports or fire training facilities that are not related to a Public Water System)").[23]

[23] The public water system settlements also contained interpretive guidance that clarified that no wastewater or stormwater claims would be released insofar as class

The same course would be prudent for the JCOs. PFAS liabilities relating to wastewater and stormwater should not be resolved via all-encompassing releases before the state and federal regulatory picture becomes clearer for water utilities. In their current form, the JCOs present too high a risk that future compliance costs for wastewater and stormwater systems will be funded by ratepayers rather than polluters.[24]

IV. CONCLUSION

PFAS pollution threatens the affordable provision of clean water services in New Jersey and throughout the country. The entities that caused that pollution should fully compensate for the harms they have caused. Because the JCOs as drafted do not abide by that principle and are not in the public interest, NACWA respectfully requests that the Court deny the motion to approve the JCOs.

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members' wastewater or stormwater systems were "physically" distinct. *See* Parties' Joint Interpretive Guidance on Certain Release Issues (Docket No. 4107-1), *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-02873-RMG (D.S.C. Nov. 29, 2023); Parties' Joint Interpretive Guidance on Certain Release Issues (Docket No. 4064-1), *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-02873-RMG (D.S.C. Nov. 19, 2023).

[24] Although this section focuses on wastewater and stormwater liability, it should not be read as endorsing the JCOs' releases insofar as they concern drinking water. As discussed in Section III.B.1, local governments are entitled to deference regarding their analyses of their financial needs and the risks of individually litigating against the Settling Defendants—the State should not and cannot make settlement decisions on their behalf without their consent.

To be clear, although it opposes the JCOs in their current form, NACWA recognizes the valuable efforts of NJDEP in securing additional funding for the State from the Settling Defendants. If the Court denies approval of the proposed JCOs and negotiations between the parties resume, NACWA would support appropriately crafted settlements within the State's clear authority, such as resolutions limited to New Jersey's claims for natural resource damages relating to PFAS.

Dated: December 12, 2025

Respectfully submitted,
MARTEN LAW, LLP

s/ Daniel F. Mulvihill
Daniel F. Mulvihill
Marten Law LLP
45 Rockefeller Plaza, Suite 2000
New York, NY 10111
Tel.: (347) 218-8148
dmulvihill@martenlaw.com

Jeffrey B. Kray*
Marten Law LLP
920 Fifth Ave, Suite 2700
Seattle, WA 98104
Tel.: (206) 292-2608
jkray@martenlaw.com

Victor Xu*
Marten Law LLP
1050 SW Sixth Ave, Suite 2150
Portland, OR 97204
Tel.: (503) 241-2641
vxu@martenlaw.com

Attorneys for National Association of Clean Water Agencies

* Admitted *Pro Hac Vice*
(Docket No. 759)